No. 15-1799

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Petitioners.

RESPONSE BRIEF FOR RESPONDENTS 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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GLOSSARY

EPA	United States Environmental Protection Agency
NPDES	National Pollutant Discharge Elimination System
OSMRE	Office of Surface Mining Reclamation and Enforcement
SMCRA	Surface Mining Control and Reclamation Act of 1977

INTRODUCTION

For many years, the EPA and the State of West Virginia have collaborated under the Clean Water Act's regulatory structure of cooperative federalism to assure that the State's program for issuing National Pollutant Discharge Elimination System ("NPDES") permits meets the requirements of the Clean Water Act.[1] The EPA and the State, through its Department of Environmental Protection, have worked to improve the State's permitting program, particularly as it relates to issues associated with the discharge of pollutants from surface coal mining. The EPA continues to employ its statutory oversight of the State's NPDES program to identify issues and develop appropriate corrective measures with the State.

In 2009, Petitioners submitted an administrative petition to the EPA in which they requested that the EPA take the extraordinary step of withdrawing its approval of the NPDES program from the State of West Virginia. Petitioners identified seven issues that they believed justified revocation of the EPA's prior approval of the State's program and assumption by the EPA of the administration and enforcement of the NPDES program in West Virginia. Because the EPA had

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[1] *See U.S. Dep't. of Energy v. Ohio*, 503 U.S. 607, 633 (1992) (White, J., concurring in part and dissenting in part) (the Clean Water Act establishes "a distinctive variety of cooperative federalism").

not yet responded to this administrative petition, Petitioners filed a petition for a writ of mandamus to compel an EPA response.

The EPA has now responded to the administrative petition, making a writ of mandamus unnecessary. The EPA's written response is included in the Addendum to this brief. The EPA determined that most of the issues raised by Petitioners do not justify withdrawal of the State's NPDES program, and denied the administrative petition as to those issues. Resp. Add. at 3-4. The EPA explained that it continues to consider whether initiation of withdrawal proceedings is warranted on portions of two issues: (i) the inclusion of appropriate limits for selenium in NPDES permits; and (ii) the enforcement against NPDES violations at mining sites. *Id.* With respect to permit requirements for selenium discharges, the EPA found that the State adequately addressed some of the allegations raised by the Petitioners and made significant improvements in the permitting of selenium discharges. *Id.* at 8-11. The EPA nonetheless chose to defer action while it continues to review the State's issuance of NPDES permits to assess whether they are in compliance with the Clean Water Act requirement to include limits as necessary to meet water quality standards for selenium. *Id.* at 10-11. As for the mining enforcement issue, the EPA is deferring action in order to coordinate with an ongoing, parallel administrative proceeding by the Department of the Interior's

Office of Surface Mining Reclamation and Enforcement under the Surface Mining Control and Reclamation Act of 1977. *Id.* at 17.

Because the EPA responded to Petitioners' allegations and reasonably explained its decision to defer action on two issues, the Court should not issue a writ of mandamus to compel further EPA action.

STATEMENT OF THE ISSUE

On September 23, 2015, the EPA responded to Petitioners' administrative petition for withdrawal of West Virginia's NPDES program. Are Petitioners entitled to the drastic remedy of mandamus when the EPA's response to Petitioners' administrative petition decided nearly all of the issues raised in the petition and, with respect to portions of two issues, reasonably explained why the EPA was deferring its decision?

STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act and the NPDES Program

The Clean Water Act 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 Act 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 (*i.e.*, discrete conveyances) into waters of the United States are regulated under the NPDES permit program established in Clean Water Act Section 402, 33 U.S.C. § 1342.[2] A person discharging pollutants from a point source into waters of the United States generally must obtain 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. Water quality standards, established by states and reviewed and approved by the EPA, consist of designated uses, water quality criteria to protect those uses, and an anti-degradation policy. 33 U.S.C. § 1313(c); 40 C.F.R. §§ 131.3(i), 131.10-131.12.

The Clean Water Act recognizes "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The Act specifically established as "the policy of Congress that the States . . . implement the [NPDES] permit programs." *Id.* States may seek authority to administer the

[2] 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 Clean Water Act provision – 33 U.S.C. § 1344 – and are not implicated here.

NPDES program and issue NPDES permits. 33 U.S.C. § 1342(b).[3] The Act includes criteria governing the EPA's approval of state NPDES program authority. *Id.*

The Clean Water Act also sets forth the process by which the EPA may withdraw its approval of a state's NPDES program:

> 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.

33 U.S.C. § 1342(c)(3).

B. The EPA Regulations Implementing the NPDES Program

The EPA's regulations implementing the NPDES program explain in further detail the process for withdrawal of approval of a state NPDES program. *See* 40 C.F.R. Part 123. The regulations identify the criteria for withdrawal of a state program and provide 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). The EPA Administrator may order the commencement of withdrawal proceedings on

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[3] EPA has authorized 46 states and one Territory, including the State of West Virginia, to administer their own NPDES programs. The EPA administers the program in the remaining jurisdictions. *See* http://water.epa.gov/polwaste/npdes/basics/NPDES-State-Program-Status.cfm

her own initiative or in response to a petition from an interested person alleging that a State has failed to comply with the state program requirements set forth in the regulations. 40 C.F.R. § 123.64(b)(1). In the case of a petition to commence withdrawal proceedings, the regulations require the Administrator to respond in writing. *Id.* The Administrator may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence withdrawal proceedings. *Id.*

If the Administrator makes a determination to proceed with withdrawal proceedings, the Administrator issues an order fixing a time and place for a hearing and specifies the allegations against the state that are to be considered at the hearing. *See id.* The Administrator's decision regarding whether to withdraw approval of the state's program is final agency action within the meaning of the Administrative Procedure Act. *Id.* at § 123.64(b)(8)(ii), (vii).

C. Factual and Procedural Background

On May 10, 1982, the 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. Code R. §§ 47-10, *et seq.* and 47-30, *et seq*. (2015).

On June 17, 2009, Petitioners submitted an administrative petition asking the EPA to initiate proceedings to withdraw approval of the West Virginia's NPDES

program. Petitioners' Addendum ("Pet. Add.") at 1-29. The petition was supplemented on July 31, 2009, and again on November 13, 2009. Pet. Add. at 30-47.

On January 7, 2015, Petitioners filed a complaint in the United States District Court for the Southern District of West Virginia that asserted two claims against EPA Administrator Gina McCarthy and Regional Administrator Shawn Garvin. Pet. Add. at 48-60. The first claim for relief alleged that the EPA had not performed a non-discretionary duty to respond in writing to Petitioners' administrative petition to withdraw West Virginia's NPDES program delegation. Pet. Add. at 58. The second claim asserted an unreasonable delay claim under the Administrative Procedure Act alleging that the EPA failed to timely respond to Petitioners' administrative petition. Pet. Add. at 59.

The EPA moved to dismiss the complaint. *See* Pet. Add. at 61. The EPA argued that, because the Clean Water Act did not establish a mandatory duty for the EPA to respond to the administrative petition, the first claim failed to state a claim upon which relief can be granted. Pet. Add. at 62. The EPA sought dismissal of the second claim because an unreasonable delay claim related to an action that is directly reviewable in the court of appeals must be brought in the court of appeals, rather than in district court. Pet. Add. at 62. In response, Petitioners sought a stay of the district court case to allow them an opportunity to

bring their unreasonable delay claim under the Administrative Procedure Act in this Court.

The district court granted the EPA's motion to dismiss the first claim for relief based on the absence of a non-discretionary duty. *Ohio Valley Envtl. Coal. v. McCarthy*, 2015 WL 3824255 at *3, *5 (S.D. W. Va. 2015). The district court granted the Petitioners' motion for stay of their second claim contingent on Petitioners bringing an appropriate action directly before the court of appeals within 30 days of the district court's order. *Id.* at *4. Petitioners did so.

On September 23, 2015, the EPA responded in writing to Petitioners' administrative petition. *See* Respondent's Addendum 1-2 ("Resp. Add.").

ARGUMENT

I. This Court Has Jurisdiction Over the Petition for Writ of Mandamus.

Petitioners seek relief for an alleged unreasonable delay under the Administrative Procedure Act ("APA"). Pet. at 2. Petitioners claim that the EPA has unreasonably delayed acting on Petitioners' administrative petition seeking withdrawal of the NPDES program from West Virginia, and request that the Court order the EPA to respond to the administrative petition within 90 days. Pet. at 1. Because the substantive action that Petitioners seek to compel, *i.e.*, a decision on their petition to withdraw the EPA's approval of West Virginia's NPDES program,

is subject to review in this Court, any claim that the EPA has unreasonably delayed taking such action can only be heard in this Court.

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). Under the APA, a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

A final decision by EPA under the Clean Water Act that a State is, or is not, administering its NPDES program in conformity with the Act and applicable regulations is subject to exclusive review in the courts of appeals. 33 U.S.C. § 1369(b)(1)(D) (review of 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 . . . 33 U.S.C. § 1369(b)(1)(D)").[4]

This Court and other courts of appeals recognize that appellate courts have jurisdiction to grant relief to a party allegedly aggrieved by interlocutory administrative actions when the appellate court would have exclusive jurisdiction to review the final agency decision. *See, e.g.*, *Virginia Dep't. of Educ. v. Riley*, 23 F.3d 80, 83-84 (4th Cir. 1994) (this Court has authority under the All Writs Act to grant interlocutory relief when it will have full appellate jurisdiction following final agency action); *State of N. Carolina Envtl. Policy Inst. v. EPA*, 881 F.2d 1250, 1256-57 (4th Cir. 1989) (authority to undertake interlocutory review of administrative adjudication associated with decision on withdrawal of approval of state environmental program); *La Voz Radio de la Communidad v. FCC*, 223 F.3d 313, 318 (6th Cir. 2000); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421-22 (11th Cir. 1993). These cases cite with approval the District of Columbia Circuit's decision in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*").

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[4] Any challenge to an EPA final determination as to West Virginia's NPDES permit program would require the filing of a petition for judicial review in an action separate from this one. For this and other reasons, the substance of EPA's recent response to the Petitioners' administrative petition is not before the Court in this case.

In *TRAC*, the District of Columbia 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. 750 F.2d at 75 ("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.") 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. By lodging review of final agency action in the Court 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 City of Virginia Beach*, 42 F.3d 881, 884 (4th Cir. 1994) (because this Court has exclusive jurisdiction of petitions for final review of FERC decisions, it has jurisdiction to consider an unreasonable delay claim to compel issuance of a decision).

Thus, because the final EPA action sought to be compelled by Petitioners is directly reviewable only in this Court of Appeals, jurisdiction over Petitioners' claim of unreasonable delay also lies exclusively in this Court.[5]

II. Petitioners Are Not Entitled to the Extraordinary Relief of a Writ of Mandamus Because EPA Reasonably Responded to the Administrative Petition.

The remedy of mandamus is "a drastic one, to be invoked only in extraordinary situations." *In re City of Virginia Beach*, 42 F.3d at 884. The petitioner must demonstrate that its right to issuance of a writ of mandamus is "clear and indisputable." *Id*. Authority to issue a writ of mandamus should be exercised sparingly and relief should not be granted unless irreparable harm is likely. *Virginia Dep't. of Educ.*, 23 F.3d at 84. Although a writ of mandamus may be appropriate when an egregious delay unduly postpones the resolution of a matter committed to an agency, *In re City of Virginia Beach*, 42 F.3d at 885, that situation does not exist here.

The EPA has responded in writing to the administrative petition. It denied the petition with respect to nearly all of the issues raised by Petitioners, thereby

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[5] District courts have also applied this principle in concluding that they lacked subject-matter jurisdiction to hear an unreasonable delay claim in the context of a petition to withdraw a state's NPDES program authorization. *See Johnson Cnty. Citizen Comm. for Clean Air and Water v. EPA*, 2005 WL 2204953 at *6 (M.D. Tenn. 2005) (Tennessee's NPDES program); *Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1208 (N.D. Fla. 2005) (Florida's NPDES program).

mooting the petition for writ of mandamus as to those issues. The EPA decided to defer a decision regarding portions of two issues: (i) the State's alleged failure to include appropriate water quality-based effluent limits for selenium in NPDES permits for mining operations; and (ii) alleged deficiencies in the State's enforcement program for violations at mining operations. The EPA provided reasonable explanations for its decision to defer action on these two issues, and deferral of action on these issues does not justify issuing a writ of mandamus.

A. The EPA reasonably deferred action on permitting issues associated with selenium because West Virginia has made significant progress on correcting deficiencies and the EPA needs further time to review whether recent permits meet the Clean Water Act's requirements.

Petitioners alleged several problems with the permitting of selenium discharges in NPDES permits issued by West Virginia. *See* Pet. Add. at 10-14. Since 2009, the EPA has reviewed hundreds of permits issued by the State, including at least 80 permits with water quality- based effluent limitations for selenium discharges. Resp. Add. at 8. The EPA found that some of the problems identified by the petitioners, in particular those related to "report only" requirements and to compliance schedules, Pet. Add. at 10, 13, have been addressed by West Virginia and are not grounds for commencing withdrawal proceedings. But because the EPA is still reviewing recent permits with effluent limitations for selenium discharges to assure that limits are incorporated consistent

with the Clean Water Act, the EPA deferred a decision on the other allegations concerning the adequacy of permits for discharges of selenium.

NPDES permits issued to dischargers must include, in addition to applicable technology-based limits, any more stringent limits necessary to achieve water quality standards. The EPA published a water quality criterion for selenium in 1987 for the protection of wildlife from toxicity associated with selenium. Resp. Add. at 8. West Virginia subsequently set two aquatic life criteria for selenium, a chronic criterion of 5.0 µg/l and an acute criterion of 20 µg/l. *See* W. Va. Code R. 47-2-8, Appdx. E, Table 1, 8.27 (June 2015). NPDES permits for discharges that contain contaminants at levels that will result in an exceedance of, or has the reasonable potential to exceed, water quality standards in the receiving water must contain water quality-based effluent limitations. *See* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1). However, not until the early 2000s did the federal government and states administering NPDES programs make the connection between surface coal mining operations and discharges of selenium at levels having the potential to exceed water quality standards. Resp. Add. at 8.

In the early 2000s, West Virginia began to require monitoring for selenium in discharges from surface coal mines. *Id.* The State included this requirement so that future permitting decisions would be informed by actual data from outfalls. *Id.* Monitoring can be useful to demonstrate several important aspects of a

discharge, including whether the contaminant of interest is present in the discharge at a concentration that exceeds or potentially may exceed water quality standards, and whether there are changes in concentration over time, in different seasons and under different hydrological conditions. *Id.* at 8-9. In a number of cases, the State issued permits that required the discharger to report the monitoring results for selenium but did not place any effluent limitations on the amount of selenium in the discharges. *Id.* at 9.

The EPA declined to initiate withdrawal proceedings based on Petitioners' allegations arising from the inclusion of only monitoring and reporting obligations in permits because the EPA found that the State has worked to correct this issue. When West Virginia previously issued permits only requiring monitoring and reporting provisions for selenium for certain outfalls, the State asserted that it had inadequate data to be able to establish water quality-based effluent limitations for selenium in the permitted discharges. *Id.* The lack of data was particularly common for bench discharges, which are discharges from sedimentation ponds that only discharge during precipitation events. *Id.* If monitoring showed that the discharges included selenium, the state would consider whether selenium permit limits were necessary. *Id.* However, more recently, in the case of new discharges into waters impaired for selenium, the State has included selenium limits in the permits without initial monitoring or analytical data from the discharge, basing the

limits on the data from other nearby discharges. *Id.* In addition, the State added selenium limits when it reissued permits to existing mines that previously had no selenium limits. *Id.* Therefore, the EPA declined to initiate withdrawal proceedings based on Petitioners' argument that permits addressed selenium only through reporting and monitoring obligations.

Petitioners' administrative petition also alleged misuse of compliance schedules in West Virginia's permits for coal mine discharges. When the State initially incorporated water quality-based effluent limitations for selenium into existing mining permits, the State's permits often provided for a schedule to come into compliance with this new parameter. *Id.* at 9.

The EPA declined to initiate withdrawal proceedings based on issues associated with compliance schedules because West Virginia has also significantly improved this aspect of its program. The EPA recognized that, prior to Petitioners' administrative petition, West Virginia included compliance schedules in permits that may not have been consistent with the Clean Water Act. *Id.* In November 2007, EPA Region III sent a letter to the West Virginia Department of Environmental Protection to clarify the Clean Water Act requirements on the use of compliance schedules in NPDES permits. *Id.* Since 2007, the State's Department of Environmental Protection has worked with the EPA to ensure that permits with compliance schedules are consistent with NPDES program

requirements, *e.g.*, the permits include schedules only when appropriate, require compliance as soon as possible, and incorporate enforceable milestones. *See* 40 C.F.R § 122.47; W.Va. Code R. §§ 47-10-8 and 47-30-6.2.o (2015). The EPA has found that only a small number of the over 80 permits it has reviewed since 2009 that have limits for selenium include a compliance schedule for selenium. Resp. Add. at 10.

Although the EPA found that West Virginia addressed some of the allegations raised by the Petitioners with regard to permits for selenium discharges, the EPA elected for several reasons to defer a decision on Petitioners' request to revoke NPDES approval based on this permitting issue. First, the EPA is continuing to review West Virginia's NPDES permits to assess whether they are in compliance with the requirement of the Clean Water Act to include limits as necessary to meet the water quality standard for selenium. *Id.* at 10. This review includes evaluating whether the State is appropriately determining the reasonable potential for new discharges to cause exceedances of the selenium water quality criteria. *Id.*

The EPA noted that deferring a decision will also allow the EPA additional time to consider the impact of potential new selenium criteria on the permitting of selenium discharges. Pursuant to legislative amendments to W.Va. Code § 22-11-6 adopted in 2013, the West Virginia Department of Environmental Protection has

proposed adding new selenium criteria which, if approved by the EPA, will be reflected in permits where a water quality-based effluent limitation is required to meet this water quality standard. Resp. Add. at 10.

In addition, deferring a decision on the allegations in the petition concerning the permitting of selenium discharges is consistent with an ongoing investigation by the Office of Surface Mining Reclamation and Enforcement ("OSMRE") of the U.S. Department of the Interior. The OSMRE oversees state programs that implement the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). In June 2013, the OSMRE received a petition from 18 organizations, including Petitioners, which requested that the OSMRE withdraw approval of the West Virginia surface coal mining regulatory program under SMCRA. Resp. Add. at 10. One of the 19 allegations included in the petition to OSMRE focuses on the effect of discharges from mines in creating, and preventing improvement in, selenium-impaired streams. *Id.* On December 30, 2013, after analysis of the allegations and review of relevant information, the OSMRE issued an initial determination on the SMCRA petition. *Id.* The OSMRE determined that five allegations in the SMCRA petition warranted further evaluation, including the allegation that the permitting of mines by West Virginia impaired stream water quality due to selenium discharges. *Id.* The OSMRE anticipates issuing a final decision in 2016. The EPA's decision to continue evaluating the allegation in the

Clean Water Act petition regarding permitting of selenium discharges will enable the EPA to coordinate with the OSMRE in its review.

Based upon the State of West Virginia's progress in issuing permits with limits governing selenium discharges that comply with the Clean Water Act and the EPA's ongoing review of the State's NPDES program to determine its current compliance with the requirement to include limits as necessary to meet water quality-based standards for selenium, EPA reasonably deferred action on this issue.

B. EPA reasonably deferred action on Petitioners' allegation that West Virginia's lack of enforcement against violations at mining operations does not comply with the Clean Water Act.

The Clean Water Act requires state NPDES programs to have adequate authority to address violations of NPDES permits or the permit program. 33 U.S.C. § 1342(b)(7); 40 C.F.R. § 123.27. Failure to seek adequate penalties or to act on permit violations can be grounds for withdrawing NPDES program approval. 40 C.F.R. § 123.63(a)(3). The EPA determined that three of the four specific enforcement-related allegations raised by Petitioners do not constitute grounds for initiating withdrawal proceedings: lack of enforcement of permit limits for selenium; municipal and industrial facility enforcement; and the Dunkard Creek fish kill. *See* Resp. Add. at 13-17. In response to Petitioners' allegations regarding the State's general failure to adequately enforce against permit violations by mining operations, the EPA deferred action pending the completion of

OSMRE's evaluation of the State's surface coal mining enforcement program. The EPA's deferral is reasonable.

The EPA reviews the State's enforcement program as part of its established oversight activities. In 2004, the EPA, working collaboratively with the Environmental Council of the States, designed a State Review Framework (the "Framework") to evaluate state enforcement of environmental programs under multiple statutes, including the Clean Water Act. Resp. Add. at 13. The Framework was designed to address concerns about consistency in enforcement activity across state programs and in the oversight of state programs by the EPA regions. *Id.* The Framework evaluates state enforcement performance using existing program guidance, such as EPA national enforcement response policies, compliance monitoring policies, and civil penalty policies, and to make recommendations to improve the program. *Id.*

The EPA most recently conducted a Framework review of West Virginia's Clean Water Act program in 2011. *Id.* In the Framework Report, the EPA made recommendations for improving certain aspects of the State's NPDES compliance and enforcement program. *Id.* While the EPA noted in the Framework review specific areas where the State's program needs improvement, the EPA determined in its response to Petitioners' administrative petition that the quality of West

Virginia's NPDES enforcement program as a whole does not warrant initiation of withdrawal proceedings. *Id.*

The 2011 Framework review did not focus on enforcement of violations of mining permits; the EPA conducted a separate programmatic review in July 2011 to evaluate, based on 2010 data, West Virginia's compliance monitoring and enforcement activities for the State's NPDES mining program. *Id.* at 15. This review identified a number of issues with the State's mining program, including a failure to take timely and appropriate enforcement action and a failure to capture economic benefit for noncompliance when assessing penalties. *Id.* In addition, State inspection reports reviewed by EPA did not capture or document the NPDES portion of the facility inspections and based enforcement recommendations only on SMCRA requirements. *Id.*

As a result of these programmatic reviews, EPA has worked with the State to improve enforcement of the State's NPDES program for mining permits. West Virginia is working to strengthen the documentation in its penalty calculations to show recovery of economic benefit. *Id.* Further improvements include the training of enforcement personnel and revisions to enforcement policy documents. Information supplied by the State shows that it has undertaken a significant number of enforcement actions with respect to mining discharges and collected

millions of dollars in penalties since Petitioners filed their administrative petition. *Id.*

While acknowledging improvements in the State's enforcement activities against violations by mining operations, the EPA is deferring a decision as to whether to initiate withdrawal proceedings on this issue pending completion of the OSMRE's evaluation of the State's surface coal mining enforcement program. *Id.* at 17. As described in the previous section, the OSMRE received an administrative petition seeking the withdrawal of federal approval of the State's surface coal mining regulatory program. *See supra* at 18. In its response to that petition, the OSMRE decided it would evaluate further the enforcement-related allegation that the West Virginia Department of Environmental Protection fails to enforce Clean Water Act violations at mining sites. *Id.* at 16. The OSMRE is in the process of conducting that evaluation, which is considering whether West Virginia is properly addressing and preventing repeated noncompliance at mining sites. *Id.* at 17. According to the OSMRE, it anticipates its evaluation will be completed in 2016. *Id.*

EPA reasonably deferred its decision on the allegation related to the West Virginia Department of Environmental Protection's failure to bring appropriate enforcement actions in the case of violations from mining discharges until after OSMRE has completed its evaluation. The OSMRE findings will be relevant to

the EPA's evaluation of the adequacy of West Virginia's NPDES mining permit enforcement. EPA's deferral occurs against a backdrop of an active and improving West Virginia mining enforcement effort. The EPA's limited deferral on this issue does not justify the extraordinary remedy of mandamus.

C. Application of the *TRAC* factors relevant to agency delay does not support issuance of a writ of mandamus.

Petitioners discuss in their brief six factors articulated by the District of Columbia Circuit in *TRAC* that may be useful in assessing claims of agency delay. *TRAC*, 750 F.2d at 80;[6] Pet. Brief at 23-28. Most of that discussion is no longer relevant because EPA has responded to the administrative petition. To the extent EPA's administrative response includes two limited deferrals as part of its determination of the seven issues presented, the *TRAC* factors do not justify issuance of a writ of mandamus.

[6] The six factors to be considered are: (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.

The EPA's limited deferrals meet the "rule of reason" because, as explained above, the EPA deferred action only on those issues that involve ongoing compliance review or coordination with parallel OSMRE proceedings. Further, Congress did not provide a timetable in the Clean Water Act or in the APA for the EPA to respond to administrative petitions that seek to initiate proceedings for the withdrawal of NPDES program approval. Although the program issues raised by Petitioners implicate human health and welfare, this factor is not dispositive because the EPA's entire docket involves issues concerning human health and welfare and any acceleration here may come at the expense of delay of EPA action elsewhere. *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987). The EPA has been diligently working with the State since submission of the administrative petition to improve the State's NPDES program, which has mitigated the alleged injury to the Petitioners' interests prejudiced by the delay. Thus, consideration of the *TRAC* factors does not support issuance of a writ of mandamus to compel action on the limited deferrals included in the EPA's administrative response.

D. EPA's decision to defer a determination on two of Petitioners' allegations reasonably reflects the cooperative federalism of the Clean Water Act and the drastic consequences associated with withdrawal of the State's program.

The Clean Water Act anticipates a partnership between the States and the Federal Government. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Congress sought to "recognize, preserve, and protect the primary responsibilities and rights

of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Congress intended States to implement the NPDES program. *Id.* The Act's legislative history confirms that Congress intended that the EPA would withdraw a state's NPDES authority only in extraordinary circumstances. *See* 118 Cong. Rec. 33,750 (1972) (statement by Representative Jones of Alabama) ("the Administrator shall not [withdraw approval of a State program] except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise to comply with the law.").

The EPA's limited deferral decision reasonably reflects Congressional intent that the EPA assume a "supervisory" role in the NPDES program. *Dist. 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). The Clean Water Act's substantive provisions and legislative history "reflect the desire of Congress to put the regulatory burden on the states and to give [EPA] broad discretion in administering the program." *Dist. of Columbia*, 631 F.2d at 860.

EPA's limited deferral as part of its administrative decision also properly reflects the drastic consequences associated with a withdrawal of a state's NPDES permit program. Federal courts have acknowledged these consequences when considering an EPA decision to defer a withdrawal decision. For example, in *Save*

the Valley, Inc. v. EPA, 223 F. Supp. 2d 997 (S.D. Ind. 2002), the plaintiffs sought to compel EPA to withdraw the State of Indiana's NPDES program due to noncompliance with the Clean Water Act regarding permitting of confined animal feeding operations. The court recognized that the EPA had worked with the State for years to help the State develop appropriate rules to govern these animal feeding operations. *Id.* at 1013. Even though the State had not yet come into compliance, the court declined "to take the drastic action" of compelling the EPA to immediately withdraw the approved State NPDES program. The court was "acutely aware of the harmful effects that could result from the immediate withdrawal of Indiana's NPDES program," and the significant administrative burdens imposed on the EPA if it did so. *Id.* at 1014. As a result, the court allowed the State adequate time to bring its program into compliance. *Id.* The same considerations support the reasonableness of the EPA's limited deferral in response to Petitioners' administrative petition.

CONCLUSION

The Court should deny the petition for writ of mandamus.

Respectfully submitted,

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Assistant Attorney General

s/ Alan D. Greenberg

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SEPTEMBER 24, 2015

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 21 and 32(c)(2) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the page limitations of Fed. R. App. P. 21(d) because it does not exceed 30 pages, excluding the parts of the brief exempted under Rule 21(d).

s/ Alan D. Greenberg
ALAN D. GREENBERG

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Alan D. Greenberg
ALAN D. GREENBERG

ADDENDUM

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

SEP 23 2015

Mr. Joseph Lovett, Executive Director
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, West Virginia 24901

Mr. Derek Teaney, Senior Staff Attorney
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, West Virginia 24901

Dear Mr. Lovett and Mr. Teaney:

On June 17, 2009, the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and the Ohio Valley Environmental Coalition ("the Petitioners") filed a petition with the United States Environmental Protection Agency Region III ("EPA"). The Petition asked EPA to withdraw approval for the State of West Virginia to administer the National Pollutant Discharge and Elimination System ("NPDES") program, based on a number of allegations related to the implementation and enforcement of the program. The Petitioners filed supplemental letters and materials on July 31, 2009 and November 13, 2009. In addition, EPA representatives met with you on November 19, 2010 and held several conference calls in 2010 to discuss the Petitioners' concerns with West Virginia's NPDES program.

EPA conducted an investigation of the various issues raised by the initial petition and the supplemental materials (collectively referred to hereinafter as the "Petition"). EPA also had various informational discussions with West Virginia's Department of Environmental Protection ("WV DEP") to better understand the issues and to explore potential corrective action where necessary.

The Petitioners raised concerns with effluent limits for selenium in NPDES permits. EPA will continue to monitor the adequacy of West Virginia's mining permits in regard to selenium limits. Similarly, EPA is considering the allegations in the Petition concerning inadequate enforcement against violations by mining dischargers. EPA is also coordinating the ongoing review of the state's enforcement of mining-related violations with a review currently being conducted by the United States Department of Interior's Office of Surface Mining Reclamation and Enforcement which is evaluating analogous issues to those raised in the 2009 Petition. In order to ensure a complete and comprehensive investigation of the allegations cited above, the Petition will remain open with regard to these issues.

As to the other allegations raised in the Petition, EPA has determined that it will not withdraw the NPDES program from the State of West Virginia based on the allegations contained in the Petition. The enclosed response describes EPA's analysis of each of the issues presented by the Petitioners, and constitutes a partial denial of the Petitioners' request for withdrawal of the NPDES program for the state of West Virginia.

If you have any questions, please do not hesitate to contact Mr. Jon Capacasa, Director Water Protection Division, at 215-814-5422.

Sincerely,

Shawn M. Garvin
Regional Administrator

Enclosures

US ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO THE PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FROM THE STATE OF WEST VIRGINIA

The United States Environmental Protection Agency (EPA) is providing a response to the petition submitted on June 17, 2009 (and supplemented on July 31 and November 13, 2009) on behalf of the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition (jointly Petitioners) seeking withdrawal of the approval of the National Pollutant Discharge Elimination System (NPDES) program implemented by the State of West Virginia (WV).[1] Petitioners seek withdrawal of the state's program approval based on the following allegations:

I. WV's legal authority no longer meets the requirements of the Clean Water Act (CWA).
   1. Adjudicative decisions by the Environmental Quality Board (EQB) have rendered state law inconsistent with the CWA water quality-based effluent limit requirements by unlawfully allowing the consideration of compliance cost in NPDES permitting decisions;
   2. Recent legislative action limits WV's authority to implement the state NPDES program; and
   3. An EQB decision suggests that the anti-backsliding provision of the CWA does not apply in WV.

II. WV has failed to comply with the requirements of 40 C.F.R. Part 123 in the operation of its NPDES program.

III. WV repeatedly issues permits that do not conform to the requirements of Federal regulations.

IV. WV consistently fails to comply with the public participation requirements of 40 C.F.R. Part 123.

V. WV's NPDES enforcement program is grossly deficient.
   1. Selenium
   2. General Mining
   3. Toxics at Industrial Facilities
   4. Municipal Facilities
   5. Dunkard Creek Fish Kill

VI. WV has failed to comply with the terms of the Memorandum of Agreement (MOA) required under 40 C.F.R. § 123.24.

VII. WV has failed to develop an adequate regulatory program for water quality based effluent limits (WQBELs).
   1. Antidegradation – Socioeconomic Reviews
   2. General Mining permit
   3. Failure to develop Total Maximum Daily Loads (TMDLs) for streams impaired due to ionic strength
   4. Mercury

The EPA has concluded that most of the allegations listed above do not warrant initiation of withdrawal proceedings. The EPA is continuing to consider whether initiation of withdrawal proceedings is warranted with respect to the allegations raised in Part III, concerning permitting of selenium

[1] In addition, a separate petition regarding West Virginia's NPDES program was submitted by some of the same petitioners in September 2014. EPA is considering that petition separately.

discharges, and with respect to Part V as it relates to enforcement against NPDES violations in mining sites, as discussed below.

INTRODUCTION

In 1982, the EPA authorized WV to administer the NPDES program in the State, pursuant to section 402(b) of the Clean Water Act (CWA), 33 U.S.C. § 1342(b). In accordance with CWA section 402(c), (d) and (e), the EPA oversees the states' NPDES programs. The EPA has the authority to withdraw NPDES program approval in accordance with the procedures in 40 C.F.R. §§ 123.63 – 123.64. On June 17, 2009, the Petitioners requested the EPA to withdraw approval of the WV's NPDES program. Petitioners also filed two supplements to the June 17 petition, on July 31st and November 13, 2009. The EPA met with the Petitioners on November 19, 2009 and held several conference calls in 2010 to discuss in more depth the Petitioners' concerns with West Virginia's NPDES program.

As a result of the petition, the EPA has reviewed WV's implementation of the NDPES program in the state. As part of this review, the EPA asked WV to respond to the allegations raised by the Petitioners. The state submitted its response to the EPA on August 3, 2010, and the EPA and WV have discussed the concerns raised by the Petitioners. ("WVDEP Response" is attached as Attachment A.) Since that time, WV has worked to improve its permit program and implement EPA's recommendations, in particular with regards to permitting of selenium discharges, antidegradation and enforcement. These improvements include, but are not limited to the following: permits routinely include water quality-based effluent limits (WQBELs) for selenium where appropriate; permit limits for selenium are effective immediately upon permit issuance unless the administrative record supports a reasonable compliance schedule; WV requests public comments on proposed permits reissued after review by the West Virginia Environmental Quality Board (EQB); and the state has increased the number of enforcement actions against mine dischargers in violation of their permit, with corresponding increases in the amount of penalties collected. Additional discussion of the program improvements is provided in this document. In light of the state's ongoing corrective actions, as discussed below, the EPA has concluded that commencing proceedings to withdraw approval of WV's NPDES program based on most of the allegations discussed in the petition is not warranted and declines to exercise its discretion to do so at this time on the basis of those allegations.

PETITIONERS' ALLEGATIONS AND THE EPA'S RESPONSE

I. ALLEGATION: WV'S LEGAL AUTHORITY NO LONGER MEETS THE REQUIREMENTS OF THE FEDERAL WATER POLLUTION CONTROL ACT

Petitioners assert in their petition to withdraw that WV does not have adequate legal authority to administer the NPDES program. Petitioners point to three bases for their allegations of lack of legal authority: 1) that the WV EQB, an administrative board which reviews permits issued by the WVDEP, has interpreted state law in a manner that renders it inconsistent with the requirements of the Clean Water Act (CWA); 2) that a 2009 state law modified the state NPDES program making it less stringent than federal law; and 3) that a 2008 EQB decision suggested that WV was not bound by the CWA. After careful consideration of these issues, the EPA has determined that commencement of withdrawal proceedings is not warranted.

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 in NPDES Permitting Decisions**

Summary Statement: The Petitioners question whether WV has the legal authority required to administer the NPDES program, because of the application by the EQB of WV Code § 22B-1-7. That statute, which governs appeals to the EQB, mandates the EQB to "take into consideration," among others, "the economic feasibility" of treating the discharge. Id. Petitioners point to the EQB's decisions in Jack Branch Coal Co. v. W. Va. Dept. of Environmental Protection, Appeal No. 07-11-EQB (Oct. 23, 2008), and W. Va. Highlands Conservancy v. McClung, Appeal Nos. 07-10-EQB and 07-12-EQB (June 12, 2008), as two examples where the EQB applied economic considerations under WV Code § 22B-1-7 to remove or modify the application of WQBELs in a permit appeal.

Response: The statute cited by the Petitioners and by the EQB, WV Code § 22B-1-7, was in effect in the state when the EPA approved the NPDES program in 1982. The EPA and West Virginia recognized at the time that the mandate to the EQB to "take into consideration" economic feasibility in permit appeals could potentially conflict with the CWA requirement for WQBELs in NPDES permits. To dispel any potential conflict, during the approval of the West Virginia NPDES Program the state's Attorney General, who is authorized under the state law to speak for the state's executive branch on questions of state law, (*see* WV Code § 5-3-1) clarified that the state provision requiring consideration of economic feasibility did not authorize a waiver of any CWA requirement. *See* May 1982 Supplemental Response Statement by West Virginia Attorney General, cited in the August 3, 2010, letter from Thomas L. Clarke, Director of the Division of Mining and Reclamations, WVDEP, to Jon Capacasa, Director of the Water Protection Division, U.S. EPA Region III, at p. 3.[2] Rather, the EQB is mandated to perform its duties as necessary to secure the state's participation in the federally approved program. See WV Code § 22B-1-5(4). The WVDEP restated this understanding of the state legal authority in its August 3, 2010 response. The EQB is aware of the state law mandate to carry out the requirements of the CWA, and has recognized that NPDES permits must include limits to control all pollutants that could cause excursions above the water quality standards in the receiving stream. See Sierra Club v. Clarke, Appeal No. 10-34-EQB, WV Envt'l Quality Bd., at 21-22 (March 25, 2011), reversed on other grounds, Patriot Mining Co. v. Clarke, Civ. No 11-AA-102 and 11-AA104 (WV Kanawha Co. Ct. Feb. 13, 2013). As when the EPA approved the West Virginia NPDES Program in 1982, WV still has the required legal authority to implement the NPDES Program. In light of the interpretation of the state's laws, the EPA has concluded that this issue does not warrant commencement of withdrawal proceedings.

2. **Recent Legislative Action Limits WV's Authority to Implement the State NPDES Program**

Summary Statement: The Petitioners assert that WV SB 461 makes WV's NPDES program less stringent than Federal regulations because, according to Petitioners, its purpose was to suspend the application of the selenium water quality criteria.

Response: W. Va. Code § 22-11-6 provides statutory authority for including compliance schedules in permits for WQBELs. The regulations of the W. Va. Code of State Rules at §§ 47-10-8 and 47-30-6.2.o further specify the requirements for compliance schedules in NPDES permits issued by WV DEP. In

[2] Although the statement from the Attorney General cites state laws that have been repealed, the applicable provisions were recodified and still apply to the EQB and the WVDEP. Compare W.Va. Code §§ 20-5A3(a)(1), 20-5A-3(b)(2)(d) and 20-5A-15(g), with §§ 22-11-4(a)(1), 22B-1-5(4) and 22B-1-7(h).

2009, the WV Legislature amended W. Va. Code § 22-11-6 to provide that WVDEP could modify existing permits to extend compliance schedules for achieving WQBELs for selenium until July 2012. In April 2013, the WV Legislature amended this law,[3] removing the language referring to compliance schedules for selenium. Thus, this part of the law has been repealed and it is no longer relevant. Therefore, commencing program withdrawal proceedings based on the enactment of this law is not warranted.

3. An EQB Decision Suggests that the Anti-backsliding Provision of the CWA Does not Apply in WV

Summary Statement: The Petitioners assert that a 2008 EQB opinion limits WV's authority to implement its permitting program because the EQB stated that WVDEP administers a federally-approved program and not federal law, including the anti-backsliding prohibition in Section 402(o) of the CWA.

Response: As properly described by the EQB in West Highlands Conservancy v. McClung, Appeal Nos. 07-10-EQB and 07-12-EQB (June 12, 2008), under the CWA, states implement their federally-approved program consisting of state law and procedures that meet the requirements of the CWA. States do not implement the CWA directly. Rather, they must have legal authority under state laws and regulations to implement the requirements of the CWA. See CWA §402(b); 40 C.F.R. Part 123. Therefore, the conclusion of law as stated by EQB is in accordance with the CWA.

With regard to the application of anti-backsliding to WV NPDES permits, the EQB decision found that anti-backsliding did not apply to the facts of the case (because there was no limit in effect in the previous permit), not that anti-backsliding does not apply at all to WV NPDES permits. [Id. at 39-40 ("The Board concludes that there was never a final 'established' limit in the permits. If the prior permit contains an unexpired compliance schedule for achieving an effluent limit, EPA does not consider the 'effluent limit' to have yet been 'established' or become enforceable for the purposes of antibacksliding.")] WV NPDES regulations themselves include anti-backsliding prohibitions. See WV C.S.R. §§ 47-10-6.3.j; 47-30-6.2.m.

II. ALLEGATION: WV HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF 40 C.F.R. PART 123 IN THE OPERATION OF ITS NPDES PROGRAM

1. Bond Forfeiture Sites

Summary Statement: Petitioners argue that the EPA should commence withdrawal proceedings because WV has failed to permit itself for discharges from bond forfeiture mining sites.

Response: At the time Petitioners submitted their petition, WV had taken the legal position that when it revoked a mining permit issued under the state's mining regulatory program and the bond associated with the mining permit was forfeited, the state did not become an operator subject to CWA permitting

[3] The 2013 amendment to WV Code § 22-11-6, cited above, addresses the selenium water quality criterion in West Virginia, asking WVDEP to develop an implementation plan for the criteria and conduct monitoring to develop a state-specific selenium criterion. The CWA regulations allow the states to develop numeric criteria based on scientifically defensible methods. The states then submit those criteria, together with the scientifically defensible rationale for the revisions, to EPA for approval. WV recently proposed new selenium criteria. If and when the state adopts different criteria for selenium, EPA will review under Section 303(c) of the CWA, which addresses water quality standards. Until EPA approves any newly adopted criteria, the current previously approved criteria continue to apply for CWA purposes, including for determining appropriate limits in NPDES permits.

requirements for the discharges from the bond-forfeited mines. Some environmental organizations (including the West Virginia Highlands Conservancy, one of the Petitioners) filed two complaints in federal court against the state on this matter, one in the Northern District and one in the Southern District of West Virginia. The district courts ruled against WV, finding that in the case of bond-forfeited mines, the state has to obtain NPDES permits for the discharges from such mines. *See West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512 (S.D.W.Va. 2009); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 588 F. Supp. 2d 678 (N.D.W.Va. 2009), *aff'd*, 625 F. 3d 159 (4th Cir. 2010). In light of the court decisions, WV has begun to issue NPDES permits for its bond forfeiture sites and the EPA understands that it intends to continue to do so. WVDEP has already drafted over 100 permits for such sites and submitted those draft permits to the EPA for review. The EPA provided comments and technical assistance to WV on many of the draft permits.

WV has issued NPDES permits for over 140 bond forfeiture site discharges, in accordance with consent decrees that the state entered into to resolve the *WVHC v. Huffman* cases cited above. Also, the WV State Legislature enacted legislation to increase the coal tax funding the Special Reclamation Water Trust Fund which the state uses to fund water treatment if the bond forfeited is not sufficient.

The EPA will continue to work with the state to support the development of permits for bond forfeiture sites. WV is complying with the CWA requirement to issue permits for the bond forfeiture sites. Therefore, commencement of withdrawal proceedings is not warranted at this time.

2. Other Abandoned Mine Sites

Summary Statement: Petitioners also raised concerns about the permitting of discharges from abandoned mines. The petition raises concerns that WVDEP 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.

Response: Abandoned mines typically refer to lands and waters affected by mining or mining material processing that occurred prior to the enactment of the Surface Mining Control and Reclamation Act (SMCRA) in 1977. As the mines are abandoned, there are generally no identifiable viable private parties responsible for discharges. Abandoned mine lands can raise serious health and safety concerns in addition to environmental concerns. West Virginia has set up a reclamation fund to reclaim the lands and waters affected by abandoned mines. For example, West Virginia has done reclamation work at the Kempton/Coke abandoned mine to address the most pressing safety and environmental concerns at this site. The Federal government supports states' reclamations efforts to address abandoned mine sites.

The EPA acknowledges that there has been uncertainty about the applicability of NPDES permits to discharges from pre-SMCRA abandoned coal mines. For example, the EPA has assigned load allocations, which are typically assigned to nonpoint sources not subject to permitting, to discharges from abandoned mines for the purpose of calculating a total maximum daily load under CWA Section 303(d), but explicitly stated that the EPA has not made a determination of whether there are point source discharges from these sites requiring NPDES permits. *See., e.g.,* "Metals and pH TMDL for the Tug Fork River Watershed, West Virginia," September 2002, EPA Region III. *Cf.* "*Clean Water Act § 402 National Pollutant Discharge Elimination System (NPDES) Permit Requirements for 'Good Samaritans' at Orphan Mines Sites*," EPA Memorandum, Cynthia Giles, Office of Enforcement and Compliance Assurance; Mathy Stanislaus, Office of Solid Waste and Emergency Response; and Nancy Stoner, Office of Water, Dec. 12, 2012 (on abandoned or orphaned hard rock mine sites).

Discharges from abandoned mines should be subject to NPDES permits where the owners or operators of point sources who are legally responsible for the discharges can be identified. State NPDES programs are responsible for implementing the NPDES permit program with respect to discharges from abandoned mines for which a responsible owner or operator has been identified. The EPA continues to consider how best to address abandoned mine discharges under the NPDES program where a responsible owner or operator has not been identified and has concluded that initiating withdrawal procedures on this ground is not warranted at this time.

III. ALLEGATION: WV REPEATEDLY ISSUES PERMITS THAT DO NOT CONFORM TO THE REQUIREMENTS OF FEDERAL REGULATIONS

Summary Statement: The Petitioners assert that WVDEP has failed to include appropriate WQBELs for selenium in NPDES permits for mining operations and appropriate compliance schedules for municipal permits. The Petitioners provide four examples of how WVDEP fails to comply with the federal requirements including: 1) WVDEP assigns "report only" requirements on some outfalls having a reasonable potential to exceed the WQS for selenium; 2) WVDEP fails to require selenium core samples, selenium effluent limits or selenium monitoring at all mines in traditionally high selenium bearing seams; 3) WVDEP issues new permits with water quality based limits without an assurance that those limits can be met; and 4) WVDEP issues permits with inappropriate compliance schedules.

Response: Petitioners alleged several problems with the permitting of selenium discharges by WV. The EPA has reviewed hundreds of permits issued by the state since 2009, including at least 80 permits with WQBELs for selenium discharges. As described below, the EPA has found that some of the problems identified by the Petitioners, in particular those related to "report only" requirements and to compliance schedules, have been addressed by WV and are not grounds for commencing withdrawal proceedings. But because the EPA is still reviewing permits with effluent limitations for selenium discharges to assure that limits are incorporated consistent with the CWA, we are deferring a decision on the rest of the allegations concerning adequacy of permits for discharges of selenium.

NPDES permits issued to dischargers must include, in addition to any applicable technology-based limits, any more stringent limits necessary to achieve water quality standards (WQS). The EPA published a water quality criterion for selenium in 1987 for the protection of wildlife from toxicity associated with selenium. WV has approved aquatic life criteria for selenium, a chronic criterion of 5.0 ug/l adopted in 1990 and a 20 ug/l acute criterion adopted in 1995.

Selenium is commonly found in the soil and in certain coal seams. However, it was not until 2003 with the publication of the draft *Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia* that the federal government and states administering NPDES programs made the connection between surface mining operations and the potential for discharges of selenium from coal mining operations. Around this time WVDEP began to require monitoring for selenium in discharges from surface coal mining. Monitoring for selenium was required so that future permitting decisions would be informed by actual data from outfalls. The collection of outfall data is an important part of the permitting program. Monitoring may be useful to demonstrate several aspects of the discharge, including but not limited to the following:

1. That the contaminant of interest is present in the discharge;
2. That the contaminant of interest is present at a concentration that exceeds or potentially may exceed water quality standards; and

3. Whether there are changes in concentration over time, in different seasons and under different hydrological conditions (wet versus dry).

Once WQBELs for selenium were newly incorporated into existing mining permits, the state's permits provided for a schedule to come into compliance with this new parameter.

With regard to Petitioners' first point that WVDEP issues permits using "report only" requirements rather than WQBELs, WVDEP acknowledged in an August 3, 2010, letter to the EPA addressing the allegations in the petition, that when it first began to consider selenium in mining discharges in 2002, it issued permits only requiring monitoring and reporting provisions for selenium for certain outfalls. At that time, it had inadequate data to be able to establish WQBELs for selenium in the permitted discharges. This was particularly the case for bench discharges, which are discharges from sedimentation ponds that only discharge during precipitation events, because: 1) data from such discharges is usually more limited; 2) WVDEP's narrative WQS guidance deems these discharges to be minimal contributors of contaminants due to the limited contact of storm water with potentially toxic materials (such as selenium rich overburden); and 3) these discharges only occur during large precipitation induced events with a larger assimilative capacity (dilution). If and when monitoring showed that the discharges included selenium, the state would consider whether selenium limits were necessary. If the state determined that selenium discharges from a mine could cause exceedances of the WQS, the permit would include selenium limits. More recently, in the case of new discharges into waters impaired for selenium, WVDEP has included selenium limits in the permits even without initial monitoring or the analytical data from the discharge, basing the limits on the data from other nearby discharges.

Petitioners cited two permits as examples to support their allegations concerning the "report only" permit requirements. The Spruce No.1 NPDES permit cited by the Petitioners has expired, and the selenium limits for this mine can be reevaluated during the reissuance process. The EPA will receive this draft permit for review and will review to assure consistency with the CWA. In the case of the NPDES permit for the Hobet's Berry Branch mine, another example cited by the Petitioners, WVDEP added selenium limits when it reissued the permit in 2009.

The Petitioner's fourth point concerns the use of compliance schedules in NPDES permits. In re Star-Kist Caribe, Inc., 3 E.A.D. 172, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that: 1) after July 1, 1977, permits must require immediate compliance with effluent limitations based on water quality standards adopted prior to July 1, 1977; and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the state has clearly provided for their use in its water quality standards or implementing regulations. In addition, compliance schedules must meet the requirements outlined in the regulations at 40 C.F.R § 122.47 or equivalent state regulation. The EPA provided guidance on developing compliance schedules consistent with the CWA and the implementing regulations in a May 10, 2007, memo entitled "Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits," by James Hanlon, Director of the Office of Wastewater Management.

The EPA recognizes that in the past WV has included compliance schedules in permits that may not have been consistent with the CWA. To clarify the CWA requirements on the use of compliance schedules in NPDES permits, EPA sent a letter to WVDEP on November 16, 2007. Since 2007, WVDEP has been working with the EPA to assure that permits with compliance schedules are consistent with program requirements, include schedules only when appropriate, require compliance as soon as possible, and incorporate enforceable milestones. See 40 C.F.R § 122.47;

WV C.S.R. §§ 47-10-8 and 47-30-6.2.o. The EPA has found that only a small number of the 80 plus permits it has reviewed, which have limits for selenium, include a compliance schedule for selenium. For example, the final permit for Hobet Mining for discharges to Mud River, which WVDEP issued on March 15, 2013, includes final selenium limits that are effective immediately.

Although the EPA finds that WV has addressed some of the allegations raised by the Petitioners with regards to permits for selenium discharges, as discussed above, we are deferring a decision on permitting for selenium discharges. We are continuing to review WV NPDES permits to assess whether they are in compliance with the requirement of the CWA to include limits as necessary to meet the WQS for selenium. This includes reviewing whether the state is appropriately determining whether there is reasonable potential for new discharges to cause exceedance of the selenium water quality criteria. Deferring a decision at this time will allow the EPA to consider the impact of new selenium criteria in permitting of selenium discharges. Pursuant to the April 2013 amendments to WV Code § 22-11-6, WVDEP has proposed adding new selenium criteria, which if adopted and approved by the EPA, will need to be reflected in permits where selenium WQBELs are required. The new criteria are not based on water concentration, but rather on the level of selenium in fish tissue. Incorporation of selenium permit limits to address levels of the contaminant in fish tissue, and coordinating the application of water column versus fish tissue criteria into permits would be new practices in NPDES permitting in WV.

Deferring a decision on the allegations in the petition concerning the permitting of selenium discharges is consistent with a December 2013 determination by the Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior. OSMRE oversees state programs that implement the Surface Mining Control and Reclamation Act (SMCRA) of 1977. On June 24, 2013, OSMRE received a petition under 30 CFR Part 733 (733 petition) requesting that OSMRE withdraw approval of the West Virginia surface coal mining regulatory program. Eighteen organizations,[4] including the Petitioners, requested that OSMRE review certain aspects of the WV surface coal mining regulatory program. The same office in WVDEP reviews permit applications and issues permit under the CWA and SMCRA. One of the allegations included in the 733 petition focuses on the effect of discharges from mines in creating and preventing improvement in selenium-impaired streams. These allegations are based on Petitioners' argument that SMCRA requires compliance with the CWA and that NPDES violations for mines are automatically SMCRA violations. On December 30, 2013, after analysis of the allegations and review of relevant information, OSMRE issued an initial determination on the 733 petition. OSMRE determined that 14 of the 19 allegations in the 733 petition did not warrant further evaluation. For the remaining five allegations, OSMRE has been conducting a further evaluation. One of the areas that OSMRE is evaluating further is the permitting of mines by WV where stream water quality is impaired by selenium. We understand that OSMRE expects to complete preliminary work by the end of 2015 and to issue a final decision in 2016.[5] If OSMRE determines that

[4] The 18 organizations listed in the 733 petition are: Appalachian Catholic Worker; Appalachian Voices; Catholic Committee of Appalachia; Center For Biological Diversity; Center for Health, Environment & Justice; Christians for The Mountains; Coal River Mountain Watch; Earthjustice; Keeper of the Mountains Foundation; League Of Women Voters of West Virginia; Mountain Health and Heritage Association; National Wildlife Federation; Ohio Valley Environmental Coalition; Sierra Club; West Virginia Citizen Action; West Virginia Environmental Council; West Virginia Highlands Conservancy; and West Virginia Rivers Coalition.

[5] OSMRE "West Virginia Regulatory Program, 30 CFR 733.12(a) Evaluation Workplan, Cumulative Hydrologic Impact Assessments (CHIA) and the Petitioner's allegation of the failure of the State to anticipate mining in the permit CIAs (Cumulative Impact Areas) and occurrences of selenium in certain West Virginia watersheds." OSMRE "West Virginia Regulatory Program, 30 CFR 733.12(a) Evaluation Workplan, Exceedance of Water Quality Standards, Evaluation Years 2014/15."

the State is not effectively implementing, administering, maintaining or enforcing the approved WV SMCRA program, the procedures of 30 CFR 733.12(b) apply:

The 30 CFR Section 733.12(b) procedures include: notifying a State in writing of the portions of the program OSMRE believes are not being effectively implemented, administered, maintained, or enforced; describing OSMRE's rationale for this belief; and specifying a time period for a State to complete any necessary remedial measures. Additionally, a State is given an opportunity to participate in an informal conference and a public hearing is held. Upon exhaustion of these processes, if OSMRE determines that a State has failed to effectively implement any part of its approved program, 30 CFR Section 733.12(f) or (g) is implemented. Specifically, if a State has not demonstrated its capability and intent to properly administer its program, OSMRE will either substitute direct Federal enforcement for all or part of the program or recommend to the Secretary of the Interior withdrawal of approval of the program in whole or in part.[6]

By continuing to evaluate the allegation in this petition regarding permitting of selenium discharges, we will be able to coordinate with OSMRE in its evaluation and consider any workplan implementation in our final response. Therefore, we are deferring a decision on permitting for selenium discharges.

Compliance schedules in other permits:

In the July 31, 2009 supplement to the petition, Petitioners raised the issue of excessively long compliance schedules in permits not only in the case of selenium discharges from mining operations, but also in permits for municipal sewage treatment plants. Petitioners referred to the municipal wastewater permits issued to the cities of White Sulphur Springs and Hillsboro. Both of these permits were appealed to the WV EQB, which on July 15, 2010, issued an order reversing and remanding the permits to WVDEP. In May of 2014, the EPA received from the WVDEP the draft permit for White Sulphur Springs. Based on EPA's review and comment on the draft, a final permit was reissued for White Sulphur Springs on June 30, 2014, that reflects a compliance schedule that includes interim milestones in accordance with EPA regulations where compliance will be achieved as soon as possible. To date, no draft permit for Hillsboro has been submitted to the EPA for review. The EPA will review the appropriateness of compliance schedules when WVDEP prepares a new draft permit for Hillsboro, as well the appropriateness of compliance schedules for other municipal wastewater treatment plant (WWTP) permits. Moreover, in addition to EPA review, there is opportunity for public comment on compliance schedules in proposed permits. We note that a long compliance schedule may be appropriate if it reflects the amount of time needed to build treatment "as soon as possible." For example, in the case of a public WWTP that may require large infrastructure development to address treatment, such a long schedule may be merited. However, these are considerations to be made on a case-by-case basis. At this time, the EPA does not agree that the allegations regarding compliance schedules in permits for municipal WWTPs provide a basis for commencement of withdrawal proceedings.

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[6] *OSMRE Analysis and Determination of the June 2013 West Virginia 30 CFR Part 733 Petition: Request for Evaluation of the Approved West Virginia Program* ("*OSMRE December 2013 Analysis and Determination*"), Office of Surface Mining Reclamation and Enforcement, Department of Interior, December 30, 2013, p.1.

IV. ALLEGATION: WV CONSISTENTLY FAILS TO COMPLY WITH THE PUBLIC PARTICIPATION REQUIREMENTS OF 40 C.F.R. PART 123

Summary Statement: Petitioners allege that WV administers the NPDES program in a manner that ignores the public participation requirements, in particular as they apply to permit modifications. Petitioners point to the following problems in the state's permitting process: 1) settlements or final orders approved by the EQB result in major modifications which are not subject to public notice; 2) WVDEP has a policy of modifying permits to extend compliance schedules for aluminum WQBELs without affording the public the opportunity to review and comment on the revised permits; 3) the WV Legislature enacts legislation that affects the program without providing for public comment; and 4) WVDEP is not providing public notice and opportunity to comment on socio-economic evaluations conducted as part of antidegradation review.

Response:

Regarding Public Notice for permits after EQB review: On July 13, 2011, the EPA sent a letter to the EQB and WVDEP that explained that all NPDES permits issued by the state after an appeal to the EQB must follow all NPDES program requirements, including procedural requirements. WVDEP has confirmed that if a permit appeal to EAB results in a permit modification which is not minor, whether due to an order from the EAB or from a settlement agreement in accordance with established procedures, WVDEP requests comments in the reissuance of those permits and sends the proposed permits to the EPA for review. Since July of 2011, WVDEP has been submitting regularly to the EPA permit modifications which have resulted from an administrative appeal to the EQB for review and comment.

Regarding modifications of WQBELs for aluminum: In 2003 and 2006 the EPA approved revisions to the state's aluminum water quality criteria. Revisions to the aluminum criteria prompted revisions to aluminum WQBEL in permits. Correspondence and discussions with WV relating to these permits have resulted in greater transparency in this process. In WV's response to the Petitioners' allegations, the state indicated that it intends to treat modifications of compliance schedules in permits that alter the final compliance date as permit modifications subject to public notice. Since 2010, the EPA has reviewed over 35 such NPDES permits and permit modifications. EPA's review included the permit for Jack's Branch, wherein the state requested public comment on, among other things, the applicable aluminum WQBELs.

In EPA's view, WV is making significant progress on transparency in permit issuance, including those resulting from administrative appeal proceedings and modifications to water quality standards for aluminum. Thus, the EPA does not agree that commencement of withdrawal proceedings is warranted based on these allegations.

Laws enacted by the WV Legislature: As discussed in Part I - 2, the 2009 amendment to WV Code § 22-11-6 by SB 461 has been repealed and it is no longer relevant to the WV NPDES program.

Providing public notice and opportunity to comment on socio-economic evaluations conducted as part of antidegradation review: Antidegradation review applies to new or increased discharges that can cause significant degradation of the existing water quality of the receiving waters. WVDEP has assured the EPA that proposed permits allowing for new or increased pollutant discharges are subject to public notice and comment. Such notifications include a paragraph stating that antidegradation review has

been conducted, and that where applicable, a socio-economic evaluation is part of the public record. This provides opportunity to the public to comment on this aspect of the application. The state submitted several examples of this practice. Thus, the EPA has concluded that initiation of withdrawal proceedings is not warranted based on these allegations.

V. ALLEGATION: WV'S NPDES ENFORCEMENT PROGRAM IS GROSSLY DEFICIENT

General Summary Statement: Petitioners assert that WVDEP has a history of failing to enforce NPDES permit limits resulting in a failure to deter future violations.

Response: The petition and the November 13, 2009 supplement to the petition cite specific issues with WVDEP's enforcement program with respect to coal mine discharges of selenium, coal mining discharges generally, industrial and municipal facilities, and a large fish kill in Dunkard Creek. These specific allegations are discussed below. The Petitioners appear to be arguing that the collective allegations add up to a "weight of evidence" showing that WV's NDPES enforcement program as a whole is "grossly deficient."

The Agency has reviewed the state's enforcement program as part of its established oversight activities. The CWA requires state NPDES programs to have adequate authority to address violations of the permit and the permit program. CWA § 402(b)(7); 40 C.F.R. § 123.27. Failure to seek adequate penalties or to act on permit violations can be grounds for withdrawing NPDES program approval. 40 C.F.R. § 123.63(a)(3). To address concerns about consistency in enforcement activity across state programs and in the oversight of state programs by EPA regions, the EPA, working collaboratively with the Environmental Council of the States (ECOS), designed a State Review Framework (SRF) to evaluate state enforcement of environmental programs under multiple statutes, including the Clean Water Act, in 2004. The framework uses existing program guidance, such as EPA national enforcement response policies, compliance monitoring policies, and civil penalty policies to evaluate state enforcement performance and to make recommendations to improve the program where indicated.

EPA most recently conducted an SRF review of WVDEP's program in 2011.[7] In the SRF Report, the EPA made recommendations for certain aspects of the state's NPDES compliance and enforcement program. While noting specific areas where the WV program needs improvement, the EPA does not agree that the quality of WV's NPDES enforcement program as a whole warrants initiation of withdrawal proceedings.

In further response to the allegations in the petition, the EPA has considered whether initiation of withdrawal proceedings with respect to each of the areas of alleged specific failures of enforcement is warranted, as discussed below. In summary, the EPA is deferring a decision on the aspects of the allegation that WVDEP fails to properly enforce against violations by mining operations pending the completion of OSMRE's evaluation of WVDEP's surface coal mining regulatory program and, if warranted, the 30 CFR 733.12 process. The EPA has determined that the Petitioners' other enforcement-related allegations do not constitute grounds for initiating withdrawal proceedings based on the rationale explained below.

[7] The "Round 1" SRF review occurred in 2007. Round 2 occurred in 2011 and constituted a review of 2010 data. The full Round 1 and Round 2 SRF reports are available at http://www2.epa.gov/compliance/west-virginia-state-review-framework

1. Selenium

Summary Statement: Petitioners assert that the state of WV has a long history of not enforcing violations of selenium permit limits by coal mining operations. According to the Petitioners, WV has not required that permittees with selenium limit violations treat their wastewater discharges to reduce selenium, and come into compliance with their permit limits. Furthermore, when environmental groups sent 60-day notices of intent (NOI) to sue certain permittees in violation of their selenium limits, WVDEP filed actions that have precluded the groups' lawsuits.[8] According to the Petitioners, the purpose of WVDEP actions was to provide coverage to the permittees against the citizens and not to bring compliance with the CWA. In addition WVDEP modified 90 NPDES permits to extend the compliance schedules that were about to expire. Petitioners assert that the lack of enforcement of selenium limits is the equivalent of a *de facto* suspension of the WQS for selenium.

Response: WV has taken a number of actions to ensure compliance with selenium effluent limits in permits issued to coal mines. The state has filed approximately 16 complaints in state circuit court to address selenium discharge violations. As of October 2014, the state reported to the EPA that it had entered into about seven consent decrees that included penalties for selenium violations totaling over $1.5 million. The consent decrees also included site-specific injunctive relief, milestones, and end dates for compliance with selenium effluent limits. The numbers of enforcement cases, nature of corrective actions, and size of penalties collected do not suggest a suspension of the water quality standards for selenium, nor do they suggest a deficient enforcement program.

The Petitioners argue that the state enforcement program efforts are inadequate because the state filed actions that preempted citizens' actions. The CWA requires citizens to notify states and the EPA prior to suing an alleged polluter. CWA §505(b). This provision allows the state and/or the EPA to decide whether to file its own enforcement actions. The fact that such action might preempt a citizen's action, or that the state obtained a different remedy than the citizens might have sought, does not on its own indicate that the state enforcement action is inadequate. There is wide enforcement discretion exercised by the EPA and the states in deciding which cases to pursue and the appropriate penalty in a particular case. See, e.g., Piney Run Preservation Ass'n v. County Commissioners of Carroll County, 523 F.3d 453, 459-60 (4th Cir. 2008) (government's enforcement discretion includes the discretion to forego penalties). It is not unusual that at the time a citizen group gives notice that it intends to initiate a suit, a state is already conducting a confidential investigation and/or settlement negotiations that predate notification by the citizens. Having said that, the EPA recognizes that some of the early enforcement actions by WV on selenium violations were subsequently found to be inadequate for the purpose of citizen suit preemption, (see, e.g. OVEC v. Hobet Mining LLc, Civ. No. 3:08-cv-88, 2008 U.S. Dist. LEXIS 105559, at *13-14 (SDWA Dec. 18, 2008), but see Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376, 382 n.5 (8th Cir. 1994) (finding that evaluating a state law for the purpose of NPDES program approval is different than evaluating state law for the purpose of precluding penalty actions), but as described above, WV's current efforts to address selenium non-compliance are not, in EPA's opinion, inadequate and do not warrant the commencement of withdrawal proceedings at this time.

As discussed in Part III of this document, the EPA recognizes that in the past WV has included compliance schedules in permits that may not have been consistent with the CWA. To clarify the use of

[8] *See* CWA section 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

compliance schedules in NPDES permits, in comparison to the use of compliance schedules as tools in enforcement actions, EPA sent a letter to WVDEP on November 16, 2007, concerning the use of compliance schedules under the Clean Water Act. Since 2007, WVDEP has been working with the EPA to assure permits with compliance schedules are consistent with federal requirements, and include appropriate limits and milestones that can be enforced through administrative or judicial action.

2. General Mining

Summary Statement: Petitioners assert that WVDEP has failed to review discharge monitoring reports at mining operations and to bring enforcement actions when there are violations. As a result of successful enforcement actions by the EPA and citizen groups, several dischargers have initiated settlement discussions with WVDEP to preempt action by citizen groups. The penalties resulting from these settlements are inadequate to assure compliance. WVDEP failed to calculate the economic benefit to the polluter as a result of its noncompliance, and frequently did not assess penalties for daily violations, which would have resulted in greater fines.

Response: In the state's August 3, 2010 response to the EPA regarding the withdrawal petition, WVDEP summarizes some of its enforcement efforts from 2006 through 2010. See WVDEP's Response, pp. 13-14. During this period, WV collected millions of dollars in penalties from coal companies and cooperated with the EPA on several Federal enforcement actions.

Since 2008, WVDEP has collected significant penalties from mining discharge enforcement actions, as reported by WVDEP to the EPA. In Federal fiscal year 2010 alone, the WVDEP Division of Mining and Reclamation (DMR) issued about 134 informal actions (informal actions are those that address minor violations by notifying the permittee and requiring swift compliance without assessing penalties), nine administrative enforcement actions and 15 formal civil enforcement actions. Penalties assessed and collected in 2010 for violations by mining dischargers were more than $1.7 million. From 2006 through 2013, WVDEP collected over $15.9 million in penalties for violations. In addition WVDEP has issued over 473 Notices of Violation of permit effluent limits since 2010. In 2013, WVDEP issued a total of 191 Notices to Comply and, using the SMCRA time frame for compliance, permittees with effluent limit violations are given 24 hours to bring their operations into compliance.

West Virginia is also working to strengthen the documentation in its penalty calculations of economic benefit recovery. Actions within the mining program being discussed by the EPA and the state include training of enforcement personnel and revision to enforcement policy documents.

The SRF, discussed above, did not review enforcement of mining permits. Rather, a separate programmatic review was conducted in July 2011to evaluate WVDEP compliance monitoring and enforcement activities for the NPDES mining program (based on 2010 data). Findings for the mining program indicate a number of issues with the WVDEP mining program, including failure to take timely and appropriate enforcement action; and failure to capture economic benefit for noncompliance. In addition, inspection reports reviewed did not capture or document the NPDES portion of the inspection and enforcement is based on Surface Mining and Control and Reclamation Act requirements.

As described above in Part III, OSMRE received a 733 Petition asking for withdrawal of the approved WV surface coal mining regulatory program. Four allegations in the 733 petition are related to enforcement, specifically:

- WVDEP Failed to Properly Conduct Mandatory Inspections;
- WVDEP Failed to Make Adequate Use of Enforcement Tools;
- West Virginia Failed to Enforce Dam Safety; and
- WVDEP Fails to Issue SMCRA Violations where NPDES Violations Exist.

In its December 30, 2013 initial determination concerning the 733 Petition, OSMRE concluded that most of the enforcement-related allegations did not warrant further evaluation, but decided to study further the allegation that WVDEP fails to enforce CWA violations in mining sites. The summary of this allegation in OSMRE's initial determination is cited below:

> *Summary of Petitioners' Allegation:*
> *Petitioners allege that OSMRE failed to automatically take enforcement action when OSMRE has reason to believe an NPDES violation has occurred. Petitioners argue that WVDEP rarely issues citations when those violations occur on a mine site, even though SMCRA permits require compliance with the CWA. Petitioners state that WVDEP's failure to enforce CWA violations on SMCRA sites allows improper permitting or bond release. Petitioners allege that, as a result, WVDEP's allegedly continuous failure to issue NPDES violations shows a pattern of failure to protect water quality and illustrates WVDEP's inability to properly implement SMCRA.*[9]

In response to this allegation, OSMRE concluded:

> *OSMRE Determination:*
> *Petitioners assume self-reported exceedances of NPDES permit limits require a corresponding WVSCMRA violation to be issued; however, this is not true. Additionally, the number of outlets reporting non-compliance is a small percentage of the total outlets reporting and does not indicate a systemic failure. However, after completion of the verification process, OSMRE determined information presented warrants further evaluation of this allegation to determine whether there is reason to believe WVDEP is not effectively implementing, administering, maintaining, or enforcing the approved WV program.*
>
> *OSMRE will continue its evaluation to determine why some mines have repetitive self-reported exceedances. As part of this evaluation, OSMRE will determine if WVDEP, using the WVWPCA as the only authority to correct self-reported exceedances, impacts the effectiveness of the WV approved program.*[10]

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[9] *OSMRE December 2013 Analysis and Determination*

[10] *Id.* at 42.

OSMRE is in the process of conducting the evaluation of whether WV is properly addressing and preventing repeated noncompliance at mining sites.[11] According to OSMRE, the evaluation will be completed in 2016. If OSMRE determines that the state is not effectively implementing, administering, maintaining or enforcing the approved WV SMCRA program, the procedures of 30 CFR 733.12(b) apply, as described above in Section III.

In light of the active OSMRE process, the EPA is deferring a decision on the allegations related to WVDEP alleged failure to review discharge monitoring reports at mining operations and to bring enforcement actions when there are violations until after OSMRE has completed its 733 evaluation. The EPA expects that the OSMRE findings will be relevant to the EPA evaluation of the adequacy of WV's NPDES mining permits enforcement. The EPA is therefore deferring a response with respect to these allegations.

3. Municipal and Industrial Facilities

Summary Statement: Petitioners assert that WVDEP also neglects enforcement against major industrial facilities for violations of toxic limits and against municipal wastewater treatment facilities. The petition mentioned mercury discharges by PPG Industries and discharges of other toxic substances by Mountain State Carbon, and noncompliance by several municipal facilities, including Municipal Separate Storm Sewer Systems (MS4s).

Response: WVDEP has taken over 953 formal enforcement actions and 4,251 informal enforcement actions in calendar years 2009 through 2013. These numbers include both municipal and industrial facilities. WVDEP staff receives extensive training on conducting compliance inspections. Additionally, the EPA and WVDEP/Environmental Enforcement have regular communication including quarterly conference calls to discuss appropriate action against egregious violators, including those identified through WVDEP inspections conducted in accordance with the State's annual compliance monitoring strategy.

WVDEP has the authority to pursue administrative as well as civil and criminal enforcement to address violations. WVDEP staff oversees administrative enforcement actions, including unilateral orders, administrative consent orders, and civil administrative penalties. In addition, staff may recommend civil action. Potential cases for civil litigation are reviewed by the Chief Inspector, who determines whether to refer the case to the WVDEP Office of Legal Services (OLS).

Based on EPA's review of its records on the Mountain State Carbon facility for the period cited by the Petitioners, non-compliance appeared to be related to an internal monitoring point that did not result in an effluent exceedance at point of discharge. WVDEP, as well as the EPA, could take enforcement action against this facility in the future in the case of continuing noncompliance. WVDEP has continued to monitor Mountain State Carbon's permit compliance, in part through onsite inspections, and has issued several Notices of Violation (NOVs) requiring the facility to immediately correct deficiencies, and/or develop a corrective action plan. In each instance the NOVs were issued to the regulated entity shortly after an inspection was conducted, and each NOV required a written response with the description of remedial measures taken to address the violation.

[11] See footnote 5, *supra.*

With regard to the municipal facilities mentioned by the Petitioners, the state has investigated and brought enforcement actions against the City of Weston, the City of Nitro, and North Beckley. At the City of Weston facility, WVDEP took a number of enforcement actions from 2007 through 2014 (e.g., NOVs and pre-enforcement actions). WVDEP imposed a penalty on Weston and imposed a compliance schedule that includes eliminating combined sewer overflow outfalls, submitting an approvable Long Term Control Plan, and studying and implementing projects to reduce inflow and infiltration. WVDEP has monitored the compliance schedule that became final on February 10, 2011, following the close of a public comment period. Since the effective date of the final order, WVDEP has conducted annual inspections of the facility and promptly notified the City of any noncompliance. A Compliance Sampling Inspection, conducted on May 20, 2014, resulted in a Notice of Violation issued to the City of Weston to address all non-compliance that was observed during the inspection. The WVDEP files reviewed for inspection and enforcement action since 2007 demonstrate that the WVDEP has inspected, promptly addressed noncompliance, and monitored the long-term schedule included in the final order.

WVDEP conducted an inspection of the City of Nitro facility on August 25, 2011, and issued a notice of violation for failure to submit discharge monitoring reports for outfall 002 during the second half of 2010. The facility has since come into compliance and additional enforcement actions have not been pursued. When Nitro's Long-Term Control Plan (LTCP) was approved on March 29, 2011, WVDEP concurrently amended an enforcement compliance order against the facility that incorporated the necessary LTCP projects and implementation schedule.

Following an inspection conducted by WVDEP on June 8, 2011, WV issued an NOV to North Beckley, which included the following violations: failure to submit a plan of action after exceeding ninety percent of design flow in three consecutive months; unauthorized discharges at the Sprague lift station; and industrial user effluent limit violations. WVDEP has advised the EPA that it considers North Beckley to be in compliance with its permit as of April 2012.

With respect to PPG, after WVDEP filed a complaint against the facility in the spring of 2009, it negotiated a consent decree that included a compliance schedule to address effluent violations including total mercury, total recoverable copper, total sulfide, and total recoverable iron. Petitioners allege that the WVDEP took action only after a citizens' group filed a Notice of Intent to Sue (NOI) against PPG, but the state's complaint was the culmination of an ongoing investigation that preceded the citizens' NOI. The consent decree, entered in August 2010, also imposed a $1,020,000 cash penalty, and included stipulated penalties and supplemental environmental projects valued at $350,000. WVDEP continues to closely monitor this facility, and on January 2013, WVDEP renegotiated the consent decree with PPG to address new violations. The revised decree covers violations of new permit limits, which became effective in July of 2011, for organochlorides, and required PPG to pay nearly $450,000 in additional penalties. WVDEP conducted an inspection of this facility and monitored PPG's compliance obligations following issuance of the final penalty order. The PPG facility permit was transferred from PPG Inc. to Eagle Natrium LLC, a subsidiary of Axail Corporation on January 31, 2013.

Regarding enforcement of municipal stormwater permit requirements, the most recent MS4 general permit issued by WV in July 2009 includes detailed provisions that allow for more focused enforcement. WVDEP has inspected about half of the municipalities covered by the MS4 permit and it intends to complete inspections of all covered municipalities. In December 2012, all state MS4 inspectors received training at the EPA. WVDEP evaluated the City of Huntington's compliance with their NPDES permit. The evaluation resulted in the issuance of a unilateral order to the City on

September 9, 2009, requiring the City to correct observed program deficiencies. MS4 implementation and enforcement is a growing program nationwide and the state is enhancing its program accordingly.

Thus, based on the review of these various municipal inspection and enforcement actions the EPA has concluded that initiation of withdrawal proceedings based on these allegations is not warranted.

4. Dunkard Creek Fish Kill

Summary Statement: Petitioners point to the massive fish kill in Dunkard Creek in the fall of 2009 that resulted from a failure to enforce chloride limit violations by Consol Energy's Blacksville No. 2 mine.

Response: The 2009 aquatic life kill in Dunkard Creek resulted in the death of thousands of fish, salamanders and mussels. The kill resulted from the bloom of an algal species not expected to be found in WV. It is believed that high levels of chloride in the creek allowed the algae to bloom. The high levels of chloride were caused, at least in part, by discharges to surface water from several mines. While the mines had NPDES permits, the permits had been modified to include lenient compliance schedules which are believed to have exacerbated the problem. WV no longer issues orders to modify compliance schedules in permits, and is properly implementing compliance schedules in permits (see Part III of this document). WV immediately responded to the fish kill by limiting the discharges to the creek and it partnered with the United States to investigate and address the Dunkard Creek fish kill.

A joint judicial action by WV and the United States resulted in a consent decree against Consol Energy Inc. that required Consol to pay $5.5 million in penalties. The decree also required that Consol build treatment for chloride discharges from several mines, at a cost of approximately $200 million.

As a result of the state's restoration efforts and of the limitations in discharges to the creek implemented by Consol, aquatic life appears to be recovering in the creek. Based on a survey conducted by the state in 2012, the state found that about 95% of the fish population had returned to the creek and they continue to increase in number. Thus, the EPA will not commence withdrawal proceedings based on these allegations.

VI. ALLEGATION: WV HAS FAILED TO COMPLY WITH THE TERMS OF THE MEMORANDUM OF AGREEMENT REQUIRED UNDER 40 C.F.R. § 123.24

Summary Statement: Petitioners state that in 2009 they submitted a request for information to WVDEP for the production of annual statistics reports required under the 1982 Memorandum of Agreement (MOA) between the EPA and WV. The Petitioners received a "no records" response, which led them to conclude that WV had not submitted the reports required by the MOA. The annual statistics report required by the MOA should include the number of minor permits reviewed, numbers of non-complying minor permittees, numbers of enforcement actions and the numbers of permit modifications with extended compliance deadlines. Because nearly all mining permits are classified as minor, Petitioner states that this failure to submit annual statistics reports contributes to lax enforcement of the NPDES program in WV.

Response: In its efforts to gather information responsive to this petition, EPA conducted a search of its records. The EPA found that the annual statistics report required by the MOA had been submitted to the

EPA by WVDEP in a timely manner. Much of the information contained in these annual reports is now available in publically searchable databases.

In addition to the reporting requirements set forth in the MOA, if a state receives financial assistance from the EPA authorized under Section 106 of the CWA (to establish and implement ongoing water protection programs), it is subject to further reporting measures and performance standards. WV receives a CWA Section 106 grant which helps to fund programs such as NPDES permitting, the development of water quality standards and TMDLs, ambient water monitoring, enforcement, training, and public information. In accordance with its grant and other reporting requirements, the state has consistently submitted the required reporting information. Many of the reporting requirements under the CWA Section 106 grants are identical to those required by the MOA and over time, the reports have been combined, updated and computerized to make information collection and reporting manageable and cost effective.

As described above, WV is submitting the required information to the EPA, and that information is generally available to the public from various sources.[12]

VII. ALLEGATION: WV HAS FAILED TO DEVELOP AN ADEQUATE REGULATORY PROGRAM FOR WATER QUALITY BASED EFFLUENT LIMITS

1. Antidegradation – Socioeconomic Reviews

Summary Statement: Petitioners point to several permits that would allow significant degradation of water quality due to selenium discharges permitted without the proper antidegradation review.

Response: The antidegradation policy mandated by the CWA prohibits significant degradation of the quality of high quality waters except where necessary to accommodate important economic and social development. See 40 C.F.R. § 131.12(a)(2) and WV Code of State Rules §§ 47-2-4.1.b and 60-5-5.

In addition, if it appears that a new or increased discharge will significantly degrade the assimilative capacity of the water, the discharger has to provide an alternative analysis, WV Code of State Rules § 60-5-5.7. If the discharge will not reduce the assimilative capacity of the receiving water, then it is deemed not to cause significant degradation. To prevent significant degradation and to obviate the alternative and the socio-economic justification, permits include limits to assure that the discharge will not reduce the assimilative capacity by more than 10%. In other words, although all discharges must include limitations to maintain the uses of the water and to prevent excursions above the applicable water quality criteria, discharges to high quality water can be further subject to even more stringent limits. In the alternative, discharges that would degrade high quality waters must be justified through a social and economic analysis.

In a review of mining permits since 2009, the EPA has found that WV generally calculated limits in accordance with the antidegradation requirements. The state and the EPA have been working and will

[12] For example, the EPA maintains the Enforcement and Compliance History (ECHO) website which provides information to the public, at http://www.epa-echo.gov/echo/. ECHO integrates inspection, violation and enforcement information for the several environmental statutes including the CWA.

continue to work together during permit review to improve implementation of antidegradation and to assure that a social and economic analysis is completed when needed. In EPA's view, progress is being made on this issue, and therefore this issue is not a basis to initiate proceedings for withdrawal of the NPDES program at this time.

With regard to the NPDES permit for the Consol of Kentucky, Buffalo Mountain Mine (WV1029690), a revised permit was forwarded to the EPA on March 26, 2012 for its review and comment. The review of that revised permit and associated documents shows that WVDEP has addressed EPA's concerns related to assimilative capacity and the socioeconomic review. The permit was issued on October 29, 2012. The WV antidegradation implementation procedures, WV C.S.R. §60-5.8, specify the factors that need to be addressed in deciding whether to allow a discharge to a high quality water. Those factors include, among others, employment benefits and economic and environmental impacts. In the case of Buffalo Mountain, the EPA found that WV followed the required and federally-approved procedures for reviewing the social and economic importance of the project. Therefore, the EPA has concluded that based on this allegation, initiation of withdrawal proceedings is not warranted.

2. Mining General Permit

Summary Statement: In 2007 WVDEP issued permit WVG0499991, a general permit intended to cover a subset of alkaline mine drainage mines. It was initially believed that this general permit would cover approximately 50 mining sites. Petitioner asserts that this permit does not comply with Federal CWA requirements for water quality based effluent limits.

Response: The EPA and WVDEP agree that permitting for mining sites subject to NPDES requirements can best be accomplished using individual permits rather than a general permit. Therefore WV did not reissue this permit after it expired in May 2012, and it has no plan to do so in the future. Accordingly, this issue is no longer relevant and does not constitute a basis for initiating proceedings to withdrawal NPDES program approval from WV.

3. Failure to Develop TMDLs for Ionic Strength Impaired Streams

Summary Statement: Petitioners seek to commence withdrawal proceedings because WV has not developed TMDLs for ionic strength impaired streams. Petitioners point to several TMDLs (Upper Kanawah River, 2005; Coal River, 2007; Gaulely River, 2008; Upper Ohio South Watershed, proposed 2009; and Dunkard Creek, proposed 2009) that identified ionic toxicity as a stressor but did not include TMDLs for that parameter. According to the Petitioners, the failure to develop ionic toxicity TMDLs and to adopt a WQS for that parameter has resulted in permits that are not protective of the waters of WV.

Response: Failure to develop TMDLs for particular impaired waters is not one of the criteria for withdrawal of a state NDPES program under 40 C.F.R. §123.63. Thus, these allegations do not provide a basis for commencing withdrawal proceedings.

4. Mercury

Summary Statement: Petitioners claim that WVDEP is not implementing its tissue-based human health water quality criterion for mercury and is not conducting reasonable potential analysis when permitting facilities that discharge mercury. Further, Petitioners note that WV's tissue-based criterion of 0.5 ug/g is inconsistent with the CWA 304(a) recommended criterion of 0.3 ug/g.

Response: To issue permits in compliance with the CWA, with any effluent limits necessary to meet WQS, the state must use appropriate sampling and methods to properly assess if such limits are necessary. In order for permit writers to determine whether a WQBELS for mercury is necessary, most industrial discharges must include mercury in the effluent characterization required in the NPDES application. If the effluent characterization does not show reasonable potential for mercury in the effluent discharge to cause or contribute to an excursion above any state water quality standard, mercury WQBELs are not required. In 2007, the EPA issued guidance to assist states implementing and monitoring tissue-based mercury criteria. WV has improved its procedures to incorporate appropriate monitoring for mercury. The state has required appropriate methylmercury monitoring in non-mining permits since at least 2006 and in mining permits since 2012. With mercury monitoring based on the appropriate methods, WV is now able to determine whether mercury WQBELs are necessary and to incorporate such limits.

In a letter dated September 21, 2007, the EPA addressed a separate petition from the Ohio Valley Environmental Coalition and the West Virginia Highlands Conservancy concerning WV's mercury criteria. In that letter, the EPA concluded that the Petitioners had not demonstrated that WV's mercury criteria were inconsistent with the CWA.

The EPA believes that with the requirement of methylmecury monitoring, the state has sufficient information to conduct a reasonable potential analysis and develop any required WQBEL. The EPA will continue to provide support to WV by reviewing monitoring and limit requirements for mercury in discharges in NPDES permits, in light of the implementation challenges of a tissue-based criterion. The EPA does not view this as a reason to withdrawal the NPDES permitting program from WV.

CONCLUSION

For the reasons discussed above, the EPA has concluded that most of the allegations raised by the Petitioners do not warrant initiation of withdrawal proceedings. The EPA is continuing to consider whether initiation of withdrawal proceedings is warranted with respect to the allegations raised in Part III, concerning permitting of selenium discharges, and in Part V, concerning enforcement against violations from mining discharges.

ATTACHMENT A
(enclosures not included)

west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street SE
Charleston, WV 25304
304-926-0490

Joe Manchin III, Governor
Randy Huffman, Cabinet Secretary
dep.wv.gov

August 3, 2010

Jon M. Capacasa, Director
Water Protection Division
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

RE: West Virginia Department of Environmental Protection's Response to the Petition of the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch and Ohio Valley Environmental Coalition for Withdrawal of NPDES Program Delegation

Dear Mr. Capacasa:

Enclosed is the response of the West Virginia Department of Environmental Protection to the original Petition of the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch and Ohio Valley Environmental Coalition for Withdrawal of NPDES Program Delegation. A response to the First and Second Supplements to this Petition will be forthcoming.

If you have any questions, please contact me or Scott Mandirola.

Sincerely,

Thomas L. Clarke, Director
Division of Mining and Reclamation

TLC/cm
David B. McGuigan, Ph.D.
cc: Joe Lovett

Enclosure

THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION's RESPONSE TO THE PETITION OF THE SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH and OHIO VALLEY ENVIRONMENTAL COALITION FOR WITHDRAWAL OF NPDES PROGRAM DELEGATION

The West Virginia Department of Environmental Protection (WVDEP) herby responds to the petition of the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch and Ohio Valley Environmental Coalition for withdrawal of NPDES program authority. The Clean Water Act's National Pollutant Discharge Elimination System establishes a complex, evolving regulatory scheme. The WVDEP believes it is implementing this aspect of the Clean Water Act as well or better than most states. Indeed, the United States Environmental Protection Agency (USEPA) recognized West Virginia NPDES program: for its outstanding performance for implementation of its program in 2005 achieving the goal of 90% of all permits current in FY 2007 and 95% of all priority permits issued in FY 2006 and FY 2007 as well as the National Environmental Performance Track Appreciation Award in 2007. As recently as July 13, 2010, EPA's Office of Water recognized West Virginia's leadership among NPDES programs: "EPA's Office of Water in many respects shares the view of Region 3 that WVDEP is a leader in implementing water quality-based effluent limitations, anti-degradation policy and TMDLs in permits to coal mining operations." West Virginia Response to Comments on "Review of Clean Water Act §402 Permitting for Surface Coal Mines by Appalachian States: Findings and Recommendations" Draft Report. The WVDEP also believes the issues raised in this petition have little or no merit and the petition should be soundly rejected. However, as with any complex, evolving regulatory scheme, there may be things the WVDEP can and should do to elevate its already high level of performance. The WVDEP welcomes the opportunity to explore improvements to its regulatory program with USEPA through the normal channels of USEPA oversight.

Below, the WVDEP repeats each topic heading raised in the petition, followed by its response to the allegations the petitioners make under that heading.

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

The WVDEP believes that it has all necessary legal authority under state law to fully and completely implement the NPDES program of the Federal Water Pollution Control Act. Through the West Virginia Water Pollution Control Act and the regulations lawfully promulgated in accordance with state law, the State of West Virginia has established a comprehensive regulatory scheme for implementation of the NPDES program. The petition does not provide any basis to believe otherwise and its contentions to the contrary must be rejected.

Independent of the allegations of the petition, the WVDEP is aware that the USEPA from time to time conducts Legal Authority Reviews of state NPDES programs. The WVDEP is willing to discuss any issues that arise as a result of such a review with USEPA and welcomes the opportunity to demonstrate that it has all legal authority necessary to operate this program.

Although the WVDEP does not believe it will be necessary, should it be determined to be necessary, it will initiate the process to promulgate any rules or seek any legislation that may be necessary to correct any deficiencies that may be found.

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 petition bases this claim on three cases involving appeals from NPDES permitting decisions made by the WVDEP. Each case was heard by the West Virginia Environmental Quality Board (EQB), the administrative adjudicative body established by State law to hear such appeals. A first flaw with this contention is the principle of West Virginia law that the doctrine of stare decisis does not ordinarily apply to administrative decisions. *Chesapeake & Potomac Tel. Co. v. Public Service Commission*, 171 W.Va. 494, 300 S.E.2d 607 (1982). Only a decision by the State's court of last resort, the West Virginia Supreme Court of Appeals, construing a statute is considered to become a component part of the statute and, therefore, a part of the general body of law of the State. *State ex rel. Zirk v. Muntzing*, 146 W.Va. 349, 120 S.E.2d 260 (1961) (Syl. Pt. 2). Even if an administrative adjudicative body or an inferior court (in West Virginia, a circuit court) were to render a decision which improperly construes the statutes and rules making up the West Virginia NPDES program in a manner that is inconsistent with their federal counterparts, such a decision cannot have the effect the petition claims. These decisions only represent the law of the case in these individual cases and cannot be regarded as a part of the general body of law of the State so as to diminish the State's legal authority to implement the NPDES program, if they were wrongly decided.

A second problem is that the principle case about which the petition complains, *Jacks Branch Coal Company v. WV Department of Environmental Protection*, 07-11-EQB, is something the petition neglects to disclose in order to try to make an argument that cannot be supported by the reality of the matter. This case is still being actively litigated in the Circuit Court of Kanawha County, West Virginia on the WVDEP's appeal from the EQB decision in the matter. Accordingly, no final decision has been rendered in this case. The petition's complaint about the EQB decision in *Jacks Branch,* that it improperly considers the economic feasibility of treating a discharge,[1] is a matter that is addressed in the WVDEP's appeal. Specifically, the WVDEP has argued that the EQB's authority to consider the economic feasibility of treating or controlling a discharge, is " . . . constrained by additional statutory duties, namely a requirement that the Board apply the Water Pollution Control Act and the legislative rules promulgated pursuant thereto . . .." WVDEP Brief, p. 5. The very same legal point in the *Jack's Branch* decision which the petition uses to deem the State's legal authority to be deficient is a point the State is currently contesting in its appeal of the *Jack's Branch* decision. Importantly, the State's position as to the meaning of the statute authorizing the EQB to consider economic feasibility in

[1] The real complaint of this portion of the petition is less with the three decisions it cites than it is with W.Va. Code §22B-1-7(h), which authorizes the EQB to consider "the economic feasibility of treating or controlling, or both, the discharge". This provision has been a part of West Virginia law since 1982 when West Virginia first received delegation of NPDES authority from EPA.

Jack's Branch, is essentially the same as when the State addressed this issue when it originally sought primacy under the Clean Water Act. Under a similar statutory provision that applied to the EQB's predecessor hearing board, the West Virginia Attorney General gave the following opinion:

> On appeals to the Water Resources Board on the Chief's action or inaction on a permit, the Board, in determining its course of action, considers the "economic feasibility" of treatment or control measures. [W.Va. Code § 20-5A-15(g).] However, the Board is not authorized by this provision to waive any requirements under the Clean Water Act and the regulations promulgated thereunder. These minimum requirements are binding on the Chief and the Board.

NPDES Attorney General's Statement – Supplemental Response (Attachment 1). In 1982, USEPA determined this interpretation of the Board's authority to consider economic feasibility to be consistent with the legal authority required for approval of state regulatory programs under the Clean Water Act. West Virginia's interpretation of this provision has not changed. Accordingly, there is no basis to believe that the legal authority for implementation of the Clean Water Act under West Virginia state law is inadequate.

Another observation about these cases is in two of them, the counsel for the petitioners before USEPA, Joe Lovett, was counsel for one or more parties in the case and failed to appeal the result about which he complains in the petition to a higher state court which could have addressed any alleged deficiency in the lower tribunal's application of the law. To be consistent with the Congressional policy of federalism which forms the basis for Congress' decision to create a statutory scheme which gives states primary responsibility for application and enforcement of the Clean Water Act, a litigant should not be able to complain to USEPA in a withdrawal petition about decisions in cases in which he has been directly involved as a litigant and made a conscious choice not to pursue an appeal in the appropriate state forum.

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

This contention is based on the petition's mischaracterization of a bill the West Virginia Legislature enacted during its regular session in 2009, Senate Bill 461. Contrary to the contentions in the petition, Senate Bill is not a suspension of water quality based effluent limitations for selenium. This Bill authorizes, but does not require, the WVDEP to extend compliance deadlines for selenium until July 1, 2012. Any authority it grants is purely discretionary and must be exercised in accordance with existing state law governing compliance schedules, which is <u>not</u> affected by this legislation. The WVDEP intends to utilize compliance schedules only in the manner contemplated by state and federal law, including the USEPA's interpretation of federal law in this area which USEPA provided to the State 2007 (the "Hanlon memo"). The adoption of Senate Bill 461 in no way diminishes the WVDEP's legal authority to implement the NPDES program.

The EPA should recall that, before Senate Bill 461 was adopted, the WVDEP sought USEPA's input on it when it was still proposed legislation. It shared a copy of this legislation with USEPA for its comments. Had USEPA expressed concern then about whether this Bill limited the WVDEP's legal authority to implement the NPDES program at the state level, the WVDEP would have communicated these concerns to the State's legislative leadership and Governor. The USEPA gave the WVDEP no indication that it had a real concern with this legislation. USEPA passed on the real effects of Senate Bill 461 previously and apparently found them not to negatively affect the State's legal authority.

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

The petition alleges the a case decided by the EQB "casts doubt on whether it believes that West Virginia is bound to apply section 402(o) of the Clean Water Act." This case, *West Virginia Highlands Conservancy v. McClung*, 07-10-EQB and 07-12-EQB, was initiated by petitioners' counsel, Joe Lovett, before the EQB. This contention is based entirely on two paragraphs in a 46 page final order issued by the EQB in the case. To make this contention, the petitioners take these paragraphs out of context. These paragraphs provide:

8. The WVDEP administers a federally-approved state program and is not charged with administering federal law. *See, generally, West Virginia Coal Association v. Bragg*, 248 F.3d 275 (4th Cir. 2001). Accordingly, the requirements of the West Virginia Water Pollution Control Act and its associated regulations are the controlling law before this Board.

9. 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).

A first observation about these two paragraphs is that, regardless of whether the Fourth Circuit's surface mining-based decision in *Bragg v. West Virginia Coal Association* is apposite in a case involving clean water laws, they simply state the law. In administering a federally-approved program at the state level, it is State law that is applied. This is the whole reason that USEPA conducts Legal Authority Reviews of State programs from time to time – to assure that state law counterparts to provisions of the federal Clean Water Act and associated regulations provide the state with sufficient authority to operate a regulatory program in a manner that is consistent with federal law. Where state law is deficient, or where the State is not administering state law in a manner consistent with federal law, it is a matter to be taken up by USEPA and WVDEP pursuant to 33 U.S.C. § 1342 (b) and (c). A second observation, which is more important for purposes of the petitioner's argument that this EQB decision indicates that these paragraphs cast doubt as to whether the EQB believes the State is bound to apply section 402(o) of the Clean Water Act, is that the requirements of section 402(o) are specifically addressed by the EQB in the next three paragraphs of this decision:

10. Nevertheless, with regard to allegations that the challenged orders violate the CWA's "antibacksliding" provisions, the CWA section 402(o)

limitation on relaxing a water quality-cased effluent limit in a subsequent permit only applies when the limit in the past permit has been "established" and the new limit is "comparable" to the limit in the previous permit. 33 U.S.C. § 1342(o)(1).

11. The Board concludes that there was never a "established" limit in the permits. If the prior permit contains an unexpired compliance schedule for achieving an effluent limit, USEPA does not consider the "effluent limit" to have yet been "established" or become enforceable for the purpose of anti backsliding.

12. Without an established final limit in effect, there can be no "backsliding." In the present situation, the only permit limitation for selenium with which any of these permittees have ever had to comply is the "monitor only" requirement. The extension of this "monitor only requirement" until April 5, 2010 does not equal a relaxation of an effective limit because that permit limit has not changed. Moreover, the final limit has not been changed by any of the WVDEP's actions.

The petitioners attempt to create the impression that the EQB dismissed its antibacksliding argument based on paragraphs 8 and 9 of the EQB Order, omitting any mention of the parts of the EQB order that squarely address this argument. The fact is that the EQB addressed the backsliding issue under 402(o) of the Clean Water Act in a manner that the WVDEP believes is consistent with federal law. If the petitioners believe this application of the law by the EQB is contrary to the Clean Water Act, they had the option of appealing this EQB decision. That they did not do this, or even raise this issue in a cross appeal after the WVDEP appealed from this decision, speaks volumes about the merits of the contention that they now make in the context of this petition.

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

Bond Forfeiture Sites

40 C.F.R. § 122.21(a)(1) imposes the duty to apply for a NPDES permit on "Any person who discharges or proposes to discharge pollutants . . .". In the case of each and every bond forfeiture site, all discharges have been initiated by and continue as a result of the actions of a mine operator which subsequently failed to comply with the conditions of its mining permit or with the West Virginia Surface Coal Mining and Reclamation Act, resulting in revocation of its mining permit and forfeiture of the associated bond. The legal duty the WVDEP carries out following bond forfeiture is to "take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate, with the resources available." 38 C.S.R. 2 §§ 12.4.c, -12.4.d. At bond forfeiture sites, the WVDEP, as a unit of government, is only carrying out a legal mandate to take remedial action based on the failure of a regulated entity to comply. It only performs the remedial function the law requires it to perform and does not believe that it becomes the "operator" of the mine operator's point source by doing so.

The WVDEP has merely opposed, at the district court level and on appeal to the United States Court of Appeals for the Fourth Circuit, what it believes to be an erroneous interpretation of mining law and the Clean Water Act advanced by the petitioners. The WVDEP is not alone in the position it has taken on the issue of whether it is obligated to obtain a NPDES permit for the remedial work it performs at bond forfeiture sites. The legal duty under State law to take remedial action upon the failure of a mining company to comply is derived from the federal Surface Mine Control and Reclamation Act (SMCRA), after which West Virginia's Surface Coal Mining and Reclamation Act is patterned. The WVDEP's position on this issue is required to be consistent with the interpretation of the federal agency responsible for administration of SMCRA, the Office of Surface Mining, Reclamation and Enforcement (OSM), on this point. See, *Russell v. Island Creek Coal Co.*, 389 S.E.2d 194, 182 W.Va. 506 (1989); *Canestraro v. Faerber*, 179 W.Va. 793, 374 S.E.2d 319 (1988) (State surface mining law is required to be interpreted in a manner consistent with federal surface mining law). In this regard, the statement of basis and purpose OSM included in the Federal Register in support of rules it promulgated for the federally-operated mining regulatory program in Tennessee is instructive. These rules governed instruments that provide security against the costs of OSM's remedial efforts (including water treatment) in the event of a mine operator's default. OSM stated:

> If we are required to forfeit a trust fund or annuity, we are acting in our capacity as the regulatory authority. However, that is the extent of our responsibility under SMCRA and these rules. We are not the permittee, and we do not become the permittee when the permittee defaults on reclamation obligations, which means that we do not assume the permittee's NPDES compliance duties.

72 Fed. Reg. 9615, 9629 (Mar. 2, 2007). The WVDEP is simply taking the same position on the duties imposed by state surface mining law that federal OSM has taken. WVDEP's position is also consistent with that of other states that operate state regulatory programs under SMCRA. Notably, the multi-state organization that represents the natural resource interests of the states, the Interstate Mining Compact Commission, has filed a brief as *amicus curiae* in support of the WVDEP's appeal in the Fourth Circuit.

The petitioner's contention that "WVDEP has refused to acquiesce to the district court's order", Petition, p. 6, is at best misleading. As ordered by the district court, the unit of the WVDEP that is responsible for reclamation of bond forfeiture sites has prepared and filed applications for NPDES permits for those of these sites that were subject to the district court's order. Another unit of the WVDEP is processing these applications and has sent draft permits to USEPA for its review. While it is pursuing vindication of its legitimate legal position on appeal, the WVDEP is also adhering to the schedule mandated by the district court for filing permit applications and issuing permits.

The petitioner's contention that "WVDEP has a history of underfunding the Special Reclamation Fund and has historically had difficulty determining the amount of funding it needs to meet its responsibility of treating acid mine drainage at bond forfeiture sites . . . " Petition, p. 5, is equally misleading for many reasons. First, the funding level of the Special Reclamation Fund is established by a statute adopted by the West Virginia Legislature. It is not and cannot be set by the WVDEP. Second, since the court decisions the petitioners cite for this proposition, the

Legislature has adopted legislation establishing Special Reclamation Advisory Council. This Council meets at least twice per year to examine bond forfeiture trends, reclamation cost estimates and other data in order to make recommendations to the Legislature as to the appropriate funding level for the Special Reclamation Fund. The Council utilizes economic and actuarial experts it has retained to assist it in performing its task. Since the Council was established, the Legislature has never failed to adopt legislation funding the Special Reclamation Fund at a level at least equal to that recommended by the Council. Third, water treatment costs are estimated using "AMD Treat", a cost estimation methodology developed by OSM for the specific purpose of estimating water treatment costs at mine sites, which, through the use of conservative assumptions, more commonly overestimates treatment costs instead of underestimating them. West Virginia's approach to funding the Special Reclamation Fund is as sound as that of any state with a similar fund. Fourth, and perhaps most importantly, the Special Reclamation Fund exists solely as a matter of State surface mining laws. USEPA has no jurisdiction over the level of funding of the Special Reclamation Fund by the State.

Abandoned Mine Lands ("AML")

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) established a fund which is financed from a fee levied on each ton of coal produced in the United States. This Abandoned Mine Lands (AML) fund is administered by prioritizing the sites on the bases of, among other things, to protect the public health and safety from the extreme danger or adverse effect s of past coal mining practices, and to restore land, water and environment adversely effected by past coal mining practices. However, in order to be eligible to receive funding for alleviating such dangers and adverse effects it must be determined the site was abandoned prior to August 3, 1977, and that there is no continuing reclamation responsibility for the site. In short, the structure of the AML program contemplates that if the site was not active after August 3, 1977, there is no statutory responsibility assigned for addressing dangers and adverse effects caused by mining prior to that date.

Congress passed the SMCRA anticipating the funds created for AML reclamation would be spent on high priority health and safety issues. The fact that Congress set forth a prioritization approach to reclamation and restoration work at abandoned mine sites reflects an acknowledgement that costs for the sites which qualify for funding from the AML program would likely exceed available funding. Even though the environmental impacts of acid mine drainage (AMD) can be devastating and were present and known when the SMCRA was passed, notably, AMD abatement was generally assigned a lower priority (third) for funding. This illustrates that Congress anticipated that adequate funds and technology would never exist to fully treat all AML-eligible pollutional discharges. It also establishes that funding of AMD treatment at any particular site is a discretionary matter and not a mandatory duty of the WVDEP.

Currently, the WVDEP AML program installs and maintains active and passive AMD treatment systems at some AML-eligible sites to improve the quality of the water emanating from these sites with the objective of restoring these streams to a habitable condition. It has focused its water treatment efforts on restoring more streams to a habitable condition instead of meeting all NPDES requirements in fewer streams. Requiring an NPDES permit for each and

every AML-eligible pollutional discharge would cause the WVDEP-AML Program and local watershed groups to be less effective in treating past abandoned (AML eligible) pollutional discharges due to the substantial costs (ministerial, technological, capital etc.) associated with water treatment systems under NPDES permits. Due to limited funding, the treatment that is currently active at some AML-eligible sites will likely cease to exist in order to pay for costs associated with obtaining NPDES permits and meeting NPDES limitations at other locations. Instead of making streams affected by AML-eligible discharges habitable for some aquatic life over a broader area, the WVDEP AML program would be forced to restrict its water treatment efforts and the associated benefits to just a few locations. In addition, the costs of compliance with NPDES permits could inhibit the performance of work on health and safety issues to which Congress assigned higher priority for AML funding, such as sealing portals with poor water quality.

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

The Petitioners allege that WVDEP fails to comply with requirements of federal regulations for the regulation of selenium in four ways. None of these contentions have any merit and do not support withdrawal of the State's authority to operate its NPDES program.

I.

The first way in which the Petitioners claim that WVDEP disregards federal regulations is an alleged practice of determining 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. The Petitioners cite the Spruce No.1 Surface Mine as an example of this alleged practice. In particular, they complain about the treatment of outlet 28 on this permit.

The Spruce Surface Mine WVNPDES permit WV1017021 was originally issued in 1999, well before selenium was addressed in any coal-related NPDES permit anywhere. At this time the *Bragg* litigation, which specifically targeted this proposed mining operation, was pending and the State's action on this permit was under heavy scrutiny from EPA. As a result of this scrutiny, this permit was one of the first coal mining NPDES permits in West Virginia to include selenium monitoring. Report only monitoring for selenium was added to all in-stream outlets during Modification No.1 of the permit in 2002. Criteria-end-of-pipe limits were assigned to all in-stream outlets and "report only" monitoring added to all on bench outlets during Modification No.2 of the permit in 2005. Where the immediate receiving stream is not impaired or where no developed downstream TMDL exists, report-only monitoring was the practice for adding selenium to a permit for on-bench discharges. The distinction was made because in-stream outlets discharge from ponds and flow more continuously, while on-bench outlets discharge from sediment ditches, which do not often discharge, except for during heavy or long duration precipitation events, and therefore have far lower potential to impact water quality.

The 2007 reissuance of the Spruce NPDES permit reassigned existing limits and monitoring requirements. As part of this reissuance, outlet 028 was added to the permit. This

outlet had previously been designated as outlet 007 on another permit, WV1013289, for the adjacent, existing Seng Camp mining operation. The Spruce mine used a valley fill, pond(s) and outlets from this adjacent operation. As Outlet 007 on WV1013289, it discharged on a regular frequency, but had not been subjected to selenium monitoring requirements. When outlet 028 was added to the Spruce permit, the WVDEP included "report only" monitoring requirements for selenium to gather data for this outlet. This will enable the WVDEP to perform a reasonable potential analysis for selenium for this outlet. If warranted based on the data, selenium limits will be added to this outlet in a future permitting action.

The Petitioners allege that another example 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). This mine is a completed deep mine that is currently in Phase I bond release under the surface mining program. Outlet 004 on Permit no. WV1017225 is the outlet assigned to monitor the discharge from a down dip punchout near the mouth of Berry Branch. During the reissuance of WV1017225 in January of 2004, when the WVDEP was in the process of implementing regulation of selenium in the coal industry, "report-only" selenium monitoring was added to the permit. Selenium limits were added to the permit at reissuance in June, 2009. At that time, a one year compliance schedule was established. The WVDEP believes that allowing a one year compliance schedule when compliance limits for a new parameter are added to an existing permit is a reasonable exercise of discretion in NPDES permitting. Time must be allowed for the permittee to construct treatment structures to meet newly assigned limits.

2.

The Petitioners allege that the WVDEP disregards federal regulations in a second way by allegedly failing to require selenium core samples, selenium effluent limits or selenium monitoring at all mines in traditionally high selenium seams. As a general matter, the WVDEP began requiring analysis of geologic core samples for selenium for new mines in the area of the geologic column where selenium has been found to be an issue when it began regulating selenium in the coal industry around 2003 - 2004. Analysis of these core samples has been required under the surface mining regulatory program, under which there is clear authority for this, rather than the NPDES program. (See, discussion below under item 3.) Because it has gathered core data for selenium through the surface mining, the WVDEP has generally not required additional, redundant core testing under the NPDES program.

The example the Petitioners cite is the Nellis Mine, SMCRA permit S504090 and NPDES permit WV1010824 where the WVDEP did not require selenium core samples to assess site specific selenium risk, or selenium monitoring or effluent limits at the NPDES outfalls. WV1010824 was issued in 1993. This was long before selenium had been identified as a potential parameter of concern for coal mining operations in West Virginia. The mine for which permit number WV1010824 was issued has never been started. This permit has been reissued in 1999, 2003 and 2007.

Because, selenium had not been identified as an issue in 1993 when Permit No. WV1010824 was issued, overburden testing for selenium was not required by the WVDEP during this time period. This NPDES permit assigned limits in accordance with the Coal River TMDL. The Coal River TMDL does not list the receiving stream, Fork Creek, or any of the

surrounding streams as being impaired or requiring reductions for selenium, so no selenium limits have been imposed.

The WVDEP's approach on this permit is supported by site specific examination of other mines near the Nellis Mine that are operating in the same seams and strata it proposes to mine. Selenium has not been identified as an issue at any surface mine or deep mine operating in the same seams and strata in the vicinity of the Nellis. These operations include Elk Run Coal Company's East of Stollings Surface Mine, West of Stollings Surface Mine, Black Castle Surface Mine and the Laxere Surface Mine. Selenium concentrations of less than 5.0 ug/l were reported in Table IV-C analysis for these operations at the time of their reissuance. Using the WVDEP's Selenium Implementation Guidance, an activity may be deemed to lack reasonable potential to cause or contribute to selenium water quality violations if site-specific or adjacent water quality data (associated with mining in the same geologic strata) shows concentrations less than 5.0 ug/l. The WVDEP has acted consistently with this guidance.

3.

The third way in which Petitioners claim that the State disregards federal regulations with regard to selenium is a purported practice of issuing new permits with water quality based effluent limitations for selenium without any assurance that those limits can be met. Petitioners criticize WVDEP's reliance on material handling plans to eliminate the need for treatment of effluent for selenium. In addition, in a somewhat contradictory manner, Petitioners contend that WVDEP should require selenium handling plans for the coal seams being mined.

Incident to permitting under its surface mining regulatory program, the WVDEP requires core samples be taken in accordance with the established November 13, 2007 Selenium Implementation Guidance document in its Permit Handbook. Core samples are taken from across the proposed mining area. The cores penetrate to the lowest seam being mined. Each geologic unit in the core is sampled for selenium. The established pattern of core sample collection provides adequate information to identify strata having high selenium concentration. Core samples submitted to DEP for review have shown that, generally, the dark shale and inseam partings contain higher concentrations of selenium than other strata (sandstone, siltstone, clay, etc.) and, thus, raise concerns of high concentrations of selenium in the discharge. By identifying the dark shale and partings as the culprit, the operation can isolate these strata when encountered. These strata are specially handled in reclamation by encapsulating them to keep the strata with higher levels of selenium out of the course of drainage so they do not contribute selenium to the discharge. This same practice has been successful for many years in identifying acid bearing strata and isolating it so they do not contribute to the formation of acid mine drainage. If carefully followed by a mine operator, a selenium handling plan can prevent discharges that contribute to violations of water quality standards. The selenium handling plan is a condition of the mine operator's surface mine permit.

Encapsulation of the selenium bearing strata works to establish an impermeable shield to isolate the selenium bearing material from water to prevent selenium from leaching out. The key is to utilize a good impermeable material in the encapsulation process. Even if the encapsulation material used is alkaline, as long as water does not penetrate, leaching of selenium should not occur.

The argument that selenium handing plans do not work is an over-generalization. Only operations on the Mud River were identified by the petitioners as places where selenium is found to exist in the discharges in high concentrations, despite utilization of special handling plans. The WVDEP has investigated these operations and found that selenium handling plans were not being followed in some instances. In these instances, the WVDEP has cited the mine operator under surface mining laws for its failure to follow its material handling plan for selenium. To truly conclude that special handling plans do not work, all of the operations employing selenium handling plans must be observed and inspected for compliance.

Material handling plans do not need to include the coal seam, since it will be removed from the site. Only the overburden will remain and consequently be subjected to precipitation and drainage.

4.

The fourth way in which Petitioners claim that West Virginia runs afoul of federal regulations with regard to selenium is in its use of compliance schedules. Since receiving EPA's November 16, 2007 letter and attachments setting forth the EPA's interpretation of the law concerning the use of compliance schedules, the WVDEP has endeavored to follow EPA's interpretation.

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

The EQB

The petitioners appear to erroneously believe that the Environmental Quality Board (EQB) is a part of the West Virginia Department of Environmental Protection and that the function it performs is an extension of the NPDES permitting process. They are wrong. The EQB is an independent adjudicatory body. It renders decisions in appeals from the WVDEP's permitting decisions and other actions taken by the WVDEP. There is no legal requirement in state law for the EQB notify the public of its intent to enter any order in an appeal pending before it and seek public comment prior to entering it. The Clean Water Act does not impose such a requirement on adjudicatory bodies, either.

The EQB is not without procedures for public participation. It is subject to the West Virginia Open Meetings Act, W.Va. Code §§ 6-9A-1 through – 12, and, as such, provides advance notice to the public of each of its meetings and their purpose, including the agenda of appeals to be heard at any particular meeting. The EQB's rules incorporate appropriate rules of the West Virginia Rules of Civil Procedure to govern procedure, W.Va. CSR 46-4-6.13, including Rule 24 on intervention of parties. Accordingly, members of the public have the same right of intervention before the EQB as they would have in the courts of the State of West Virginia.

WVDEP routinely extends the final compliance deadline in schedules of compliance without public notice or comment.

Petitioners assert that in January, 2006, without public notice or comment, WVDEP issued modification orders, extending compliance schedules for aluminum in existing permits through permit expiration. Under the existing compliance schedules, none of these permits had final limits for aluminum in effect, so this modification only affected the date when final limits would take effect. This was done in the interest of administrative efficiency. It allowed effluent limits based on the newly approved water quality standard for dissolved aluminum to take effect at the time of reissuance of the various permits, instead of requiring hundreds of applications for permit modifications to be processed at one time. Subsequent to the decision to implement the newly approved water quality standard in this manner, the WVDEP received Jon M. Capacasa's November 13, 2007 letter and attachments, which provide guidance from USEPA regarding implementation of compliance schedules under the Clean Water Act. Since receiving this guidance, the WVDEP has endeavored to follow it, including treatment of modifications to compliance schedules as major permit modifications subject to public notice and comment.

The West Virginia Legislature

It is ludicrous for the petitioners to contend that any provision of the federal Clean Water Act can impose procedural requirements concerning the manner in which the Legislature of the State of West Virginia adopts state law. Even if the Clean Water Act purported to impose such requirements on the West Virginia Legislature, the United States Constitution would foreclose enforcement of such requirements.

This contention by the petitioners is even more absurd if one considers the circumstances surrounding the adoption of the legislation about which they complain. The particular enactment petitioners target with this portion of their petition is Senate Bill 461, which the West Virginia Legislature adopted in 2009. Prior to the adoption of this legislation, the Judiciary Committee of the West Virginia House of Delegates, to which the Bill was assigned in the House of Delegates, held a public hearing on this Bill. This hearing was held on April 8, 2009. At this public hearing, representatives of two of the four petitioning organizations made comments in opposition to the adoption of this legislation. The sign-in sheet (Attachment 2) for those who addressed the Judiciary Committee shows that Matt Noerpel (Noerpel did not identify the organization he represented on the sign-in sheet, however, at that time, the WVDEP is aware that he was active in environmental affairs on behalf of petitioner, Coal River Mountain Watch.) and Patricia Feeney of the petitioner, Ohio Valley Environmental Coalition (OVEC), spoke in opposition to the Bill. The sign-in sheet also reflects that Don Garvin, John Christensen and Vickie Wolfe of the West Virginia Environmental Council (WVEC) also spoke in opposition to the Bill. Although Garvin identified himself as a representative of WVEC on the sign-in sheet, it should be noted that he also serves as a Director of the petitioner, West Virginia Highlands Conservancy (WVHC). Contrary to the petitioners claims, the West Virginia Legislature sought public participation by holding a public hearing on this legislation and receiving comments on it from representatives of the petitioners before acting.

WEST VIRGINIA'S NPDES ENFORCEMENT PROGRAM IS GROSSLY DEFICIENT

Selenium

As the USEPA is aware, the WVDEP is a leader among state NPDES regulatory authorities in Region 3 and among coal producing states in implementation of water quality-based effluent limitations (WQBELs) for parameters beyond those EPA chose to include in its technology-based effluent guidelines for coal mining in 40 CFR, Part 434. The WVDEP began implementing WQBELs for selenium in 2003 – 2004. Because this was a newly regulated parameter for the coal mining industry, the WVDEP imposed compliance schedules for selenium for most existing permitees at that time, with "report-only" monitoring for selenium. In 2007, without any known, effective treatment technology for selenium, most of these compliance schedules were extended through April, 2010. At that time, many entities facing selenium limits that were becoming effective took legal action to prevent selenium limits from taking effect. The WVDEP is actively contesting these legal actions. Efforts at selenium enforcement by the WVDEP are described below under the heading, General Mining.

General Mining

The West Virginia Department of Environmental Protection believes that its recent enforcement history against the coal mining industry compares favorably to that of any state against a significant industry segment operating in that state. Beginning in 2006, the West Virginia Department of Environmental Protection, began an enforcement initiative in the mining industry. This has resulted in action by the WVDEP, either individually or as a co-plaintiff with the USEPA, against nearly all of the major coal producers in West Virginia.

- In 2006, the WVDEP concluded an enforcement action it filed in the circuit courts of West Virginia against the five NPDES permits held by subsidiaries of Massey Energy with the worst compliance history. This resulted in the payment of a civil penalty of $1.4 million to the State. (Attachment 3.)

- Between 2008 and 2010, the WVDEP entered into administrative penalty orders with 74 coal companies covering violations on 489 NPDES permits. (Attachments 4 through 79.) The petitioners had the opportunity to comment on all these administrative penalty orders and offered a comment of a non-substantive nature on only one of them. In response to this comment, the WVDEP amended the penalty order to include a list of violations addressed by the order, as the petitioners suggested the WVDEP should do in their comment. Nearly all of these administrative penalty orders were also forwarded to USEPA for comment. USEPA did not offer comments on any of them. Through these administrative penalty orders, the WVDEP has assessed an aggregate of $12.9 million in cash penalties and Supplemental Environmental Projects (SEPs), to date. Many of these administrative penalty orders provide for stipulated penalties for future violations, which the WVDEP will continue to assess and collect for the duration of the time periods covered by these orders.

- Although, having recently pursued its own enforcement action against Massey Energy subsidiaries (concluded in 2006), the WVDEP declined USEPA's invitation to join it as a co-plaintiff in the federal enforcement action that was filed against Massey Energy and subsidiaries, the WVDEP provided much of the information upon which the federal action was based and cooperated fully with USEPA's prosecution of this action against Massey. As the USEPA is aware, this action resulted in payment of $20 Million in penalties, injunctive relief and stipulated penalties for future violations.

- In 2008, the WVDEP, concluded an enforcement action it filed against Hobet Mining, LLC for violations on four of its NPDES permits, through the entry of a Consent Order in the Circuit Court of Boone County, West Virginia. (Attachment 80.) This Consent Order provided for cash penalties and SEPs of $4 Million, plus injunctive relief and stipulated penalties for future violations. To date, an additional $ 636,500 in stipulated penalties have been assessed by the WVDEP against Hobet. This Consent Order was modified on Hobet's motion by an order entered by the court on December 10, 2009. (Attachment 81.)

- In 2009, the WVDEP and USEPA, as co-plaintiffs, concluded a civil enforcement action against Patriot Coal and its subsidiaries with a Consent Order that provided for payment of $6 Million in civil penalties, injunctive relief and stipulated penalties for future violations. (Attachment 82.) The State's share of these penalties is $3.6 Million. To date, $ 79,000 in stipulated penalties have been assessed against Patriot subsidiaries. The State's share of these stipulated penalties is $39,500.

- The WVDEP continues to pursue enforcement action against coal operators. As USEPA is aware, the WVDEP has agreed to pursue federal civil enforcement action against other major coal producer(s) in the state as co-plaintiff with USEPA.

- In the last month, the WVDEP has filed enforcement lawsuits against 10 coal companies and 12 NPDES permits to enforce selenium and other effluent limitations and water quality standards. (Attachments 83 through 92.)

Contrary to the petitioner's assertions, the WVDEP has had a robust enforcement initiative targeting the coal industry. Since 2006, the State share of civil and administrative penalties (including SEPs) assessed against the coal industry for NPDES violations is $19.4 Million. As suggested above, the WVDEP believes that its record of NPDES enforcement action compares favorably against that of any state against an important industry in its economy.

Toxics at Industrial Sites

The petition asserts "WVDEP also continues to overlook egregious violations of NPDES effluent for toxic substances at major facilities" citing PPG Industries and Mountain State Carbon as examples.

First and foremost, it is important to understand the number of non-coal major facilities (98) in WV is minuscule in comparison to the number of non-coal minor facilities (5237 excluding HAU). It is equally important to understand the potential environmental impact associated with minor facilities' violations often are more severe than violations associated with major facilities, generally due to the size of the receiving stream. Therefore, addressing violations at minor facilities often takes a higher priority for WVDEP based on potential or actual environmental impact.

USEPA has concurred with this approach to prioritizing workload. Following this federally-approved strategy; WVDEP's Environmental Enforcement staff finalized thirteen (13) formal enforcement actions on major facilities and 307 formal enforcement actions on minor or unpermitted facilities over the past three years (2007 through 2009). This does not include additional facilities which are under compliance schedules established prior to 2007. In this same time period, as previously reported to USEPA, 17,647 inspections were conducted and 6,018 Notices of Violation were issued (Attachment 93). These efforts were accomplished by an inspection staffing level of 23 positions (inspectors, inspector specialists, and inspector supervisors) funded by the water pollution control program. To assert that "egregious violations" are overlooked is simply unfounded. To the contrary, USEPA's state review framework reported that WVDEP has a very aggressive enforcement program.

With regard to PPG, there is a lengthy period of time (July 2005 through September 2007) immediately prior to the violations cited by the petition when PPG's permit was either under appeal (in an appeal brought by Petitioner's counsel – Joe Lovett) or in the process of modification. In 2008 and 2009, WVDEP's inspection reports of PPG (Attachments 94 and 95), clearly reflect WVDEP's concern with PPG's violations of effluent limits. The 2008 inspection was accompanied by a Notice of Violation (Attachment 96) regarding effluent limit violations and other deficiencies as well. The 2009 inspection deficiencies will be addressed through WVDEP's ongoing enforcement action.

The petition goes into much detail regarding the CWA Section 505 sixty day Notice of Intent associated with PPG. While the petitioners obviously take exception to the timing of the commencement of WVDEP's enforcement action, such action is clearly what Congress intended by including citizen suit provision with notice in the CWA. Simply put, this is the law "at work". In support of WVDEP's diligent prosecution of this case, the Complaint, Answer and Scheduling Order are enclosed (Attachments 97, 98 and 99).

The second specific example of "lax enforcement" cited in the petition under this item is Mountain State Carbon, LLC. WVDEP cannot attest to the accuracy of the information reported by USEPA's ECHO database referenced in the petition, or how that information may be portrayed by the database. However, WVDEP has reviewed agency records for the period referenced in the petition. This review reflected this facility has experienced non-compliance at Outlet 205, which is an internal monitoring point, and does not discharge direct to the environment. While WVDEP does not discount the non- compliance, it is relevant that this is an internal outlet and that such noncompliance is not reflected at the discharge point to the external environment. It is also relevant that inspection staffing in the area was at 33% during much of the time in question. Enclosed is a summary reflecting WVDEP's review (Attachment 100).

Municipal Facilities

The petition alleges WVDEP's "failure to enforce permit limits includes a number of municipal sewage treatment plants...and failure to enforce the MS4 general permits." Specifically, the petition references the city of Nitro, North Beckley PSD and the City of Weston. Many of the violations associated with these facilities are related to zinc. WVDEP and USEPA have, on multiple occasions over recent years, discussed zinc non-compliance at municipal wastewater treatment facilities. It has been the consensus between USEPA and WVDEP to exercise enforcement discretion on this issue. As discussed with EPA, zinc orthophosphate is used by drinking water utilities as an anticorrosive agent to comply with requirements of the Safe Drinking Water Act. The municipal facilities are not designed to treat zinc to the restrictive limits now in place. Zinc is also a hardness based limit/standard, further complicating the matter.

Details of WVDEP's record review regarding Nitro, North Beckley and Weston are enclosed (Attachment 101). WVDEP does not agree with the petition's characterization of Nitro's and North Beckley PSD's violations as "significant unresolved". With regard to Weston, violations are extensive in recent years. Weston has experienced an escalation in enforcement action (NOV's, pre-enforcement) through this time period, and this escalation will continue as discussed with USEPA. It should be noted that over the past three (3) years (2007 through 2009) WVDEP's Environmental staff have finalized in excess of 40 formal enforcement actions on municipal and public service district facilities.

In implementing West Virginia's MS4 program, WVDEP elected to initially focus efforts on compliance assistance for these relatively new federal requirements. In doing so, numerous instructional workshops on MS4 requirements were conducted and/or sponsored by WVDEP. This strategy is mirrored by the minimal MS4 inspection commitment (two inspections) made by WVDEP to USEPA in its grant work plans (see enclosed grant excerpts FY07 through FY09). In January 2009, prior to the filing of the petition, WVDEP and USEPA held internal discussions (See, Attachment 102) among permitting and enforcement staff regarding storm water issues and to began developing an enforcement strategy for MS4 communities. The outcome of these discussions was to initially target enforcement efforts on those communities which had done nothing or very little to comply with MS4 requirements.

With regard to the City of Huntington, WVDEP issued an Order to Huntington in September 2009, and Huntington has submitted its corrective action plan (Attachment 103). Orders (Attachments 104, 105 and 106) were also sent to Ceredo, Kenova and Bethlehem in 2009 regarding MS4 non-compliance. Kenova and Bethlehem were also issued Orders in 2007. These latter three (3) communities remain in non-compliance with MS4 requirements, and enforcement efforts actions will be escalated if necessary. WVDEP acknowledges that Westover has not submitted annual reports since 2007. It is noteworthy that WVDEP has not received any additional financial support or increase in staffing for inspection and enforcement activity related to MS4 requirements, and that any effort extended toward MS4 activity lessens the ability to conduct inspection and enforcement activity in other regulated areas with a greater degree of environmental impact.

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

The contention that WVDEP has failed to file required statistical information to USEPA is based on a "no records" response to a state Freedom of Information Act request the petitioners filed with WVDEP in May, 2009, seeking such summaries for the two previous years. Contrary to the Petitioner's claims, WVDEP has filed the statistical summaries with USEPA. The 2008 information had not been compiled at the time of petitioner's FOIA request. It was generated and filed only recently pursuant to a USEPA request. (Attachment 107.) The 2007 information was in existence and had been filed with USEPA at the time of petitioner's FOIA request, but was apparently overlooked when the "no records" response was given to petitioners in May, 2009. (Attachment 108.)

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

The contention is not well founded. Based on conversations with EPA Region 3 personnel and others, the WVDEP believes it is a leader within the Region and among coal producing states in the implementation of antidegredation policy, Total Maximum Daily Loads (TMDLs), and water quality based effluent limits for parameters other than those regulated under the technology based effluent limitation guidelines in 40 CFR, Part 434. If USEPA examined the records elsewhere, there would be many places USEPA should look to exercise its program withdrawal authority instead of first directing it at West Virginia.

Antidegradation – Socioeconomic Reviews

This contention is based on the imposition of effluent limitations for selenium at new mining operations that are protective of the chronic water quality standard for selenium, without conducting a Tier 2 antidegredation review. The WVDEP believes that, generally, where a selenium handling plan has been required, there will not be reasonable potential to violate water quality standards for selenium. Because there have been a few operations where the mine operator has failed to adhere to its material handling plan for selenium, resulting in violations of water quality standards, the WVDEP exercised its discretion to begin imposing effluent limitations for this parameter, without a Tier 2 review, to give mine operators a greater incentive to comply. In these cases, the WVDEP believes that it has been overprotective of water quality because strict adherence to material handling plans should not result in violations of water quality standards for selenium.

Mining General Permit

This allegation is also not well founded. The general permit for mining is inapplicable to instream outlets and any other location where water quality based effluent limitations would be required. There are no in-stream ponds covered under the current General (Coal) Permit. In addition, there are no plans by WVDEP to authorize its use for such activity in the future.

Failure to Develop TMDLs for Ionic Strength Impaired Streams

WVDEP has deferred TMDL development for certain biologically impaired streams where ionic strength was determined to be a significant stressor, with EPA's full knowledge and consent. The deferrals are reflected on the approved West Virginia 2008 Section 303(d) list and on the draft West Virginia 2010 Section 303(d) list.

WVDEP disagrees with the petitioners' statement that TMDL development deferral "has no basis in law or fact". There is no regulation that specifically prescribes deadlines, but EPA's expectations of a reasonable timeframe between initial 303(d) listing and TMDL development is provided in its PACE guidance. Since the inception of its TMDL program, WVDEP has demonstrated its commitment to the spirit of the PACE guidance. Since 2005, WVDEP has developed more than 1200 high quality, EPA- approved TMDLs. WVDEP efforts have honored all EPA consent decree commitments, constituted a significant portion of the TMDLs developed in Region III and were all developed in accordance with PACE guidance. The deferrals occurred because, in the WVDEP's judgment, the information necessary to develop defensible TMDLs was not available. In the Decision Rationales of approval of our most recent TMDL projects, EPA concurred with WVDEP's position that adequate time remained for TMDL development to address the ionic stress deferrals.

WVDEP's technical concerns regarding ionic stress have been exhaustively described in multiple forums and, most recently, in the response to public comments for draft TMDLs in the Upper Ohio River South and Dunkard Creek watersheds. When the deferred ionic stress impairments were being considered, WVDEP lacked conclusive information regarding the causative stressors and appropriate thresholds and also the necessary ambient and source data to adequately model cumulative measures of ionic strength.

The petition also points out that WVDEP has not created a plan to develop the deferred TMDLs. This is not quite accurate. WVDEP and EPA have agreed to coordinate a plan and have recently initiated discussions regarding the timing of TMDL development and the various technical approaches that may be pursued. WVDEP specified a 2013 TMDL development date for each of the legacy deferrals in the draft West Virginia 2010 Section 303(d) list. Additionally, recent pre-TMDL monitoring efforts have been expanded to generate data that will facilitate model representation of ionic strength based upon significant constituent ions. Several of these constituent ions have not been monitored for prior to this effort (e.g. potassium, sodium). Although significant scientific debate is expected, WVDEP is committed to a continuing dialogue with EPA as necessary to define appropriate endpoints for the ionic stress TMDLs.

Mercury

The petitioners make two allegations regarding mercury. The first allegation is that WVDEP is not properly implementing the tissue-based human health water quality standard for mercury. In the second allegation, the petitioners claim the WVDEP's tissue-based criteria is inconsistent with USEPA's recommended criteria and that the WVDEP's fish consumption

study, supporting the West Virginia's criteria, was done incorrectly and is misleading due to the existing mercury consumption advisory.

The WVDEP has both a tissue-based Water Quality Standard (WQS) of 0.5 ug/g methylmercury and a water column based Water Quality Standard of 0.012 ug/l methylmercury. The method of implementing these standards in permits is to set permit limits based on the water column number to protect the tissue-based limit. This is based on USEPA's 1986 Gold Book water quality criteria recommendations which states:

> [F]reshwater aquatic organisms and their uses should not be affected unacceptably if the 4-day average concentration of mercury does not exceed 0.012 ug/l more than once every 3 years on the average and if the 1-hour average concentration does not exceed 2.4 ug/l more than once every 3 years on the average. If the 4-day average concentration exceeds 0.012 ug/l more than once in a 3-year period, the edible portion of consumed species should be analyzed to determine whether the concentration of methylmercury exceeds the FDA action level.

Based on this information, permits are written to protect an instream WQS of 0.012 ug/l methylmercury, which is designed to protect the tissue-based WQS for methylmercury. This methodology is also consistent with USEPA's recent "Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion", EPA823-R-10-001.

WVDEP contracted with Responsive Management, a nationally recognized survey firm, to perform its 2008 fish consumption survey of state residents in order to determine fish consumption rates in the state fish consumption rate survey. This was done to assure that the West Virginia body burden criterion for mercury, which was developed before USEPA developed its recommended body burden criterion, did not need to be adjusted based on current information. The survey was developed with input from USEPA, FDA, Responsive Management, and WVDEP. During the development of the survey these involved parties brought up many issues, all of which were addressed by WVDEP and Responsive Management. The result was a survey that was agreed upon by the group that would accomplish the goal of determining a site specific fish consumption rate for West Virginia. As stated above, USEPA and FDA's expert were involved in the survey development process with full knowledge of the intended use of the results and gave a tremendous amount of input to assure all the areas of concern would be addressed in the survey methodology before moving forward with it.

USEPA's section 304(a) guidance as to an acceptable fish body burden criterion mercury was updated in 2001 to 0.3 mg/kg. A national fish consumption rate of 17.5 gr/day was used to calculate this value. This national fish consumption rate USEPA used greatly exceeds the average fish consumption rate of approximately10 gr/day for West Virginia citizens, as determined by the 2008 survey. When this more accurate value for West Virginia is used in place of the national fish consumption rate in the formula USEPA used to calculate its recommended criterion, this formula actually produces a higher number than West Virginia's current methylmercury fish body burden criterion of 0.5 ug/g. Other fish consumption surveys performed in West Virginia indicate that the consumption rate determined by the 2008 survey may be conservatively high. A survey performed in 2004 and reported in 2005 by the West Virginia Division of Natural Resources (WVDNR) to evaluate the use of wildlife by West

Virginia citizens yielded a fish consumption rate for West Virginia ranging from 5.7 to 9.2 gr/day. The range in results is due to the varying catfish meal size and percentage of species eaten. Use of these consumption rates in the formula results in calculated body burden values ranging from 0.90 mg/kg to 0.55mk/kg. Because a statewide fish consumption advisory was issued in December, 2004, after the WVDNR survey was completed, its results do not take into account any likely reduction in fish consumption among State residents as a result of the advisory. Clearly, even assuming the highest fish consumption rate determined in the 2004 WVDNR survey, West Virginia's site specific fish consumption rate is lower than the value being assumed by EPA nationally. West Virginia's 2008 survey confirms the results of the previous WDNR survey. It also confirms that, using formula USEPA uses, West Virginia's body burden standard is as protective as that of USEPA.

Attached please find as supporting information a copy of the pertinent sections of the Responsive Management 2005 report, West Virginia Resident's Attitudes towards Wildlife, their Participation in Wildlife-Related Recreation, and Their Consumption of Fish Caught in West Virginia done for WVDNR, the Responsive Management November 2008 Survey of west Virginia Residents' Consumption of Fish, done for WVDEP, EPA Mercury Recommended Criterion as presented in Quality Criteria for Water, 1986 Gold Book, and an EPA letter addressed to Margaret Janes dated September 21, 2007 in which EPA responds to a petition requesting that EPA "review and revise the West Virginia mercury water quality criteria for the protection of human health and aquatic life" under its discretionary Clean Water Act (CWA) section 303(c)(4)(B) authority. (Attachments 109 through 112.)

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