No. 19-2194

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, APPALACHIAN VOICES, AND SIERRA CLUB,

Plaintiffs-Appellants,

v.

RED RIVER COAL COMPANY, INC.,

Defendant-Appellee,

Appeal from the United States District Court for the Western District of Virginia
Big Stone Gap Division

APPELLEE'S RESPONSE BRIEF

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January 7, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-2194 Caption: Southern Appalachian Mountain v. Red River Coal Company, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Red River Coal Company, Inc.
(name of party/amicus)

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who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Brooks M. Smith Date: 1/7/20

Counsel for: Red River Coal Company, Inc.

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INTRODUCTION

Congress enacted the Clean Water Act ("CWA") in 1972 to regulate point source discharges of pollutants to the Nation's waters and enacted the Surface Mining Control and Reclamation Act ("SMCRA") in 1977 to address the environmental impacts of mining. Recognizing that many federal environmental programs already regulated mining activities, SMCRA includes a provision governing the interaction of SMCRA with existing federal environmental laws, including the CWA. That provision, § 702(a), provides that nothing in SMCRA "shall be construed as superseding, amending, modifying, or repealing" any of the provisions of those laws, including the CWA. *See* 30 U.S.C. § 1292(a).

The district court correctly held that § 702(a)(3) barred a claim for violations of SMCRA based on discharges that the court found were permitted under the CWA's statutory permit shield, 33 U.S.C. § 1342(k). Plaintiffs-Appellants Southern Appalachian Mountain Stewards, Appalachian Voices, and Sierra Club (collectively "SAMS") argue that § 702(a)(3) does not apply because the SMCRA performance standards at issue do not "conflict" with the CWA or are "consistent with" the CWA. Application of SMCRA's performance standards in this case, however, does conflict and is inconsistent with application of the CWA's statutory permit shield. Moreover, § 702(a)(3) is not limited to conflicts or inconsistencies between SMCRA standards and the CWA. Rather, § 702(a)(3) bars any

construction of SMCRA that supersedes, amends, modifies or repeals any provision of the CWA, including the statutory permit shield. Here, liability under SMCRA would "supersede," "amend," "modify" or "repeal" the CWA because it would usurp the CWA's sole authority to regulate the point source discharges at issue and would overturn Congress' determination that the statutory permit shield precludes liability under the CWA.

As the courts of appeals for both the D.C. Circuit and the Sixth Circuit have held, wherever there is regulatory overlap between SMCRA and the CWA, § 702(a)(3) expressly directs that the CWA and its regulatory framework control, so as to afford consistent standards nationwide. Thus, where alleged discharges are in compliance with the CWA based on the application of the CWA's statutory permit shield, as is the case here, § 702(a)(3) prohibits a finding of liability under SMCRA for the same discharges.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. CWA

The CWA regulates the discharge of pollutants from a point source to waters of the United States through the National Pollutant Discharge Elimination System ("NPDES") permit program. The Environmental Protection Agency ("EPA") delegated authority to implement the CWA to Virginia in April 1975. In 1983, EPA approved a sub-delegation of Virginia's NPDES authorization from the

Virginia Department of Environmental Quality to the Virginia Department of Mines, Minerals and Energy, Division of Mined Land Reclamation ("DMLR") to allow DMLR to issue, administer and enforce NPDES permits for coal surface mining operations. J.A. 043.

The CWA requires States to adopt and periodically review and revise water quality standards for jurisdictional waters within their boundaries. 33 U.S.C. § 1313. Virginia's water quality standards are codified as regulations. *See* 9 Va. Admin. Code § 25-260 *et seq.* Water quality standards serve as the basis for water quality-based effluent limitations in permits, where the permit writer determines that such limitations are necessary to protect against exceedances of those standards.

1. The CWA's Permit Shield

The CWA contains a statutory "permit shield" in 33 U.S.C. § 1342(k)[1] which insulates NPDES permit holders from liability for certain discharges of pollutants not explicitly identified in the permit. Under the permit shield, "a permit holder is in compliance with the CWA even if it discharges pollutants that are not listed in its permit, as long as it only discharges pollutants that have been

[1] 33 U.S.C. § 1342(k) provides: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except that any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health."

adequately disclosed to the permitting authority." *Piney Run Preservation. Ass'n v. Cnty. Comm'rs,* 268 F.3d 255, 268 (4th Cir. 2001) (citation omitted). "The purpose of Section 402(k) seems to be to relieve permit holders of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *Atl. States Legal Found. v. Eastman Kodak Co*., 12 F.3d 353, 357 (2d Cir. 1993) (quoting *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977)).

As this Court held in *Piney Run*, the permitting process compels the applicant to disclose the nature of its effluent discharges to the permitting authority, after which the permitting authority must analyze the impact of those discharges and then develop limits for any pollutants that it reasonably anticipates could adversely affect water quality. 268 F.3d at 268. As long as a permit holder complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit if those discharges were "reasonably anticipated by, or within the reasonable contemplation of, the permitting authority." *Id*. (citation omitted). Thus, "the scope of the permit shield defense is relatively straightforward … all discharges adequately disclosed to the permitting authority are within the scope of the permit's protection." *Id*. at 269.

2. The Rahall Amendment to the CWA

In 1987, Congress amended the CWA to encourage "remining" of areas that were mined prior to the passage of SMCRA in 1977. The so-called "Rahall Amendment" added Section 301(p) to the CWA, which provides incentives for remining of abandoned mine lands. These incentives are in the form of relaxed effluent limitations for certain pollutants in recognition of the efforts taken by mining companies engaged in remining to reclaim abandoned mines that would otherwise not be reclaimed or would be reclaimed at the Commonwealth's expense as part of its Abandoned Mine Land Program. J.A. 054; J.A. 059.

DMLR encourages remining under the Rahall Amendment because it is a way to reclaim land that was mined before SMCRA's enactment and would not otherwise be reclaimed, thus helping to improve water quality. J.A. 873. DMLR believes that remining is beneficial to the environment by reducing erosion and the amount of pollutants that ultimately reach waterways. J.A. 520-22. More specifically, DMLR believes that remining is important to efforts to restore water quality in the Virginia coalfields, like the watershed where the North Fox Gap Mine is located. J.A. 522.

B. SMCRA

Virginia assumed exclusive jurisdiction over the regulation of surface mining within the Commonwealth under SMCRA in 1981. 30 U.S.C. § 1253(a);

30 C.F.R. § 732.15(a); 46 Fed. Reg. 61,088 (Dec. 15, 1981); 30 C.F.R. § 946.10. In Virginia, DMLR issues joint NPDES and SMCRA permits that are "a single permit incorporating the requirements of both the SMCRA and the NPDES programs[.]" 48 Fed. Reg. 48,826 (Oct. 21, 1983). As EPA stated in its delegation decision, "[f]or coal mining and reclamation facilities, the requirements of the NPDES and the SMCRA permit programs are overlapping and duplicative." *Id.* Thus, as SAMS acknowledges, DMLR applies the same water quality standards under its SMCRA permitting program as under the CWA, and regulates the same discharges that are covered by the CWA. SAMS Br. 32 ("as we have shown above, the water quality standards incorporated into SMCRA are exactly the same as those that apply under the CWA.").

To ensure consistency between existing federal environmental laws and SMCRA, Congress included § 702(a), which addresses how SMCRA interacts with other federal environmental laws. As relevant to this case, § 702(a) provides as follows:

> Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing . . . any of the following Acts or with any rules or regulation promulgated thereunder, including but not limited to
>
> . . .
>
> (3) the Federal Water Pollution Control Act [the CWA] (79 Stat. 903), as amended [33 U.S.C. 1251 *et seq.*], the

> State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.

See 30 U.S.C. § 1292(a).

II. Procedural Background

This case is SAMS's second attempt to address through litigation its objections to how DMLR regulates mining operations at the Defendant-Appellee Red River Coal Company, Inc. ("Red River") North Fox Gap Surface Mine (the "North Fox Gap Mine"). In the first case, the district court granted Red River's Motion for Summary Judgment on SAMS's CWA claims challenging DMLR's interpretation of a condition in Red River's NPDES permit. *S. Appalachian Mt. Stewards v. Red River Coal Co.*, No. 2:14cv24, 2015 U.S. Dist. LEXIS 48483, 2015 WL 1647965 (W.D. Va. Apr. 13, 2015); *see also S. Appalachian Mt. Stewards v. Red River Coal Co.*, No. 15-1522 (4th Cir. Dec. 11, 2015) (granting Red River's unopposed motion to dismiss SAMS's appeal to the Fourth Circuit after SAMS agreed its appeal became moot shortly after filing its opening brief.). Rather than directly challenging DMLR's implementation of its delegated CWA and SMCRA authority, SAMS filed this action asserting violations of the CWA, 33 U.S.C. §§ 1251 *et seq.* and SMCRA, 30 U.S.C. §§ 1201 *et seq.*, as well as an alternative claim under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, based on alleged discharges from valley fill underdrains at the North Fox Gap Mine to the South Fork of the Pound River and Rat Creek.

SAMS's claims focus on the removal, as required by DMLR and State regulation, of sedimentation ponds at the bottom of valley fills at the North Fox Gap Mine. A hollow or valley fill consists of excess spoil material from mining operations. J.A. 873. Pursuant to SMCRA, such fills must be engineered with an underdrain, which is designed to convey groundwater and rain water below the valley fill. *Id.* After reclamation, including stabilization, and no sooner than two years after the last augmented seeding, DMLR may authorize removal of sedimentation ponds if water quality monitoring demonstrates no effluent non-compliance for at least six months. 4 Va. Admin. Code § 25-130-816.46(b)(5); J.A. 434 (DMLR Procedures Manual, Procedure No. 3.3.16, Sedimentation Pond Effluent Limits/Removal Pre-bond Reduction Inspections); J.A. 072. SAMS alleged that groundwater and stormwater discharges from the valley fill underdrains after removal of the sedimentation ponds violated the CWA, SMCRA and, in the alternative, RCRA.

Red River moved for summary judgment on all of SAMS's claims, J.A. 003, Docs. 54 and 55. The district court granted Red River's Motion for Summary Judgment and entered final judgment in favor of Red River. J.A. 904; J.A. 905; J.A. 005. [2] As to the CWA claim, the district court found that the undisputed

[2] SAMS incorrectly asserts that the district court "made factual findings" relating to the discharge of pollutants from the hollow fill underdrains. SAMS Br. 17-18.

evidence showed that Red River had fully disclosed the discharges from the valley fill underdrains and that such discharges were within DMLR's reasonable contemplation when it issued Red River's NPDES permit. J.A. 900. Accordingly, the CWA's statutory permit shield precluded liability under the CWA. *Id.* As the district court stated, "[b]y being completely forthcoming with DMLR and complying with the express terms of its Permit, Red River has met its obligations under the CWA and is entitled to rely on the permit shield." *Id*.

The district court further found that the SMCRA claim was barred by § 702(a)(3), adopting the reasoning of the Sixth Circuit in *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 291 (6th Cir. 2015). J.A. 903. There, the court held that § 702(a)(3) prohibits a finding of liability under SMCRA where the permit shield precludes liability under the CWA. *ICG Hazard*, 781 F.3d at 291. As the district court noted, "[t]he SMCRA claim asserted by SAMS is based on the very same discharges that are protected by the CWA's permit shield." J.A. 903. Thus, "[a] finding that Red River has complied with the CWA but has violated SMCRA based on the same discharges would allow SMCRA to override the CWA's permit shield and would thus violate" § 702(a)(3). *Id.*

The district court could not make factual findings on summary judgment, and Red River specifically disputed SAMS's allegations regarding the alleged discharge of pollutants.

SAMS does not challenge the district court's application of the permit shield to its CWA claim or the district court's grant of judgment to Red River on its RCRA claim. The sole issue that SAMS raises on appeal is whether § 702(a)(3) precludes liability under SMCRA for discharges that meet the requirements of the CWA's statutory permit shield.

III. Factual Background

The area in which the North Fox Gap Mine is located was mined extensively prior to the enactment of SMCRA. J.A. 872. Historic surface mining polluted the South Fork of the Pound River by exposing overburden material, which weathered and leached, causing acidic surface runoff, seepage and discharges with elevated concentrations of sediment, iron and manganese. J.A. 872-73; J.A. 085-086; J.A. 120. Discharges from pre-SMCRA underground mining have also polluted the watershed. J.A. 873; J.A. 086; J.A. 120. Virginia has classified the South Fork of the Pound River as impaired due to high levels of total dissolved solids ("TDS") and has established a total maximum daily load ("TMDL") addressing all of the different sources and causes of impairment in the river. J.A. 872; *see also S. Appalachian Mt. Stewards*, No. 2:14cv24, 2015 U.S. Dist. LEXIS 48483, *11-12, 2015 WL 1647965 (W.D. Va. Apr. 13, 2015) (deferring to DMLR's interpretation of a TMDL-based condition in Red River's NPDES permit and noting that

"DMLR has made clear that Red River has complied with all DMLR requirements with regard to the TMDL.").

In 1991, Red River submitted an application for a joint SMCRA and CWA permit to conduct remining at the North Fox Gap Mine. As part of that application, Red River submitted plans for construction of valley or hollow fills and monitoring of discharges at underdrains of those fills. J.A. 558, J.A. 584, J.A. 367-73, J.A. 077-80, J.A. 088-89. Red River also disclosed in its application monitoring results from preexisting deep mine discharges to the underdrains, which were of poor quality. J.A. 345, J.A. 067-69, J.A. 120-121, J.A. 126-128, J.A. 064-65, J.A. 126-29. DMLR acknowledged that water quality in the watershed was poor as a result of historic mining in the area pre-SMCRA. J.A. 064-65; J.A. 127-128.

DMLR issued a combined CSMO/NPDES Permit (the "Permit") to Red River on January 16, 1992. J.A. 161. Permit coverage has been maintained continuously since that time. *See* Jan. 17, 1997 Permit Renewal (J.A. 202), Jan. 16, 2002 Permit Renewal (J.A. 208), 2006 Permit Renewal (J.A. 224), and Aug. 5, 2016 Permit Renewal ("2016 Permit") (J.A. 232). Because it is a remining permit, the Permit includes Rahall provisions, including effluent limitations that reflect the pre-existing pollution problems. J.A. 051; J.A. 518. The Permit also requires Red River to monitor discharges from the valley fill underdrains and to disclose those

monitoring results to DMLR on an ongoing basis, and DMLR has acknowledged that it was well aware of the underdrains and monitoring data when it issued each of Red River's Permit renewals. J.A. 050; J.A. 898.

Under a remining permit, the permittee must reclaim the mining area to current regulatory standards. J.A. 519-20. Thus, after completing its mining operations, Red River was required to undertake reclamation efforts such as achieving the approximate original contour of the land and establishing stabilized channels and drainways for runoff. J.A. 518-19. Reclamation also included fixing previously mined areas by, for example, blending existing overburden with neutral material to make it suitable for vegetation growth. J.A. 084. Similarly, during mining activities, Red River was required to install sedimentation ponds at the base of the valley fills. Once the area was stabilized after mining was complete and vegetation had been well established, Red River was required to remove the sedimentation ponds as part of the reclamation process. J.A. 072; J.A. 434.

SUMMARY OF ARGUMENT

As the court of appeals for the D.C. Circuit held in 1980, § 702(a)(3) is not "merely a savings clause" to prevent the CWA from being weakened or nullified. *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1366-67 (D.C. Cir. 1980). Rather, § 702(a)(3) is "an absolute prohibition against 'superseding, amending, modifying, or repealing'" the CWA." *Id*. at 1367. Thus, "where there

is an overlap of regulation [SMCRA] is not to be interpreted as altering in any fashion" the CWA. *Id*. at 1366. Where there is regulatory overlap, § 702(a)(3) expressly directs that the CWA controls. *Id*. at 1367. In 2015, the court of appeals for the Sixth Circuit adopted and relied on the D.C. Circuit's decision in *In re Surface Mining Regulation* in a case decided under facts almost identical to those here. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6th Cir. 2015). In *ICG Hazard*, the court held that since the CWA's statutory permit shield precluded liability under the CWA, § 702(a)(3) barred liability under SMCRA "because the CWA regulatory framework controls over inconsistent regulation" under SMCRA. *Id*. at 290-91.

SAMS's argument that § 702(a)(3) is limited to "conflicts" or "inconsistencies" between SMCRA performance standards and the CWA ignores the plain meaning of the statute and the Supreme Court's interpretation of similar language in another federal statute. Under the plain meaning § 702(a), SMCRA may not be construed to "alter," "take the place of," "change" or "repeal" the permit shield, but if, as SAMS argues, liability can be imposed under SMCRA for discharges which meet the requirements of the CWA permit shield, the SMCRA standard has improperly "altered," "taken the place of" or "repealed" the permit shield, and at a minimum has "modified" or "made different" the scope of the CWA permit shield.

SAMS's reliance on statements made by the Office of Surface Mining ("OSM") in rulemakings in 1979 and 1983 and in a letter from OSM to DMLR in 2015 do not change this result. None of the OSM statements that SAMS cites address whether liability can be imposed under SMCRA for discharges that are permitted under the CWA's permit shield. Moreover, since 1983, OSM has more clearly articulated that SMCRA standards cannot be construed as superseding, amending, modifying or repealing the CWA, as SAMS attempts to do here. Finally, since the language of § 702(a)(3) is unambiguous, any OSM interpretation of the statute that differs from the plain meaning of the statute is entitled to no deference.

Finally, SAMS's argument that where a conflict exists between a "savings clause" and the "substantive provisions" of a statute, the substantive provisions control fails for several reasons. Section 702(a) is not a "savings clause" nor does SAMS identify any conflict between § 702(a)(3) and any other provision of SMCRA. SAMS also fails to explain why § 702(a)(3) is any less of a "substantive provision" of SMCRA than any other provision of the statute. What is more, the two cases SAMS relies on for this argument, *U.S. v. Locke*, 529 U.S. 89 (2000) and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), are inapposite to the issues before the court. Both *Locke* and *Geier* address savings clauses preserving state regulation in the context of whether the clauses precluded federal preemption of

state claims. There is no issue of federal preemption in this case, and neither *Locke* nor *Geier* addressed the interaction of two federal statutes or statutory provisions even remotely similar to § 702(a).

ARGUMENT

I. SINCE THE PERMIT SHIELD PRECLUDES LIABILITY UNDER THE CWA, § 702(a) BARS LIABILITY UNDER SMCRA

A. The CWA controls where there is regulatory overlap with SMCRA, including where the CWA permit shield applies

As far back as 1980, courts have recognized that "Congress meant exactly what it said in section 702(a)(3) of the Act, that where there is an overlap of regulation the Surface Mining Act is not to be interpreted as altering in any fashion the Federal Water Pollution Control Act." *In re Surface Mining Regulation*, 627 F.2d at 1366.[3] The D.C. Circuit later confirmed the unambiguous nature of Section 702(a) when it held that "Congress did, however, clearly state that nothing in the SMCRA should be construed as 'superseding, amending, modifying, or repealing' various statutes…or regulations promulgated thereunder." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 765 (D.C. Cir. 1988) (quoting Section 702(a)). Notably, in

[3] *See also Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 101 (4th Cir. 2006) ("Congress *explicitly disclaimed* any intent to supersede or preempt [environmental and mining] statutes with potentially overlapping provisions."), (emphasis added) (citing Section 702(a)).

Hodel, the court recognized the clarity of Section 702(a) when analyzing competing interpretations of another SMCRA provision, Section 515(b)(4).[4]

The district court and SAMS characterize § 702(a) as a "savings clause" that does not prohibit more stringent regulation under SMCRA. *See e.g.*, J.A. 901-03; SAMS Br. 2. To the contrary, the court of appeals for the D.C. Circuit expressly rejected the argument that "Section 702(a)(3) is merely a 'savings clause' to prevent the Federal Water Pollution Control Act from being weakened or nullified by passage" of SMCRA. *In re Surface Mining Regulation*, 627 F.2d at 1366-67. Where Congress intended that regulation be "at least as strict" as some other requirement, the court noted, it explicitly used those terms. *Id*. at 1367. Section 702(a)(3), by contrast, "contains an absolute prohibition against 'superseding, amending, modifying, or repealing' the Federal Water Pollution Control Act." *Id*. While SMCRA gave the Secretary of the Interior authority to regulate where the CWA was silent, "where the Secretary's regulation of surface coal mining's hydrologic impact overlaps EPA's, the Act expressly directs that the Federal Water

[4] Sec. 515(b)(4) requires surface coal mining operations to, at a minimum, "stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution[.]" The parties in *Hodel* disputed the meaning of "effectively control erosion and attendant air and water pollution," which the court determined was ambiguous. Consistent with *Chevron*, the court deferred to OSM's reasonable interpretation of that phrase. *Hodel*, 839 F.2d at 764-65.

Pollution Control Act [CWA] and its regulatory framework are to control so as to afford consistent effluent standards nationwide." *Id.*

In *In re Surface Mining Regulation*, the D.C. Circuit considered whether interim effluent regulations for surface and underground mining proposed by OSM in the 1979 rulemaking violated Section 702(a). After reviewing SMCRA's legislative history, the court noted that "Congress certainly recognized . . . that the EPA's existing regulatory authority under the [Clean Water Act] was deficient with respect to surface coal mining, in that EPA could not directly regulate discharges from abandoned and underground mines or from nonpoint sources (*i.e.*, discharges not emanating from a 'discernible, confined, and discrete conveyance')." *In re Surface Mining Regulation*, 627 F.2d at 1367 (citation omitted). The court concluded, however, that SMCRA "gave [OSM] authority to regulate in these areas because the [Clean Water Act] was silent in regard to them, but where [OSM's] regulation of surface coal mining's hydrologic impact overlaps EPA's, [SMCRA] *expressly directs* that the [CWA] and its regulatory framework are to control[.]" *Id.* (emphasis added). The court did not suggest in any way that, as SAMS argues, regulatory "overlap" requires a conflict between SMCRA and the CWA.

The CWA's statutory permit shield is analogous to the EPA variances at issue in *In re Surface Mining Regulation*. There, EPA allowed variances from

effluent limitations, but the SMCRA regulations did not, and the court held that SMCRA's lack of a general variance constituted a "modification" or "repeal" of the CWA. *Id*. at 1368. Likewise, EPA provided an exemption from effluent requirements for overflows from control facilities, but the SMCRA regulations limited the exemption for overflows. *Id*. Third, in measures for suspended solids, EPA provided for an exemption or credit for pollutants already present in intake water, but the SMCRA regulations did not. "[T]o the extent that EPA affords an exemption to surface mining operations for pollutants already in water when it comes onto the mine site, such a provision must be incorporated into . . . the interim regulations so as to fulfill the mandate of section 702(a)(3) . . . that the Federal Water Pollution Control Act not be 'modified' or 'repealed' by the Surface Mining Act." *Id*. at 1368-69. Just as the interim SMCRA regulations at issue in *In re Surface Mining Regulation* "modified" or "repealed" EPA's exemptions, variances and credits, so too does any contrary provision of SMCRA "modify", "amend" or "repeal" the exemption from liability provided by the statutory CWA permit shield.

SAMS contends that the permit shield is not the same as an exemption or variance but rather "merely prevents and delays enforcement until the next permit cycle when appropriate standards are incorporated into the permit." SAMS Br. 32-33. Not so. The statutory permit shield is a substantive provision that exempts a

permit holder from liability for the discharge of pollutants that are not listed in its permit, as long as it adequately discloses those discharges to the permitting authority. *Piney Run*, 268 F.3d at 268. There is nothing in the text of the permit shield or any of the case law applying the permit shield indicating that the permit shield merely "prevents and delays enforcement" until the next permit cycle. Nor is there any basis for concluding, as SAMS argues (SAMS Br. 34-35), that § 702(a) should apply differently to the permit shield than it applies to any other provision of the CWA.

The Sixth Circuit adopted and relied on the D.C. Circuit's decision in *In re Surface Mining Regulation* in *ICG Hazard*. There, the court held that "[w]here regulation under the CWA is silent, regulation under [SMCRA] is permissible, but where there is regulatory overlap, [Section 702(a)(3)] of [SMCRA] expressly directs that the CWA and its regulatory framework control, so as to afford consistent standards nationwide." *ICG Hazard*, 781 F.3d at 291 (citing *In re Surface Mining Regulation*, 627 F.2d at 1367).

ICG Hazard is on all fours with this case. There, the plaintiff alleged that the discharges that allegedly violated the CWA also violated the water quality standards incorporated into the defendant's surface mining permit under SMCRA. *Id*. at 290. The Sixth Circuit affirmed summary judgment on the plaintiff's CWA claim on the grounds that the CWA's permit shield precluded liability under the

CWA. *Id*. Further, the court held, there could be no liability under SMCRA where the CWA's permit shield prohibited enforcement against essentially the same point source discharges that formed the basis for claims under the CWA. *Id*. at 291-292 ("because the CWA regulatory framework controls over inconsistent regulation under the Surface Mining Act, it follows that Sierra Club's claims under the Surface Mining Act are effectively barred by operation of the permit shield under the CWA").[5]

Other courts have reached the same conclusion. In *Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC*, 555 F. Supp. 2d 640 (S.D. W. Va. 2008), plaintiffs alleged CWA and SMCRA violations associated with discharges regulated under the CWA's NPDES program. Two outfalls were removed from the NPDES permit, and plaintiffs acknowledged they could no longer pursue their CWA claims. Plaintiffs, refused, however, to drop their claims under SMCRA that the discharges contributed to pollutant levels in excess of water quality standards. *Id.* at 650. The district court granted summary judgment to defendant because

[5] SAMS criticizes the decision in *ICG Hazard* on the grounds that the court did not consider § 1311(b)(1)(C) of the CWA, but fails to explain why a provision of the CWA is relevant to its SMCRA claim. In fact, § 1311(b)(1)(C) does not impose any obligation on dischargers. Rather, it sets a timeline for achievement of objectives of the CWA. Moreover, to the extent that § 1311(b)(1)(C) imposes any liability, the permit shield bars such a claim. *See* 33 U.S.C. § 1311(a) (stating that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with various sections of the CWA, including 33 U.S.C. § 1342).

plaintiffs' challenge under SMCRA "threatens to supersede the provisions of the CWA." *Id.* at 651. If a discharger cannot be held liable under the CWA, the court reasoned that it could not find liability under SMCRA because doing so would "impose discharge limits more stringent than those required under the CWA" which would "supersede those of the CWA." *Id.* Accepting the plaintiffs' theory, the court noted, "implicates core issues of the structure and function of the CWA. Moreover, if accepted, Plaintiffs' theory would have enormous policy implications for CWA regulation and enforcement." *Id.*

In *Hodel*, the D.C. Circuit reached the same conclusion when considering the interplay between the Clean Air Act ("CAA") and SMCRA. There, the appellants challenged (in relevant part) the scope of OSM's application of a provision regulating air pollution, arguing that OSM should regulate *all* air pollution associated with surface mining, not just the impacts of mining on air quality associated with erosion. *Hodel*, 839 F.2d at 764. The court affirmed its ruling in *In re Surface Mining Regulation*, holding that OSM is limited "when otherwise exercising [its] lawful authority under [SMCRA], to promulgate regulations that fill a 'regulatory gap' in the coverage of another statute." *Id.* at 765, (citing *In re Surface Mining Regulation* at 1367). Since EPA has authority under the CAA to regulative fugitive dust from coal mines, and at the time was considering whether to do so, any interpretation of SMCRA regulations that

purported to extend their applicability to fugitive dust from coal mines failed to comply with Section 702(a) because there was no "'absence of regulation.'" *Id.*

B. Section 702(a) is not limited to conflicts or inconsistencies between SMCRA standards and the CWA

SAMS argues that § 702(a) does not bar its SMCRA claim because SMCRA enforcement standards are "consistent" with the CWA and there is no actual or potential "conflict" between SMCRA standards and the CWA. SAMS Br. 19-20, 26. SAMS cites no authority supporting the argument that § 702(a) applies only where SMCRA standards are "inconsistent" or "conflict" with the CWA.[6] Moreover, SAMS ignores the broad language of the statute, which provides that SMCRA shall not be construed as "superseding," "amending," "modifying," or "repealing" any provision of the CWA. As the courts held in *In re Surface Mining Regulation* and *ICG Hazard*, where there is regulatory overlap, SMCRA "is not to be interpreted as *altering in any fashion*" the CWA. *In re Surface Mining Regulation*, 627 F.2d at 1366 (emphasis added); *see also ICG Hazard*, 781 F.3d at 291. SAMS acknowledges that the water quality standards incorporated into SMCRA are "exactly the same" as those in the CWA. SAMS Br. 32. Thus, there is regulatory overlap, and applying the SMCRA standards would alter the

[6] In any event, SAMS's SMCRA claim is "inconsistent" and "conflicts" with the application of the CWA permit shield to the alleged discharges at issue, and so § 702(a) applies even under SAMS's narrow interpretation of the statute.

requirements under the CWA statutory permit shield, modifying the permit shield in violation of Section 702(a)(3).

SAMS's SMCRA claim would "supersede" the CWA because it would usurp the CWA's sole authority to regulate the discharges at issue. A finding of liability under SMCRA would also overturn Congress' determination that the permit shield precludes liability under the CWA where the permit holder has complied with its NPDES permit, has disclosed the discharges at issue and those discharges were within the reasonable contemplation of the permit issuer. For the same reasons, SAMS's SMCRA claim would "amend" or "modify" the CWA by changing its meaning, namely reading the permit shield out of the statute for discharges that allegedly violate a SMCRA standard.

Moreover, the ordinary meaning of the terms in the statute encompass more than a "conflict" or "inconsistency" between SMCRA and the CWA. For example, the ordinary meaning of "supersede" is "to annul, make void, or repeal by taking the place of." *Supersede*, BLACK'S LAW DICTIONARY (11th ed. 2019). A decision from the Eleventh Circuit further explains that:

> Black's Law Dictionary defines "supersede" as "[t]o annul, make void, or repeal by taking the place of." Supersede, Black's Law Dictionary 1667 (10th ed. 2014). Similarly, Merriam-Webster's entry reads: "(1) (a) to cause to be set aside, (b) to force out of use as inferior; (2) to take the place, room, or position of; (3) to displace in favor of another: supplant." Supersede, Merriam Webster's Collegiate Dictionary 1183 (10th ed. 1996).

> Lastly, Webster's: "(1) to cause to be set aside or dropped from use as inferior or obsolete and replaced by something else; (2) to take the place or office of; to succeed; (3) to remove or cause to be removed so as to make way for another; to supplant." Supersede, Webster's New Twentieth Century Dictionary of the English Language 1830 (1976) (unabridged). *All three dictionaries indicate that the word "supersedes" involves replacing one thing with another*, rather than causing something to be cancelled or invalidated without replacement.

Bodine v. Cook's Pest Control Inc., 830 F.3d 1320, 1326-27 (11th Cir. 2016) (emphasis added).

In addition, the Supreme Court has interpreted similar statutory language to be broader than "inconsistent' or "conflicting." In language similar to § 702(a), the Employee Retirement Income Security Act of 1974 ("ERISA") provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States…or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). In considering whether ERISA preempted a state fair employment law, the Supreme Court analyzed whether preemption would "impair" or "modify" Title VII of the Civil Rights Act. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983). Applying the plain meaning of the statute, the Supreme Court held that the terms "impair" or "modify" included anything that "would *change* the means by which [Title VII] is enforced." *Id.* (emphasis added). Based on this plain meaning, the Court concluded that to the

extent the state law provided a means of enforcing Title VII, preemption would "modify" or "impair" federal law because it would impermissibly disrupt the goal of encouraging the joint state/federal enforcement scheme contemplated by Title VII. *Id.* at 103.

Thus, pursuant to § 702(a), SMCRA may not be construed to "alter," "take the place of," "change" or "repeal" the CWA statutory permit shield, but that is exactly what SAMS attempts to do here. If liability can be imposed for discharges under SMCRA even though those discharges are covered by the CWA permit shield, the SMCRA standard has improperly "altered," "taken the place of" or "repealed" the permit shield, and at a minimum has "modified" or "made different" the scope of the CWA permit shield.

C. Statements by the Office of Surface Mining cannot alter the scope of § 702(a)

SAMS also relies on several statements by OSM that purportedly allow for the independent enforcement of SMCRA performance standards. SAMS Br. 24-25. None of the statements by OSM which SAMS cites, however, address whether liability can be imposed under SMCRA for discharges that are permitted by the CWA.

First, SAMS relies on statements in OSM's 1979 rulemaking in response to comments OSM received about requirements for air pollution control plans. SAMS Br. 24; *see* 44 Fed. Reg. 14,902, 15,050 (March 13, 1979) (discussing 30

C.F.R. § 780.15, regarding air pollution control plans). Further, as support for its "authority to regulate air pollution," OSM cited to the district court's holding in *In re Surface Mining Regulation* that OSM was authorized to issue regulations to "fill in a 'regulatory gap.'" *Id*. (citing *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1314 (D.D.C. 1978)). Nowhere does OSM state that it has authority to regulate in areas of overlap with the CWA or any other environmental statute. OSM's citation to the district court decision in *In re Surface Mining Regulation* also highlights that OSM's statements in 1979 predate the D.C. Circuit's holding in *In re Surface Mining Regulation* that SMCRA cannot alter the CWA where the two statutes overlap. *In re Surface Mining Regulation*, 627 F.2d at 1366-67. In short, OSM's statements in 1979 provide no support for the proposition that SAMS can maintain an action under SMCRA for discharges protected by the CWA permit shield.

SAMS also relies on general statements in a 2015 letter from OSM to DMLR that mining operators are expected to comply with water quality standards. SAMS Br. 24 (citing J.A. 825). Again, nothing in OSM's 2015 letter addresses the application of § 702(a) where there is regulatory overlap between SMCRA and the

CWA or whether application of the permit shield precludes liability under SMCRA.[7]

The 2015 OSM letter quotes a small portion of the preamble to a 1983 Federal Register notice regarding OSM's standards for siltation structures. J.A. 825; *see* 48 Fed. Reg. 43,956 (Sept. 26, 1983). That preamble does not address § 702(a) or the holding in *In re Surface Mining Regulation* and does not otherwise support SAMS's arguments. In fact, in the 1983 rulemaking, OSM rejected a requirement for permanent erosion and sediment control structures. 48 Fed. Reg. at 44,039 ("once the disturbed area has been successfully revegetated, the amount of sediment per acre leaving the reclaimed area should be the same as that of the adjacent undisturbed area."). Instead, OSM struck a balance by requiring sediment control structures to remain in place until the regulatory authority (here, DMLR) determines removal is appropriate. *Id.* ("The regulatory authority is in the best position to judge when vegetation is sufficiently well established to allow removal of the [sedimentation] structure . . ."). In that rulemaking, OSM also rejected proposals to require compliance with EPA effluent limitations. *Id.* at 44,040. Instead, once stabilization and revegetation had occurred, the "siltation structure

[7] SAMS also attempts to brush off the fact that the 2015 OSM letter upheld the plan DMLR and Red River had developed to implement best management practices to control sedimentation at the North Fox Gap Mine. J.A. 827. SAMS's speculation about what DMLR or OSM might determine based on subsequent events is irrelevant.

can be removed [as directed by the regulatory authority] and effluent limitations will no longer apply." *Id.*

Moreover, since its 1979 and 1983 statements cited by SAMS, OSM has more clearly articulated how water quality provisions in its regulations interact with Section 702(a):

- 73 Fed. Reg. 75,814, 75,842 (Dec. 12, 2008) (emphasis added):

  > However, in adopting these rules, we reiterate that nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the Clean Water Act or the authority to determine when a permit or authorization is required under the Clean Water Act. Under paragraphs (a) and (a)(2) of section 702 of SMCRA, *nothing in SMCRA (and, by extension, regulations adopted under SMCRA) may be construed as superseding, amending, modifying, or repealing the Clean Water Act or any state laws or state or federal rules adopted under the Clean Water Act.* In addition, nothing in the Clean Water Act vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law.

- 69 Fed. Reg. 1,036, 1,043 (Jan. 7, 2004):

  > The change would have no effect on a mining operator's obligation to comply with other statutes, such as the CWA. The proposed change is intended to avoid the possibility that the SBZ [stream buffer zone] rule could be misinterpreted to supersede the CWA by prohibiting an activity because of water quality standards that would otherwise be authorized under the CWA.

- 73 Fed. Reg. 75,814, 75,841 (Dec. 12, 2008) (emphasis added):

> In the preamble to the proposed rule, we sought comment on whether we should amend 30 CFR 816.42 and 817.42, which currently address only discharges of water, to include a paragraph specifying, for informational purposes, that discharges of dredged or fill materials into waters of the United States must comply with all applicable State and Federal requirements. Commenters were divided on the merits of this potential rule change. *We have decided against adding this provision, both because of the possibility that the language might be erroneously interpreted as being enforceable under SMCRA* rather than as just an informational provision and because adding the language is unlikely to be helpful to the regulated community, which is well aware of the need to comply with both SMCRA and the various elements of Clean Water Act regulatory programs.

What is more, the statements by OSM on which SAMS relies are entitled to no deference. In determining whether and how much deference to afford an agency's interpretation of a statute it administers, courts must assess "whether the statute at issue is unambiguous with respect to the question presented. If so, then the plain meaning controls[.]" *Bracamontes v. Holder*, 675 F.3d 380, 384 (4th Cir. 2012), (citing *Saintha v. Mukasey*, 516 F.3d 243, 251 (4th Cir. 2008) and *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984)). If the statute is silent or ambiguous with respect to the issue before the court, the agency's interpretation is entitled to deference if it is based on a permissible or reasonable construction of the statute. *Id.* (citing *Chevron*, 467 U.S. at 843). SAMS has not suggested that § 702(a) is ambiguous and no court has found that it is. Thus, any OSM

interpretation that strays from the statute's plain language is not entitled to any deference.

D. *U.S. v. Locke*, 529 U.S. 89 (2000) and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) address federal preemption of state laws in the context of statutory provisions preserving state law regulation and so are inapposite to the application of § 702(a)

SAMS argues that when a conflict exists between a "savings clause" and the "substantive provisions" of a statute, the substantive provisions control. SAMS Br. 27. As the Court held in *In re Surface Mining Regulation*, however, § 702(a) is not a "savings clause" but "an absolute prohibition against 'superseding, amending, modifying, or repealing' the CWA. 627 F.2d at 1366-67. In any event, SAMS identifies no conflict between § 702(a) and any other provision of SMCRA; nor does SAMS explain why § 702(a) is any less a "substantive provision" of SMCRA than other provisions of the statute.

Further, the statutory provisions at issue in the cases cited by SAMS differ markedly from § 702(a). *U.S. v. Locke*, 529 U.S. 89, 104-05 (2000) involved a statutory provision which preserved state law liability rules and financial requirements relating to oil spills. Likewise, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) involved a provision stating that compliance with a federal safety standard did not exempt a person from liability under state common law. Neither case involved statutory language similar to § 702(a) or a provision, like

§ 702(a), which governs how one federal statute is construed in relationship to other federal laws.

Locke and *Geier* addresses federal preemption of conflicting state laws, not the interaction of two federal statutes. *Locke* addressed federal preemption of state regulations governing oil tanker operations and design. *Locke*, 529 U.S. at 104-06 (2000). Similarly, *Geier* addressed whether a federal motor vehicle safety standard preempted a state common-law tort action. 529 U.S. at 869; *see also Am. T&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 216 (1998) (addressing whether state law claim for tortious interference with contract preempted by the federal Communications Act). There is no issue of federal preemption of state law in this case, and so *Locke* and *Geier* are inapposite.

Moreover, in *Locke* and *Geier*, the Court did not hold, as SAMS claims, that where a saving clause conflicts with a substantive provision of a statute, the substantive provision controls. Rather, in both cases, the Court held that the saving clause at issue either controlled over another substantive provision or simply did not apply. In *Locke*, for example, the Court held that a saving clause which addressed liability rules and financial requirements for oil spills did not apply to whether federal law preempted state regulations governing the operation and design of oil tankers. *Locke*, 529 U.S. at 105 ("Placement of the saving clauses in Title I of OPA suggests that Congress intended to preserve state laws of a scope

similar to the matters contained in Title I of OPA, not all state laws similar to the matters covered by the whole of OPA or to the whole subject of maritime oil transport."). Thus, in *Locke*, the Court found that the saving clause was directed to a different subject than the federal regulations at issue, not that there was a conflict between the two.

In *Geier*, the Court held that a saving clause in the Federal Motor Vehicle Safety Act that preserved state common law liability actions governed over a provision in the same statute which expressly preempted state safety standards. 529 U.S. at 867-68. Thus, contrary to SAMS's argument, *Geier* held that a saving clause controlled over another substantive provision of the statute. *Id*. at 868 ("Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt" state common law liability actions). The saving clause, however, did not foreclose preemption of state common law liability actions that actually conflict with federal standards. *Id*. at 869 ("We now conclude that the saving clause … does *not* bar the ordinary working of conflict pre-emption principles.") (emphasis in original). Thus, to the extend it addressed a conflict between two statutes, *Geier* determined whether a state common law liability standard conflicted with a federal safety standard, *not* whether the saving clause preserving state law liability actions conflicted with another federal statutory provision.

Since § 702(a) is not a saving clause at all and does not address the preservation of state laws, like those in *Locke* and *Geier*, and because those cases involved federal preemption of state laws, not the interaction of two federal statutes, neither case has any relevance to whether § 702(a) permits SAMS to assert a SMCRA claim where its CWA claim is barred by the CWA's statutory permit shield.

CONCLUSION

For the foregoing reasons, the Court should affirm judgment in favor of Red River on SAMS's claim for violations of SMCRA.

Dated: January 7, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2020, I electronically filed the foregoing response on behalf of Red River Coal Company, Inc. with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

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CERTIFICATE OF COMPLIANCE

I certify that this response brief complies with the type-volume limitation because it contains 7,657 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

January 7, 2020 /s/ Brooks M. Smith

RED RIVER STATUTORY AND REGULATORY ADDENDUM

- 29 U.S.C. § 1144
- 30 U.S.C. § 1253
- 30 U.S.C. § 1292
- 33 U.S.C. § 1311
- 33 U.S.C. § 1313
- 33 U.S.C. § 1342
- 30 C.F.R. § 732.15
- 30 C.F.R. § 946.10
- 4 Va. Admin. Code § 25-130-816.46

29 USCS § 1144

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 29. LABOR (Chs. 1 — 32) > CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM (§§ 1001 — 1461) > PROTECTION OF EMPLOYEE BENEFIT RIGHTS (§§ 1001 — 1191c) > REGULATORY PROVISIONS (§§ 1021 — 1191c) > Administration and Enforcement (§§ 1131 — 1151)

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) Construction and application.

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)

(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4(b) [29 USCS § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act [29 USCS § 1136].

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(5)

(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—

(i)any State tax law relating to employee benefit plans, or

(ii)any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle [29 USCS §§ 1021 et seq., 1101 et seq.], and the preceding sections of this part [29 USCS §§ 1131 et seq.] to the extent they govern matters which are governed by the provisions of such parts 1 and 4 [29 USCS §§ 1021 et seq., 1101 et seq.], shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph [enacted Jan. 14, 1983]), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 [29 USCS § 1136] with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 [29 USCS §§ 1021 et seq., 1101 et seq.] and the preceding sections of this part [29 USCS § 1131 et seq.].

(6)

(A) Notwithstanding any other provision of this section—

(i)in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I)standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II)provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 [29 USCS §§ 1002(1), 1003] necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i) [29 USCS § 1056(d)(3)(B)(i)]), qualified medical child support orders (within the meaning of section 609(a)(2)(A)) [29 USCS § 1169(a)(2)(A)], and the provisions of law referred to in section 609(a)(2)(B)(ii) [29 USCS § 1169(a)(2)(B)(ii)] to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

(A) with respect to which the State exercises its acquired rights under section 609(b)(3) [29 USCS § 1169(b)(3)] with respect to a group health plan (as defined in section 607(1) [29 USCS § 1167(1)]), or

(B)for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 USCS §§ 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 731 [29 USCS § 1191].

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b) [29 USCS §§ 1031, 1137(b)]) or any rule or regulation issued under any such law.

(e) Preemption of conflicting state regulations.

(1) Notwithstanding any other provision of this section, this title shall supersede any law of a State which would directly or indirectly prohibit or restrict the inclusion in any plan of an automatic contribution arrangement. The Secretary may prescribe regulations which would establish minimum standards that such an arrangement would be required to satisfy in order for this subsection to apply in the case of such arrangement.

(2) For purposes of this subsection, the term "automatic contribution arrangement" means an arrangement—

(A)under which a participant may elect to have the plan sponsor make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash,

(B)under which a participant is treated as having elected to have the plan sponsor make such contributions in an amount equal to a uniform

percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage), and

(C)under which such contributions are invested in accordance with regulations prescribed by the Secretary under section 404(c)(5) [29 USCS § 1104(c)(5)].

(3)

(A) The plan administrator of an automatic contribution arrangement shall, within a reasonable period before such plan year, provide to each participant to whom the arrangement applies for such plan year notice of the participant's rights and obligations under the arrangement which—

(i)is sufficiently accurate and comprehensive to apprise the participant of such rights and obligations, and

(ii)is written in a manner calculated to be understood by the average participant to whom the arrangement applies.

(B)A notice shall not be treated as meeting the requirements of subparagraph (A) with respect to a participant unless—

(i)the notice includes an explanation of the participant's right under the arrangement not to have elective contributions made on the participant's behalf (or to elect to have such contributions made at a different percentage),

(ii)the participant has a reasonable period of time, after receipt of the notice described in clause (i) and before the first elective contribution is made, to make such election, and

(iii)the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the participant.

History

HISTORY:

Act Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 5, § 514, 88 Stat. 897; Jan. 14, 1983, P.L. 97-473, Title III, §§ 301(a), 302(b), 96 Stat. 2611, 2613; Aug. 23, 1984, P. L. 98-397, Title I, § 104(b), 98 Stat. 1436; April 7, 1986, P. L. 99-272,

Title IX, Subtitle B, § 9503(d)(1), 100 Stat. 207; Dec. 19, 1989, P. L. 101-239, Title VII, Subtitle G, Part V, Subpart D, § 7894(f)(2)(A), (3)(A), 103 Stat. 2450, 2451; Aug. 10, 1993, P. L. 103-66, Title IV, Subtitle D, § 4301(c)(4), 107 Stat. 377; Aug. 21, 1996, P. L. 104-191, Title I, Subtitle A, Part 1, § 101(f)(1), 110 Stat. 1953; Sept. 26, 1996, P. L. 104-204, Title VI, § 603(b)(3)(G), 110 Stat. 2938; July 16, 1998, P. L. 105-200, Title IV, § 401(h)(2)(A)(i), (ii), 112 Stat. 668; Aug. 17, 2006, P. L. 109-280, Title IX, § 902(f)(1), 120 Stat. 1039.

End of Document

30 USCS § 1253

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 30. MINERAL LANDS AND MINING (Chs. 1 — 32) > CHAPTER 25. SURFACE MINING CONTROL AND RECLAMATION (§§ 1201 — 1328) > CONTROL OF THE ENVIRONMENTAL IMPACTS OF SURFACE COAL MINING (§§ 1251 — 1279)

§ 1253. State programs

(a) Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness. Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 521 and 523 and title IV of this Act [30 USCS §§ 1271 and 1273, and 1231 et seq.], shall submit to the Secretary, by the end of the eighteenth-month [eighteen-month] period beginning on the date of enactment of this Act [enacted Aug. 3, 1977], a State program which demonstrates that such State has the capability of carrying out the provisions of this Act [30 USCS §§ 1201 et seq.] and meeting its purposes through—

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act [30 USCS §§ 1201 et seq.];

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this Act [30 USCS §§ 1201 et seq.], including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act [30 USCS §§ 1201 et seq.];

(4) a State law which provides for the effective implementations [implementation], maintenance, and enforcement of a permit system, meeting the requirements of this title [30 USCS §§ 1251 et seq.] for the

regulations [regulation] of surface coal mining and reclamation operations for coal on lands within the State;

(5)establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 [30 USCS § 1272] provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; [and]

(6)establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7)rules and regulations consistent with regulations issued by the Secretary pursuant to this Act [30 USCS §§ 1201 et seq.].

(b) Approval of program. The Secretary shall not approve any State program submitted under this section until he has—

(1)solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2)obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151–1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(3)held at least one public hearing on the State program within the State; and

(4)found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date such State program was submitted to him.

(c) Notice of disapproval. If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised State program or portion thereof. The Secretary

shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) Inability of State to take action. For the purposes of this section and section 504 [30 USCS § 1254], the inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under titles IV and VII of this Act [30 USCS §§ 1231 et seq. and 1251 et seq.] or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 502 of this Act [30 USCS § 1252], until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of sections 503 and 504 [30 USCS §§ 1253 and 1254] shall again be fully applicable.

History

HISTORY:

Act Aug. 3, 1977, P. L. 95-87, Title V, § 503, 91 Stat. 470.

30 USCS § 1292

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 30. MINERAL LANDS AND MINING (Chs. 1 — 32) > CHAPTER 25. SURFACE MINING CONTROL AND RECLAMATION (§§ 1201 — 1328) > ADMINISTRATIVE AND MISCELLANEOUS PROVISIONS (§§ 1291 — 1309b)

§ 1292. Other Federal laws

(a) Construction of 30 USCS §§ 1201 et seq. as superseding, amending modifying, or repealing certain laws. Nothing in this Act [30 USCS §§ 1201 et seq.] shall be construed as superseding, amending, modifying, or repealing the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a), the National Environmental Policy Act of 1969 (42 U.S.C. 4321–47), or any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to—

(1) The Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 721–740).

(2) The Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742).

(3) The Federal Water Pollution Control Act (79 Stat. 903), as amended (33 U.S.C. 1151–1175), the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality.

(4) The Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

(5) The Solid Waste Disposal Act (42 U.S.C. 3251–3259).

(6) The Refuse Act of 1899 (33 U.S.C. 407).

(7) The Fish and Wildlife Coordination Act of 1934 (16 U.S.C. 661–666c).

(8) The Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 et seq.).

(b) Effect on authority of Secretary or heads of other Federal agencies. Nothing in this Act [30 USCS §§ 1201 et seq.] shall affect in any way the authority of the Secretary or the heads of other Federal agencies under other provisions of law to include in any lease, license, permit, contract, or other instrument such conditions as may be appropriate to regulate surface coal mining and reclamation operations on land under their jurisdiction.

(c) Cooperation. To the greatest extent practicable each Federal agency shall cooperate with the Secretary and the States in carrying out the provisions of this Act [30 USCS §§ 1201 et seq.].

(d) Major Federal action. Approval of the State programs, pursuant to section 503(b) [30 USCS § 1253(b)], promulgation of Federal programs, pursuant to section 504 [30 USCS § 1254], and implementation of the Federal lands programs, pursuant to section 523 of this Act [30 USCS § 1273], shall not constitute a major action within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). Adoption of regulations under section 501(b) [30 USCS § 1251(b)] shall constitute a major action within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

History

HISTORY:

Act Aug. 3, 1977, P. L. 95-87, Title VII, § 702, 91 Stat. 519.

End of Document

33 USCS § 1311

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 33. NAVIGATION AND NAVIGABLE WATERS (Chs. 1 — 54) > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL (§§ 1251 — 1388) > STANDARDS AND ENFORCEMENT (§§ 1311 — 1330)

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved—

(1)

(A)not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and

(B)for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,

(C)not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2)

(A)for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USCS § 1317];

(B)[Repealed]

(C)with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(D)for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 USCS § 1317] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(E)as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 USCS § 1314(b)(4)]; and

(F)for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)

(A)for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989; and

(B)for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [33 USCS § 1342(a)(1)] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in

reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [33 USCS § 1312] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste or medical waste. Notwithstanding any other provisions of this Act [33 USCS §§ 1251 et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants.

(1) General authority. The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications. A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A)such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B)such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C)such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may

reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification. If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants.

(A) General authority. Up on petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)], toxic pollutants subject to section 307(a) of this Act [33 USCS § 1317(a)], and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing.

(i) Sufficient information. The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination. The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) of this Act [33 USCS § 1317(a)].

(iii) Listing as toxic pollutant. If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) [33 USCS § 1317(a)], the Administrator shall list the pollutant as a toxic pollutant under section 307(a) [33 USCS § 1317(a)].

(iv) Nonconventional criteria determination. If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with

respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions. A petition for listing of a pollutant under this paragraph—

(i)must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314];

(ii)may be filed before promulgation of such guideline; and

(iii)may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition. A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314].

(E) Burden of proof. The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants. The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1)there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act [33 USCS § 1314(a)(6)];

(2)the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the

protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3)the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4)such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5)all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6)in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7)to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8)there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9)the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 304(a)(1) of this Act [33 USCS § 1314(a)(1)] after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase “the discharge of any pollutant into marine waters” refers to a discharge into deep waters of the

territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)]. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions.

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act [33 USCS §§

1251 et seq.] available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act [33 USCS § 1342] or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act [33 USCS § 1281(b)–(g)], section 307 of this Act [33 USCS § 1317], and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2)

(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i)if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii)if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii)if either an application made before July 1, 1977, for a construction grant under this Act [33 USCS §§ 1251 et seq.] for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has

an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 [33 USCS § 1342] to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act [33 USCS § 1284], and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) [33 USCS § 1317(a), (b)] during the period of such time modification.

(j) Modification procedures.

(1) Any application filed under this section for a modification of the provisions of—

(A)subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [than] the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 [enacted Dec. 29, 1981], except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987], and except as provided in paragraph (5);

(B)subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314] or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act [33 USCS §§ 1251 et seq.], unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g).

(A) Effect of filing. An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the

requirement that the person seeking such modification or listing comply with effluent limitations under this Act [33 USCS §§ 1251 et seq.] for all pollutants not the subject of such application or petition.

(B) Effect of disapproval. Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this Act [33 USCS §§ 1251 et seq.].

(4) Deadline for subsection (g) decision. An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline.

(A) In general. In the 180-day period beginning on the date of the enactment of this paragraph [enacted Oct. 31, 1994], the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application. An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will—

(i)achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii)result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions. The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies. A

(D) Preliminary decision deadline. The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology. In the case of any facility subject to a permit under section 402 [33 USCS § 1342] which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402 [33 USCS § 1342], in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industry-wide application.

(l) Toxic pollutants. Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act [33 USCS § 1317(a)(1)].

(m) Modification of effluent limitation requirements for point sources.

(1) The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403 [33 USCS § 1343], with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A)the facility for which modification is sought is covered at the time of the enactment of this subsection [enacted Jan. 8, 1983] by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B)the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 403 [33 USCS § 1343] exceed by an unreasonable amount the benefits to be obtained, including the objectives of this Act [33 USCS §§ 1251 et seq.];

(C)the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D)such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E)there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F)the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)];

(G)the applicant accepts as a condition to the permit a contractural [contractual] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H)the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this Act [33 USCS §§ 1251 et seq.] applicable to similarly situated discharges; and

(I)no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of

shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3)A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided,* That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors.

(1) General rule. The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) [33 USCS § 1317(b)] for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A)the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B)the application—

(i)is based solely on information and supporting data submitted to the Administrator during the rule-making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications. An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision. The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information. The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications. For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection [enacted Feb. 7, 1987] shall be treated as having been submitted to the Administrator on the 180th day following such date of enactment [enacted Feb. 7, 1987]. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application. An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial. If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports. By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 301 or 304 of this Act [33 USCS § 1311 or 1314] or any national categorical pretreatment standard under section 307(b) of this Act [33 USCS § 1317(b)] filed before, on, or after such date of enactment [enacted Feb. 7, 1987].

(o) Application fees. The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of section 301, section 304(d)(4), and section 316(a) of this Act [33 USCS §§ 1311(c), (g), (i), (k), (m), (n), 1314(d)(4), 1316(a)]. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled “Water Permits and Related Services” which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations.

(1) In general. Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b) [33 USCS § 1342(b)], may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations. The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the

pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 303 of this Act [33 USCS § 1313].

(3) Definitions. For purposes of this subsection—

(A) Coal remining operation. The term “coal remining operation” means a coal mining operation which begins after the date of the enactment of this subsection [enacted Feb. 4, 1987] at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) Remined area. The term “remined area” means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(C) Pre-existing discharge. The term “pre-existing discharge” means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws. Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

History

HISTORY:

Act June 30, 1948, ch 758, Title III, § 301, as added Oct. 18, 1972, P. L. 92-500, § 2, 86 Stat. 844; Dec. 27, 1977, P. L. 95-217, §§ 42–47, 53(c), 91 Stat. 1582-1586, 1590; Dec. 29, 1981, P. L. 97-117, §§ 21(a) in part, (b), 22(a)–(d), 95 Stat. 1631, 1632; Jan. 8, 1983, P. L. 97-440, 96 Stat. 2289; Feb. 4, 1987, P. L. 100-4, Title III, §§ 301(a)–(e), 302(a)–(d), 303(a), (b)(1), (c)–(f), 304(a), 305, 306(a), (b), 307, 101 Stat. 29; Nov. 18, 1988, P. L. 100-688, Title III, Subtitle B, § 3202(b), 102 Stat. 4154; Oct. 31, 1994, P. L. 103-431, § 2, 108 Stat. 4396; Dec. 21, 1995, P. L. 104-66, Title II, Subtitle B, § 2021(b), 109 Stat. 727.

End of Document

33 USCS § 1313

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 33. NAVIGATION AND NAVIGABLE WATERS (Chs. 1 — 54) > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL (§§ 1251 — 1388) > STANDARDS AND ENFORCEMENT (§§ 1311 — 1330)

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards.

(1) In order to carry out the purpose of this Act [33 USCS §§ 1251 et seq.], any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act [33 USCS §§ 1251 et seq.] unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water

Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)

(A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972] has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations.

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], if—

(A)the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)

(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33 USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act [33 USCS § 1317(a)(1)] for which criteria have been published under section 304(a) [33 USCS § 1314(a)], the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such

designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8) [33 USCS § 1314(a)(8)]. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act [33 USCS §§ 1251 et seq.], such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act [33 USCS §§ 1251 et seq.].

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act [33 USCS §§ 1251 et seq.].

(d) Identification of areas with insufficient controls; maximum daily load; certain effluvient limitations revision.

(1)

(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the

date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this

section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process.

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.].

(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 [enacted Oct. 18, 1972] to the Administrator for his approval a proposed continuing planning process which is consistent with this Act [33 USCS §§ 1251 et seq.]. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act [33 USCS §§ 1251 et seq.]. The Administrator shall not approve any State permit program under title IV of this Act [33 USCS §§ 1341 et seq.] for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A)effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B)the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C)total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D)procedures for revision;

(E)adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) [33 USCS § 1311(b)(1), (2)] nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act [33 USCS § 1326].

(h) Thermal water quality standards. For the purposes of this Act [33 USCS §§ 1251 et seq.] the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria.

(1) Adoption by States.

(A) Initial criteria and standards. Not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000], each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a) [33 USCS § 1314(a)].

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 304(a)(9) [33 USCS § 1314(a)(9)], each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt.

(A) In general. If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000].

(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

History

HISTORY:

Act June 30, 1948, ch 758, Title III, § 303, as added Oct. 18, 1972, P. L. 92-500, § 2, 86 Stat. 846; Feb. 4, 1987, P. L. 100-4, Title III, § 308(d), Title IV, § 404(b), 101 Stat. 39, 68; Oct. 10, 2000, P. L. 106-284, § 2, 114 Stat. 870.

End of Document

33 USCS § 1342

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 33. NAVIGATION AND NAVIGABLE WATERS (Chs. 1 — 54) > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL (§§ 1251 — 1388) > PERMITS AND LICENSES (§§ 1341 — 1346)

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A)apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B)are for fixed terms not exceeding five years; and

(C)can be terminated or modified for cause including, but not limited to, the following:

(i)violation of any condition of the permit;

(ii)obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii)change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D)control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

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

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A)a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B)a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the

State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or

transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A) NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404 [33 USCS § 1344], existing permitting requirements under section 402 [33 USCS § 1342], or from any other federal law.

(C) The authorization provided in Section 505(a) [33 USCS § 1365(a)] does not apply to any non-permitting program established under 402(p)(6) [33 USCS § 1342(p)(6)] for the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307

and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A)such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B)the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if—

(A)the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B)the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A)material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)

(i)information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii)the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C)a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D)the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E)the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the

limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A)A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B)A discharge associated with industrial activity.

(C)A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D)A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E)A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a

violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall

issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the “CSO control policy”).

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(s) Integrated plans.

(1) Definition of integrated plan. In this subsection, the term 'integrated plan' means a plan developed in accordance with the Integrated Municipal Stormwater and Wastewater Planning Approach Framework, issued by the Environmental Protection Agency and dated June 5, 2012.

(2) In general. The Administrator (or a State, in the case of a permit program approved by the Administrator) shall inform municipalities of the opportunity to develop an integrated plan that may be incorporated into a permit under this section.

(3) Scope.

(A) Scope of permit incorporating integrated plan. A permit issued under this section that incorporates an integrated plan may integrate all requirements under this Act [33 USCS §§ 1251 et seq.] addressed in the integrated plan, including requirements relating to—

(i)a combined sewer overflow;

(ii)a capacity, management, operation, and maintenance program for sanitary sewer collection systems;

(iii)a municipal stormwater discharge;

(iv)a municipal wastewater discharge; and

(v)a water quality-based effluent limitation to implement an applicable wasteload allocation in a total maximum daily load.

(B) Inclusions in integrated plan. An integrated plan incorporated into a permit issued under this section may include the implementation of—

(i)projects, including innovative projects, to reclaim, recycle, or reuse water; and

(ii)green infrastructure.

(4) Compliance schedules.

(A) In general. A permit issued under this section that incorporates an integrated plan may include a schedule of compliance, under which actions taken to meet any applicable water quality-based effluent limitation may be implemented over more than 1 permit term if the schedule of compliance—

(i)is authorized by State water quality standards; and

(ii)meets the requirements of section 122.47 of title 40, Code of Federal Regulations (as in effect on the date of enactment of this subsection).

(B) Time for compliance. For purposes of subparagraph (A)(ii), the requirement of section 122.47 of title 40, Code of Federal Regulations, for compliance by an applicable statutory deadline under this Act [33 USCS §§ 1251 et seq.] does not prohibit implementation of an applicable water quality-based effluent limitation over more than 1 permit term.

(C) Review. A schedule of compliance incorporated into a permit issued under this section may be reviewed at the time the permit is renewed to determine whether the schedule should be modified.

(5) Existing authorities retained.

(A) Applicable standards. Nothing in this subsection modifies any obligation to comply with applicable technology and water quality-based effluent limitations under this Act [33 USCS §§ 1251 et seq.].

(B) Flexibility. Nothing in this subsection reduces or eliminates any flexibility available under this Act [33 USCS §§ 1251 et seq.], including the authority of a State to revise a water quality standard after a use attainability analysis under section 131.10(g) of title 40, Code of Federal Regulations (or a successor regulation), subject to the

approval of the Administrator under section 303(c) [33 USCS § 1313(c)]..

(6) Clarification of state authority.

(A) In general. Nothing in section 301(b)(1)(C) [33 USCS § 1311(b)(1)(C)] precludes a State from authorizing in the water quality standards of the State the issuance of a schedule of compliance to meet water quality-based effluent limitations in permits that incorporate provisions of an integrated plan.

(B) Transition rule. In any case in which a discharge is subject to a judicial order or consent decree, as of the date of enactment of this subsection, resolving an enforcement action under this Act [33 USCS §§ 1251 et seq.], any schedule of compliance issued pursuant to an authorization in a State water quality standard may not revise a schedule of compliance in that order or decree to be less stringent, unless the order or decree is modified by agreement of the parties and the court..

History

HISTORY:

Act June 30, 1948, ch 758, Title IV, § 402, as added Oct. 18, 1972, P. L. 92-500, § 2, 86 Stat. 880; Dec. 27, 1977, P. L. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1577, 1591, 1599, 1600; Feb. 4, 1987, P. L. 100-4, Title IV, §§ 401–403, 404(a), (c) [(d)], 405, 101 Stat. 65–69; Oct. 31, 1992, P. L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, P. L. 104-66, Title II, Subtitle B, § 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, P. L. 106-554, § 1(a)(4), 114 Stat. 2763; July 30, 2008, P. L. 110-288, § 2, 122 Stat. 2650; Feb. 7, 2014, P. L. 113-79, Title XII, Subtitle C, § 12313, 128 Stat. 992; Jan. 14, 2019, P.L. 115-436, § 3(a), 132 Stat. 5558.

End of Document

30 CFR 732.15

This document is current through the December 31, 2019 issue of the Federal Register. Title 3 is current through December 31, 2019.

Code of Federal Regulations > TITLE 30 -- MINERAL RESOURCES > CHAPTER VII -- OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER C -- PERMANENT REGULATORY PROGRAMS FOR NON-FEDERAL AND NON-INDIAN LANDS > PART 732 -- PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM SUBMISSIONS

§ 732.15 Criteria for approval or disapproval of State programs.

The Secretary shall not approve a State program unless, on the basis of information contained in the program submission, comments, testimony and written presentations at the public hearings, and other relevant information, the Secretary finds that--

(a) The program provides for the State to carry out the provisions and meet the purposes of the Act and this Chapter within the State and that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of the Chapter.

(b) The State regulatory authority has the authority under State laws and regulations pertaining to coal exploration and surface coal mining and reclamation operations and the State program includes provisions to --

(1) Implement, administer and enforce all applicable requirements consistent with subchapter K of this chapter;

(2) Implement, administer and enforce a permit system consistent with the regulations of subchapter G of this chapter and prohibit surface coal mining and reclamation operations without a permit issued by the regulatory authority;

(3) Regulate coal exploration consistent with 30 CFR parts 772 and 815 and prohibit coal exploration that does not comply with 30 CFR parts 772 and 815;

(4) Require that persons extracting coal incidental to government financed construction maintain information on site consistent with 30 CFR 707;

(5) Enter, inspect and monitor all coal exploration and surface coal mining and reclamation operations on non-Indian and non-Federal land within the State consistent with the requirements of section 517 of the Act and subchapter L of this chapter;

(6) Implement, administer and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with the requirements of subchapter J of this chapter;

(7) Provide for civil and criminal sanctions for violations of the State law, regulations and conditions of permits and exploration approvals including civil and criminal penalties in accordance with section 518 of the Act and consistent with 30 CFR 845, including the same or similar procedural requirements;

(8) Issue, modify, terminate and enforce notices of violation, cessation orders and show cause orders in accordance with section 521 of the Act and consistent with the requirements of subchapter L of this chapter including the same or similar procedural requirements;

(9) Designate areas as unsuitable for surface coal mining consistent with subchapter F of this chapter;

(10) Provide for public participation in the development, revision and enforcement of State regulations and the State program, consistent with public participation requirements of the Act and this chapter;

(11) Monitor, review and enforce the prohibition against indirect or direct financial interests in coal mining operations, by employees of the State regulatory authority, consistent with 30 CFR 705;

(12) Require the training, examination and certification of persons engaged in or responsible for blasting and the use of explosives consistent with regulations issued by the Secretary, except that no State program is required to implement this provision until six months after Federal regulations for this provision have been promulgated;

(13) Provide for small operator assistance.

(14) Provide for administrative review of State program actions, in accordance with section 525 of the Act and subchapter L of this chapter;

(15) Provide for judicial review of State program actions in accordance with State law, as provided in section 526(e) of the Act, except that judicial review of State enforcement actions shall be in accordance

with section 526 of the Act. Judicial review in accordance with State law shall not be construed to limit the operation of the rights established in section 520 of the Act, except as provided in that section.

(16) Cooperate and coordinate with and provide documents and other information to the Office under the provisions of this chapter.

(c) The State laws and regulations and the State program do not contain provisions which would interfere with or preclude implementation of those in the Act and this chapter.

(d) The State regulatory authority and other agencies having a role in the State program have sufficient legal, technical and administrative personnel and sufficient funding to implement, administer and enforce the provisions of the program, the requirements of paragraph (b) of this section, and other applicable State and Federal laws.

Statutory Authority

30 U.S.C. 1201 et seq. and 16 U.S.C. 470 et seq.

History

[44 FR 15326, Mar. 13, 1979, as amended at 46 FR 53384, Oct. 28, 1981; 47 FR 26366, June 17, 1982; 48 FR 2272, Jan. 18, 1983; 48 FR 44779, Sept. 30, 1983]

Annotations

Case Notes

LexisNexis® Notes

Energy & Utilities Law : Exploration, Discovery & Recovery : General Overview
Energy & Utilities Law : Mining Industry : Coal : General Overview
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation

Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : General Overview
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : Compliance Enforcement
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : State Program Delegation
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : Surface Mining Permits :
Transportation Law : Air Transportation : Charters

Energy & Utilities Law : Exploration, Discovery & Recovery : General Overview

Alternate Fuels, Inc. v. Lujan, 1992 U.S. Dist. LEXIS 15785 (D Kan Sept. 22, 1992).

Overview: *Insufficiency of notice of a proposed rule as published in the Federal Register did not affect the validity of the rule where the mining companies challenging the rule had actual notice of the contents of the rule.*

- The same requirements that apply to the approval of a state program do not apply to the approval of an amendment to that program. The Secretary of Interior may not approve a state program unless he finds that the state regulatory authority has the authority under state laws and regulations pertaining to coal exploration and surface coal mining and reclamation operations. 30 C.F.R. § 732.15(b). This regulation is based on the Surface Mining Control and Reclamation Act (SMCRA). The Secretary shall not approve any state program submitted under this section until he has found that the state has the legal authority and qualified personnel necessary for enforcement of the environmental protection standards. 30 U.S.C.S. § 1253(b)(4). These are the requirements for approval of a state program. The Secretary may reasonably interpret, within his discretion, SMCRA and the accompanying regulations as not requiring the Office of Surface Mining Reclamation and Enforcement to make a finding concerning a state's legal authority when approving an amendment to a state program. Go To Headnote

Energy & Utilities Law : Mining Industry : Coal : General Overview

Indiana Coal Council, Inc. v. Babbitt, 2000 U.S. Dist. LEXIS 14629 (SD Ind Sept. 25, 2000).

Overview: *Agency's disapproval of provisions of amendments to state's surface coal mining and reclamation program was arbitrary and capricious when agency departed from its prior ruling on a similar program absent a rational reason.*

- A state amendment concerning a program of surface coal mining and reclamation operations must be in accordance with the provisions of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C.S. § 1201 et seq., and consistent with the requirements of the chapter. 30 C.F.R. § 732.15(a) (2000). The terms "consistent with" and "in accordance with" mean: (a) With regard to the SMCRA, the state laws and regulations are no less stringent than, meeting the minimum requirements of and include all applicable provisions of the SMCRA, and (b) With regard to the Secretary of Interior's regulations, the state laws and regulations are no less effective than the secretary's regulations in meeting the requirements of the SMCRA. 30 C.F.R. § 730.5 (2000). Go To Headnote

Alternate Fuels, Inc. v. Lujan, 1992 U.S. Dist. LEXIS 15785 (D Kan Sept. 22, 1992).

Overview: *Insufficiency of notice of a proposed rule as published in the Federal Register did not affect the validity of the rule where the mining companies challenging the rule had actual notice of the contents of the rule.*

- The same requirements that apply to the approval of a state program do not apply to the approval of an amendment to that program. The Secretary of Interior may not approve a state program unless he finds that the state regulatory authority has the authority under state laws and regulations pertaining to coal exploration and surface coal mining and reclamation operations. 30 C.F.R. § 732.15(b). This regulation is based on the Surface Mining Control and Reclamation Act (SMCRA). The Secretary shall not approve any state program submitted under this section until he has found that the state has the legal authority and qualified personnel necessary for enforcement of the environmental protection standards. 30 U.S.C.S. § 1253(b)(4). These are the requirements for approval of a state program. The Secretary may reasonably interpret, within his discretion, SMCRA and the accompanying regulations as not requiring the Office of Surface Mining Reclamation and Enforcement to make a finding concerning a state's legal authority when approving an amendment to a state program. Go To Headnote

Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation

Indiana Coal Council, Inc. v. Babbitt, 2000 U.S. Dist. LEXIS 14629 (SD Ind Sept. 25, 2000).

Overview: *Agency's disapproval of provisions of amendments to state's surface coal mining and reclamation program was arbitrary and capricious when agency departed from its prior ruling on a similar program absent a rational reason.*

- A state that proposes any amendments to its laws or regulations that make up its approved surface coal mining and reclamation program must submit them for approval to the Director of the Office of Surface Mining Reclamation (OSM). 30 C.F.R. § 732.17(g) (2000). Upon receipt of a proposed amendment, the OSM is required to publish in the Federal Register a notice of receipt of the proposed amendment, a summary of the amendment, an invitation for public comments, and a notice of any public hearings or meetings to be held. 30 C.F.R. § 732.17(h) (2000). The OSM Director must review the proposed amendments with reference to the criteria set forth in 30 C.F.R. § 732.15 for the approval or disapproval of the state program. 30 C.F.R. § 732.17(h)(10) (2000). Go To Headnote

Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 1995 U.S. App. LEXIS 22659 (3rd Cir Aug. 16, 1995).

Overview: *The Secretary of the Interior was within his discretion when he approved more stringent state amendments to the Surface Mining Control and Reclamation Act because the federal law allowed the state to impose tougher standards within the state.*

- A state that proposes any amendments to the laws or regulations that make up the approved state program must submit them for approval to the Director of the Office of Surface Mining Reclamation and Enforcement (OSM Director). 30 C.F.R. § 732.17(g). The OSM Director must review the proposed amendments with reference to the criteria set forth in 30 C.F.R. § 732.15 for the approval or disapproval of the state program. 30 C.F.R. § 732.17(h)(10). Go To Headnote
- The plain language of 30 C.F.R. § 732.15(b)(7) imposes no duty on the Secretary of the Interior (Secretary) to ensure that all elements of the state program are consistent with state law. Under 30 C.F.R. § 732.15(a) the Secretary must ensure consistency with the relevant provisions of federal

law. 30 C.F.R. §§ 732.15(b)(7), (8) require only that the Secretary find that the Pennsylvania Department of Environmental Resources has the authority under state law and regulations to provide for civil and criminal sanctions for Pennsylvania Surface Mining Conservation and Reclamation Act violations and to enforce them. Go To Headnote

National Coal Ass'n v. Uram, 1994 U.S. Dist. LEXIS 16404 (DDC Sept. 16, 1994).

Overview: *Surface mining regulations were upheld because they were not arbitrary, capricious, or inconsistent with law and were based on a permissible interpretation of the Surface Mining Control and Reclamation Act.*

- Before the Secretary of the Interior may approve a state program, the state program must be consistent with, and cover the same area as, the Surface Mining Control and Reclamation Act of 1977 (Act) and regulations. The state program must be no less stringent than, meet the minimum requirement of, and include all applicable provisions of the Act. 30 C.F.R. § 730.5 (1981). In addition, the state program must be no less effective than the Secretary's regulations in meeting the requirements of the Act. 30 C.F.R. § 732.15(a) (1980). Go To Headnote

Alternate Fuels, Inc. v. Lujan, 1992 U.S. Dist. LEXIS 15785 (D Kan Sept. 22, 1992).

Overview: *Insufficiency of notice of a proposed rule as published in the Federal Register did not affect the validity of the rule where the mining companies challenging the rule had actual notice of the contents of the rule.*

- The duty of the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior in reviewing state program amendments is limited to a determination of whether the proposed state provisions are in accordance with the Surface Mining Control and Reclamation Act and consistent with its implementing regulations. 30 C.F.R. §§ 732.15(a), 730.5(b). Therefore, the basis and purpose statement only needs to address whether the state program amendments meet this consistency requirement. There is no need for the secretary to provide a detailed technical explanation of the state program itself; that is the duty of the state. Go To Headnote

Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : General Overview

Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 1995 U.S. App. LEXIS 22659 (3rd Cir Aug. 16, 1995).

Overview: *The Secretary of the Interior was within his discretion when he approved more stringent state amendments to the Surface Mining Control and Reclamation Act because the federal law allowed the state to impose tougher standards within the state.*

- The Secretary of the Interior (Secretary) has the authority to promulgate regulations establishing procedures and requirements for the preparation, submission and approval of state programs. 30 U.S.C.S. § 1251(b). The criteria established by the Secretary for the approval or disapproval of state programs provide that the Secretary shall not approve a proposed state program unless the Secretary makes findings consistent with 30 C.F.R. § 732.15(a), (b)(7). Go To Headnote

In re Permanent Surface Mining Regulation Litigation, 1980 U.S. Dist. LEXIS 17722 (DDC Feb. 26, 1980).

Overview: *The broad power of Secretary of Interior to issue regulations pursuant to Surface Mining Control and Reclamation Act of 1977 was upheld but certain regulations that were arbitrary, capricious, or inconsistent with the law were remanded for revision.*

- 30 C.F.R. §§ 732.15(b)(7), 840.13(a) require that a state program be consistent with 30 C.F.R. § 845. Go To Headnote

Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : Compliance Enforcement

Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 1995 U.S. App. LEXIS 22659 (3rd Cir Aug. 16, 1995).

Overview: *The Secretary of the Interior was within his discretion when he approved more stringent state amendments to the Surface Mining Control and Reclamation Act because the federal law allowed the state to impose tougher standards within the state.*

- The plain language of 30 C.F.R. § 732.15(b)(7) imposes no duty on the Secretary of the Interior (Secretary) to ensure that all elements of the state program are consistent with state law. Under 30 C.F.R. § 732.15(a) the Secretary must ensure consistency with the relevant provisions of federal law. 30 C.F.R. §§ 732.15(b)(7), (8) require only that the Secretary find that

the Pennsylvania Department of Environmental Resources has the authority under state law and regulations to provide for civil and criminal sanctions for Pennsylvania Surface Mining Conservation and Reclamation Act violations and to enforce them. Go To Headnote

Alternate Fuels, Inc. v. Lujan, 1992 U.S. Dist. LEXIS 15785 (D Kan Sept. 22, 1992).

Overview: *Insufficiency of notice of a proposed rule as published in the Federal Register did not affect the validity of the rule where the mining companies challenging the rule had actual notice of the contents of the rule.*

- The duty of the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior in reviewing state program amendments is limited to a determination of whether the proposed state provisions are in accordance with the Surface Mining Control and Reclamation Act and consistent with its implementing regulations. 30 C.F.R. §§ 732.15(a), 730.5(b). Therefore, the basis and purpose statement only needs to address whether the state program amendments meet this consistency requirement. There is no need for the secretary to provide a detailed technical explanation of the state program itself; that is the duty of the state. Go To Headnote

Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : State Program Delegation

Utah Chapter of the Sierra Club v. Bd. of Oil, 289 P.3d 558, 2012 Utah LEXIS 151 (Utah Oct. 30, 2012).

Overview: *Under Utah Admin. Code r. 645-301-411.140, Board of Oil, Gas and Mining properly concluded that Division of Oil, Gas and Mining gave adequate consideration to cultural and historic resources in adjacent area next to mine. Division's Cumulative Hydrologic Impact Assessment satisfied Utah Admin. Code r. 645-301-72.100 and Utah Code Ann. § 40-10-10.*

- In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C.S. §§ 1201=hr4 1328. SMCRA took a cooperative federalism approach to surface coal mining by establishing minimum national standards and encouraging the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards, as well as any more stringent, but not inconsistent, standards that they might choose. Under SMCRA, the Secretary of the Interior, acting

through the Office of Surface Mining Reclamation and Enforcement (OSM), reviews and either approves or disapproves of State regulatory programs, 30 U.S.C.S. § 1211(c)(1). The Secretary may not approve a State's program or any amendments to a State's program unless, at a minimum, they are no less stringent than SMCRA and no less effective than the federal implementing regulations, 30 U.S.C. S. § 1253(b); 30 C.F.R. §§ 732.15(a), 730.5, 732.17(h)(10). However, once a State's program is approved, it becomes the exclusive authority over mining in that State, 30 U.S.C.S. §§ 1253(a), 1254(a). Because the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously. Go To Headnote

Indiana Coal Council, Inc. v. Babbitt, 2000 U.S. Dist. LEXIS 14629 (SD Ind Sept. 25, 2000).

Overview: *Agency's disapproval of provisions of amendments to state's surface coal mining and reclamation program was arbitrary and capricious when agency departed from its prior ruling on a similar program absent a rational reason.*

- A state amendment concerning a program of surface coal mining and reclamation operations must be in accordance with the provisions of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C.S. § 1201 et seq., and consistent with the requirements of the chapter. 30 C.F.R. § 732.15(a) (2000). The terms "consistent with" and "in accordance with" mean: (a) With regard to the SMCRA, the state laws and regulations are no less stringent than, meeting the minimum requirements of and include all applicable provisions of the SMCRA, and (b) With regard to the Secretary of Interior's regulations, the state laws and regulations are no less effective than the secretary's regulations in meeting the requirements of the SMCRA. 30 C.F.R. § 730.5 (2000). Go To Headnote

West Virginia Mining & Reclamation Ass'n v. Babbitt, 970 F. Supp. 506, 1997 U.S. Dist. LEXIS 10708 (SD W Va July 11, 1997).

Overview: *The Director of the Office of Surface Mining's disapproval of a proposed amendment to West Virginia Surface Coal Mining Reclamation Act, W.V. Code § 22-3-1 to 22-3-32, was in accordance with the regulatory scheme of the U.S. Surface Mining Control and Reclamation Act to place the burden of coal mining operation water clean up on mine operators.*

- The Director of the U.S. Office of Surface Mining, Reclamation, and Enforcement (the Director) may approve a program amendment upon finding that a state's amendment is in accordance with the Surface Mining

Control and Reclamation Act (SMCRA) and consistent with SMCRA's implementing regulations. 30 C.F.R. §§ 732.15(a), 732.17(h)(10). In approving newly proposed state regulations, the Director must determine whether the proposed regulations are "consistent with" the SMCRA and "no less effective than" the Director's own regulations. 30 C.F.R. §§ 1253(a)(7) and 730.5. Further, the proposed amendments may not supersede, amend, modify or repeal the enforcement mechanisms contained in other federal environmental laws, including the Clean Water Act, 33 U.S.C.S. §§ 1251-1387. 30 U.S.C.S. § 1292(a)(3). Go To Headnote

Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 1995 U.S. App. LEXIS 22659 (3rd Cir Aug. 16, 1995).

Overview: *The Secretary of the Interior was within his discretion when he approved more stringent state amendments to the Surface Mining Control and Reclamation Act because the federal law allowed the state to impose tougher standards within the state.*

- A state that proposes any amendments to the laws or regulations that make up the approved state program must submit them for approval to the Director of the Office of Surface Mining Reclamation and Enforcement (OSM Director). 30 C.F.R. § 732.17(g). The OSM Director must review the proposed amendments with reference to the criteria set forth in 30 C.F.R. § 732.15 for the approval or disapproval of the state program. 30 C.F.R. § 732.17(h)(10). Go To Headnote

National Coal Ass'n v. Uram, 1994 U.S. Dist. LEXIS 16404 (DDC Sept. 16, 1994).

Overview: *Surface mining regulations were upheld because they were not arbitrary, capricious, or inconsistent with law and were based on a permissible interpretation of the Surface Mining Control and Reclamation Act.*

- Before the Secretary of the Interior may approve a state program, the state program must be consistent with, and cover the same area as, the Surface Mining Control and Reclamation Act of 1977 (Act) and regulations. The state program must be no less stringent than, meet the minimum requirement of, and include all applicable provisions of the Act. 30 C.F.R. § 730.5 (1981). In addition, the state program must be no less effective than the Secretary's regulations in meeting the requirements of the Act. 30 C.F.R. § 732.15(a) (1980). Go To Headnote

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- The duty of the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior in reviewing state program amendments is limited to a determination of whether the proposed state provisions are in accordance with the Surface Mining Control and Reclamation Act and consistent with its implementing regulations. 30 C.F.R. §§ 732.15(a), 730.5(b). Therefore, the basis and purpose statement only needs to address whether the state program amendments meet this consistency requirement. There is no need for the secretary to provide a detailed technical explanation of the state program itself; that is the duty of the state. Go To Headnote
- The same requirements that apply to the approval of a state program do not apply to the approval of an amendment to that program. The Secretary of Interior may not approve a state program unless he finds that the state regulatory authority has the authority under state laws and regulations pertaining to coal exploration and surface coal mining and reclamation operations. 30 C.F.R. § 732.15(b). This regulation is based on the Surface Mining Control and Reclamation Act (SMCRA). The Secretary shall not approve any state program submitted under this section until he has found that the state has the legal authority and qualified personnel necessary for enforcement of the environmental protection standards. 30 U.S.C.S. § 1253(b)(4). These are the requirements for approval of a state program. The Secretary may reasonably interpret, within his discretion, SMCRA and the accompanying regulations as not requiring the Office of Surface Mining Reclamation and Enforcement to make a finding concerning a state's legal authority when approving an amendment to a state program. Go To Headnote

In re Permanent Surface Mining Regulation Litig., 1979 U.S. Dist. LEXIS 10266 (DDC Aug. 21, 1979).

Overview: *Environmental and industry groups were denied preliminary injunctive relief as to regulations issued by the Office of Surface Mining that set standards for state mining programs because the regulations complied with the federal enabling statute.*

- Under the Surface Mining Control and Reclamation Act of 1977 (Act), the only explicit congressional requirement for approval of state programs that involves citizen participation is that the Secretary of the Interior (Secretary)

hold at least one public hearing on the program within the state prior to approval. 30 U.S.C.S. § 1253(b)(3). Promulgated regulations, however, exist requiring citizen participation pursuant to a general statutory power to establish procedures for the preparation, submission, and approval of state programs. 30 U.S.C.S. § 1251(b). These requirements are, first, that the application for program approval contain, inter alia, narrative descriptions, flow charts or other appropriate documents providing for public participation in the development revision and enforcement of state regulations, the state program, and permits under the state program. 30 C.F.R. § 731.15(g)(14) (1979). Second, the Secretary will not approve a program unless he finds that it provides for public participation in the development, revision, and enforcement of state regulations and the state program, consistent with public participation requirements of the Act. 30 C.F.R. § 732.15(10) (1979). Go To Headnote

Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : Surface Mining Permits :

Indiana Coal Council, Inc. v. Babbitt, 2000 U.S. Dist. LEXIS 14629 (SD Ind Sept. 25, 2000).

Overview: *Agency's disapproval of provisions of amendments to state's surface coal mining and reclamation program was arbitrary and capricious when agency departed from its prior ruling on a similar program absent a rational reason.*

- A state amendment concerning a program of surface coal mining and reclamation operations must be in accordance with the provisions of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C.S. § 1201 et seq., and consistent with the requirements of the chapter. 30 C.F.R. § 732.15(a) (2000). The terms "consistent with" and "in accordance with" mean: (a) With regard to the SMCRA, the state laws and regulations are no less stringent than, meeting the minimum requirements of and include all applicable provisions of the SMCRA, and (b) With regard to the Secretary of Interior's regulations, the state laws and regulations are no less effective than the secretary's regulations in meeting the requirements of the SMCRA. 30 C.F.R. § 730.5 (2000). Go To Headnote

Transportation Law : Air Transportation : Charters

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- Under the Surface Mining Control and Reclamation Act of 1977 (Act), the only explicit congressional requirement for approval of state programs that involves citizen participation is that the Secretary of the Interior (Secretary) hold at least one public hearing on the program within the state prior to approval. 30 U.S.C.S. § 1253(b)(3). Promulgated regulations, however, exist requiring citizen participation pursuant to a general statutory power to establish procedures for the preparation, submission, and approval of state programs. 30 U.S.C.S. § 1251(b). These requirements are, first, that the application for program approval contain, inter alia, narrative descriptions, flow charts or other appropriate documents providing for public participation in the development revision and enforcement of state regulations, the state program, and permits under the state program. 30 C.F.R. § 731.15(g)(14) (1979). Second, the Secretary will not approve a program unless he finds that it provides for public participation in the development, revision, and enforcement of state regulations and the state program, consistent with public participation requirements of the Act. 30 C.F.R. § 732.15(10) (1979). Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Bureau of Land Management, Department of the Interior, regulations with respect to mineral lands: 43 CFR, chapter II, subchapter C.

Federal Energy Regulatory Commission, Department of Energy: 18 CFR chapter I.

Foreign Trade Statistics, Bureau of the Census, Department of Commerce: 15 CFR part 30.

Forest Service regulations relating to mineral developments and mining in national forests: 36 CFR part 251.

General Services Administration regulations for stockpiling of strategic and critical materials: 41 CFR subtitle C, subchapter C.

Geological Survey: 30 CFR chapter II.

Interstate Commerce Commission: 49 CFR chapter X.

Bureau of Indian Affairs, Department of the Interior, mining regulations: 25 CFR chapter I, subchapter I.

EDITORIAL NOTE: Other regulations issued by the Department of the Interior appear in title 25, chapters I and II; title 36, chapter I; title 41, chapter 114, title 43; and title 50, chapters I and IV.

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter VII Availability of Final Report, see: 82 FR 50532, Nov. 1, 2017.]

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30 CFR 946.10

This document is current through the December 31, 2019 issue of the Federal Register. Title 3 is current through December 31, 2019.

Code of Federal Regulations > TITLE 30 -- MINERAL RESOURCES > CHAPTER VII -- OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER T -- PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE > PART 946 -- VIRGINIA

§ 946.10 State regulatory program approval.

The Virginia regulatory program, as submitted on March 3, 1980, as amended and clarified on June 16, 1980, as resubmitted on August 13, 1981, and as clarified in a meeting with OSMRE on September 21 and 22, 1981, and in a letter to the director of the Office of Surface Mining on October 15, 1981, is conditionally approved, effective December 15, 1981. Effective January 1, 1985, the Department of Mines, Minerals and Energy replaces the Department of Conservation and Economic Development as the regulatory authority in Virginia for all surface coal mining and reclamation operations and all exploration operations on non-Federal and non-Indian lands. Copies of the approved program as amended are available for review at the following locations:

(a) Virginia Division of Mined Land Reclamation, P.O. Drawer 900, Big Stone Gap, Virginia 24219.

(b) Office of Surface Mining Reclamation and Enforcement, Big Stone Gap Field Office, P.O. Drawer 1216, Powell Valley Square Shopping Center, room 220, Route 23, Big Stone Gap, Virginia 24219.

(c) and (d)[Removed. 59 FR 17930, Apr. 15, 1994.]

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

30 U.S.C. 1201 et seq.

History

[51 FR 42554, Nov. 25, 1986; 59 FR 17930, Apr. 15, 1994]

Annotations

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Bureau of Land Management, Department of the Interior, regulations with respect to mineral lands: 43 CFR, chapter II, subchapter C.

Federal Energy Regulatory Commission, Department of Energy: 18 CFR chapter I.

Foreign Trade Statistics, Bureau of the Census, Department of Commerce: 15 CFR part 30.

Forest Service regulations relating to mineral developments and mining in national forests: 36 CFR part 251.

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Geological Survey: 30 CFR chapter II.

Interstate Commerce Commission: 49 CFR chapter X.

Bureau of Indian Affairs, Department of the Interior, mining regulations: 25 CFR chapter I, subchapter I.

EDITORIAL NOTE: Other regulations issued by the Department of the Interior appear in title 25, chapters I and II; title 36, chapter I; title 41, chapter 114, title 43; and title 50, chapters I and IV.

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter VII Availability of Final Report, see: 82 FR 50532, Nov. 1, 2017.]

End of Document

4 VAC 25-130-816.46

This document is current through November 15, 2019

VA - Virginia Administrative Code > TITLE 4. CONSERVATION AND NATURAL RESOURCES > AGENCY 25. DEPARTMENT OF MINES, MINERALS AND ENERGY > CHAPTER 130. COAL SURFACE MINING RECLAMATION REGULATIONS > PART 816 PERMANENT PROGRAM PERFORMANCE STANDARDS???SURFACE MINING ACTIVITIES

4 VAC 25-130-816.46 Hydrologic Balance; Siltation Structures.

(a) For the purposes of this section only, "disturbed area" shall not include those areas???

(1) In which the only surface mining activities include diversion ditches, siltation structures, or roads that are designed, constructed and maintained in accordance with this Part; and

(2) For which the upstream area is not otherwise disturbed by the operator.

(b) General requirements.

(1) Additional contributions of sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (b)(5) or (e) of this section.

(3) Siltation structures for an area shall be constructed before beginning any surface mining activities in that area and, upon construction, shall be certified by a qualified registered professional engineer to be constructed as designed and as approved in the reclamation plan.

(4) Any siltation structure which impounds water shall be designed, constructed and maintained in accordance with 4VAC25-130-816.49.

(5) Siltation structures shall be maintained until removal is authorized by the division and the disturbed area has been stabilized and revegetated. In no case shall the structure be removed sooner than two years after the last augmented seeding.

(6) When a siltation structure is removed, any embankment material and all accumulated sediment shall be placed in designated disposal areas,

and the land on which the siltation structure was located shall be regraded and revegetated in accordance with the reclamation plan and 4VAC25-130-816.111 through 4VAC25-130-816.116. Sedimentation ponds approved by the division for retention as permanent impoundments may be exempted from this requirement.

(c) Sedimentation ponds.

(1) When used, sedimentation ponds shall???

(i) Be used individually or in series;

(ii) Be located as near as possible to the disturbed area and out of perennial streams unless such location is approved by the division; and

(iii) Be designed, constructed, and maintained to???

(A) Provide adequate sediment storage volume and provide adequate detention time to allow the effluent from the ponds to meet state and federal effluent limitations;

(B) Have a minimum volume of 0.125 acre-feet per acre of disturbed area draining to it, of which 0.075 acre-feet per acre disturbed shall be sediment storage volume and the remainder shall be detention storage volume;

(C) Treat the 10-year, 24-hour precipitation event ("design event") unless a lesser design event is approved by the division based on terrain, climate, other site-specific conditions and on a demonstration by the permittee that the effluent limitations of 4VAC25-130-816.42 will be met;

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraphs (c)(1)(iii)(A) and (B) of this section;

(E) Minimize, to the extent possible, short circuiting;

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event. The elevation corresponding to the sediment storage volume shall be determined and a bench mark set in the field from which this elevation can readily be established. Sediment shall be removed when its accumulation reaches the cleanout level or more frequently if the operation of the structure is impaired. Sediment removed shall be placed only in disposal areas identified and approved in the reclamation plan;

(G) Ensure against excessive settlement;

(H) Be free of sod, large roots, frozen soil, and acid or toxic-forming coal-processing waste; and

(I) Be compacted properly.

(2) Spillways. A sedimentation pond shall include either a combination of principal and emergency spillways or a single spillway configured as specified in 4VAC25-130-816.49(a)(9).

(d) Other treatment facilities.

(1) Other treatment facilities shall be designed to treat the 10-year, 24-hour precipitation event unless a lesser design event is approved by the division based on terrain, climate, other site-specific conditions and a demonstration by the permittee that the effluent limitations of 4VAC25-130-816.42 will be met.

(2) Other treatment facilities shall be designed in accordance with the applicable requirements of paragraph (c) of this section.

(e) Exemptions. Exemptions to the requirements of this section may be granted if???

(1) The disturbed drainage area within the total disturbed area is small; and

(2) The permittee demonstrates that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed area to meet the effluent limitations under 4VAC25-130-816.42 and the applicable state and federal water quality standards for the receiving waters.

Statutory Authority

Statutory Authority:

§§ 45.1-161.3 and 45.1-230 of the Code of Virginia.

History

Historical Notes:

Derived from VR480-03-19 § 816.46, eff. December 15, 1981; amended, eff. June 28, 1982; October 28, 1982; December 14, 1982; October 11, 1983; December 27, 1983; May 8, 1984; June 22, 1984; August 2, 1984; October 16, 1985; January

7, 1987; July 22, 1987; November 25, 1987; October 12, 1988; December 26, 1990; July 1, 1991; July 17, 1991; November 20, 1991; July 7, 1992; May 5, 1993; October 19, 1994; Volume 15, Issue 06, eff. January 6, 1999.
