IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB,

Plaintiffs,

v. **CIVIL ACTION NO. 3:15-cv-00277**

GINA MCCARTHY, et al.,

Defendants.

NOTICE OF PLAINTIFFS' FILING IN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Plaintiffs hereby notify the Court that they filed a Petition for a Writ of Mandamus and for Relief from Unreasonably Delayed Agency Action in the United States Court of Appeals for the Fourth Circuit on July 20, 2015 in accordance with this Court's June 19, 2015 Memorandum Opinion and Order (CM/ECF #13). The petition as filed is provided as Exhibit 1 to this Notice. The addendum is provided as Exhibit 2.

Respectfully submitted,

/s/ Amy Vernon-Jones
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2015, I caused a true and correct copy of NOTICE OF PLAINTIFFS' FILING IN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT to be electronically filed via the Court's electronic case filing system which will provide notice of the filing to all counsel of record.

Respectfully submitted,

/s/ Amy Vernon-Jones
Amy Vernon-Jones (W.Va. Bar No. 12027)
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Counsel for Plaintiffs

NO. _____

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re OHIO VALLEY ENVIRONMENTAL COALITION,
WEST VIRGINIA HIGHLANDS CONSERVANCY,
and SIERRA CLUB,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS AND FOR RELIEF FROM UNREASONABLY DELAYED AGENCY ACTION BY THE ENVIRONMENTAL PROTECTION AGENCY,
GINA MCCARTHY, in her official capacity as ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
AND
SHAWN M. GARVIN, in his official capacity as REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 3

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Ohio Valley Environmental Coalition: The Ohio Valley Environmental Coalition has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States and no publicly held corporation has a 10% or greater ownership in the Ohio Valley Environmental Coalition because it has never issued any stock or other security.

West Virginia Highlands Conservancy: The West Virginia Highlands Conservancy has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States, and no publicly held corporation has a 10% or greater ownership interest in the West Virginia Highlands Conservancy because it has never issued any stock or other security.

Sierra Club: Sierra Club has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States, and no publicly held corporation has a 10% or greater ownership interest in Sierra Club because it has never issued any stock or other security.

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I. INTRODUCTION[1]

A. Relief Sought

Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, and Sierra Club (collectively, "Petitioners") submit this Petition requesting that this Court issue a writ of mandamus compelling the United States Environmental Protection Agency ("EPA") to take long overdue action to respond in writing to Petitioners' June 17, 2009 Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of West Virginia as required by section 402(c)(3) of the federal Clean Water Act ("CWA"), 33 U.S.C. §1342(c)(3), and the implementing regulations at 40 C.F.R. §123.54. Petitioners request that the Court order EPA to respond to their Clean Water Act section 402(c)(3) Petition within 90 days.

B. Issues Presented

Clean Water Act section 402(c)(3), 33 U.S.C. § 1342(c)(3), authorizes the Administrator of EPA to withdraw approval of a State's NPDES permitting and enforcement program if the State is not administering that program in accordance with the requirements of federal law. EPA's regulation implementing Section 402(c)(3) states that the Administrator may order the commencement of withdrawal proceedings either on her own initiative or in response to a petition

[1] References to the addendum are cited as "Add. __."

from an interested person and further states that the Administrator "will respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 123.64(b)(1).

The West Virginia National Pollutant Discharge Elimination System ("NPDES") Program suffers from numerous flaws in legal authority and implementation. The Petitioners have worked for many years to eliminate these deficiencies. As a part of those efforts, in 2009, Petitioners sent a formal petition to EPA detailing the deficiencies, primarily in relation to surface coal mining, and requesting EPA to withdraw delegation of the NPDES program from the State of West Virginia. Add. 1–29. In the six years that have passed since receiving that Petition, EPA has not responded in writing. EPA's years of inaction constitute unreasonable delay pursuant to 5 U.S.C. § 706(1), and warrant a writ of mandamus from this Court ordering EPA to issue a meaningful response to the 2009 Petition. If this Court determines it lacks jurisdiction, then EPA's inaction gives rise to a District Court action and warrants an injunction under 5 U.S.C. § 706(1).

There is authority for this Court's jurisdiction to issue the writ of mandamus sought by this Petition pursuant to the All Writs Act, 28 U.S.C. § 1651. Section 509(b) of the CWA, 33 U.S.C. § 1369(b), grants jurisdiction to the Courts of Appeals to review EPA's determinations as to a State permit program submitted under section 402(b) of the CWA, and the All Writs Act empowers the Court to

issue a writ to protect its "prospective jurisdiction" by compelling EPA to make a substantive decision regarding West Virginia's NPDES program, that once made will be reviewable by this Court. See Virginia Dep't of Educ. v. Riley, 23 F.3d 80, 83 (4th Cir. 1994); Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 76 (D.C. Cir 1984) ("TRAC").

However, as will be discussed below, Court of Appeals jurisdiction is not clear-cut. Therefore, because time is of the essence due to ongoing environmental degradation cause by deficiencies in West Virginia's NPDES Program, and since there is a lack of controlling authority as to whether Petitioners' claim is reviewable by the Court of Appeals or by a district court, Petitioners also filed suit in federal district court. That case is stayed pending this action.

Whichever court has jurisdiction, the underlying merit of Petitioners' claim is clear. EPA's prolonged failure to address the failings of West Virginia's NPDES program has impaired and will continue to impair the Petitioners' and their members' use and enjoyment of waters across West Virginia for fishing, recreation, wildlife observation, aesthetic enjoyment, and spiritual contemplation. Compliance with, and enforcement of, the CWA is less certain to occur without the final action of the EPA on the 2009 Petition. Therefore Petitioners seek a writ compelling a timely response to the 2009 Petition.

II. STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act, 33 U.S.C. § 1251 *et seq*., is a comprehensive water quality statute designed "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the CWA, id. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit issued pursuant to the Act. Section 402 of the Act, id. § 1342, establishes the National Pollution Discharge Elimination System ("NPDES") under which the Administrator of EPA may issue permits for the discharge of pollutants into waters of the United States, upon the condition that such discharges will meet all applicable requirements of the CWA. Permits issued pursuant to the NPDES program define the obligations of the dischargers under the CWA, including setting limitations on rates and quantities of pollutant discharges and establishing monitoring and reporting requirements. Id. § 1342(a)(2); 40 C.F.R. Part 122. Compliance with an NPDES permit is deemed compliance with the Act as a whole. 33 U.S.C. § 1342(k); 40 C.F.R. § 122.5. Proper administration of the NPDES program is thus essential to achieving the goals on the Act.

Section 402(b) of the CWA, 33 U.S.C. § 1342(b), allows the EPA Administrator to authorize any state to administer its own NPDES program upon an application showing that the state possesses adequate authority to carry out all

aspects of the program. Authorized state NPDES programs must at all times be in accordance with the federal program. Id. § 1342(c)(2). EPA retains significant oversight over delegated programs. For example, EPA reviews state water quality standards, id. § 1313(c); has a right to review, object to, and comment on the issuance of permits, id. § 1342(d)(2); and enforces NPDES permits when a state fails to do so, id. § 1319(a). See also U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 634 (1992) (White, J., *concurring in part and dissenting in part*).

If at any time the Administrator determines that a state is not administering its NPDES program in accordance with the requirements of the federal program, she may initiate proceedings to withdraw the state's NPDES authorization. Section 402(c)(3) of the CWA states that:

> Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

33 U.S.C. § 1342(c)(3). EPA's regulation implementing Section 402(c)(3) states that the "Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person." 40 C.F.R. § 123.64(b)(1). The regulation makes clear that EPA has a mandatory

duty to respond to a petition submitted pursuant to CWA section 402(c)(3), stating that "[t]he Administrator will respond in writing to any petition to commence withdrawal proceedings." Id. (emphasis added). Those authorities create a nondiscretionary duty for EPA to respond in writing to petitions seeking withdrawal of delegation from non-compliant state programs. See Save the Valley, Inc. v. U.S. E.P.A., 99 F.Supp.2d 981, 984–86 (S.D. Ind. 2000); National Wildlife Federation v. Adamkus, 936 F.Supp. 435, 442 (W.D. Mich. 1996) ("[T]he Administrator is required to respond in writing to any petition to commence withdrawal proceedings. The Administrator is given no discretion as it regards this duty.").

At all relevant times, the State of West Virginia has been authorized by EPA to administer an NPDES program for regulating the discharges of pollutants into the waters of the State. Permits issued under this program are issued by the West Virginia Department of Environmental Protection ("WVDEP") and are known as "WV/NPDES" permits.

The Administrative Procedure Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA defines "agency action" to include those instances where an agency has failed to act, id. § 551(13), and mandates that

"within a reasonable time, each agency shall proceed to conclude a matter presented to it." Id. § 555(b). The APA also provides that a court shall "compel agency action unlawfully withheld or unreasonably delayed." Id. § 706(1). The EPA is a federal agency whose actions are subject to review under the APA. Id. § 551(1).

III. FACTUAL BACKGROUND

A. The Petition

On June 17, 2009, Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition submitted to EPA a Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of West Virginia. The Petition asked EPA "to evaluate the systematic failure of West Virginia to administer and enforce the National Pollutant Discharge Elimination System program and to withdraw the delegation of the program from the West Virginia Department of Environmental Protection." Add. 1. The groups specifically requested that EPA formally respond to their petition in writing, as required by 33 U.S.C. § 1342(c)(3) and 40 C.F.R. § 123.64(b)(1). Add. 4.

The June 17 Petition provided overwhelming evidence that West Virginia is failing to administer its NPDES program in accordance with the requirements of the Act in numerous ways, including the legal authority no longer meeting the

requirements of the Act, 40 C.F.R. § 123.63(a)(1), failing to issue necessary NPDES permits for certain activities, id. § 123.63(a)(2)(i), repeatedly issuing permits that do not comply with the Act, id. § 123.63(a)(2)(ii), and failing to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits, id. § 123.63(a)(2). The specific failures described in the Petition, supported by extensive citations and exhibits, primarily relate to the West Virginia Department of Environmental Protection's inadequate regulation of pollution from coal mining operations and include:

- Unlawfully requiring the consideration of compliance cost in WV/NPDES permitting appeals decisions, Add. 5–6;
- Refusing to apply the anti-backsliding provision of section 402(o) of the Act, Add. 7–8;
- Failing to permit point source discharges from abandoned mine lands, Add. 9–10;
- Failing to enforce the selenium water-quality standard and water-quality based effluent limits, Add. 16–18;
- Failing to submit annual statistical reports as required by the 1982 Memorandum of Agreement between EPA and West Virginia, Add. 21;
- Failing to follow West Virginia's antidegradation policy, Add. 22–23; and

- Failing to develop total maximum daily loads for ionic stress and continuing to issue NPDES permits to new sources of ionic stress that will discharge into biologically impaired streams, Add. 24–25.

The petition informed EPA that West Virginia's failure to administer its NPDES program in accordance with the requirements of the CWA was having dire consequences for the health of the State's waters, citing the thousands of miles of rivers and streams that West Virginia itself has determined are impaired. Add. 4. It concluded by stating that "[b]ecause 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." Add. 26.

The Petition was supplemented on July 31, 2009 and November 13, 2009, with additional evidence of specific examples of West Virginia's shortcomings. Add. 30–47. The Petition and its supplements (collectively "the 2009 Petition") demonstrate that the WVDEP is not administering its NPDES program in accordance with the requirements of CWA section 402, 33 U.S.C. §1342. Six years have passed since Petitioners sent their initial Petition to EPA. Petitioners have not received a formal written response to the Petition.

EPA identified many concerns similar to those raised in the 2009 Petition in its July 13, 2010 Findings and Recommendations for the Permit Quality Review of

Clear Water Act § 402 Permitting for Surface Coal Mines by Appalachian States (PQR). The PQR found that the Appalachian states, including West Virginia, were ignoring available existing data needed to characterize proposed discharges, failing to properly perform the reasonable potential analyses necessary for water quality-based effluent limitations, failing to include permit conditions necessary to prevent violations of narrative water quality criteria as a result of conductivity pollution, and failing to include permit conditions necessary to prevent violations of numeric aquatic life water quality criteria, among other things. Rather than use the PQR to inform its action on the 2009 Petition, EPA dodged its duty. Although the review investigated the performance of West Virginia's NPDES program and identified similar concerns as the 2009 Petition, EPA claimed, "This review did not specifically assess the specific assertions in the petitions," and continued to take no action. Water Permits Division, U.S. Environmental Protection Agency, Review of Clean Water Act §402 Permitting for Surface Coal Mines by Appalachian States 12 n.12 (2010), *available at:* http://water.epa.gov/polwaste/npdes/upload/Final_Appalachian_Mining_PQR_07-13-10.pdf.

The majority of the failures identified in the 2009 Petition continue to this day. For example, to Petitioners' knowledge, West Virginia has never issued a WV/NPDES permit for a point source discharge on abandoned mine lands. Of the

few failures that have been rectified, most occurred only after repeated appeals of inadequate WV/NPDES permits and citizen suits enforcing the effluent limits and water quality standards in existing WV/NPDES Permits by Petitioners, not in response to any action by EPA. West Virginia only started permitting bond forfeiture sites in response to a federal court order issued in a citizen suit. See W. Virginia Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159 (4th Cir. 2010). In multiple instances, federal judges have found that West Virginia's enforcement actions have not met the standard for diligent prosecution. See Ohio Valley Envtl. Coalition v. Consol of Kentucky. Civ. No. 2:13-5005, 2014 WL 1761938 (S.D. W. Va. April 30, 2014); Ohio Valley Envtl. Coalition v. Maple Coal Co., 808 F.Supp.2d 868 (S.D. W. Va. 2011); Ohio Valley Envtl. Coalition v. Hobet Min., LLC, 723 F.Supp.2d 886 (S.D. W. Va. 2010); Ohio Valley Envtl. Coalition. v. Hobet Min., LLC, Civ. No. 3:08-0088, 2008 WL 5377799 (S.D. W. Va. Dec. 18, 2008). West Virginia and EPA's failures to act in the face of these many problems make a response to the 2009 Petition indispensable.

B. Procedural History

On January 7, 2015, Petitioners filed suit in the Southern District of West Virginia against Gina McCarthy, Administrator of the United States Environmental Protection Agency, and Shawn Garvin, Regional Administrator of the United States Environmental Protection Agency Region III (collectively, "EPA"), alleging

that EPA's failure to respond to the 2009 Petition constituted an unreasonable delay pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 555(a), 706(1). Ohio Valley Envtl. Coalition. v. McCarthy, Civ. No. 3:15–0277 (S.D. W. Va. filed Jan. 7, 2015); Add. 48–60. EPA then moved to dismiss, asserting that the district court did not have jurisdiction over the unreasonable delay claim because "where the action that is before an agency is directly reviewable in the circuit court of appeals, as is the case here, an unreasonable delay claim related to that action must be brought in the court of appeals rather than in district court." Add. 62.

Petitioners then moved to stay the district court action, in order to file this action in the Court of Appeals, in the interest of a prompt, efficient resolution of their claims, regardless of venue. The district court dismissed Petitioners' citizen suit claim and granted the stay:

> [E]ven where jurisdiction for ultimate review is exclusively held by the Court of Appeals—there is some authority to suggest that a district court may properly entertain a suit alleging unreasonable delay and seeking that a court compel agency action. In addition to this troubling mix of authority, there also appears to be an absence of authority from the Fourth Circuit. Particularly in light of that silence, this Court agrees with Plaintiffs' suggestion that the prudent and efficient course is a stay of this matter, allowing Plaintiffs an opportunity to bring the APA claim directly in the Court of Appeals.

Ohio Valley Envtl. Coalition. v. McCarthy, Civ. No. 3:15–0277, 2015 WL 3824255 at *4 (S.D. W. Va. Jun. 19, 2015). Petitioners thus now seek a writ of mandamus from this Court.

C. The Petitioners

Petitioners are non-profit, grassroots organizations whose missions include the protection of water quality and the spread of information related to water quality issues. Sierra Club is a nonprofit corporation incorporated in California, with approximately 600,000 members nationwide and over 2,000 members who belong to its West Virginia chapter. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia. Add. 83.

Ohio Valley Environmental Coalition ("OVEC") is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1,500 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. OVEC has focused on water quality issues and is a leading source of information about water pollution in West Virginia. Add. 95–96.

West Virginia Highlands Conservancy, Inc., (hereinafter "WVHC") is a nonprofit organization incorporated in West Virginia. It has approximately 1,500 members. It works for the conservation and wise management of West Virginia's natural resources. Add. 86.

IV. ARGUMENT

A. Petitioners Have Standing to Pursue This Writ.

Petitioners have standing to bring this action. Petitioners' standing arises both from injury suffered by their members and from direct injury to their organizational interests. Petitioners' members use and enjoy water bodies in West Virginia that are impaired by mining pollution as a result of the failures of West Virginia's regulators, and Petitioners' organizational missions include advocacy to strengthen the protections applicable to those water bodies. Petitioners are further injured by the denial of access to information caused by EPA's failure to timely respond to the Petition. Under either the traditional standing inquiry or the reduced standards applicable to procedural injuries, Petitioners' injuries would be redressed by an order from this court directing EPA to respond to the Petition.

To satisfy the "case or controversy" requirements of Article III of the U.S. Constitution, a party must demonstrate that: (1) it will suffer an "injury in fact" without judicial relief; (2) the injury is "fairly traceable" to the complained-of conduct; and (3) a favorable judicial ruling will "likely" redress that injury. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81 (2000). The injury need not be large; an "identifiable trifle" is sufficient to confer standing. Friends of the Earth v. Gaston Copper Recycling, Corp., 204 F.3d 149, 156 (4th Cir. 2000).

Petitioners bring suit on behalf of their organizations and members who regularly use and enjoy streams, rivers, lakes and other freshwater bodies in West Virginia that receive pollution discharges subject to regulation under the WV/NPDES program. Add. 84, 88–93, 96–97, 100–103. An organization has representational standing to sue on behalf of its members when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Am. Canoe Ass'n. v. Murphy Farms, 326 F.3d 505, 517 (4th Cir. 2003); see also, Laidlaw, 528 U.S. at 181.

Petitioners' members suffer injury because the West Virginia waterbodies they use are degraded by the types of coal mining pollution, such as toxic selenium and conductivity, that are not sufficiently addressed by West Virginia regulators and that therefore are the subject of the Petition. Add. 89–93, 101–103. Petitioners' members' interests in enjoying, drinking, swimming, fishing, recreating in or on, and otherwise using certain freshwater bodies are harmed by EPA's failure to respond to their Petition. The coal mining pollution that is the subject of the Petition diminishes Petitioners' members' enjoyment of particular streams in West Virginia and causes those members to cease visiting certain areas due to concerns about that pollution. Add. 89–93, 102–103. If EPA were to take action in response

to the Petition, either by requesting that West Virginia take corrective action or by ultimately instituting procedures to withdraw West Virginia's NPDES program, then those injuries would be redressed to some degree. Add. 88, 93, 94, 101–103. Petitioners' members therefore have standing in their own right, and Petitioners satisfy the first requirement for representational standing. See Murphy Farms, 326 F.3d at 517.

Petitioners also satisfy the second requirement for representational standing because this litigation over water pollution from coal mines is germane to the purposes of Petitioners' organizations—the protection of the environment and clean water. Add. 83, 84, 86–88, 95–97, 101; see id. at 517. Finally, the third element of representational standing is satisfied because Petitioners' members are not seeking individualized relief and therefore the members' direct participation in the litigation is not required.. See Murphy Farms, 326 F.3d at 517.

Petitioners also have organizational standing to sue on their own behalf, including on the basis of informational injury. Petitioners suffer informational injury as a result of EPA's failure to evaluate and respond to their claims that West Virginia is not administering its NPDES program in conformance with the CWA. See Doe v. Pub. Citizen, 749 F.3d 246, 263-64 (4th Cir. 2014); Am. Canoe Ass'n, v. City of Louisa Water & Sewer Com'n, 389 F.3d 536, 544–47 (6th Cir. 2004) (citizen groups alleged sufficient informational injury to establish

organizational standing where desired but withheld information on CWA discharges would help further their organizational interests). EPA's failure to respond to their Petition deprives Petitioners of the type of information regarding the health of West Virginia's waterways and the State's compliance with the CWA that they regularly use to educate and organize their own members, members of allied organizations, and the general public. Add. 84–85, 93–94, 97, 99, 103. For example, since the initial filing of the Petition, Petitioners have regularly educated the public and prepared comments on proposals to alter West Virginia's Clean Water Act program, including proposed changes its NPDES regulations at 47 C.S.R. Part 30. Id. EPA's refusal to provide a substantive response to their Petition deprives Petitioners of information that is "essential to their daily organizational activities and to fulfilling their institutional goals." See Am. Canoe Ass'n, v. City of Louisa Water & Sewer Com'n, 389 F.3d 536, 546 (6th Cir. 2004). This information includes, but is not limited to, EPA's own monitoring data for West Virginia's waters, EPA's own evaluation of draft and final WV/NPDES permits, and EPA's evaluation of West Virginia's impaired streams and TMDL development. Id. Thus, even if EPA's response to the Petition did not mandate corrective action from West Virginia or result in NPDES withdrawal proceedings, Petitioners' injuries could be redressed to some degree through access to this critical information.

The injuries suffered by Petitioners and their members are directly traceable to EPA's failure to timely respond to their Petition. The absence of a response from EPA has allowed coal mining pollution to continue to degrade West Virginia waterbodies to the detriment of Petitioners and their members. EPA's failure to respond has also denied Petitioners access to important information that would inform their organizational activities and institutional goals regarding coal mining pollution in West Virginia. Id.

An order from this court directing EPA to respond to the Petition would redress Petitioners' injuries and those of their members. Petitioners are confident that a response from EPA would improve implementation of the Clean Water Act in West Virginia by either initiating proceedings to withdraw the state's NPDES authority or by compelling the state to improve its program implementation. Petitioners need not prove that this will be the outcome of EPA's response, however, because the normal standards for causation and redressability are relaxed when a party has asserted violation of a procedural right. Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 598 n.7 (1992)). These relaxed standards prevent a party from having to prove that the agency will ultimately reach a decision most favorable to the party's interests, instead requiring that there be only "some possibility" that the requested relief will prompt the agency to take action favorable to the party. Massachusetts v.

EPA, 549 U.S. 497, 518 (2007). Here, as explained in more detail below, the Clean Water Act affords Petitioners the procedural right to a timely response by EPA to a petition submitted under Section 402(c)(3). Because it is within EPA's power to withdraw West Virginia's delegated NPDES authority and substitute effective oversight, there is at least some possibility that Petitioners' injury will be fully redressed.

B. The Authority on Jurisdiction in this Case is Ambiguous.

No controlling authority squarely addresses whether jurisdiction in this case lies in the Court of Appeals or in the District Court. EPA has historically taken conflicting positions on the issue. Some courts have held that the CWA does impose a mandatory duty to respond to such petitions, such that a citizen suit in the district court is the proper vehicle for petitioners to seek redress. See, e.g. Save the Valley, Inc. v. U.S. EPA, 99 F.Supp.2d 981, 985–86 (S.D. Ind. 2000). Indeed, EPA has itself suggested that a CWA citizen suit for failure to perform a mandatory duty could provide redress for the agency's failure to respond to a petition under Section 402(c)(3). Save the Bay, Inc. v. Administrator of Environmental Protection Agency, 556 F.2d 1282, 1289–90 n. 8 (5th Cir. 1977) (When discussing options for EPA's failure to respond to a 402(c)(3) petition, the court noted that review might be had in the district court under the APA and that "At oral argument EPA suggested that a citizen's suit under the [CWA] for failure to perform a non-

discretionary duty, § 505, 33 U.S.C. § 1365, might provide similar redress."); see also Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 266 (5th Cir. 1989) (finding that action to compel EPA to promulgate effluent limitations must be brought in the district court, despite jurisdiction over subsequent challenges to those limitations being vested in the court of appeals). Petitioners have alleged a failure to act and are not seeking review of an EPA determination respecting a state program. It is not clear that any response from EPA to Petitioners' petition would necessarily constitute a "determination as to a State permit program submitted under section 1342(b)" that would be directly reviewable in this Court. Under the APA, 5 U.S.C. § 706, federal courts have the "authority to compel an agency to take an action that has been unlawfully withheld of unreasonably delayed," and District Courts have jurisdiction over such claims under 28 U.S.C. § 1331.

In the district court case on the petition at hand, EPA argued that a citizen suit was not available to Petitioners and that this Court has exclusive jurisdiction over Petitioners' APA claim because, "the substantive action that Petitioners seek to compel, i.e., a decision on their petition to withdraw EPA's approval of West Virginia's NPDES program, is subject to review only in the Fourth Circuit Court of Appeals and any claim that EPA has unreasonably delayed taking such action may only be heard in the Fourth Circuit." Add. 77–80. There is some judicial authority for this proposition under the All Writs Act, although none of it is

squarely on point. See FTC v. Dean Foods Co., 384 U.S. 597, 604 (1966); Pub. Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622, 626, 630 (9th Cir. 1985); TRAC, 750 F.2d at 79; see also Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992).

EPA's inconsistent positions on jurisdiction have exacerbated the problem of delay which Petitioners seek to address. In light of the lack of clarity on this issue and the absence of existing authority from this Court, Petitioners and the district court agreed, without objection from EPA, that the prudent course would be to present the issue directly to this Court in order to most efficiently and authoritatively determine which court is authorized to compel EPA to issue its long-overdue response.

C. If This Court Accepts Jurisdiction, the Writ Should Issue Because Petitioners' Rights to a Fair Determination are Threatened.

The Fourth Circuit has established that interlocutory review of agency proceedings by mandamus is a rare, but sometimes necessary, protection of petitioner's rights. Such review is appropriate where "ongoing agency proceedings suffer from a 'fundamental infirmity.'" In re City of Virginia Beach, 42 F.3d 881, 885 (4th Cir. 1994). "[A] fundamental infirmity in an agency proceeding, justifying interlocutory relief, may occur when an agency unduly delays the resolution of a matter committed to it." Id.; see also State of N.C. Envtl. Policy Inst. v. E.P.A., 881 F.2d 1250, 1257 (4th Cir. 1989).

EPA's inaction on the 2009 Petition presents one of the limited circumstances where mandamus relief is appropriate. EPA's regulations, together with the APA, provide Petitioners with the right to a response to their 2009 Petition. 40 C.F.R. § 123.64(b)(1). Although the ultimate decision whether to institute withdrawal proceedings is left to the discretion of the Administrator, "the regulation clearly states that the Administrator is required to respond in writing to any petition to commence withdrawal proceedings. The Administrator is given no discretion as it regards this duty." National Wildlife Federation v. Adamkus, 936 F.Supp. 435, 442 (W.D. Mich. 1996); see also Sierra Club v. U.S. E.P.A., 377 F.Supp.2d 1205, 1208 (N.D. Fla. 2005) ("[A]ny unreasonable delay by the EPA in [responding to a CWA section 402(c)(3) petition] is reviewable in the [court of appeals]."). EPA is currently denying Petitioners their right to a response. Petitioners have no way to remedy the excessive delay within the administrative proceedings, "necessitating interlocutory intervention." State of N.C. Envtl. Policy Inst. v. E.P.A., 881 F.2d 1250, 1257 (4th Cir. 1989). In addition, EPA's ongoing delay frustrates this Court's role in providing a forum for review of EPA's determination on the West Virginia NPDES program and the now six-year delay is unwarranted.

An agency's delay must be "egregious" to justify granting a writ of mandamus. In re City of Virginia Beach, 42 F.3d 881, 885 (4th Cir. 1994). The

D.C. Circuit in Telecommunications Research & Action Center v. FCC ("TRAC") laid out a test for determining whether an agency's delay is "so egregious as to warrant mandamus." 750 F.2d 70, 80 (D.C. Cir 1984). The Fourth Circuit has neither adopted nor rejected the TRAC test, but many circuits have adopted it, finding that it provides a useful framework for assessing delay claims. The TRAC test instructs courts to consider the following factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason," (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason, (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake, (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, (5) the court should also take into account the nature and extent of the interests prejudiced by delay, and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.' "

Id. at 80 (citations omitted). Application of the above factors to the present case demonstrates that EPA's six-year delay in responding to the Petition is unreasonable and warrants mandamus.

The first, "and most important" TRAC factor, is the principle that, "the time agencies take to make decisions must be governed by a 'rule of reason.'" In re Core Commc'ns, Inc., 531 F.3d 849, 855 (D.C. Cir. 2008) (citing TRAC, 750 F.2d

at 80). Although "[t]here is no per se rule as to how long is too long to wait for agency action," id. at 855, "a reasonable time for an agency decision should encompass 'months, occasionally a year or two, but not several years or a decade.'" In re American Rivers, 372 F.3d 413, 419 (D.C. Cir. 2004) ("FERC's six-year-plus delay is nothing less than egregious.") (citing MCI Telecomms. Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980)); see also Pub. Citizen Health Research Group. v. Chao, 314 F.3d 143, 153 (3d Cir. 2002) (same).

In this case, EPA's six-year delay in responding to Petitioners' Petition violates the rule of reason. This is not a case where EPA must develop complex technical standards governing large classes of industrial discharges. All of the CWA standards have already been set; all EPA must do is judge whether the Petition demonstrates that West Virginia is failing to meet those standards. Petitioners' request does not involve a question of great scientific uncertainty that will require EPA to conduct extensive new research. Just after Petitioners submitted the 2009 Petition, EPA initiated a permit quality review of NPDES permits associated with Appalachian surface coal mine projects then under review by EPA and the U.S. Army Corps of Engineers, including a review of such permitting in West Virginia. On July 13, 2010, EPA released a final report detailing the deficiencies in West Virginia. Water Permits Division, U.S. Environmental Protection Agency, Review of Clean Water Act §402 Permitting for

Surface Coal Mines by Appalachian States (2010), *available at:* http://water.epa.gov/polwaste/npdes/upload/Final_Appalachian_Mining_PQR_07-13-10.pdf. Therefore at least five years ago, EPA investigated and identified failures in the West Virginia NPDES program but failed to follow through with a response to the 2009 Petition. EPA has been notified that the delay has been unreasonable and still has not taken action. Petitioners sent a notice of intent to sue letter for unreasonable delay in responding to the 2009 Petition to EPA on November 7, 2014. At no point since then has EPA contacted Petitioners to assure Petitioners that EPA is making progress or to provide a timeline for its petition response. There is simply no justification for refusing to provide any substantive response to the serious concerns raised for more than six years. The rule of reason dictates that EPA's response has been unreasonably delayed.

While there is no established deadline for EPA's response to a petition to withdraw a state's NPDES program, other related statutory and regulatory deadlines provide guidance for what is reasonable under the statutory scheme and therefore relevant for the second TRAC factor. Section 402(c)(1) gives EPA a 90-day deadline for EPA to review the submission of a new state NPDES program. 33 U.S.C. § 1342(c)(1). Section 402(c)(3) gives a state 90 days after being notified to rectify deficiencies in a state program before EPA withdraws program approval. 33 U.S.C. § 1342(c)(3); see also 40 C.F.R. §123.64(b)(3). If a state wants to

voluntarily transfer its NPDES program back to EPA, it must give EPA 180-days' notice. 40 C.F.R. §123.64(a)(1). In the context of these three to six month deadlines for similar actions regarding the delegation of NPDES programs, a six-year delay in a simple written response to the 2009 Petition is clearly unreasonable.

The third and fifth factors, involving the consequences of delay for human health and welfare and the nature of the interest prejudiced by the delay, are critical. Cutler v. Hayes, 818 F.2d 879, 898 (D.C. Cir. 1987). "It goes without the need of citation that a material aspect of any just determination is that the decisional process not be unduly protracted. This is particularly so when 'human health and welfare are at stake.'" In re City of Virginia Beach, 42 F.3d 881, 886 (4th Cir. 1994) (footnote omitted) (quoting TRAC, 750 F.2d at 80). "When the public health may be at stake, the agency must move expeditiously to consider and resolve the issues before it." Pub. Citizen Health Research Group v. Comn'r., Food & Drug Admin., 740 F.2d 21, 34 (D.C. Cir.1984). The consideration of human health and welfare includes environmental concerns. See, e.g., In re Bluewater Network, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (finding nine-year delay in rulemaking unreasonable based on environmental concerns). EPA's ongoing inaction is causing daily harm to the water of West Virginia. Although it is possible that there are situations in the sphere of economic regulation where a six-

year delay is tolerable, such a delay in protecting water quality is patently unreasonable. See TRAC, 750 F.2d at 80.

The breadth and seriousness of the harms detailed in the 2009 Petition demonstrate the gravity of the harm to Petitioners' interests in clean water. The water quality in West Virginia has not improved in the intervening six-year period. In the 2008 West Virginia Integrated Water Quality Monitoring and Assessment Report, the state reported that after assessing 60% of stream miles in West Virginia, it found that 33% of total stream miles in the state were impaired for at least one pollutant. Division of Water and Waste Management, West Virginia Department of Environmental Protection, West Virginia Integrated Water Quality Monitoring and Assessment Report 2008 18 (2009), *available at:* http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2008_Documents/WV_IR_2008_Supplements_Complete_Version_EPA_Approved.pdf. EPA's inaction has allowed that number to increase, materially undermining the purposes of the CWA. According to the 2014 West Virginia Integrated Water Quality Monitoring and Assessment Report, 44% of stream miles in West Virginia are impaired for at least one pollutant. That is a huge portion, considering that only 66% of stream miles have been assessed. Division of Water and Waste Management, West Virginia Department of Environmental Protection, 2014 West Virginia Integrated Water Quality and Monitoring Report 16 (2015), *available at*:

http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2014_Documents/DraftIRtoEPA/DraftReportSupplements2014.pdf. Petitioners and the waters of West Virginia have suffered irreparable harm as a result of EPA's delay and that harm is ongoing.

Under the fourth factor, Petitioners cannot speculate as to what, if any, competing priorities have prevented EPA from substantively responding to their Petition because EPA has not provided any justification for its delay.[2] Given the minimal amount of work involved, providing a meaningful response should not unduly interfere with any of the agency's competing priorities. Justifications for delay "must always be balanced against the potential for harm," Cutler, 818 F.2d at 898, and an agency's "asserted justifications for the delay become less persuasive the longer the delay continues." In re International Chemical Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992). "There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough.'" Id. (quoting Pub. Citizen Health Research Group v. Brock, 823 F.2d 626 (D.C. Cir. 1987)). After six years with no response to the Petition, that time has come.

[2] Petitioners do not attribute EPA's delay to any improper motive, but under the final TRAC factor, no such motive is required to find unreasonable delay. Blankenship, 587 F.2d. at 334 (finding unreasonable delay despite limited agency resources and lack of dilatory motive)

V. CONCLUSION

If this Court determines it has jurisdiction over Petitioners' claims, Petitioners respectfully request that the Court issue a writ of mandamus compelling EPA to take long overdue action to respond in writing to Petitioners' 2009 Petition. The Petitioners request that this Court order EPA to respond in writing to the 2009 Petition within ninety days of this Court's decision. In addition, Petitioners request that the Court award fees and costs to Petitioners under CWA section 509 (b)(3), 33 U.S.C. § 1369(b)(3), in an amount to be determined following subsequent motion practice and briefing.

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UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

In re OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB, Petitioners,	**ADDENDUM TO PETITION FOR WRIT OF MANDAMUS**

Appalachian Center
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June 17, 2009

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

Dear Administrator Jackson:

Enclosed is a Petition for withdrawal of the National Pollutant Discharge Elimination System program delegation from the State of West Virginia on behalf of the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition. These citizens groups petition EPA to evaluate the systematic failure of West Virginia to administer and enforce the National Pollutant Discharge Elimination System program and to withdraw the delegation of the program from the West Virginia Department of Environmental Protection.

Respectfully submitted,

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ADDENDUM 1

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ADDENDUM 3

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

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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).

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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 exceedences 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.

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(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 lengthly 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**

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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 handing 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 handing 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

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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).

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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.

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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 because 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 Envtl. 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

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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.

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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,

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ADDENDUM 26

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 Envtl. 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&ss1id=720
(10) Byrant et al, Region 3 Mountaintop Removal Environmental Impact Statement at http://www.epa.gov/Region3/mtntop/pdf/appendices/d/stream-chemistry/MTMVFChemistryPart2.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&ss1id=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

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(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&ss1id=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

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(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

ADDENDUM 29

July 31, 2009

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

Dear Administrator Jackson:

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

Respectfully submitted,

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cc:
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ADDENDUM 31

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

The Appalachian Center for the Economy and the Environment, Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition, hereby supplement their petition dated June 17, 2009 to the United States Environmental Protection Agency ("EPA") to withdraw the delegation of the National Pollutant Discharge Elimination System ("NPDES") program from the West Virginia Department of Environmental Protection ("WVDEP"). The purpose of this supplement is to include recent findings related to NPDES antidegradation reviews and compliance schedules.

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

Antidegradation - Socioeconomic Reviews

The June 17, 2009 petition outlined WVDEP's complete failure to require socioeconomic reviews when selenium discharges from mining operations were anticipated to cause significant degradation of receiving waters. Further investigation has revealed that, even when WVDEP requires a socioeconomic review to justify significant degradation for other pollutants, those reviews do not weigh the economic benefits against the environmental impacts of the discharge. Rather, the socioeconomic reviews seem to assume that *any* job creation or *any* increase in tax base is worth the environmental degradation that will be caused.

For example, the February 29, 2008 socioeconomic review for the Marfork Coal Eagle No 2 Mine, NPDES No. WV1022024, justifies significant degradation to tributaries of Clear Fork and Marsh Fork of the Big Coal River from proposed discharges of iron and aluminum. The 30-page text of the document devotes less than one-half page to the assessment of the environmental impacts from those discharges. (1 at 21).[1] In addition, there is no assessment of decreased property values near the mine or impacts to the local population due to noise, dust, blasting, flooding, and water pollution. In fact, the remainder of the 29.5 pages of the document are devoted to extolling the economic benefits of the coal mining operation due to job creation and increases in tax revenues. Neither WVDEP nor the applicant evaluated the potential for "widespread" and "significant adverse impacts," as required by EPA's Economic Guidance for Water Quality Standards Workbook, that could occur if the project were not permitted. (15 at 1-2). In order to have evaluated those impacts, WVDEP would have had to assess both the positive and negative economic impacts related to the project. The NPDES permit was approved on August 19, 2008, with permit limits that allow significant degradation of the receiving stream.

Similarly brief disclaimers of harm and the singular focus on the job creation and tax benefits of mining coal were included in the four other socioeconomic reviews submitted to WVDEP since January 2007. (3, 4, 5, 6). The socioeconomic reviews were then used to justify significant

[1] References will be listed by number at the end of this document and will include either the url for websites or will be included on the CD-ROM accompanying this document.

degradation to West Virginia's rivers and streams. Given this trend, it is hard to imagine that any request to significantly degrade a stream would be refused by WVDEP.

In sharp contrast to WVDEP's approach, EPA's Water Quality Standards Handbook states that, before water quality can be reduced, an antidegradation review must "assure that the highest statutory and regulatory requirements for point sources, including new source performance standards . . . are achieved (this requirement ensures that the limited provision for lowering water quality of high quality waters down to 'fishable/swimmable' levels will not be used to undercut the Clean Water Act requirements for point source and nonpoint source pollution control; furthermore, by ensuring compliance with such statutory and regulatory controls, there is less chance that a lowering of water quality will be sought to accommodate new economic and social development)." EPA further states that "[t]his provision is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for "fishable/swimmable" water, and both cannot be achieved. The burden of demonstration on the individual proposing such activity will be very high." (7 at 4-7)

The WVDEP has totally failed to weigh the economic and social need for any activity leading to increased pollution versus the benefit of maintaining water quality above that necessary to maintain fishable/swimmable water quality. In fact, there is no valuation of community benefits of clean rivers and streams at all. Those benefits include but are not limited to: increased local property values, improved health, less dust, fewer respiratory and other associated mining illnesses, elimination of black lung disease, improved ability to attract new industries, improved recreation and increased likelihood of tourism, decreased drinking water treatment costs, and improved aesthetics. All of these community attributes have a positive economic benefit that will be eliminated due to mining. They are simply never evaluated.

A recent study by researchers at West Virginia University and Washington State University concluded that

> [t]he human cost of the Appalachian coal mining economy outweighs its economic benefits. . . . The heaviest coal mining areas of Appalachia had the poorest socioeconomic conditions. Before adjusting for covariates, the number of excess annual age-adjusted deaths in coal mining areas ranged from 3,975 to 10,923, depending on years studied and comparison group. Corresponding VSL (Value of Statistical Life) estimates ranged from $18.563 billion to $84.544 billion, with a point estimate of $50.010 billion, greater than the $8.088 billion economic contribution of coal mining. After adjusting for covariates, the number of excess annual deaths in mining areas ranged from 1,736 to 2,889, and VSL costs continued to exceed the benefits of mining. Discounting VSL costs into the future resulted in excess costs relative to benefits in seven of eight conditions, with a point estimate of $41.846 billion.

(17 at 541). This study reiterates the importance of a complete socioeconomic review of a proposed discharge.

ADDENDUM 33

WVDEP has also failed to assess the specific water quality downstream from mining operations that have real economic impacts related to the attributes and studies noted above. A recent paper by stream ecologists Dr. Margaret Palmer and Dr. Emily Bernhardt summarize these impacts.

> The streams and rivers below valley fills receive alkaline mine drainage that include highly elevated concentrations of sulfate, bicarbonate, calcium and magnesium ions and which often include elevated concentrations of multiple trace metals. The combined toxicity of multiple constituents results in significant increases in conductivity and total suspended solids below valley fills. This decline in water quality leads to a loss of sensitive aquatic organisms even when downstream habitats are intact. The resulting high conductivity and high sulfates can persist long after mining activities cease and scientists have found no empirical evidence documenting recovery of macroinvertebrate communities in the streams impacted by alkaline mine drainage. The water quality impacts of MTMVF activities are more severe and more persistent than other land use changes within the southern Appalachians.
>
> - Streams impacted by MTVF often have 30-40 fold increases in sulfate concentrations and sulfate concentrations in receiving waters continue to increase after mining activities end. High sulfate concentrations can lead to impacts on aquatic organisms and ecosystem functions.
> - Ions of calcium, magnesium, and bicarbonate increase dramatically in the waters so that electrical conductivity levels and total suspended solids in receiving streams below fills can be extremely high ("alkaline drainage syndrome"). Trace elements of iron, aluminum, zinc, and selenium are often elevated as well.
> - The cumulative effect of elevated levels of all these ions is highly correlated to biological impairment in streams below MTVF. Functionally important aquatic biota are sensitive to ionic stress which disrupts water balance and can cause stress or death.12
>
> Typical mitigation projects do nothing to reverse the severe ecological consequences of the water quality impacts downstream from large scale surface mining operations.

(14 at 3).

In addition, economic benefits from mining are short term, and those short-term benefits must be weighed against long-term water quality issues, including persistent selenium and sulfate/conductivity pollution downstream from mine sites. "Case studies show that selenium in sediments can cycle into the water and food chain for decades after selenium inputs are stopped." (8 at 6) Impacts on water quality downstream from mining operations after mining has ceased may not return to pre-mining levels even after 50 years. (13 at 15) Further, "it appears that improvements in water quality (reduction in mine-drainage constituents), which were rapid at first, show only gradual reduction as time increases. Consequently, it is likely to take many years for concentrations of metals, acidity, and sulfate to reach pre-mining concentrations. (13 at 16)

In failing to consider these impacts, WVDEP has not only thumbed its nose at the Clean Water Act but has also pledged its allegiance to the coal industry. WVDEP's actions related to

antidegradation add to the previously provided proof that the agency has utterly failed to carry out the mandates of the Clean Water Act.

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

WVDEP fails to provide an opportunity for public notice and comment related to socioeconomic reviews. An opportunity for public notice and comment is guaranteed by the Clean Water Act. Section 402(b)(3) insures "that the public . . . receive notice of each application for a permit." Regulations at 40 C.F.R. § 124.10(c) and 47 C.S.R. § 30.10.2.d.2.C mandate that the state, among other things, give notice to persons on a mailing list including those who request to be on the mailing list in writing. WVDEP maintains such a list and circulates notices through an email listserve and the postal service. WVDEP also requires that NPDES permit applications be noticed through publication in a local newspaper. 47 C.S.R. 30.10.2.c.

Public notice and opportunity for comment is required for antidegration reviews related to NPDES permits and is specifically required for, "[t]he results of the socio-economic evaluation of the activity." 60 C.S.R. § 5-8.4.a.4. Despite this requirement, WVDEP has generally failed to provide public notice of socioeconomic reviews to individuals on area lists and has failed, in at least one instance, to assure that an opportunity for public notice and comment was even placed in local newspapers. (16, 18) Even more egregious is that public notices to those on area lists for permits for 4 of the 5 operations known to have gone through socioeconomic reviews since 2007 actually stated that the proposed discharge would not cause significant water quality degradation and, thus, did not need socioeconomic reviews. (16 at 1)

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

Compliance Schedules

The June 17, 2009 petition outlined serious deficiencies in WVDEP's use of compliance schedules. As previously noted, 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). Specifically, EPA's regulations require that compliance schedules:

- include interim requirements if the schedule is longer than one year in duration. 40 C.F.R. § 122.47(a)(3)
- include an "enforceable sequence of actions" leading to compliance (9 at 2)
- include an enforceable "final effluent limit in the permit" (9 at 2)

- include a "*reasonable finding*, adequately *supported by the administrative record*" that the compliance schedule will lead to compliance with the final effluent limits on schedule (emphasis added) (9 at 2)
  include assurances supported by the record that the schedule is "appropriate" and "as soon as possible" (9 at 2).
- Must be based on actions by the permittee and not an agency (such as a TMDL or establishing a water quality standard) (10 at 3)

WVDEP's deficiencies related to compliance schedules are significant. For example, in two recently reissued permits for municipal sewage treatment plants, WVDEP gave each facility a 20-year compliance schedule to meet new phosphorus limits to prevent significant algal blooms in the Greenbrier River. (11, 12) WVDEP states in each permit:

a. The permittee shall achieve initial phosphorus limitations of .5 mg/l average monthly and 1.0 mg/l maximum daily during the months of April through October within three years from the issuance date of this permit.
b. The permittee shall submit a Plan of Action outlining how the permittee will achieve the limitations required by Section C.24.a within ninety days of the issuance of this permit.
c. The permittee shall submit a permit modification application within 2 years from the issuance of this permit including approvable plans and specifications for the necessary upgrades to meet the limitations required by Section C.24.a.
d. The permittee shall submit quarterly progress reports after the Plan of Action has been submitted until compliance is attained with Section C.24a.
e. The permittee shall achieve final phosphorous limitations of 0.01 mg/l average monthly and 0.02 mg/l maximum daily during the months of April through October within twenty years from the issuance date of this permit. These final limitations are subject to modification by the agency in the future based on the results of interim activities and/or the development of WV numeric nutrient water quality criteria. The permittee shall continue to submit quarterly progress reports for the remainder of the permit outlining the actions the permittee has taken and will take in order to achieve the final phosphorus limitations. Further compliance schedule milestone will be reassessed during the next permit reissuance.

(11 at 38 of 49)

Neither the permits nor the facts sheets justify the 3- and 20-year compliance schedules or assure that these time frames are "as soon as possible." The 20-year compliance schedules are based, in part, on a future agency action (establishing WV numeric nutrient water quality criteria) and not on productive efforts by the permittee to actually meet limits related to violations of the West Virginia narrative criteria. In addition, WVDEP states that the limits noted in the permit are not true final limits as they may be revised in the future. This creates substantial uncertainty as to what the final limits will be and will add to confusion and significant delays in compliance. In fact, because WVDEP has given the facilities such a long compliance schedule, the agency appears to be content to delay setting major milestones well into the future instead of setting them prior to permit issuance as required.

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CONCLUSION

Because the above issues further underline 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 supplement to our original petition as soon as possible.

Respectfully Submitted,

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REFERENCE LIST

1. Socio Economic Review for the Marfork Coal, Eagle No 2 Mine, NPDES No. WV1022024, 2/29/08 in four parts.
2. Marfork Coal, Eagle No 2 Mine, NPDES Permit No. WV1022024
3. Socio Economic Review for Paynter Branch, WV1021346, in two parts
4. Socio Economic Review for Allen quarry
5. Socio Economic Review Coyote Coal, WV1022423, in three parts
6. Socio Economic Review for Consol of KY
7. See USEPA, Water Quality Standards Handbook, Second Edition, EPA-823-B-94-005a, August 1994 at http://www.epa.gov/waterscience/standards/handbook/handbooktoc.pdf
8. Declaration of Dennis Lemly in OVEC v Hobet Civil Case No. 3:08-cv-00088 (S.D.W.Va.)
9. Memo on compliance schedules from James A Hanlon, Director of Office of Wastewater management USEPA to Alexis Strauss, Director, Water Division, USEPA Region 9, May 10, 2007.
10. Letter from Alexis Strauss of USEPA to Celeste Cantu of California State Water Resources Control Board, RE: California SIP, compliance schedule provisions, October 23, 2006.
11. White Sulphur Springs NPDES Permit, No. WV0084000 issued May 29, 2009
12. Hillsboro NPDES Permit No. WV0054283 issued April 30, 2009
13. Sams, James I. and Beer, Kevin M.USGS. Effects of Coal-Mine Drainage on Stream Water Quality in the Allegheny and Monongahela River Basins – Sulfate Transport and Trends. Water-Resources Investigations Report 99-4208. 2000.
14. Palmer, Margaret and Bernhardt, Emily. Mountaintop Mining Valley Fills and Aquatic Ecosystems: A Scientific Primer on Impacts and Mitigation Approaches. May, 2009.
15. See EPA's economic guidance at http://www.epa.gov/waterscience/standards/econworkbook/index.html

ADDENDUM 37

16. FOIA response – area list notices for socio economic reviews
17. Hendryx, Michael and Ahern, Melissa. Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost. Public Health Reports. Vol. 124. July-August 2009.
18. FOIA response – news paper ads for socio economic reviews

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November 13, 2009

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

Dear Administrator Jackson:

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

Respectfully submitted,

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cc:
The Honorable William C. Early
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///

ADDENDUM 39

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ADDENDUM 40

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

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

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

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

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

The answer to that question appears to be point source discharges high in chlorides and total dissolved solids permitted by WVDEP. Investigators have identified Consol Energy's Blacksville No. 2 Mine as the likely major source of the causative pollutants. (3) The State of West Virginia has known since at least 2002 that Consol has been discharging chlorides in concentrations causing water quality standards violations. (4) But rather than prohibiting those discharges, or enforcing the Clean Water Act to protect Dunkard Creek, WVDEP issued a compliance order to Consol in 2004 that purports to modify Consol's NPDES permit to suspend the final effluent limitations for chlorides until June 30, 2007.[1] (5) West Virginia's express

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

///

Respectfully Submitted,

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ADDENDUM 45

REFERENCE LIST

1. Frank Jernejcic and David Wellman, West Virginia Division of Natural Resources, Dunkard Creek Fish Kill Assessment (September 2009 PowerPoint)

2. Patrick Campbell, West Virginia Department of Environmental Protection, Dunkard Creek Aquatic Life Kills (September 2009 PowerPoint)

3. Letter from John Hanger, Secretary, Pennsylvania Department of Environmental Protection, to Randy Huffman, Secretary, West Virginia Department of Environmental Protection, Re: Dunkard Creek Fish Kill Consolidation Coal Company Blacksville No. 1 Mine (Oct. 2, 2009)

4. Consolidation Coal Co. v. Turner, Agreed Order Withdrawing Appeals, Appeal Nos. 2-23-EQB, 2-24-EQB, 2-25-EQB, 2-26-EQB, 2-27-EQB (W. Va. Envtl. Quality Bd. Feb. 20, 2003)

5. Amended Order 133 to Consolidation Coal Co. Re: WV/NPDES Permit Numbers WV0064602, WV0093505, WV0050598, WV0040711, WV0004201, WV1011456, WV0005801 (West Virginia Department of Environmental Protection Dec. 29, 2004)

6. Amended Order 133B to Consolidation Coal Co. Re: WV/NPDES Permit Numbers WV0064602, WV0093505, WV0050598, WV0040711, WV0004201, WV1011456, WV0005801 (West Virginia Department of Environmental Protection June 1, 2007)

7. Amended Order 133C to Consolidation Coal Co. Re: WV/NPDES Permit Numbers WV0064602, WV0093505, WV0050598, WV0040711, WV0004201, WV1011456, WV0005801 (West Virginia Department of Environmental Protection September 30, 2008)

8. Consol Energy, Inc., Phase I Compliance Plan for Chloride AMD Treatment Plant Discharges in Northern West Virginia (January 2008)

9. Potesta & Assoc., Inc., Progress Report: Phase I Compliance Plan for Chloride AMD Treatment Plant Discharges in Northern West Virginia (August 2008)

10. Letter from Derek O. Teaney, Appalachian Ctr. for the Economy & the Envt., to J. Brett Harvey & John Owsiany, Consolidation Coal Co., Re 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permits and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions of West Virginia Surface Mining Permits (Aug. 27, 2008)

11. Ohio Valley Envtl. Coalition v. Hobet Mining, LLC, Memo. Op. & Order, Civ. No. 3:08-cv-0088, 2008 WL 5377799 (S.D. W. Va. Dec. 18, 2008)

ADDENDUM 46

12. Mandirola v. Hobet Mining, LLC, [Proposed] Modified Settlement and Consent Order, Civ. Action No. 07-C-3 (Boone County Cir. Ct. Oct. 20, 2009)

13. Letter from Derek O. Teaney, Appalachian Ctr. for the Economy & the Envt., to Honorable Lisa Jackson and the Honorable William C. Early, U.S. E P.A. Re: West Virginia Legislature's Revisions to State NPDES Permitting Program and Selenium Water Quality Standard (May 7, 2009)

14. Letter from Derek O. Teaney, Appalachian Ctr. for the Economy & the Envt., to Kent Desrocher, Hobet Mining, LLC, Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permit WV1022911 and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions on West Virginia Surface Mining Permit Number S500806

15. Memo. of Agreement Between the Division of Water Resources of the Department of Natural Resources of the State of West Virginia and the Regional Administrator, Region III, U.S. E.P.A. Regarding the Administration and Enforcement of the National Pollutant Discharge Elimination System (NPDES) (May 10, 1982)

16. Letter from Jon M. Capacasa, U.S. E.P.A. Region III, to Scott Mandirola & Tom Clarke, West Virginia Department of Environmental Protection (July 7, 2009)

17. Mandirola v. Hobet Mining, LLC, Affidavit of John McHale, Civ. Action no. 07-C-3 (Boone County Cir. Ct. Aug. 28, 2009)

18. Ohio Valley Envtl. Coalition v. Hobet Mining, LLC, Declaration of A. Dennis Lemly, Ph.D. on Aquatic Hazard of Selenium Releases From Coal Mining in the Mud River Ecosystem, West Virginia, Civ. No. 3:08-cv-88 (S.D. W. Va. April 18, 2008)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB,

Plaintiffs,

v. **CIVIL ACTION NO.** 3:15-cv-00277

GINA MCCARTHY, in her official capacity as ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

And

SHAWN M. GARVIN, in his official capacity as REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 3,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action arises under the citizen suit provision of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. (hereinafter "the Clean Water Act" or "the CWA"). Plaintiffs seek a declaration that the United States Environmental Protection Agency (EPA) has failed to perform its non-discretionary duty to respond to Plaintiffs' petition seeking withdrawal of the State of West Virginia's authority to administer the National Pollutant Discharge Elimination System (NPDES) within its borders and an injunction ordering it to promptly respond.

2. Alternatively, this action arises under Administrative Procedure Act, 5 U.S.C. §§ 501 et seq. (hereinafter "the APA"). Plaintiffs seek a declaration that the United States Environmental Protection Agency (EPA) has unreasonably delayed responding to Plaintiffs' petition seeking withdrawal of the State of West Virginia's authority to administer the National Pollutant Discharge Elimination System (NPDES) within its borders and an injunction ordering it to promptly respond.

3. On June 17, 2009, pursuant to CWA section 402(c)(3), 33 U.S.C. § 1342(c)(3), Plaintiffs submitted a petition to Defendants' predecessors at EPA asking them "to evaluate the systematic failure of West Virginia to administer and enforce the National Pollutant Discharge Elimination System program and to withdraw the delegation of the program from the West Virginia Department of Environmental Protection." June 17, 2009 Petition ("the June 17th Petition") at 1, attached as Exhibit A. The petition identified numerous ways in which the West Virginia Department of Environmental Protection's ("WVDEP" or "West Virginia") administration of its NPDES permitting and enforcement program failed to meet the requirements of the Act, resulting in widespread harm to the State's waters. On July 31, 2009, Plaintiffs submitted a supplement to the June 17th Petition. July 31, 2009 Supplement ("the June 31st Supplement"), attached as Exhibit B. On November 13, 2009, Plaintiffs submitted a second supplement to the June 17th Petition. November 13, 2009 Supplement ("the November 13th Supplement"), attached as Exhibit C. The June 17th Petition, the June 31st Supplement, and the November 13th Supplement (hereinafter, collectively "the Petition" or "Plaintiffs' Petition") focused on West Virginia's failure to adequately regulate pollution discharges from the coal mining industry.

4. As of the filing of this complaint, more than five years after receiving Plaintiffs' Petition, EPA has not offered any substantive written response and has taken no action to withdraw the NPDES authority from the WVDEP. On information and belief, the vast majority of the failures identified in the Petition and two Supplements remain unaddressed, leading to ongoing degradation of West Virginia's waters.

JURISDICTION AND VENUE

5. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365 (Clean Water Act citizens' suit provision).

6. Alternatively, this court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (Administrative Procedure Act).

7. On November 7, 2014, Plaintiffs gave notice to the Defendants of their failure to perform their non-discretionary duty to respond to Plaintiffs' Petition and of Plaintiffs' intent to file suit if Defendants did not respond within 60 days, as required by Section 505(b)(2) of the CWA, 33 U.S.C. § 1365(b)(2). More than sixty days have passed since notice was served and Defendants have not offered a response.

8. Venue in this District is proper pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to this claim occurred in this district.

PARTIES

9. Plaintiff Ohio Valley Environmental Coalition ("OVEC") is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1,500 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media

outreach. OVEC has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

10. Plaintiff West Virginia Highlands Conservancy, Inc., (hereinafter "WVHC") is a nonprofit organization incorporated in West Virginia. It has approximately 1,700 members. It works for the conservation and wise management of West Virginia's natural resources.

11. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and approximately 1,900 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia.

12. Plaintiffs' members' use and enjoyment of the water resources of West Virginia for recreational, aesthetic, and other beneficial purposes are adversely affected by the Defendants' failure to respond to Plaintiffs' Petition. Plaintiffs' members, including Vivian Stockman and others, use and enjoy rivers, streams, and lakes in the State where water quality is threatened by the WVDEP's failure to administer its NPDES program in accordance with the requirements of the CWA. Plaintiffs' members refrain from those activities or enjoy them less because of the WVDEP's failure to regulate pollution discharges as required by law. An order compelling Defendants to substantively respond to Plaintiffs' Petition would provide redress for those injuries.

13. At all relevant times, Plaintiffs were and are "persons" as that term is defined by

the CWA, 33 U.S.C. § 1362(5), and the APA, 5 U.S.C. § 551(2).

14. Plaintiffs and their members are persons with interests that are adversely affected by the Defendants' failure to respond to their Petition, and those interests in the use, enjoyment, and protection of waters of West Virginia from coal mining pollution are within the zone of interests sought to be protected by the Clean Water Act.

15. Gina McCarthy is sued in her official capacity as Administrator of the United States Environmental Protection Agency, which is the agency of the federal government to which administration and enforcement of the Clean Water Act ("CWA" or "the Act") has been delegated by Congress. Pursuant to CWA section 402(c)(3), the Administrator is responsible for responding to petitions and commencing proceedings to withdraw a state's NPDES delegation.

16. Shawn M. Garvin is sued in his official capacity as the Regional Administrator of the United States Environmental Protection Agency's Region 3, which is the office of EPA directly responsible for oversight of the State of West Virginia's administration of its NPDES program.

STATUTORY AND REGULATORY FRAMEWORK

17. The Clean Water Act, 33 U.S.C. § 1251 *et seq*., is a comprehensive water quality statute designed "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).

18. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit issued pursuant to the Act. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollution Discharge Elimination System ("NPDES") under which the Administrator of EPA may issue permits for the discharge of pollutants into waters of the United States, upon the

condition that such discharges will meet all applicable requirements of the CWA.

19. Permits issued pursuant to the NPDES program define the obligations of the dischargers under the CWA, including setting limitations on rates and quantities of pollutant discharges and establishing monitoring and reporting requirements. 33 U.S.C. § 1342(a)(2); 40 C.F.R. Part 122. Compliance with an NPDES permit is deemed compliance with the Act as a whole. 33 U.S.C. § 1342(k); 40 C.F.R. § 122.5.

20. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), allows the EPA Administrator to authorize any state to administer its own NPDES program upon an application showing that the state possesses adequate authority to carry out all aspects of the program. Authorized state NPDES programs must at all times be in accordance with the federal program. Id. at § 1342(c)(2).

21. EPA retains significant oversight over delegated programs. If at any time the Administrator determines that a state is not administering its NPDES program in accordance with the requirements of the federal program, she may initiate proceedings to withdraw the state's NPDES authorization. Section 402(c)(3) of the CWA states that:

> Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

33 U.S.C. § 1342(c)(3).

22. EPA's regulation implementing Section 402(c)(3) states that the "Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person." 40 C.F.R. § 123.64(b)(1). The regulation

makes clear that EPA has a mandatory duty to respond to a petition submitted pursuant to CWA section 402(c)(3), stating that "[t]he Administrator will respond in writing to any petition to commence withdrawal proceedings." Id. (emphasis added). Those authorities create a non-discretionary duty for EPA to respond in writing to petitions seeking withdrawal of delegation from non-compliant state programs. See Save the Valley, Inc. v. U.S. E.P.A., 99 F.Supp.2d 981, 984–86 (S.D. Ind. 2000).

23. EPA's regulations explain the that circumstances where withdrawal of a state's NPDES authority is appropriate include:

> (1) Where the State's legal authority no longer meets the requirements of this part, including:
> (i) Failure of the State to promulgate or enact new authorities when necessary; or
> (ii) Action by a State legislature or court striking down or limiting State authorities.
>
> (2) Where the operation of the State program fails to comply with the requirements of this part, including:
> (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
> (ii) Repeated issuance of permits which do not conform to the requirements of this part; or
> (iii) Failure to comply with the public participation requirements of this part.
>
> (3) Where the State's enforcement program fails to comply with the requirements of this part, including:
> (i) Failure to act on violations of permits or other program requirements;
> (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or
> (iii) Failure to inspect and monitor activities subject to regulation.
>
> (4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24 (or, in the case of a sewage sludge management program, § 501.14 of this chapter).
>
> (5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.
>
> (6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to

> adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

40 C.F.R. § 123.63(a).

24. At all times relevant to this complaint, the State of West Virginia has been authorized by EPA to administer an NPDES program for regulating the discharges of pollutants into the waters of the State. Permits issued under this program are issued by the WVDEP and are known as "WV/NPDES" permits.

25. Section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), authorizes any "citizen" to "commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."

26. In an action brought under Section 505(a) of the CWA, the district court has jurisdiction to "order the Administrator to perform such act or duty." 33 U.S.C. § 1365(a).

27. Under Section 505(d) of the CWA, 33 U.S.C § 1365(d), the court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."

28. The Administrative Procedure Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

29. The APA defines "agency action" to include those instances where an agency has failed to act. 5 U.S.C. § 551(13).

30. The EPA is a federal agency whose actions are subject to review under the APA. See 5 U.S.C. § 551(1).

31. The APA mandates that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b).

32. The APA provides that a court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

FACTUAL BACKGROUND

33. On June 17, 2009, Plaintiffs submitted a petition to Defendants' predecessors at EPA asking them "to evaluate the systematic failure of West Virginia to administer and enforce the National Pollutant Discharge Elimination System program and to withdraw the delegation of the program from the West Virginia Department of Environmental Protection." Exhibit A at 1. The groups specifically requested that EPA formally respond to their petition in writing, as required by 33 U.S.C. § 1342(c)(3) and 40 C.F.R. § 123.64(b)(1). Id. at 4.

34. The June 17th Petition provided overwhelming evidence that West Virginia is failing to administer its NPDES program in accordance with the requirements of the CWA. The specific failures described in the June 17th Petition, supported by extensive citations and exhibits, primarily relate to WVDEP's inadequate regulation of pollution from coal mining operations and include:

a. Unlawfully requiring the consideration of compliance cost into NPDES permitting appeals decisions (Ex. A at 2–3);

b. Refusing to apply the anti-backsliding provision of section 402(o) of the Act (Ex. A at 4–5);

c. Failing to permit point source discharges from bond forfeiture sites and abandoned mine lands (Ex. A at 5–7);

d. Failing to adequately protect its streams from toxic selenium pollution by not including protective effluent limits in NPDES permits (Ex. A at 7–11);

e. Failing to comply with public participation requirements (Ex. A at 12–13);

f. Failing to enforce the selenium water-quality standard and water-quality based effluent limits, and other limits at mining sites, industrial facilities, and municipal facilities (Ex. A at 13–18);

g. Failing to submit annual statistical reports as required by the 1982 Memorandum of Agreement between EPA and West Virginia (Ex. A at 18);

h. Failing to follow its antidegradation policy (Ex. A at 19–20);

i. Failing to develop total maximum daily loads for ionic stress and continuing to issue NPDES permits to new sources of ionic stress that will discharge into biologically impaired streams (Ex. A at 21–22);

j. Failing to implement its tissue-based human health water-quality criterion for mercury and using an insupportably high criterion for mercury (Ex. A at 22); and

k. Unlawfully allowing and extending compliance schedules (Ex. A at 3–4, 10–11; Ex. B at 6–7; Ex. C at 1–4).

35. The petition informed EPA that West Virginia's failure to administer its NPDES program in accordance with the requirements of the CWA was having dire consequences for the health of the State's waters, citing the thousands of miles of rivers and streams that West Virginia itself has determined are impaired. Ex. A at 4. It concluded by stating that "[b]ecause 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." Id. at 26.

36. More than five years have passed since Plaintiffs sent their Petition to EPA. Plaintiffs have yet to receive a formal written response as requested and as required by 33 U.S.C. § 1342(c)(3) and 40 C.F.R. § 123.64(b)(1).

37. On information and belief, the majority of the failures identified in Plaintiffs Petition continue to this day.

38. Further failures in the intervening years prompted Plaintiffs and other environmental groups to send an additional, separate petition to EPA on September 3, 2014,

requesting that EPA initiate formal proceedings under 40 C.F.R. § 123.64(b) to withdraw approval of the State of West Virginia's NPDES program on grounds independent from those stated in the June 17th Petition, June 31st Supplement, and November 13th Supplement. EPA has not responded to that petition.

39. Pursuant to Section 505(b)(2) of the CWA, 33 U.S.C. § 1365(b)(2), Plaintiffs sent a notice of intent letter ("NOI"), postmarked on November 7, 2014, notifying the Defendants of their failure to perform their non-discretionary duty to respond to Plaintiffs' Petition. The NOI notified Defendants of Plaintiffs' intent to file suit if Defendants did not respond within 60 days. The NOI was sent by certified mail, return receipt requested, to the following persons: Gina McCarthy, Administrator of EPA; Shawn M. Garvin, Regional Administrator of EPA Region 3; and Eric Holder, United States Attorney General.

FIRST CLAIM FOR RELIEF

(Failure to Perform Non-Discretionary Duty Under the Clean Water Act)

40. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 39 supra.

41. Clean Water Act section 402(c)(3), 33 U.S.C. § 1342(c)(3), and 40 C.F.R. § 122.64(b)(1) establish a non-discretionary duty for the Administrator of EPA to respond in writing to any petition seeking the withdrawal of a state NPDES program delegation.

42. Plaintiffs' submission of their June 17, 2009 Petition and July 31, 2009 and November 13, 2009 Supplements triggered the EPA's non-discretionary duty to provide a written response.

43. More than five years have passed since Plaintiffs submitted their petition and EPA has yet to fulfill its duty to provide a written response.

44. On information and belief, absent an Order from this Court, EPA will remain in

violation of the CWA as a result of its failure to perform the non-discretionary duty to respond in writing to petitions submitted pursuant to CWA section 402(c)(3), 33 U.S.C. § 1342(c)(3).

SECOND, ALTERNATIVE CLAIM FOR RELIEF
(Unreasonable Delay Under the Administrative Procedure Act)

45. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 39 supra.

46. The Administrative Procedure Act mandates that all federal agencies shall "within a reasonable time . . . proceed to conclude a matter presented to it," 5 U.S.C. § 555(a), and provides that a court shall "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1).

47. Plaintiffs' submission of their June 17, 2009 Petition and July 31, 2009 and November 13, 2009 Supplements triggered the EPA's duty under the APA to respond and proceed to conclude the matters presented in Plaintiffs' Petition within a reasonable time.

48. The more than five year delay between Plaintiffs' submission of their Petition and the filing of this action is patently unreasonable.

49. On information and belief, absent an Order from this Court, EPA's unreasonable delay in responding to Plaintiffs' Petition will continue.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this court enter an Order:

(1). Declaring that EPA has failed to perform its non-discretionary duty under the Clean Water Act to respond in writing to Plaintiffs' Petition;

(2). Alternatively, declaring that the EPA's failure to respond to Plaintiffs' Petition for more than five years constitutes an unreasonable delay under the Administrative Procedure Act;

(3). Ordering EPA to promptly provide a substantive, written response to Plaintiffs'

Petition seeking withdrawal of West Virginia's NPDES program delegation;

(4). Awarding Plaintiffs' attorney fees and all other reasonable expenses incurred in pursuit of this action; and

(5). Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ Amy Vernon-Jones
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Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON

OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB, Plaintiffs, v. GINA McCARTHY, in her official capacity as Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and SHAWN GARVIN, in his official capacity as Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 3, Defendants.	Case No. 3:15-cv-00277

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Gina McCarthy, Administrator of the United States Environmental Protection Agency, and Shawn Garvin, Regional Administrator of the United States Environmental Protection Agency Region III (collectively, "EPA") submit this memorandum in support of their Motion to Dismiss the Complaint filed by Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy and Sierra Club (ECF No. 1) for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.

INTRODUCTION

Count I of the Complaint asserts a claim against EPA under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(2). ECF No. 1 ¶ 5. Plaintiffs contend that EPA has failed to perform an alleged nondiscretionary duty under CWA Section 402(c)(3), 33 U.S.C. § 1342(c)(3), and 40 C.F.R. § 123.64(b)(1), to respond in writing to their administrative petition seeking the withdrawal of the West Virginia's National Pollutant Discharge Elimination System ("NPDES") permit program. ECF No. 1 ¶ 41. Because the CWA does not establish a mandatory duty for EPA to respond to Plaintiffs' petition, Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs have also failed to identify an applicable waiver of sovereign immunity, which is a mandatory prerequisite for any action against the United States. See United States v. Mitchell, 463 U.S. 206, 212 (1983). Therefore, Count I should be dismissed for lack of subject matter jurisdiction.

In Count II, Plaintiffs assert that EPA's alleged failure to timely respond to their administrative petition constitutes an "unreasonable delay" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). ECF No. 1 ¶ 6. See id. ¶ 48. EPA is required to "conclude a matter presented to it" under the APA. 5 U.S.C. § 555(b). But where the action that is before an agency is directly reviewable in the circuit court of appeals, as is the case here, an unreasonable delay claim related to that action must be brought in the court of appeals rather than in district court. Count II should therefore also be dismissed for lack of subject matter jurisdiction.

STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act and the NPDES Permit Program

The CWA was adopted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits

the discharge of any pollutant into waters of the United States except in accordance with certain restrictions. 33 U.S.C. § 1311(a). Discharges of pollutants from point sources into waters of the United States are regulated under the NPDES permit program established in CWA Section 402, 33 U.S.C. § 1342.[1] The CWA defines a "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A person discharging pollutants from a point source into waters of the United States generally must secure an NPDES permit. NPDES permits contain technology-based effluent limitations and, where necessary, more stringent limitations to ensure that receiving waters comply with water quality standards. 33 U.S.C. §§ 1311, 1312.

The CWA recognizes that States bear "the primary responsibilit[y] and right[] . . . to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). In that regard, the CWA specifically established as "the policy of Congress that the States . . . implement the [NPDES] permit program." Id. The CWA's substantive provisions and legislative history thus "reflect the desire of Congress to put the regulatory burden on the States and to give [EPA] broad discretion in administering the program." District of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980); see also Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd., 495 F. Supp. 1229, 1232 (E.D. Va. 1980) ("A State's administration of an NPDES program is indicative of Congress's intent to 'recognize, preserve and protect the primary responsibilities and rights of the states to prevent, reduce, and eliminate pollution. . . .'"). The courts have described EPA's role once a state has assumed NPDES permitting authority as "supervisory." See Chesapeake Bay Found, 495 F. Supp. at 1232. For example, although EPA may prevent the issuance of a

[1] Discharges of "dredged or fill material" from point sources into waters of the United States are regulated through the issuance of permits by the U.S. Army Corps of Engineers under a different CWA provision – Section 404, 33 U.S.C. § 1344 – and are not implicated here.

state NPDES permit by vetoing it, EPA's decision to acquiesce in a state permit decision is "totally discretionary and unreviewable." Id.

CWA Section 402(b), 33 U.S.C. § 1342(b), provides that states may seek authority to administer the NPDES program and issue NPDES permits.[2] Section 402(b) includes criteria governing EPA's approval of state NPDES program authority.[3]

CWA Section 402(c) sets forth the process by which EPA may withdraw its approval of a state's NPDES program. As set forth in Section 402(c)(3):

> Whenever the Administrator determines after a public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

33 U.S.C. § 1342(c)(3). While this provision requires that the Administrator act within 90 days after notification to a state if the state fails to take corrective action, that duty is triggered only after the Administrator provides notice to the state that she has determined that the state is not administering its program in accordance with requirements of the CWA, and that determination can be made only after a public hearing. Notably, the CWA contains no provision specifying: (1) when, if ever, EPA must hold a public hearing regarding the sufficiency of a state NPDES

[2] Forty-six states, including the State of West Virginia, have been authorized by EPA to administer their own NPDES programs. EPA administers the program in the remaining jurisdictions *See* http://water.epa.gov/polwaste/npdes/basics/NPDES-State-Program-Status.cfm

[3] CWA Section 304(i), 33 U.S.C. § 1314(i), authorizes EPA to establish minimum requirements for State NPDES programs.

program; or (2) when, if ever, EPA must make a determination that a state's NPDES program is inadequate.

The legislative history confirms that Congress intended EPA to withdraw a state's NPDES authority only in extraordinary circumstances. See 118 Cong. Rec. 33750 (1972) (statement by Representative Jones of Alabama):

> If the State fails to carry out its responsibility or misuses the permit program, the Administrator is fully authorized to withdraw his approval of the State plan or[,] in the case of an individual permit which does not meet regulations and guidelines in the [A]ct, preclude the issuance of such permit. It is intended, however, that the Administrator shall not take such action except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise to comply with the law.

B. EPA Regulations Implementing the State NPDES Program

EPA's regulations implementing the NPDES program at 40 C.F.R. Part 123 explain in detail the process for withdrawal of a state program. Section 123.63, "[c]riteria for withdrawal of State programs," provides that the EPA Administrator "may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action." 40 C.F.R. § 123.63(a) (emphasis added).[4] Consistent with the discretionary language in Section 123.63, Section 123.64(b)(1) provides that the EPA Administrator "may" order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging that a State has failed to comply with the

[4] Under EPA's regulations, such circumstances include situations where EPA has determined that the state's legal authority or its operation of its NPDES program no longer meets or complies with EPA's requirements. Id. Examples of potential non-compliance include: a state's failure to promulgate or enact new authorities "when necessary"; action by a state legislature or court "striking down or limiting State authorities"; a state's failure to "exercise control" over activities required to be regulated under EPA regulations; a state's "repeated" issuance of permits that do not conform to EPA requirements; and a state's failure to comply with "public participation" requirements. 40 C.F.R. § 123.63(a)(1)(i),(ii); (2)(ii),(iii).

requirements of part 123, as set forth in Section 123.63. 40 C.F.R. § 123.64(b)(1). The regulation provides that the Administrator will respond in writing to any petition to commence withdrawal proceedings and "may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence [withdrawal] proceedings." Id. (emphasis added). Even where the Agency conducts an informal investigation, there is no requirement that EPA hold a hearing or proceed further with withdrawal proceedings. Only if the Administrator makes a determination to proceed with withdrawal proceedings does the Administrator issue an order fixing a time and place for a hearing and specifying the allegations against the state that are to be considered at the hearing. See id. In such a case, the state must respond to the allegations in writing within 30 days. Id. The party seeking withdrawal of a state's program bears the burden of coming forward with evidence at the hearing. Id.

At the conclusion of a hearing, the presiding officer evaluates the record, together with the proposed findings and briefs filed by the parties, and prepares a recommended decision that is presented to the Administrator or her delegatee. Id. The Administrator reviews the record and issues a decision. If the Administrator concludes that the state "has administered the program in conformity with the appropriate Act and regulations [the Administrator's] decision shall constitute 'final agency action' within the meaning of 5 U.S.C. 704." 40 C.F.R. at § 123.64(8)(vii). If the Administrator concludes that the state has not administered its program in conformity with the CWA and EPA's regulations, the Administrator must list the deficiencies in the program and provide the state a reasonable time, not to exceed 90 days, to take "such appropriate corrective action as the Administrator determines necessary." Id. at § 123.64(8)(iii). If the state fails to take appropriate corrective action within the prescribed time, the Administrator is to issue a supplementary order withdrawing approval of the state program. Id.

at § 123.64(8)(vi). If the state takes appropriate corrective action, the Administrator is to issue a supplementary order stating that approval of authority is not withdrawn. Id. Both types of supplementary orders constitute final agency action within the meaning of 5 U.S.C. § 704. Id. at § 123.64(8)(vii).

C. The Clean Water Act Citizen Suit Provision

In certain circumstances, the CWA allows private actions to be filed against EPA by a person with an interest that may be adversely affected. Section 505 of the Act, 33 U.S.C. § 1365, provides a limited waiver of sovereign immunity for citizen suits that allege, inter alia, EPA's failure to perform a nondiscretionary duty under the Act. Section 505(a)(2) provides that:

> [A]ny person may commence a civil action on his own behalf –
>
> * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Id. § 1365(a)(2).[5] The citizen suit provision further states: "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty[.]" Id. § 1365(a). A prospective plaintiff must provide EPA with 60-day notice of its intent to file a suit alleging that EPA failed to perform a nondiscretionary duty. Id. § 1365(b)(2).

D. Judicial Review Under CWA Section 509(b)

The CWA's review provision, Section 509(b), 33 U.S.C. § 1369, was intended by Congress to "establish a clear and orderly process for judicial review" of key EPA decisions implementing the CWA. See H.R. Rep. No. 92-911, at 136 (1972), reprinted at 1 Legislative

[5] CWA Section 505(a)(1), which is not implicated here, allows private actions to be filed against persons who are in violation of their NPDES permits. 33 U.S.C. § 1365(a)(1).

History of the Water Pollution Control Act of 1972, at 823 (Comm. Print 1973). Under Section 509(b), the federal Courts of Appeals have exclusive jurisdiction to review the matters enumerated in Section 509(b)(1), 33 U.S.C. § 1369(b)(1). The provision relevant here states:

> Review of the Administrator's action . . . (D) in making any determination as to a State permit program submitted under section 1342(b) of [the Act] . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business.

33 U.S.C. § 1369(b)(1)(D).

E. APA Claim of Unreasonable Delay

The APA includes a waiver of sovereign immunity for review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704.[6] A reviewing court is authorized to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), or "hold unlawful and set aside agency action" based on various legal or evidentiary grounds, id. § 706(2). A claim under Section 706(1) -- seeking to compel agency action asserted to be unreasonably delayed or unlawfully withheld -- can proceed only where a plaintiff asserts that an agency has failed to take a discrete action that it is required to take, Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004), and where there is "no other adequate remedy in a court," 5 U.S.C. § 704. See Middlesex County Sewerage Auth. v. National Sea Clammers' Ass'n, 453 U.S. 1, 20 (1981) (finding that the comprehensive scheme of remedies under the CWA citizen suit provision displaces remedies afforded by other statutes).

FACTUAL BACKGROUND AND PLAINTIFFS' COMPLAINT

A. West Virginia's NPDES Program

[6] The APA defines "agency action" to mean "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

On May 10, 1982, EPA authorized West Virginia to administer the NPDES program in that State. 47 Fed. Reg. 22,363 (May 24, 1982). The State's regulations governing the issuance and terms of its NPDES permits are set forth at W.Va. C.S.R. §§ 47-10 et seq., and 47-30 et seq.

B. Plaintiffs' Petition to Withdraw the State's Authority to Administer the NPDES Program

On June 17, 2009, Plaintiffs submitted an administrative petition asking EPA to withdraw the authority of the West Virginia Department of Environmental Protection to administer the NPDES program in that State. ECF No. 1 ¶ 3; Id. Ex. A. The petition was supplemented on June 31, 2009 and again on November 13, 2009. ECF No. 1 ¶ 3; Id. Ex. C.

C. Plaintiffs' Complaint

Plaintiffs' two-count Complaint is brought against EPA pursuant to the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2), and the APA, 5 U.S.C. § 702. ECF No. 1 ¶¶ 5-6. Count I asserts that EPA has a nondiscretionary duty to "respond in writing" to Plaintiffs' petition to withdraw West Virginia's NPDES program delegation. Id. ¶ 42. Plaintiffs seek an order declaring, inter alia, that EPA has a nondiscretionary duty to respond in writing to their petition. Id. at 13.

Count II asserts an "unreasonable delay" claim under the APA, 5 U.S.C. § 706(1), alleging that EPA has failed to timely respond to Plaintiffs' 2010 petition. Id. ¶¶ 48-49. Plaintiffs seek a declaration that EPA has unreasonably delayed acting on Plaintiffs' petition, and an order requiring EPA to take final action on the petition. Id. at 13.

STANDARD OF REVIEW

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the court must determine whether the complaint sets forth allegations sufficient to establish the court's

jurisdiction over the subject matter of the claims for relief. Because federal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by statute, the first and fundamental question presented by every case is whether the court has jurisdiction to hear it. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("jurisdiction [must] be established as a threshold matter"). Where subject matter jurisdiction does not exist, "the court cannot proceed at all in any cause." Id. (internal quotation marks and citation omitted).

The burden of establishing subject matter jurisdiction rests with the plaintiff. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (it is "to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citations omitted)). See also Piney Run Pres. Ass'n v. Carroll County Comm'rs, 523 F.3d 453, 459 (4th Cir. 2008) (plaintiff bears burden of establishing jurisdiction). To establish the existence of subject matter jurisdiction in a suit against the United States, the plaintiff bears the burden of showing that his or her claims fall within an applicable and unequivocal waiver of sovereign immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941); Welch v. United States, 409 F.3d 646, 650-51 (4th Cir. 2005) (citing Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995)). If the conditions of that waiver are not met, the claims must be dismissed under Fed. R. Civ. P. 12(b)(1). Williams, 50 F.3d at 304-05; see also Medina v. United States, 259 F.3d 220, 223 (4th Cir. 2001). As the Supreme Court has recognized, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. at 212. Waivers of sovereign immunity "must be unequivocally expressed in [the] statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted). Even when a statute provides an express waiver of sovereign immunity, that waiver is strictly construed in favor of

the government. See United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992); McMellon v. United States, 387 F.3d 329, 340 (4th Cir. 2004). Moreover, when the United States consents to be sued, it may define the terms and conditions upon which it may be sued, United States v. Kubrick, 444 U.S. 111, 117-18 (1979), and the terms of its consent are jurisdictional. See McMellon, 387 F.3d at 340.

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a case for fails to state a claim upon which relief can be granted. A court must dismiss a complaint for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction Over Count I of the Complaint Because There is No Waiver of Sovereign Immunity.

A. The CWA Citizen Suit Provision Does Not Provide a Waiver of Sovereign Immunity for Count I Because the Statute Does Not Establish a Nondiscretionary Duty for EPA to Respond to Plaintiffs' Petition.

Plaintiffs' first cause of action is asserted under the CWA's citizen suit provision, Section 505, 33 U.S.C. § 1365. Under that provision, district courts have subject matter jurisdiction only if there has been a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2).

Plaintiffs allege that CWA Section 402(c)(3), 33 U.S.C. § 1342(c)(3), and 40 C.F.R. § 123.64(b)(1) "establish a nondiscretionary duty for the Administrator of EPA to respond to any petition seeking withdrawal of a state NPDES program delegation."[7] ECF No. 1 ¶ 41; id. ¶¶ 21, 32. While Section 402(c)(3) of the CWA authorizes the Administrator to withdraw a state's

[7] Plaintiffs' citation to 40 C.F.R. § 122.64(b)(1) in Paragraph 41 of the Complaint appears to be a typographical error.

authority to administer the NPDES program upon certain conditions, the CWA does not establish a nondiscretionary duty for EPA to respond to Plaintiffs' petition to withdraw the State of West Virginia's authority to administer the NPDES program. EPA's regulations provide that the "Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person" and "[t]he Administrator will respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 123.64(b)(1); ECF No. 1 at ¶ 22. Thus, the alleged duty that Plaintiffs seek to enforce - EPA's response to their administrative petition - is not contained in the Act but, rather, is in EPA's regulations. 40 C.F.R. § 123.64(b)(1). As demonstrated below, the CWA does not authorize suit against the United States to enforce a regulatory duty - as opposed to a statutory duty - and, even if it did, EPA's regulation does not establish a nondiscretionary duty. Accordingly, there is no nondiscretionary duty cognizable under the citizen suit provision of the CWA and thus no waiver of sovereign immunity.

1. The CWA citizen suit provision does not authorize suit against EPA to enforce a regulatory duty.

Plaintiffs allege that EPA has a nondiscretionary duty to respond to their petition seeking withdrawal of West Virginia's authority to administer the NPDES program. ECF No. 1 ¶ 1. However, there is no such duty in the CWA. The citizen suit provision of the CWA authorizes suit "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. 33 U.S.C. § 1365(a)(2) (emphasis added). The plain language of the provision limits citizen suits to acts or duties mandated by the CWA. Because the citizen suit provision does not authorize suit to

enforce a duty established in a regulation, there is no waiver of sovereign immunity that allows Plaintiffs' claim to be heard.

The First Circuit is the only Court of Appeals to directly address this issue.[8] In Maine v. Thomas, 874 F.2d 883 (1st Cir. 1989), the court considered a virtually identical citizen suit provision in the Clean Air Act, and held that it did not authorize suit to compel EPA to meet a regulatory deadline. In that case, the statute established a nondiscretionary duty requiring that EPA act by a date certain to promulgate certain regulations. EPA missed the statutory deadline, but ultimately promulgated regulations to fulfill the duty, in part, and set a new deadline in the regulation for completion of the action required by the statute. After EPA failed to meet the deadline established in the regulation, plaintiffs brought a citizen suit seeking to enforce the nondiscretionary duty that was established in the statute and deferred by the regulation. The First Circuit held that EPA had satisfied the statutory duty when it promulgated the regulation and, because the regulation was a final agency action and the time to challenge the regulation had passed, the court had no jurisdiction to consider the challenge to the regulation. The court explained:

> EPA fulfilled its statutory duty here; its recalcitrance, if any, lies not in its failure to meet a deadline imposed by Congress, but rather in a failure to meet self-imposed regulatory deadlines . . . Such regulatory duties are perhaps nondiscretionary, but they are not statutory nondiscretionary duties; hence, they are not proper grist for the [citizen suit] mill.

Id. at 888, n.7 (emphasis in original).

[8] The issue was raised, but not decided, in National Wildlife Federation v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997) and in Sierra Club v. EPA, 475 F. Supp. 2d 29, 33 (D.D.C. 2007). In both cases, the courts concluded that the regulation at issue did not create a nondiscretionary duty; thus it was not necessary to decide whether such a duty would support jurisdiction under the citizen suit provision.

The circumstances presented in this case are even more compelling because in Maine v. Thomas both the statute and the regulation established nondiscretionary duties requiring EPA to act by a date certain. In this case, the statute does not establish a nondiscretionary duty to respond to Plaintiffs' petition.[9] And, as discussed below, the regulation does not establish a nondiscretionary duty to respond to Plaintiffs' petition.

2. EPA's regulation does not establish a nondiscretionary duty to respond to Plaintiffs' petition seeking withdrawal of the State's authority to administer the NPDES program.

Even if the citizen suit provision authorized a suit based upon a regulation to compel performance of a nondiscretionary duty, it would not support jurisdiction here because EPA's regulation does not establish a nondiscretionary duty to respond to Plaintiffs' petition. "A clearly mandated, nondiscretionary duty imposed on the Administrator is a prerequisite for federal jurisdiction under the CWA citizen suit provision." Miccosukee Tribe of Indians v. EPA, 105 F.3d 599, 602 (11th Cir. 1997). See also Dubois v. Thomas, 820 F.2d 943, 946 (8th Cir. 1987); Sierra Club v. Train, 557 F.2d 485, 488 (5th Cir. 1977).

The regulation cited by Plaintiffs provides only that the Administrator will respond in writing to any petition to commence withdrawal proceedings. 40 C.F.R. § 123.64(b)(1). However, it does not state when EPA must respond to such a petition; nor does it establish a time

[9] As noted above, CWA section 402(c)(3) does not require a response to a petition or even authorize the filing of a petition. Plaintiffs do not contend that EPA has a nondiscretionary duty to withdraw the State's authority to administer the NPDES program. Such a claim would also fail, because while CWA section 402(c)(3) authorizes EPA to withdraw the State's authority to administer the NPDES program, such proceedings may be commenced only after EPA determines that the State is not administering its NPDES program in accordance with the requirements of the Act and notifies the State of the determination. However, the statute does not require EPA to make such a determination. Because no such determination has been made, there is no duty to provide the notice referenced in section 402(c) or to commence proceedings as requested by Plaintiffs' petition.

period or deadline for such response. Because the regulation lacks a "date-certain deadline" by which EPA must perform the alleged duty, it cannot be interpreted to establish an enforceable nondiscretionary duty. In Sierra Club v. Thomas, 828 F.2d 783(D.C. Cir. 1987), the D.C. Circuit held that "[i]n order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandat[e]' that all specified action be taken by a date-certain deadline." Id. at 791. "In the absence of a readily-ascertainable deadline . . . it will be almost impossible to conclude that Congress accords a particular agency action such high priority as to impose upon the agency a 'categorical[] mandat[e]' that deprives it of all discretion over the timing of its work." Id.. See also Envtl. Def. Fund, 870 F.2d 892 at 897 (2d Cir. 1989) (citing Sierra Club v. Thomas and noting that only "provisions that do include stated deadlines should, as a rule, be construed as creating nondiscretionary duties"); Defenders of Wildlife v. Browner, 888 F. Supp. 1005, 1008-09 (D. Ariz. 1995) (holding that a statutory provision requiring that EPA act "promptly" "is not a categorical mandate from Congress that deprives EPA of all discretion over the timing for preparing and publishing proposed water quality regulations."). The court thus concluded that "allowing Plaintiffs to go forward under the citizen suit provision of the CWA would upset the delicate balance struck by Congress to permit citizen enforcement only of clear-cut agency violations and defaults." Id. at 1009, citing Sierra Club v. Thomas, 828 F.2d at 791.

Because EPA's regulation lacks a "date-certain deadline" for EPA to respond to the petition submitted by Plaintiffs, there is no nondiscretionary duty here and thus no jurisdiction under the citizen suit provision to impose such a deadline, even if a regulation could otherwise establish an enforceable nondiscretionary duty.

B. None of the Remaining Statutes Cited by Plaintiffs Provides Independent Grounds for this Court's Jurisdiction.

Aside from their attempt to establish a waiver of sovereign immunity under the CWA's citizen suit provision, Plaintiffs claim that this Court has jurisdiction under the federal question statute, 28 U.S.C. § 1331. ECF No. 1 ¶ 5. However, it is well settled that the federal question statute does not provide a general waiver of sovereign immunity. The federal question statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This provision merely establishes subject matters that are within the jurisdiction of federal courts to entertain. Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996). "Where the United States is the defendant . . . federal subject matter jurisdiction is not enough; there must also be a statutory cause of action through which Congress has waived sovereign immunity." Floyd v. District of Columbia, 129 F.3d 152, 155-56 (D.C. Cir. 1997) (citing Nordic Village, 503 U.S. at 34). Thus, the federal question statute does not itself provide a waiver of sovereign immunity allowing Plaintiffs to bring suit against EPA in the absence of a waiver under Section 505(a)(2) of the Act.

Nor does Plaintiffs' request for declaratory relief, Request for Relief ¶¶ 1 and 2, afford an independent basis for jurisdiction. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, provides that: "i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). However, this language creates a remedy only where the court otherwise has jurisdiction. It does not waive sovereign immunity or establish jurisdiction for a claim. Skelly Oil Co. v. Phillips Petroleum

Co., 339 U.S. 667, 671-72 (1950); Ocean Breeze Festival Park, Inc. v. Reich, 853 F. Supp. 906, 915 (E.D. Va. 1994), affirmed, 96 F.3d 1440 (4th Cir. 1996).

Plaintiffs also allege jurisdiction based on the APA, 5 U.S.C. § 702, ECF No. 1 ¶ 6. However, Plaintiffs do not rely upon the APA for their claim in Count I that EPA has failed to perform a nondiscretionary duty required by the CWA; nor could they. See Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20-21 (1981) (concluding that comprehensive remedies under the Clean Water Act's citizen-suit provision displace remedies afforded by other federal statutes). Rather, Plaintiffs rely upon the APA for Count II of their Complaint, asserting that EPA has unreasonably delayed its response to their petition. That claim must be dismissed for different reasons, as discussed below.

Accordingly, Count I of Plaintiffs' Complaint should be dismissed under Federal Rules 12(b)(1) and 12(b)(6).

II. Because the Court of Appeals Has Exclusive Jurisdiction Over Plaintiffs' Unreasonable Delay Claim, Count II Must Also Be Dismissed.

As an alternative to their citizen suit claim, Plaintiffs assert a claim of unreasonable delay under the APA. ECF No. 1 at 12-13 ("Alternative Claim for Relief"). Specifically, Plaintiffs allege that EPA has unreasonably delayed carrying out its "duty under the APA to respond and proceed to conclude the matters presented in Plaintiffs' petition." Id. ¶ 48. Plaintiffs seek a declaration that EPA has unreasonably delayed acting on Plaintiffs' petition and an injunction requiring EPA to "promptly provide a substantive, written response" to the petition. Id. at 13.

The APA requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The APA further provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). If a petition is denied in whole or in part, the agency is to give the petitioner "prompt notice" of the denial. 5 U.S.C. § 555(e). As noted above, under the APA, a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Although Plaintiffs have identified a waiver of sovereign immunity with respect to Count II, this Court lacks jurisdiction because the substantive action that Plaintiffs seek to compel, i.e., a decision on their petition to withdraw EPA's approval of West Virginia's NPDES program, is subject to review only in the Fourth Circuit Court of Appeals and any claim that EPA has unreasonably delayed taking such action may only be heard in the Fourth Circuit.

A final decision by EPA under CWA Section 402(c) that a State is, or is not, administering its program in conformity with the CWA and applicable regulations is subject to exclusive review in the Courts of Appeals. See CWA section 509(b)(1)(D), 33 U.S.C. § 1369(b)(1)(D) (Administrator's action "in making any determination as to a State permit program submitted under Section 1342(b) of [the Act]" may be had "by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business." See Save the Bay, Inc. v. Administrator of EPA, 556 F.2d 1282, 1288 (5th Cir. 1977) ("this court would have original jurisdiction to review EPA's decision to revoke or not to revoke NPDES authority" because such a decision "would be a 'determination as to a State permit program' within this court's purview under § 509(b)(1)(D), 33 U.S.C. § 1369(b)(1)(D)").

It is well-established that where a statute commits review of final agency action to the Courts of Appeals, any suit seeking relief that might affect the appellate court's future jurisdiction is also subject to exclusive appellate court review. See, e.g., La Voz Radio de la Communidad v. FCC, 223 F.3d 313, 318 (6th Cir. 2000); ITC DeltaCom Commc's, Inc. v. BellSouth Communications, Inc., 193 Fed. Appx. 413, 416 (6th Cir. 2006); George Kabeller, Inc. v. Busey, 999 F.2d 1417, 1421-22 (11th Cir. 1993). These cases cited with approval the rationale of the D.C. Circuit in Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC").

In TRAC, 750 F.2d at 75, the D.C. Circuit held that it had exclusive jurisdiction over a claim of unreasonable delay because the final agency action sought to be compelled could be reviewed only in that Court. The TRAC court held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." Id. (emphasis in original, footnote omitted). In reaching that conclusion, the D.C. Circuit stated that "[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction." Id. at 76 (citations omitted). By lodging review of final agency action in the Courts of Appeals, Congress thus intended that "the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power." Id. at 77. See also In re Bluewater Network, 234 F.3d 1305, 1310-11 (D.C. Cir. 2000) ("Where a statute commits final agency action to review by this court, we also retain exclusive jurisdiction 'to hear suits seeking relief that might affect [our] future statutory power of review.' This includes mandamus actions challenging an agency's unreasonable delay.") (citing TRAC);

Sea Air Shuttle Corp. v. United States, 112 F.3d 532, 535; 538 (1st Cir. 1997) (noting that party could pursue unreasonable delay claim in court of appeals to compel action on NPDES permit application where the permit decision would be reviewable in the court of appeals pursuant to 33 U.S.C. § 1369(b)(1)(F)).

Thus, because the final EPA action sought to be compelled here is directly reviewable only in the Fourth Circuit Court of Appeals, this suit alleging unreasonably delay of that action also lies exclusively in the Fourth Circuit. Other district courts have applied this principle in concluding that they lacked subject-matter jurisdiction to hear an unreasonable delay claim specifically in the context of a petition to withdraw a state's NPDES program delegation. For example, in Johnson County Citizen Committee for Clean Air and Water v. EPA, No. 3:05-0222, 2005 WL 2204953 (M.D. Tenn. Sept. 9, 2005), the court dismissed an unreasonable delay claim where the plaintiffs sought to compel a decision on their petition to EPA to withdraw the State of Tennessee's NPDES program. 2005 WL 2204953 at *6 (citing La Voz Radio, 223 F.3d at 318, and George Kabeller, 999 F.2d at 1421-22). And in Sierra Club v. EPA, 377 F. Supp. 2d 1205 (N.D. Fla. 2005), the court noted that the plaintiffs had dismissed their unreasonable delay claim, but that in any event, "[t]he EPA's decision whether to withdraw Florida's NPDES authorization will be reviewable in due course in the Eleventh Circuit. And in the meantime, any unreasonable delay by the EPA in making that determination also is reviewable in the Eleventh Circuit." 377 F. Supp. 2d at 1208.

Because Plaintiffs' unreasonable delay claim is brought in the wrong court, Count II must be dismissed under Federal Rule 12(b)(1).

CONCLUSION

For the foregoing reasons, the Court should grant the United States' motion to dismiss the Complaint.

DATED: March 20, 2015

Respectfully submitted,

JOHN C. CRUDEN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2015, I caused a true and correct copy of the foregoing to be electronically filed via the Court's electronic case filing system which will provide notice of the filing to all registered counsel.

/s/ Cynthia J. Morris
CYNTHIA J. MORRIS
United States Department of Justice
Environment and Natural Resources Division

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In re OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB, Petitioners,	**DECLARATION OF MARK KRESOWIK IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

I, Mark Kresowik, hereby declare and state as follows:

1. I am the Deputy Regional Director, Eastern Region for the Beyond Coal Campaign ("Campaign"). The Campaign is a project of the Sierra Club, a non-profit organization under the laws of the State of California. I am responsible for overseeing the Campaign's operations in several Eastern states, including West Virginia and Virginia. I live in Washington, DC. The following information is within my personal knowledge.

2. The Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; to educate and enlist humanity in the protection and restoration of the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club members are greatly concerned about water quality, and the Club has a long history of involvement in water quality-related activities on both the local and national levels.

3. Sierra Club presently has over 2,000 members in West Virginia.

4. I have been working at the Sierra Club since 2006. In my capacity, I am responsible for directing the activities of the Beyond Coal Campaign throughout the Northeast. These activities include community outreach, public education, legislative lobbying, and

litigation. In order to perform the responsibilities of my job, my staff and I interact on a daily basis with the Sierra Club's members in West Virginia. Because of my position and responsibilities, and through my regular interaction with members, I am familiar with the Sierra Club's purpose, organization, and activities, and with the environmental interests and concerns of Sierra Club members.

5. Sierra Club has expended its resources addressing water quality issues in West Virginia, including issues raised in the 2009 Petition Sierra Club submitted to EPA pursuant to Clean Water Act section 402(c)(3) related to water pollution from surface coal mining. For example, in July 2014 Sierra Club submitted comments on West Virginia's proposed changes to its NPDES regulations at 47 C.S.R. Part 30. Sierra Club has also challenged numerous WV/NPDES permits that fail to perform an adequate reasonable potential analysis or fail to include suitable limits on selenium. Sierra Club has fought to inform the public about the water quality and ecosystem harms accompanying mountaintop removal mining. We regularly advocate for effective implementation and strong enforcement of the Clean Water Act in West Virginia.

6. Sierra Club currently employs a full time organizer in West Virginia who works with local community members to address issues related to coal mining and coal mining pollution. Among other things, this organizer shares information with the local community regarding the condition of local waterways impacted by coal mining pollution, the sources of this pollution, and opportunities to address the pollution.

7. Sierra Club regularly uses information from EPA on the National Pollutant Discharge Elimination System ("NPDES") program in West Virginia, including the type of information we would receive in a response to our Petition for the withdrawal of West Virginia's

NPDES program. We use this information to inform our advocacy efforts and to educate the public.

8. Sierra Club's efforts in West Virginia would further benefit from access to additional information from EPA regarding the current status of West Virginia's waters and the state's efforts to protect these waters from coal mining pollution. This information includes, but is not limited to, EPA's own monitoring data for West Virginia's waters, EPA's own evaluation of draft and final WV/NPDES permits, and EPA's evaluation of West Virginia's impaired streams and TMDL development.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2015.

Mark Kresowik

UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

In re OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB, Petitioners,	**DECLARATION OF CINDY RANK IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

I, Cindy Rank, affirm and state as follows:

1. I live in Rock Cave, West Virginia.

2. I have been a member of the West Virginia Highlands Conservancy ("WVHC") since 1979. I was President from October 1988 to 1994, and currently serve on the Board of Directors. Since 1994, I have also served as Chair of the WVHC Mining Committee.

3. The West Virginia Highlands Conservancy, Inc. is a nonprofit organization incorporated in West Virginia in 1967. Its volunteer board of directors and approximately 1,500 members work for the conservation and wise management of West Virginia's natural resources. As one of West Virginia's oldest environmental activist organizations the West Virginia Highlands Conservancy is dedicated to protecting our clean air, clean water, forests, streams, mountains, and the health and welfare of the people that live here and for those who visit to recreate.

4. The West Virginia Highlands Conservancy continues to work in vigorous opposition to coal mining by mountaintop removal, including the filing of lawsuits that challenge this method of resource extraction based on violations of the Clean Water Act and the Surface Mining Control and Reclamation Act. In 1998, West Virginia Highlands Conservancy played a

key role in convincing the United States Environmental Protection Agency to conduct the first ever Environmental Impact Statement on the effects of mountaintop removal mining and valley fills, especially as that practice impacts the long term health of our water resources.

5. The West Virginia Highlands Conservancy continues to work in vigorous support of protecting and restoring streams damaged by abandoned as well as active coal mining operations, and participates in public hearings, meetings, appeals and litigation about permits and regulatory changes that control the discharges from mining areas.

6. I have also been a member of the Sierra Club since 1984.

7. Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and over 2,000 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia.

8. I have also been a member of Ohio Valley Environmental Coalition (“OVEC”) for many years.

9. OVEC, with approximately 1,500 members, has a mission to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing and coalition building, leadership development, and media outreach.

10. The interests of West Virginia Highlands Conservancy and its members have been and continue to be adversely affected by EPA's failure to respond in writing to the June 17, 2009 Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of West Virginia and the July 31, 2009 and November 13, 2009 supplements to that petition.

11. I and other members of the WVHC have volunteered years of time and effort at great personal expense (physical, mental, monetary, social and spiritual) to ensure that federal and state water laws are enforced properly so that citizens are not forced to bear the brunt of degradation cause by poor mining practices. I and other WVHC members are profoundly offended that despite incremental improvements in the regulation of water pollution from coal mining, the state continues to disregard its obligations under the Clean Water Act and allows mining companies to use the precious streams of West Virginia for inexpensive pollution disposal.

12. WVHC's members have interests in waters that have been and continue to be impacted by West Virginia's permitting and enforcement deficiencies.

13. WVHC monitors the West Virginia Department of Environmental Protection's ("WVDEP") issuance of WV/NPDES permits to ensure that they are protective of the waters of West Virginia. West Virginia's unlawful requirement to consider of cost in NPDES permitting appeals and refusal to apply the anti-backsliding provisions of the Clean Water Act impairs WVHC's ability to review WV/NPDES permits. WVHC must consider how the Environmental Quality Board will deal with cost and anti-backsliding when deciding whether to appeal permits that do not adequately protect the waters of West Virginia.

14. For example, in 2013, during the appeal by WVHC and Sierra Club of a

WV/NPDES permit, the EQB considered the burden of effluent limits to the permittee. That consideration formed part of the basis of the permittee's appeal of the EQB's decision to Circuit Court and then to the Supreme Court of West Virginia. WVHC had to defend against that appeal because the EQB was unlawfully required to consider costs.

15. WVDEP's failure to enforce water quality standards has required WVHC to enforce them instead. WVHC has sued many coal companies for discharging acid mine drainage ("AMD") as well as for violations of both selenium and narrative water quality standards.

16. Because I highly value the stream and springs on my own property that my family relies on daily, I have great concern about the long term legacy and lasting impact of acid mine drainage from mines in the nearby Buckhannon, Middle Fork and Tygart Valley Rivers and about the growing negative impact of surface mining and valley fills on streams in other part of the state, especially in southern West Virginia where much of this large scale mining is taking place. Because of these ongoing concerns I often travel through West Virginia to view and visit local streams where I know mining has and is taking place.

17. I enjoy my visits, but am particularly concerned about the potential for dangerous levels of acid mine drainage, selenium, conductivity, and other pollutants, contaminating streams that I visit. The presence of excessive amounts of pollutants in mine discharges significantly increases my concern about future well-being of these streams and decreases my enjoyment and appreciation of these great resources that bless us who are privileged to live in West Virginia and along her mountain streams. I am fearful of damage to fish, other aquatic life, and waterfowl.

18. Though it saddens and angers me to see beautiful stream hollows disappear under valley fills, it is even more frustrating and angers me deeply to realize that even when some of these streams look clear, discharges upstream have negatively impacted the quality of the water,

degraded the aquatic life, and harmed fish and waterfowl.

19. My friends and neighbors in generations old communities are unable to survive and thrive as their parents and grandparents did because they can no longer depend on the streams and springs that nourished and nurtured those earlier generations. Future use and enjoyment of West Virginia's natural world is being stolen from all of us, and from our children and our children's children. How we can allow so much devastation is beyond my understanding.

20. I have a long term connection to Twentymile Creek in the Gauley River watershed. I visit whenever I am passing through the area with some time to spare. I enjoy seeing wildlife around the stream. Because of WVDEP's failure to enforce water quality standards, Twentymile Creek has become both selenium and biologically impaired. My enjoyment of the area has decreased as mining pollution has caused increasing harm. WVHC has had to initiate citizen suits against Alex Energy, Inc. and Fola Coal Company for violating both the selenium and narrative water quality standards. As a result, some of the mines in the Twentymile Creek watershed are slowly coming into compliance. WVHC does not have the resources to rectify each water quality standards violator in a time-consuming citizen suit. I am disheartened that many more mines continue to discharge selenium and ionic pollution into this degraded watershed.

21. I have a long term connection with Tenmile Creek and other tributaries of the Buckhannon River watershed. Along with others from WVHC I have watched the pollution emanating from the Island Creek/Enoxy 2,000 acre reclaimed surface mine and sludge impoundment severely impact Tenmile and nearby Laurel Run with high levels of iron, manganese and aluminum and threaten the drinking water supply of Buckhannon and surrounding communities. In 1987 WVHC joined with other organizations to protest and

eventually stop the expansion of the mine into the Right Fork, but the iron laden discharge from the refuse impoundment continues to threaten the once reproducing trout stream and high quality water of the River itself. I am distraught every time I visit the area and continue to be concerned that the AMD saga for the Buckhannon River will only be worsened by the newly proposed expansion of another refuse impoundment in Sawmill Run of the Buckhannon not far downstream of Tenmile Creek.

22. WVHC is currently suing Stollings Trucking Company for violating selenium water-quality based effluent limits in WV/NPDES Permit WV1013203. Stollings Trucking has been violating these limits for more than 5 years with no action taken by WVDEP. Stollings Trucking's excessive discharges of selenium have damaged streams in which members of WVHC have an interest. My interest in the Little Coal River began in 1977 and I've returned there many times, each time enjoying it less because I know the tributaries and main stem continue to be subjected to excessive amounts of pollution from the mines in the area. I drove along Garland Fork with company personnel prior to mining. The stream and wooded area through which it flowed was beautiful and quite typical of WV headwater stream areas rich with wildlife and healthy water. Images of that day are strong when I drive along Spruce Fork in the Kelly area at the mouth of Garland Fork and my heart is saddened to know that selenium is now polluting that lovely stream.

23. My enjoyment of streams in West Virginia has been restricted by WVDEP's continued issuance of permits without protecting water quality. For example, I am very concerned about the proposed Bandmill Hollow Impoundment. Bandmill Coal Corporation has applied for a WV/NPDES permit for discharges from a new coal refuse impoundment in Bandmill Hollow (WV/NPDES permit WV1028219). Bandmill Hollow is already biologically

impaired, as is its receiving stream, Dingess Run. The impoundment will undoubtedly discharge ionic pollutants harmful to the biological condition in the Dingess Run watershed, further degrading the streams. In addition, West Virginia has a history of failing to require a socioeconomic review to justify additional stream degradation. Following the antidegradation policy would require WVDEP to protect the receiving streams from degradation or prove that such degradation has a socioeconomic justification. If this permit is issued without the protections required by the Clean Water Act, my enjoyment of the area will be impaired.

24. My enjoyment of many areas in the state is significantly dampened where water from abandoned mine lands still run iron red, aluminum white and deadly AMD clear. Representing WVHC on the Governor's Stream Restoration Committee 1992-95 I visited and flew over many of the abandoned mine sites especially in northern WV where acid water continues to degrade some of the most beautiful streams in our state and I occasionally return to portions of the Blackwater below the coke ovens and refuse mountain near Thomas, the Kempton discharges on the Maryland border, some smaller sites along the Potomac throughout Tucker County and most recently the Three Fork Creek and Maple Creek watersheds in Taylor County, Stonecoal Creek in Upshur County, and the Middle Fork River upstream of Audra State Park.

25. Outfall 028 on the Spruce No. 1 Mine, WV/NPDES permit WV1017021, continues to discharge selenium into Seng Camp Creek in concentrations over the water quality standard. That outfall does not have numeric selenium limits to control the discharge even though its discharges have been exceeding the water quality standard since it started discharging in 2008. WVHC was a major plaintiff in the 1998 *Bragg v Robinson* litigation that led to the Mountaintop Mining Valley Fill EIS and the initiation of many useful studies of the impacts of

large strip mining and valley fills on watersheds in Appalachia. Prior to that litigation I compiled what is considered the first ever comprehensive map of valley fill permits in the three county area of Boone, Logan and Mingo counties of West Virginia. The Spruce #1 mine figured predominantly as the largest mountaintop removal strip mine even proposed. In the ensuing 15+ years I have paid particular attention to and have visited on several occasions the area earmarked for the Spruce #1 mine. I participated in site visits with company personnel in 2008 and 2010 to view the areas proposed for expansion of the mining and fill area in the head of Seng Camp Creek, the only portion of that permit that is being mined once EPA vetoed the 404 permit for the main Pigeonroost area over the ridge to the south. Knowing that mining in those expansion areas now continues to discharge unacceptable limits of selenium to Seng Camp breaks my heart. For WVDEP to allow that additional pollution is unconscionable.

26. WVHC has a long history of utilizing information available through the NPDES program. Starting in the late 1970s when EPA was responsible for the NPDES program in West Virginia and then in the 1980s when primacy was granted to WV. In 1980 WVHC, through our member groups such as FOLK (Friends of the Little Kanawha) and Mountain Stream Monitors, made use of the seven giant three ring binder Supplemental Information Documents that accompanied EPA's "Areawide Environmental Assessment for Issuing New Source Coal Mining NPDES Permits" in West Virginia to monitor and evaluate the water quality of streams and watersheds where mining was proposed. Since participating so directly in the eventual transfer of NPDES authority to the state, WVHC has been invested in seeing the program work and work well for the protection and betterment of the waters and people of the state.

27. Sadly the WVDEP's implementation and enforcement of the NPDES program has waned through the years to the point where current deficiencies that make information difficult

to obtain and evaluate have brought us to the petition for EPA to step in more directly to improve the program or explain to us why the program doesn't need improving.

28. It took a lawsuit in which WVHC was a major plaintiff to force the state into initiating a TMDL program – with a lot of pushing and shoving and threatening takeover by EPA. Once again we look to EPA to ensure a strong NPDES program be implemented here in West Virginia.

29. EPA's Consolidated Permit Review of valley fill permits several years back is an example of the kinds of organized information that would aid WVHC in our own efforts to fulfill our role as an informed public in evaluating individual actions and components of the program that most directly affect our members and the water resources we all enjoy and rely on. Whether it be NPDES permitting or evaluating impaired streams or contributing to improved TMDLs, WVDEP must be more forthcoming with readily available and understandable information or EPA should insert itself in the process to improve the situation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 2015.

Cindy Rank

Cindy Rank

UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

In re OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB, Petitioners,	**DECLARATION OF DIANNE BADY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

I, Dianne Bady, state and affirm as follows:

1. I live in Rome Township near Proctorville, Ohio. Proctorville is, in large part, a bedroom community of Huntington and is just on the other side of the Ohio River from Huntington.

2. I am the founder of Ohio Valley Environmental Coalition ("OVEC") and have been a member since 1987. OVEC, with approximately 1,500 members and active supporters, has a mission to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing and coalition building, leadership development, and media outreach.

3. I am currently a co-director with OVEC. Because of my position and responsibilities, and through my regular interaction with members, I am familiar with the OVEC's purpose, organization, and activities, and with the environmental interests and concerns of OVEC's members.

4. I am a long time member of the West Virginia Highlands Conservancy ("WVHC"). The WVHC is a nonprofit grassroots membership organization located in West Virginia. Established in 1967, WVHC is one of the state's oldest environmental advocacy

organizations and for the past four decades has been a leader in citizen efforts to protect West Virginia's people, land, and water resources from the effects of coal mining. Its headquarters is located in Charleston, West Virginia, and most of its approximately 1,500 members reside in West Virginia.

5. I have been a member of Sierra Club for many years. Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and over 2,000 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia.

6. I have always had a close relationship with nature. It is important for me to be outside and spend time near streams and running water.

7. I am very concerned about water quality here in West Virginia and believe we need to protect our water resources. We also need to protect the communities that rely on West Virginia's rivers and streams for drinking water and recreational uses.

8. I am angered by the impacts of big surface mines on water quality, the land and community life. I think the evidence is clear that the mines harm water quality and threaten the aquatic life and water fowl that need clean streams for survival. This is very upsetting to me.

9. Since it was founded in 1987, OVEC has worked to address environmental

problems affecting the communities of West Virginia, including the need to address the harm of surface coal mining caused to our waters, communities, and other resources. This has included advocating at the state and federal level for policy changes. It also has included reviewing WV/NPDES permits in the past and under review now to protect OVEC's members who live around the state of West Virginia from the harms of water pollution. OVEC has in the past brought and has a continued interest in brining citizen suits, when necessary to fulfill its mission and protect its members' interests, to enforce the Clean Water Act. OVEC is also highly active locally in community education and outreach to explain and try to reduce the harm of surface coal mining.

10. OVEC currently employs a full time organizer in West Virginia who works with local community members to address issues related to coal mining and coal mining pollution. Among other things, this organizer shares information with the local community regarding the condition of local waterways impacted by coal mining pollution, the sources of this pollution, and opportunities to address the pollution.

11. OVEC has committed significant time and resources to these activities in the past and has concrete plans to continue to do so to try to save waterways from irreversible harm. This is what our members want and is central to OVEC's mission. To do our job, OVEC needs the type of information we anticipate coming from a response to our Petition to withdraw West Virginia's NPDES program. OVEC intends to use this type of information about the West Virginia NPDES program to make decisions about how best to expend its resources on advocacy, litigation, and public education.

12. If the West Virginia Department of Environmental Protection does not administer its NPDES program in accordance with the Clean Water Act, West Virginia's waters are harmed.

OVEC has to devote additional resources towards understanding and rectifying these errors.

13. EPA's failure to address the issues raised in our petition increases the risk that environmental harm will be overlooked. EPA's role as the overseer of the Clean Water Act reduces the risk of harm to West Virginia's streams. I would be more confident of the stream health in West Virginia if I knew EPA was paying attention to the deficiencies in West Virginia's NPDES program.

14. On behalf of OVEC, with other staff, volunteers, and members, I keep abreast of the WV/NPDES permits issued to surface coal mines in West Virginia. I believe that if any permits are issued that do not comply with existing legal requirements then OVEC will continue to need to expend more resources including by engaging in new advocacy or bringing new litigation to try to prevent degradation of our streams from WV/NPDES discharges.

15. For example, if the West Virginia Environmental Quality Board ("EQB") does not have the authority to make decisions in line with the Clean Water Act, OVEC faces additional burdens when considering permit appeals. The EQB's consideration of costs means that OVEC must engage with that irrelevant issue in permit appeals and risk losing appeals based on cost. In addition, such consideration allows the EQB to claim that any necessary water quality protections are too costly, giving pollutants the green light for almost anything.

16. In the past, OVEC has had to go to federal court to protect West Virginia streams from backsliding permit limits. EPA's investigation into the EQB's skepticism of anti-backsliding requirements is necessary so that OVEC knows if it needs to continue its vigilance about backsliding.

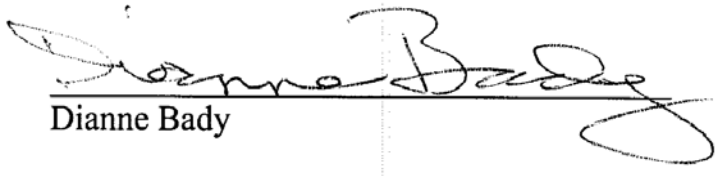
17. I feel that EPA's lack of response to our Petition demonstrates a lack of respect

for the people and communities who have the pollution impacts of coal mining imposed upon them with governmental approval. When citizens want to get some answers about pollution and what is being done to regulate it, in order to try and protect their communities and streams, EPA's lack of response adds insult to injury.

18. If OVEC receives a response to the petition from EPA, we will share it with others. OVEC is a primary source of information about environmental harm and its regulation to people who care about West Virginia. We share this information through one-on-one conversations, blog posts, and a newsletter, for example. We will share the response with our board to help us formulate next steps in our work to improve and preserve the environment. Without the response, we are not able to do as good of a job in fulfilling our mission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2015.



Dianne Bady

UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

In re OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and SIERRA CLUB, Petitioners,	**DECLARATION OF DUSTIN WHITE IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

I, Dustin White, state and affirm as follows:

1. I live in Charleston, West Virginia.

2. I have been a member of the Ohio Valley Environmental Coalition ("OVEC") since 2007. OVEC, with approximately 1,500 members, has a mission to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing and coalition building, leadership development, and media outreach.

3. I grew up in a hollow community in Boone County and spent a lot of my time playing in the mountains and in the creek beside my home and as a family we would take trips to go fishing or morel mushroom hunting in the mountains.

4. Pollution from coal is damaging the West Virginia way of life. We can no longer use the streams for recreation and fishing and mining does not restore the once rich forest. It also causes human health impacts.

5. I started out as a volunteer with OVEC and now I am on staff as a community organizer where I work with people who live in the wake of pollution from the coal industry, many of whom have health concerns.

6. In my position with OVEC, I regularly speak with other members who share my personal connection to and love of the waters in West Virginia, although they may live near or enjoy different waters than the ones I have a personal connection with. Based on my knowledge of our membership, I believe that other OVEC members also face harm to their interests, as I do, if the West Virginia NPDES program continues in its inadequate state. It is part of OVEC's mission to help represent and protect the interests of these and all other members in the special waters and environment of our state.

7. EPA's failure to respond to OVEC's Petition to withdraw West Virginia's NPDES program increases the risk of environmental harm to streams in West Virginia. Deficiencies in West Virginia's NPDES permitting will cause harm to streams I like to visit. I worry about what increased degradation will happen when West Virginia issues a final WV/NPDES permit to a proposed Coyote Coal Company mine (WV/NPDES Permit WV1028758). The mine is planning to discharge into Joes Creek, Little White Oak Creek of White Oak Creek - all of the Big Coal River of the Coal River; and Coal Fork of Cabin Creek of the Upper Kanawha River. The mine is planned with multiple valley fills and will operate in high selenium coal seams. I spent my teenage years living in the Coal River Valley in multiple areas along the river, including Racine and Seth near Joes Creek. I have family who lives up Joes Creek and would often visit and would often go fishing in areas all up and down the river and still often visit the area to reminisce. I often travel to Cabin Creek for appointments at the Cabin Creek Clinic and my mother works in the area and often visit her. I have also be there a lot working with community members and just visiting the different areas there because it is so rich in history around the Mine Wars of West Virginia.

8. I am angered and hurt by the water pollution that is occurring in streams that I

care about. For example, my family and I would take fishing trips and other recreational activities to Seng Camp and other areas in the area between Clothier and Sharples, WV. Outfall 028 on the Spruce No. 1 Mine, WV/NPDES permit WV1017021, continues to discharge selenium into Seng Camp Creek in concentrations over the water quality standard. That outfall does not have numeric selenium limits to control the discharge even though its discharges have been exceeding the water quality standard since it started discharging in 2008. WVDEP's failure to put selenium limits on this outfall and EPA's inadequate oversight have resulted in harm to Seng Camp Creek and its aquatic life. I no longer like to fish in the streams due to contamination coming from the mine site. I wish I could still go fishing in areas like Seng Creek and would still if the pollution was dealt with and not allowed to happen again. I have family friends who live in the area that I would love to visit and enjoy time down by the streams fishing and other activities.

9. I have been working with friends and community members in Hughes Creek, WV, in Eastern Kanawha County who have been living with discharge from an old underground mine. The discharge is producing hydrogen sulfide gas that has been noxious to residents since 1994. Many of the residents no longer do things like enjoy their swimming pool and entertain guest because the odor is so noxious and it is leaving a very visible and large white residue in the stream where it is draining into that aquatic life avoid. The discharge is coming from a drainage system that was put in place in 1994 when a mine blowout almost occurred. WVDEP had not been monitoring outflow from the old underground mine since the installation of the drain. This drainage was meant to be a temporary fix of abandoned mine land pollution but the WVDEP did not follow up to mitigate the issue and in March of 2015 the same area almost created a blowout again and water from the mine flooded community members' property. In trying to do my job

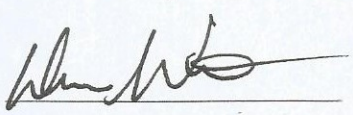
and assist the people there, the gases being released from the drainage gave me severe headaches during every visit making my work and visiting with friends difficult. If the WVDEP had adequately regulated the situation people would not be living with the toxic discharge today.

10. I believe that EPA's review and response to our Petition would result in a greater chance than in the past of safeguarding our vital natural resources. It is also important to me to gain access to the information about impacts that EPA's response would provide, so that I can use this information to protect my own interests in the waters and natural areas in West Virginia that I have a connection to.

11. EPA's failure to respond to our Petition to withdraw West Virginia's NPDES program makes it harder for me to do my job. An important part of my work is providing information about the environment. People in communities impacted by mining pollution are often unaware of the dangers of water pollution because the information is not provided to them. If I could share information from EPA's response with community members, they would have the opportunity to make more informed decisions related to their use of streams and be able to take action to protect their recreational, aesthetic, fishing, and drinking interests.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2015.



Dustin White