No. 19-2194

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

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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Dated: December 9, 2019

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SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, et al. Plaintiffs-Appellants, v. RED RIVER COAL COMPANY, INC. Defendant-Appellee	)	No. 19-2194

APPELLANTS' RULE 26.1 DISCLOSURE STATEMENT

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

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

Sierra Club: Sierra Club has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States, and no publicly held

corporation has a 10% or greater ownership interest in Sierra Club because it has never issued any stock or other security.

DATED: December 9, 2019

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants Southern Appalachian Mountain Stewards, Appalachian Voices, and Sierra Club respectfully request oral argument.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants Southern Appalachian Mountain Stewards, Appalachian Voices, and Sierra Club ("SAMS") brought this citizen suit against Defendant-Appellee Red River Coal Company, Inc., ("Red River") under the Surface Mining Control and Reclamation Act ("Surface Mining Act" or "SMCRA"), 30 U.S.C. §§ 1201 et seq., the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251 et seq., and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq. SAMS alleged that Red River's discharges of pollutants from hollow fill underdrains at its North Fox Gap Surface Mine are violating SMCRA and the CWA or, in the alternative, RCRA. J.A. 007. The District Court had jurisdiction under 30 U.S.C. § 1270 (SMCRA citizen suit provision), 33 U.S.C. § 1365 (CWA citizen suit provision), and 42 U.S.C. § 6972 (RCRA citizen suit provision). The District Court's final order and judgment—granting Red River's motion for summary judgment on all claims, and granting SAMS' motion for partial summary judgment as to jurisdictional issues—was entered on September 25, 2019. J.A. 871, 905.

SAMS filed a timely notice of appeal on October 24, 2019. J.A. 906; *see* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The single issue on appeal is whether the District Court properly applied the "savings clause" of the Surface Mining Act, 30 U.S.C. § 1292, to bar Plaintiffs' claim under that statute. That clause provides that "[n]othing in [SMCRA] shall be construed as superseding, amending, modifying, or repealing" various laws, including the CWA. The District Court held that even though enforcing Red River's obligations under SMCRA's performance standards would not be inconsistent with the CWA, applying those standards to Red River's discharges "would impermissibly circumvent the CWA" in violation of that clause. J.A. 903. SAMS contends that the District Court misinterpreted and misapplied that clause.

STATEMENT OF THE CASE

Plaintiffs initiated this suit on August 2, 2017. *See* J.A. 001. The complaint alleged that as a result of the continued discharge of harmful pollutants into Virginia waterways, Red River was in violation of the CWA, SMCRA or, alternatively, RCRA. Specifically, SAMS claimed that those discharges were not permitted by Red River's National Pollutant Discharge Elimination System ("NPDES") permit, violated SMCRA's performance standards, and violated RCRA's prohibition of imminent and substantial endangerment to the

environment. Following the close of discovery, Red River filed a motion for summary judgment on each of SAMS' three claims. *See* J.A. 003; Docs. 42 and 43. SAMS filed a motion for partial summary judgment on jurisdictional issues, including its members' standing to sue and its compliance with pre-suit notice requirements. *See* J.A. 004; Docs. 54 and 55.

In its motion for summary judgment, Red River did not deny that its mine is producing the pollutants in question, or that the receiving streams are impaired by those pollutants. Instead, Red River proffered a series of legal defenses that sought to relieve it of its obligations under any environmental protection law. Red River argued that its discharge from its hollow fills and underdrains were authorized by its CWA NPDES permit, either because the permit applies to all point sources within the permit boundary, or because the entire facility constitutes a single point source. J.A. 892, 892 n.5; Doc. 43 at 16-17, Doc. 52 at 10. Red River also asserted that even if its NPDES permit does not actually authorize its discharges, it is nevertheless shielded from liability by the Clean Water Act's permit shield provision. J.A. 897; Doc. 43 at 18. Red River further argued that if the court determined it had not violated the Clean Water Act, no independent liability could attach under SMCRA due to operation of SMCRA's savings clause. J.A. 901; Doc. 43 at 21. Finally, in a bid to evade RCRA liability, Red River offered a conditional concession that the CWA applied to its discharges because the hollow fill

underdrains are point sources. J.A. 875, 889–90; Doc. 43 at 22. If the court accepted that concession, it would be fatal to SAMS' RCRA claim, because Congress excluded CWA point sources from RCRA's scope. 42 U.S.C. § 6903(27).

In its decision, the District Court noted that the relevant facts are largely uncontested. J.A. 872. The District Court agreed with SAMS that Red River's hollow fills and underdrains are point sources that require coverage under the CWA, and that the mine's NPDES permit does not authorize discharges from those sources. J.A. 891, 897. The District Court also agreed with SAMS that the underdrains continue to produce high levels of pollutants and that those pollutants have harmed aquatic life in the receiving streams. J.A 875. Nevertheless, the District Court accepted Red River's argument that it was not liable for those unpermitted discharges because they were immunized by the CWA's permit shield. J.A. 900. The District Court also agreed with Red River's argument that it is not liable under SMCRA due to that statute's savings clause. J.A. 903. Finally, the District Court dismissed SAMS' RCRA claim because, once it determined that the mine's discharges originated from point sources, those sources were necessarily excluded from RCRA coverage by the definition of "solid waste" in 42 U.S.C. § 6903(27), which excludes "industrial discharges which are point sources subject to permits under" the CWA. J.A. 903–04.

In this appeal, SAMS does not challenge the District Court's dismissal of its CWA and RCRA claims. SAMS challenges only the portion of the District Court's decision holding that Red River is not liable under SMCRA based on application of that statute's savings clause.

LEGAL BACKGROUND

Congress passed SMCRA in 1977 to address the environmental effects of surface coal mining including, in particular, water pollution and the degradation of downstream habitat. 30 U.S.C. § 1201, *et seq.* In enacting SMCRA's comprehensive regulatory scheme, Congress recognized the inadequacy of existing environmental protections, including those provided by the 1972 Clean Water Act, to address the environmental impacts of coal mining. As this Court has found, "[b]y enacting the Surface Mining Control and Reclamation Act of 1977, Congress recognized that the Federal Water Pollution Control Act is inadequate to eliminate pollution from inactive mines. The surface mining act . . . requires a surface mine operator to restore vegetation, prevent erosion, and curtail water pollution after active mining has ceased." *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 251 (4th Cir. 1979), *rev'd in part sub nom. E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). "Inactive mines," as used here, means "surface mines during reclamation and revegetation." *Id*. at 250.

The findings by this Court are consistent with the statutory findings and purpose of SMCRA, as articulated by Congress, and the legislative history of the statute. SMCRA opens with a declaration of Congressional findings. 30 U.S.C. § 1201. These findings emphasize the harm posed by water pollution discharged from surface coal mines, and state that:

> many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources[.]

Id. at 1201(c).

As the Supreme Court has recognized, these findings were the result of "six years of the most thorough legislative consideration. Committees of both Houses of Congress held extended hearings during which vast amounts of testimony and documentary evidence about the effects of surface mining on our Nation's environment and economy were brought to Congress' attention." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 278-79 (1981). The detailed findings made by Congress include that "[s]urface coal mining activities have imposed large social costs on the public ... in many areas of the country in the

form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty." *Id*. at 279 (*quoting* S. Rep. No. 95–128, p. 50 (1977)).

> As highlighted by the Supreme Court, Congress also found that:
>
> > The most widespread damages ... are environmental in nature. Water users and developers incur significant economic and financial losses as well.
> > Reduced recreational values, fishkills, reductions in normal waste assimilation capacity, impaired water supplies, metals and masonry corrosion and deterioration, increased flood frequencies and flood damages, reductions in designed water storage capacities at impoundments, and higher operating costs for commercial waterway users are some of the most obvious economic effects that stem from mining-related pollution and sedimentation.

Id. at 280 (quoting H.R. Rep. No. 95–218, at 59, U.S. Code Cong. & Admin. News 1977, p. 597). The Clean Water Act was passed in 1972 and therefore was in full effect when Congress passed SMCRA five years later.

In structuring SMCRA, Congress provided for the protection of water quality and minimization of other environmental harms through the use of mandatory "environmental protection performance standards" that are incorporated into every permit and that apply throughout coal removal and reclamation operations. 30 U.S.C. § 1265. The federal performance standards require that "[a]ll surface mining and reclamation activities shall be conducted to . . . prevent material damage to the hydrologic balance outside the permit area." 30 C.F.R. § 816.41(a); *see also* 48 Fed. Reg. 43,956, 43,984 (Sep. 26, 1983) (EPA concurring).

The federal performance standards further require that "[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434." 30 C.F.R. § 816.42; *see also* 47 Fed. Reg. 47,216, 47,221 (Oct. 22, 1982) (EPA concurring). Finally, the federal performance standards require that if a mine's discharges are not in compliance with water quality standards, "the operator shall use and maintain the necessary water-treatment facilities or water quality controls." 30 C.F.R. § 816.41(d)(1); *see also* 48 Fed. Reg. at 43,984 (EPA concurring).

States may assume jurisdiction over the regulation of surface mining within their borders by submitting a program of state laws that meets all requirements of the federal statute and regulations. 30 U.S.C § 1253(a); 30 C.F.R § 732.15(a). Virginia secured approval to administer its own SMCRA regulatory program in December 1981. 46 Fed. Reg. 61,088 (Dec. 15, 1981); 30 C.F.R. § 946.10. Every SMCRA permit issued in Virginia requires the permit holder to comply with all performance standards. VA Code § 45.1-242(B); 4 VAC 25-130-773.17(c). The environmental protection performance standards imposed on Red River and all other Virginia coal mine operators mirror the federal performance standards, including the requirements that "[a]ll surface mining and reclamation activities

shall be conducted . . . to prevent material damage to the hydrologic balance outside the permit area," (4 VAC 25-130-816.41(a)); "[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws, standards and regulations. . ." (*id.* at 816.42); and, if mining operations fail to achieve compliance with water quality standards, that "the permittee shall use and maintain the necessary water treatment facilities or water quality controls" (*id.* at 816.41(d)(1)). Virginia's water quality standards include 9 VAC 25-260-20, which provides that "State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life."

STATEMENT OF THE FACTS

Red River's North Fox Gap Surface Mine ("the mine") discharges water contaminated with high levels of mining pollutants into streams that are listed as impaired for aquatic life due to the presence of those pollutants. J.A. 872. Although Red River touted its mine as a way to clean up earlier unreclaimed mine disturbance on the same site, the current pollutant concentrations exceed the levels recorded prior to commencement of Red River's mine operations. J.A. 872–73. Pollutant concentrations have continued to increase, even after the mine stopped

producing coal and shifted to mine reclamation. J.A. 882–83. Despite this continuing pollution, Red River and the Virginia Department of Mines, Minerals and Energy's Division of Mined Land Reclamation ("DMLR") have proceeded under the theory that because the mine is in reclamation it should not be subject to the same environmental protections as those that apply to active mines. J.A. 881–82

In 1992, DMLR issued CWA NPDES and SMCRA permits authorizing Red River's surface coal mining activities at the mine.[1] J.A. 873. As part of its mining operations, Red River disposed of excess mine spoil in eight hollow fills. J.A. 874. Each of those fills was constructed with an engineered underdrain that collects and channels water. J.A. 873–84. During coal removal, each underdrain discharged to a sediment pond located at the bottom – or toe – of the fill. J.A. 874. Each pond then discharged from a designated outfall into the South Fork Pound River – including its tributaries Rat Creek, Stillhouse Branch, and additional unnamed tributaries. J.A. 872. Those pond outfalls were designated point sources under the Clean Water

[1] Although DMLR issued the authorizations via a joint SMCRA/CWA permit, it engaged in separate analyses of the proposed operation's compliance with the SMCRA and CWA NPDES regulatory schemes, and addressed the respective regulatory requirements in separate components of the permit. J.A. 894-95.

Act, and Red River's NPDES permit authorized discharges, imposed monitoring requirements, and set pollutant limits at each outfall. J.A. 874–75.[2]

In 2014, Red River sought and received authorization from DMLR to remove each of the sediment ponds below the hollow fills. J.A. 874–75. Following pond removal, the hollow fills continue to flow but now discharge directly into the receiving streams without passing through any control or treatment structure. J.A. 874–75. In 2015, DMLR issued a "Monitoring Point Detail Supplement" that modified the mine's NPDES permit to delete certain sediment pond outfalls from permit coverage, and to relocate the compliance points for others to locations above the hollow fills. J.A. 875. The net effect of this modification was to eliminate all Clean Water Act monitoring and compliance requirements below the hollow fills. J.A. 875. In contrast, the mine's SMCRA permit continues to require monitoring of pollutants in the hollow fill underdrains. J.A. 875-76.

Prior to commencement of operations at the mine, water quality in the receiving streams below the mine was good. *See* J.A. 586, Red River Permit Application ("[d]ischarges from the permit area flow to South Fork Pound River and Rat Creek. Baseline data show that existing stream water quality in these two streams is generally good."). As determined by the District Court, levels of total

[2] Only six of the hollow fill underdrains – underdrains 1 through 6 – are the subject of the present action.

dissolved solids ("TDS")[3] and conductivity in the streams receiving the mine's discharges are now higher than they were prior to mining, and those elevated levels have harmed the biological integrity of the receiving streams. J.A. 875 ("elevated levels [of TDS and conductivity] have harmed aquatic life in the streams, which the Virginia Department of Environmental Quality has designated as impaired. . ."); J.A. 882–83 ("Samples collected by Red River's contractor as part of aquatic life benthic monitoring showed that instream conductivity in the South Fork of the Pound River and Rat Creek increased between the fall of 2015 and the fall of 2016 . . . . sampling data [from November 2017 and May 2018] showed that TDS and conductivity levels were significantly higher than the pre-mining levels. . .").

Red River applied to renew its NPDES and SMCRA permits after its NPDES permit was modified to exclude NPDES monitoring and compliance below the hollow fills. In 2015, in response to that permit renewal application, DMLR issued draft NPDES and SMCRA permits. J.A. 879. The U.S. Environmental Protection Agency (EPA) objected to issuance of the NPDES

[3] TDS is a direct measure of the concentration of dissolved materials in water. It is often considered in conjunction with the parameter of conductivity to assess the ionic concentrations of water. *Ohio Valley Environmental Coalition v. Elk Run Coal Co.*, 24 F. Supp. 3d 532, 568 (S.D.W.Va. 2014) (explaining "conductivity measures the electrical current created by dissolved ions, [] total dissolved solids measures the mass of those *same* ions"); *id.* at 578 ("The water chemistry of these streams has been dramatically altered, containing levels of ionic salts—measured as conductivity—which are scientifically proven to be seriously detrimental to aquatic life.").

permit based on the permit's failure to address discharges from the hollow fill underdrains or to address TDS contributions from those locations. J.A. 879–880. DMLR noted in its response that "[n]o constructed discharges or siltation structures exist at the original discharge locations," because "[t]he areas have been reclaimed and streams restored per the joint permit requirements." J.A. 881-82; J.A. 809. Although EPA never withdrew its objection, DMLR renewed both the NPDES and SMCRA permits in 2016. J.A. 882.

In a 2015 letter to DMLR, the federal Office of Surface Mining Reclamation and Enforcement ("OSM") clarified that Red River was required to comply with all applicable SMCRA performance standards, notwithstanding the mine's reclamation status or the removal of the CWA monitoring and compliance points below the hollow fills. OSM's Regional Director expressly stated that "[r]emoval of ponds does not negate the obligations for compliance with water quality standards." J.A. 880 n. 4; J.A. 825. OSM's Regional Director quoted the preamble to OSM's water quality performance standards, which states that "OSM agrees that mining operations should not be allowed to cause violations of the water quality standards of the downstream receiving waters." J.A. 825. Interpreting the quoted language, the OSM Regional Director further stated that "the preamble is clear on the operator's obligation to assure water quality standards are met. If water that is

not in compliance with permit conditions or the approved program is leaving the site, the DMLR is obligated to require treatment." J.A. 825.

SUMMARY OF THE ARGUMENT

Red River's ongoing discharges from the six hollow fill underdrains that are the subject of this citizen action violate performance standards of SMCRA and Red River's permit issued under that statute because they (1) violate the Virginia water quality standard that prohibits pollution harmful to aquatic life, (2) are causing material damage to the hydrologic balance outside of the permit area, and (3) are uncontrolled by water treatment facilities.

Citizen enforcement of SMCRA performance standards does not violate that statute's savings clause because the standards do not supersede, amend, modify or repeal any part of the Clean Water Act. Indeed, the SMCRA performance standards are entirely consistent with the CWA, because both require compliance with applicable water quality standards. The SMCRA savings clause must be interpreted and implemented consistent with well-established principles of statutory construction which do not allow a savings provision to control over a statute's substantive provisions and require courts to regard potentially conflicting statutes as capable of co-existence where possible.

ARGUMENT

I. Standard of Review

The District Court's grant of summary judgment and issues of statutory construction are reviewed *de novo* on appeal. *Kolkhorst v. Tilghman*, 897 F.2d 1282, 1284 (4th Cir. 1990). To prevail on a motion for summary judgment, a party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Molinary v. Powell Mountain Coal Co.*, 125 F.3d 231, 237 (4th Cir. 1997) *(citing* Fed.R.Civ.P. 56(c)). In analyzing a motion for summary judgment, courts construe all evidence in the light most favorable to the non-moving party. *Id*.

II. The Surface Mining Act's Savings Clause Does Not Preclude Liability for Red River's Ongoing Pollution Discharges that are Impairing Aquatic Life in the Receiving Streams.

Red River's SMCRA permit requires compliance with performance standards that prohibit discharges that violate water quality standards or cause material damage to the hydrologic balance outside the permit area, and that require the company to utilize appropriate treatment technology to control those discharges. Red River's ongoing hollow fill underdrain discharges that are high in TDS and conductivity violate those performance standards.

The District Court granted Red River's motion for summary judgment on the SMCRA claim, holding that "[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 SMCRA's savings clause." J.A. 903. The savings clause, found at section 702(a) of SMCRA, states that "[n]othing in this chapter shall be construed as superseding, amending, modifying, or repealing" ten enumerated statutes—including the Clean Water Act—or rules and regulations promulgated thereunder. 30 U.S.C. § 1292(a).

Contrary to the District Court's holding, enforcement of the performance standards does not violate SMCRA's savings clause because those standards are entirely consistent with the Clean Water Act, and because Supreme Court precedent commands that a savings clause cannot be used to override the core substantive provisions of federal statutes.

A. The District Court's Findings Establish that Red River's Discharges Violate SMCRA's Performance Standards.

SAMS has alleged that Red River is violating the provision in its SMCRA permit that requires it to comply with certain performance standards. J.A. 027 at ¶ 86. One such performance standard mandates that "[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws, standards and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434." 4 VAC 25-130-816.42. Thus, this Virginia SMCRA rule requires mining permittees to comply with Virginia's water

quality standards.[4] Those standards, in turn, provide that "State waters . . . shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life." 9 VAC 25-260-20. SAMS has also alleged that Red River is in violation of the performance standard requiring that "[a]ll surface mining and reclamation activities shall be conducted to . . . prevent material damage to the hydrologic balance outside the permit area." 4 VAC 25-130-816.41(a).

The District Court made factual findings which demonstrate that Red River is violating both of these standards. The District Court found that Red River "discharges pollutants into the South Fork Pound River, Rat Creek, Stillhouse Branch, and other unnamed tributaries," that those discharges "include substances that contribute to total dissolved solids ('TDS') and conductivity," and that "Virginia has classified the South Fork of the Pound River as biologically impaired due to its high level of TDS." J.A. 872. The District Court further found that Red

[4] While OSM clarified that the federal SMCRA requirement includes compliance with water quality standards, *see* 47 Fed. Reg. 47,216, 47,220 (Oct. 22, 1982), this is made even more explicit in the text of the state regulation. *Compare* 30 C.F.R. 816.42 (requiring "compliance with all applicable State and Federal water quality laws and regulations") *with* 4 VAC 25-130-816.42 (requiring "compliance with all applicable State and Federal water quality laws, *standards* and regulations") (emphasis added).

River's hollow fill underdrains "continue to produce discharges high in TDS and with high conductivity, contributing to elevated levels in the streams into which the underdrains discharge," and that "[t]hese elevated levels have harmed aquatic life in the streams" which have been "designated as impaired based on macroinvertebrate bioassessments." J.A. 875. This documented impairment and finding that elevated levels of pollutants have harmed aquatic life make clear that Red River's discharges violate the water quality standard prohibiting discharges that "are inimical or harmful to . . . aquatic life." *See* 9 VAC 25-260-20. The impairment of the receiving streams also constitutes "material damage to the hydrologic balance outside the permit area." *See* 4 VAC 25-130-816.41(a).[5] The District Court recognized that the mine operations directly contributed to the elevated pollutant contributions, finding that "TDS and conductivity levels" measured in 2017 and 2018 from the underdrain discharges and in the receiving streams "were significantly higher than the pre-mining levels reported by Red River in its 1991 permit application." J.A. 883.

Finally, SAMS has alleged that Red River is violating the performance standard that requires that "[i]f drainage control, restabilization and revegetation of

[5] These terms do not appear in the CWA and therefore provide an independent standard for liability under SMCRA. OSM has not formally defined them. However, OSM has clarified that OSM interpreted its 1983 regulation to mean that avoiding material damage requires "compliance with water-quality standards and effluent limitations." 80 Fed. Reg. 44,436, 44,474 (July 27, 2015).

disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and 4 VAC 25-130-816.42, the permittee shall use and maintain the necessary water treatment facilities or water quality controls." 4 VAC 25-130-816.41(d)(1). Red River eliminated all drainage control and water quality controls when it removed the sediment ponds that had been located below the underdrains. The District Court found that, following pond removal, the underdrains "now all discharge directly into tributaries or streams without passing through any sedimentation pond or other treatment system." J.A. 874–875. The District Court also found that pollutant concentrations increased following removal of the ponds, noting that "[s]amples collected by Red River's contractor as part of aquatic life benthic monitoring showed that instream conductivity in the South Fork of the Pound River and Rat Creek increased between the fall of 2015 and the fall of 2016, after the ponds below the hollow fills were removed." J.A. 882-83. Red River is therefore violating the performance standard requiring it to "use and maintain the necessary water treatment facilities or water quality controls." *See* 4 VAC 25-130-816.41(d)(1).

B. Enforcement of the Performance Standards Is Not Barred by the Savings Clause.

SMCRA's savings clause does not bar SAMS' enforcement of SMCRA's performance standards for two reasons. First, those standards are consistent with

the CWA, so there is no actual or potential basis for a conflict with the CWA. Second, regardless of whether there is such a conflict, Supreme Court precedent mandates that a savings clause cannot be used to override the substantive provisions of a federal statute like SMCRA.

1. Virginia's SMCRA Standards Are Consistent with the CWA.

None of the SMCRA performance standards in this case "supersed[e], amend[], modify[], or repeal[]" protections provided by the Clean Water Act. *See* 30 U.S.C. § 1292(a). Each of SAMS' SMCRA claims is based on the violation of water quality standards. First, the performance standard at 4 VAC 25-130-816.42 requires compliance with those water quality standards. Second, the performance standard at 4 VAC 25-130-816.41(d)(1) makes clear that if those standards are not met, then appropriate water quality treatment must be installed and maintained. Third, the performance standard at 4 VAC 25-130-816.41(a) mandates that there be no "material damage to the hydrologic balance outside the permit area." A violation of water quality standards in streams outside the permit boundaries constitutes such material damage. 80 Fed. Reg. 44,436, 44,474 (July 27, 2015) (explaining that avoiding material damage requires "compliance with water quality standards and effluent limitations.")

The District Court found that "the state narrative water quality standards are not themselves inconsistent with the CWA." J.A. 903. That finding is correct. The

CWA requires dischargers to comply with "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulation." 33 U.S.C. § 1311(b)(1)(C). The section of the CWA addressing "State Authority" provides that "nothing in this chapter shall . . . preclude or deny the right of any State or political subdivision thereof . . . to adopt or enforce . . . any requirement respecting control or abatement of pollution" unless that requirement is "less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter." 33 U.S.C. § 1370. Virginia's SMCRA performance standards fall squarely within the scope of sections 1311(b)(1)(C) and 1370. The limitation requiring compliance with water quality standards, 4 VAC 25-130-816.42, is a state regulation requiring compliance with water quality laws and standards issued pursuant to state authority. The other two performance standards flow directly from the same requirement. The requirements to comply with water quality standards were "established pursuant to a[] State law or regulation," and are no less stringent than the limitations under the CWA. Section 1370 of the CWA expressly allows for the establishment of such state regulations. Section 1311(b)(1)(C) requires compliance with those provisions. Virginia's SMCRA performance standards are therefore consistent with the CWA.

The Supreme Court has held that two statutes can be found to conflict only where it is "impossible for a private party to comply with both." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). Here, nothing prevents Red River from complying with both the CWA and SMCRA. There is no action Red River could take to bring its discharges into compliance with SMCRA's water quality performance standards that would run afoul of the Clean Water Act. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

By expressly giving states the authority to establish and enforce other more stringent limitations, through section 1311(b)(1)(C), Congress allowed states to harmonize their laws with the CWA without creating a conflict with that statute. Moreover, as this Court previously found, "[b]y enacting the Surface Mining Control and Reclamation Act of 1977, Congress recognized that the Federal Water Pollution Control Act [Clean Water Act] is inadequate to eliminate pollution from inactive mines." *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 251 (4th Cir. 1979), *rev'd in part sub nom. E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980); *see also In re Surface Min. Regulation Litig.*, 627 F.2d 1346, 1367 (D.C. Cir. 1980) ("Congress certainly recognized in the Surface Mining Act that the

EPA's existing regulatory authority under the Federal Water Pollution Control Act was deficient with respect to surface coal mining"). Far from indicating an intent to abrogate SMCRA's performance standards, the language of both statutes and the congressional record support an interpretation that preserves the effectiveness and enforceability of SMCRA's performance standards that address water pollution from coal mines. SMCRA's comprehensive scheme of performance standards that address water pollution was not created in a vacuum, or without the input of the EPA, the federal regulator tasked with implementing the CWA.

Similarly, the relevant regulatory authorities have interpreted the SMCRA performance standards at issue here as consistent with the CWA. SMCRA requires written concurrence by EPA of any regulation relating to water quality standards. 30 U.S.C. §1251(a)(B), (b); *see also,* H.R. Rep. 95 218 on H.R. 2, at 142 (1977) (describing the purpose of written concurrence as ensuring consistency between SMCRA and the CWA.) The EPA Administrator provided written concurrence for all of the federal and state performance standards at issue in this case. *See* 48 Fed. Reg. 43,956, 43,984 (Sep. 26, 1983) (EPA concurring in performance standards prohibiting material damage, and requiring water treatment); 47 Fed. Reg. 47,216, 47,221 (Oct. 22, 1982) (EPA concurring in performance standard requiring compliance with water quality laws). The EPA Administrator also provided written concurrence on OSM's approval of the Virginia program, which contains

performance standards equivalent to the federal standards. 46 Fed. Reg. 61,088, 61,089 (Dec. 15, 1981).

Moreover, OSM interprets the interplay between the Clean Water Act and Surface Mining Act as allowing for the independent enforcement of SMCRA performance standards that address water pollution. When promulgating rules to implement the federal SMCRA program in 1979, OSM discussed the savings clause, stating, "Congress did not intend that compliance with other environmental statutes should relieve operators from compliance with the Surface Mining Act," and that "[n]owhere in the legislative history is there language which indicates Congress intended [the savings clause of section 702(a)] to reduce the performance standards of the Act to meet the requirements of other statutes." 44 Fed. Reg. 14,902, 15,051 (March 15, 1979).

In that same Federal Register notice, OSM addressed a comment suggesting that the agency eliminate a performance standard requiring that certain mine discharges "not degrade the quality of receiving waters below the water quality standards" because, the commenter suggested, that performance standard "duplicates requirements under the Clean Water Act and State regulations." 44 Fed. Reg. at 15,169. OSM chose to retain and finalize that performance standard, stating that SMCRA requires OSM to "insure that water quality standards are met," and that "[t]he Office believes that emphasis of some important requirements may

be desirable when different agencies are regulating toward a common goal, such as improving water quality and protecting environmental values." *Id*. at 15,169–70.

OSM has maintained that interpretation, including as specifically applied to Red River's hollow fill underdrain discharges that are the subject of this action. In a December 15, 2015, letter to DMLR, OSM's Regional Director responded to a citizen complaint regarding the ongoing discharges from Red River's hollow fill underdrains, clarifying that "[r]emoval of ponds does not negate the obligations for compliance with water quality standards. The regulation at 4 VAC 25-130-816.42 provides that all discharges of water from areas disturbed by surface mining activities must be made in compliance with all applicable State and Federal water quality laws, standards and regulations . . ." J.A. 825. In support of this interpretation, OSM's Regional Director quoted from the preamble to the parallel federal regulation, which states that "OSM agrees that mining operations should not be allowed to cause violations of the water quality standards of the downstream receiving waters" J.A. 825 (quoting 48 Fed. Reg. at 44,040). OSM summarized its interpretation of the preamble as follows: "The preamble is clear on *the operator's obligation to assure water quality standards are met.* If water that is not in

compliance with the permit conditions or the approved program is leaving the site, the DMLR is obligated to require treatment." J.A. 825. (emphasis added).[6]

Because there is no conflict between the requirements of SMCRA and the CWA, the savings clause is inoperative. That clause only operates when a SMCRA provision "supersed[es], amend[s], modif[ies], or repeal[s]" a CWA provision. 30 U.S.C. § 1292. At most, the SMCRA provisions at issue here supplement and reinforce the CWA. They do not "circumvent" it, as the District Court concluded. The District Court believed that the savings clause prevented SAMS from enforcing water quality standards under SMCRA if it could not enforce those same standards under the CWA. But that is not a true statutory conflict. The CWA's permit shield only shields a permittee from enforcement of those standards under the CWA. It is not a determination that the discharges comply with all parts of the CWA, and it does not shield the permittee from enforcement of those standards under SMCRA. It only provides that compliance with a CWA permit "shall be

[6] That OSM ultimately determined in that letter that unspecified "best management practices" proposed by Red River to control the water pollution discharges were "an appropriate mechanism for assuring compliance," and that therefore DMLR's requirement of those practices "constitutes appropriate action to cause a violation to be corrected," J.A. 826–27 does not mean that Red River is in compliance with its SMCRA permit. That finding was made in 2015, not long after the ponds had been removed. Subsequent sampling established that water pollution levels continued to rise, demonstrating that the best management practices were ineffective. *See* J.A. 882–83 ("[s]amples collected by Red River's contractor as part of aquatic life benthic monitoring showed that instream conductivity in the South Fork of the Pound River and Rat Creek increased between the fall of 2015 and the fall of 2016, after the ponds below the hollow fills were removed.").

deemed compliance" for CWA enforcement purposes as to five specified sections of the CWA (none of which are the sections pertaining to enforcement of water quality standards under § 1313). 33 U.S.C. § 1342(k). The permit shield provision does not have any effect on compliance with, or enforcement of, any other federal statute. Consequently, reading the plain statutory language, there is no conflict and no circumvention.

2. Regardless of Whether There Is a Conflict Between the CWA and SMCRA, the Savings Clause Cannot Override the Substantive Provisions of SMCRA.

Despite finding that Virginia's SMCRA performance standards requiring compliance with water quality standards were consistent with the CWA, the District Court concluded that "applying [those standards] here as SAMS seeks to do would impermissibly circumvent the CWA," in violation of SMCRA's savings clause. J.A. 903. That conclusion is inconsistent with fundamental principles of statutory construction because it misinterprets the savings clause and effectively invalidates several of SMCRA's central substantive provisions.

As we show above, there is no statutory conflict between the CWA and SMCRA. Even if there were, the Supreme Court has held that when a conflict exists between a savings clause and a statute's substantive provisions, the substantive provisions control. In *U.S. v. Locke*, the Court considered whether savings clauses in the Oil Protection Act should be read as elevating a state's

liability laws over a comprehensive federal statute addressing the at-sea operation of oil tankers. 529 U.S. 89 (2000). Ultimately, the Court opted to preserve the comprehensive approach of the Oil Protection Act, noting that "[w]e decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 106.

Here, Congress has set forth in SMCRA a comprehensive regulatory scheme to address the environmental effects of coal mining, including the effects of water pollution. SMCRA achieves this by requiring that all mine operators secure permits (30 U.S.C. § 1256), and that all permits mandate compliance with certain performance standards, including standards promulgated via regulation (*id*. at § 1265(a)). Virginia's delegated program imposes those same requirements. VA Code § 45.1-234(A); VA Code § 45.1-242(B). In Virginia, the applicable performance standards mandate that all surface mining and reclamation activities be conducted to prevent material damage to the hydrologic balance outside the permit area (4 VAC 25-130-816.41(a)); discharges from areas disturbed by surface mining activities be made in compliance with all applicable State and Federal water quality laws, standards and regulations (*id*. at 816.42); and—if mining operations fail to achieve compliance with water quality laws, standards, or regulations—that the permittee use and maintain the necessary water treatment facilities or water quality controls (*id*. at 816.41(d)(1)).

Not only the statute's structure, but Congress' intent in passing SMCRA—as expressed in explicitly stated Congressional findings and purposes—make clear that protection of water quality was a primary objective of the act. *See* 30 U.S.C. § 1201 ("many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare . . . by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty. . . ."); *see also, Hodel*, 452 U.S. at 279 (*quoting* S.Rep.No.95–128, p. 50 (1977)) ("[s]urface coal mining activities have imposed large social costs on the public . . . in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty."); *Id.* at 280 (quoting H.R. Rep. No. 95–218, at 59, U.S. Code Cong. & Admin. News 1977, p. 597) ("The most widespread damages. . . are environmental in nature. Water users and developers incur significant economic and financial losses as well. Reduced recreational values, fishkills, reductions in normal waste assimilation capacity, impaired water supplies. . . are some of the most obvious economic effects that stem from mining-related pollution and sedimentation.").

Adopting the position of the District Court and Red River—that the savings clause exempts Red River from liability despite the documented harms its mine is causing to the environment—would be directly contrary to the objectives of

SMCRA. As the Supreme Court has held, a savings clause cannot be used to override the substantive provisions of a statute and "defeat its own objectives." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000). The District Court's interpretation of the savings clause would not "save" the CWA or SMCRA, but instead would destroy them. In construing a savings clause, a statute "cannot be held to destroy itself." *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.* 524 U.S. 214, 228 (1998).

To reach its decision, the District Court adopted the Sixth Circuit's reasoning in *Sierra Club v. ICG Hazard, LLC*, that where the CWA's permit shield precludes CWA liability, SMCRA's savings clause precludes liability for the same discharges under SMCRA. J.A. 901–03 (discussing 781 F.3d 281 (6th Cir. 2015)). SAMS submits that *ICG Hazard* was wrongly decided, for two reasons. First, as we have shown, there is no true statutory conflict, so the savings clause is inoperative. Both the CWA and SMCRA require compliance with water quality standards. The Sixth Circuit did not consider the plain language of § 1311(b)(1)(C) of the CWA, which requires dischargers to comply with "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulation." 33 U.S.C. § 1311(b)(1)(C). DMLR's SMCRA performance standards fall comfortably within that statutory mandate.

Second, regardless of whether there is a conflict, the Sixth Circuit's decision is inconsistent with binding Supreme Court precedent on the effect of a savings clause on substantive statutory provisions. The Sixth Circuit did not discuss or acknowledge the Supreme Court's decisions in *Locke* and *Geier*, and impermissibly allowed the SMCRA savings clause to defeat that statute's core objectives.

The Sixth Circuit's misapplication of the savings clause is rooted in its reliance on an earlier D.C. Circuit decision discussing that clause, *In re Surface Mining Regulation Litigation*. 781 F.3d at 291 (discussing 627 F.2d 1346, 1366-68 (D.C. Cir. 1980)). The D.C. Circuit's reasoning, though sound when applied to a comparison of a substantive SMCRA regulation to its CWA counterpart, offers little guidance to the situation addressed in *ICG Hazard* and here, namely the intersection of the CWA's permit shield and SMCRA's savings clause. In *In re Surface Mining Regulation*, the D.C. Circuit considered whether a SMCRA regulation violated the savings clause where it established effluent limitations and water quality standards for surface and underground mining, but omitted certain variances and exemptions found in the equivalent CWA standards. 627 F.2d at 1366. The D.C. Circuit ultimately held that "where the [CWA] and its underlying regulatory scheme are silent so as to constitute an 'absence of regulation' or a 'regulatory gap', the [OSM] may issue effluent regulations without regard to EPA

practice." 627 F.2d at 1367. The D.C. Circuit then determined that the variances and exemptions available under the CWA did not constitute gaps that SMCRA can fill. *Id*. at 1367-69.

The Sixth Circuit paraphrased the D.C. Circuit's holding as "[w]here regulation under the CWA is silent, regulation under the Surface Mining Act is permissible, but where there is regulatory overlap, § 702(a)(3) of the Surface Mining Act expressly directs that the CWA and its regulatory framework control, so as to afford consistent standards nationwide." 781 F.3d at 291 (citing 627 F.2d at 1367). As an initial matter, and as we have shown above, the water quality standards incorporated into SMCRA are exactly the same as those that apply under the CWA. Consequently, even though there is regulatory overlap, the applicable water quality standards are consistent under both statutes. The savings clause therefore provides no basis for invalidating those standards under SMCRA.

More fundamentally, the Sixth Circuit failed to consider the CWA's permit shield in its proper context when it stated that "as the reasoning of Surface Mining Regulation makes clear, enforcement of the permit shield prescribed in CWA § 402(k) is not an 'absence of regulation," but is more akin to a variance or exemption. 781 F.3d at 291. That analysis is flawed because the CWA permit shield is not the same as an exemption or variance from discharge standards. The permit shield is not designed to exempt a permittee from compliance with the

CWA. Instead, it merely prevents and delays enforcement of substantive requirements until the next permit cycle when appropriate standards are incorporated into the permit. The text of the shield provision itself makes this clear: "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance, *for purposes of sections 1319 and 1365* of this title, with sections 1311, 1312, 1316, 1317 and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health." 33 U.S.C. § 1342(k) (emphasis added).[7] Sections 1319 and 1365 of the CWA are the provisions allowing for enforcement by regulators and citizens, respectively. *See* 33 U.S.C. § 1319 ("Enforcement"); 33 U.S.C. § 1365 ("Citizen Suits"). The purpose of the permit shield is "to prevent permit holders from being forced to change their procedures due to changes in regulations, or to face enforcement actions over 'whether their permits are sufficiently strict.'" *Southern Appalachian Mtn. Stewards v. A &G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014) (citing *E.I. du E.I. du Pont de Nemours & Co*. v. *Train*, 430 U.S. 112, 138 n. 28 (1977). Thus, the permit shield is merely a procedural device to prevent and delay CWA enforcement until a CWA permit is strengthened to comply with substantive requirements.

[7] Notably, the permit shield provision does not mention compliance with water quality standards, which are enacted pursuant to section 1313.

The concerns regarding fairness and finality that underlie the CWA's permit shield simply do not apply to the enforcement of performance standards under SMCRA. As the District Court found, "DMLR chose to regulate the [discharges from hollow fill] underdrains under the SMCRA portion of the Permit rather than under the NPDES portion." J.A. 898. Red River's SMCRA permit expressly requires compliance with the performance standards. J.A. 898. Thus, Red River has not been subjected to shifting standards or litigation over the stringency of its permit. Nor is it being held to a higher standard than what is substantively required under the CWA. SAMS' action simply seeks to enforce the requirements to which Red River has always been subject under its SMCRA permit—compliance with water quality standards—which are consistent with the substantive provisions of the CWA.

The facts of this case exemplify why the savings clause should not bar enforcement under SMCRA. Virginia DMLR decided not to regulate Red River's discharges from its hollow fills under the CWA, because DMLR determined that the NPDES permit did not apply to hollow fill discharges. *See* J.A. 889 ("[i]t is clear from the record that both DMLR and Red River believe that the underdrains that remain following sedimentation pond removal are not point sources and are not subject to regulation under the CWA.") Instead, DMLR decided to regulate those discharges under SMCRA. J.A. 898. The District Court found that DMLR's

decision not to issue a CWA permit for hollow fill discharges was incorrect, but that Red River's discharges were nevertheless protected by the permit shield.

Under the District Court's interpretation of the permit shield, not only does Red River escape liability under the CWA—the statute which DMLR intended (incorrectly) to exclude, but also from SMCRA—the statute which DMLR intended (correctly) to apply. If DMLR had been correct that the CWA did not apply to hollow fill discharges, there would have been no savings clause issue because only SMCRA would have applied. If DMLR had correctly regulated hollow discharges pursuant to a CWA NPDES Permit, there would have been no savings clause issue because the permit shield would not have applied. Allowing Red River to use the permit shield to escape all liability under both statutes is simply perverse. It improperly turns the permit shield into an all-purpose blanket of immunity from liability, despite Red River's clear violations of SMCRA's performance standards.

CONCLUSION

Red River's discharges from its hollow fill underdrains violate Virginia's SMCRA performance standards and the provisions of Red River's SMCRA permit that require compliance with those standards. Because those performance standards are consistent with the separate requirements of the Clean Water Act, and because the SMCRA savings clause cannot be held to override the substantive provisions of

the act, the District Court erred when it held that SMCRA's savings clause precludes SAM's enforcement action.

Respectfully submitted this 9th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting portions of the brief described in Fed. R. App. P. 32(f), the brief contains 8,202 words.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. Pl. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Time New Roman, 14-point.

DATED: December 9, 2019

/s/ Peter Morgan
Peter Morgan

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2019, I have served the forgoing Appellants' Opening Brief on all registered counsel through the Court's electronic filing system (ECF).

/s/ Peter Morgan
Peter Morgan

ADDENDUM OF STATUTES AND REGULATIONS

- 30 U.S.C. § 1292
- 33 U.S.C. § 1311
- 33 U.S.C. § 1342
- 33 U.S.C. § 1370
- 30 C.F.R. § 816.41
- 30 C.F.R. § 816.42
- 4 VAC 25-130-816.41
- 4 VAC 25-130-816.42
- 9 VAC 25-260-20

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 25. Surface Mining Control and Reclamation (Refs & Annos)
Subchapter VII. Administrative and Miscellaneous Provisions (Refs & Annos)

30 U.S.C.A. § 1292

§ 1292. Other Federal laws

Currentness

(a) Construction of chapter as superseding, amending, modifying, or repealing certain laws

Nothing in this chapter 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, the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality.

(4) The Clean Air Act, as amended.

(5) The Solid Waste Disposal Act.

(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 chapter 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.

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(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 chapter.

(d) Major Federal action

Approval of the State programs, pursuant to section 1253(b) of this title, promulgation of Federal programs, pursuant to section 1254 of this title, and implementation of the Federal lands programs, pursuant to section 1273 of this title, 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 1251(b) of this title 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).

CREDIT(S)

(Pub.L. 95-87, Title VII, § 702, Aug. 3, 1977, 91 Stat. 519.)

Notes of Decisions (4)

30 U.S.C.A. § 1292, 30 USCA § 1292
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1311

§ 1311. Effluent limitations

Currentness

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, 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 chapter 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 1314(b) of this title, 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 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title 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 1314(d)(1) of this title; 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 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(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 1314(b)(2) of this title, 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

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developed pursuant to section 1325 of this title), 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 1314(b)(2) of this title, 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 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(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 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title 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 1314(b) of this title, 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 1314(b) of this title, 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 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; 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 1314(b) of this title, 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 1342(a)(1) of this title in a permit issued after February 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

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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 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter 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

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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

Upon 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 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, 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 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(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

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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 1314 of this title;

(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 1314 of this title.

(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 1342 of this title 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 1314(a)(6) of this title;

(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;

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(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 1314(a)(1) of this title 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 1251(a)(2) of this title. 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

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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 chapter 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 1342 of this title 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 February 4, 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 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(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 chapter 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 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 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 chapter.

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(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 1284 of this title, 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 1317(a) and (b) of this title 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 [1] the 365th day which begins after December 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 February 4, 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 1314 of this title or not later than 270 days after December 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 chapter, 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 chapter for all pollutants not the subject of such application or petition.

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(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 chapter.

(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 October 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.

(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.

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(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title 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 1342 of this title, 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 industrywide 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 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, 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 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 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(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;

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(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 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] 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 chapter 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 1317(b) of this title 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 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

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(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking 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 non-water 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 February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 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.

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(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 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 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 this section, section 1314(d)(4) of this title, and section 1326(a) of this title. 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 1342(b) of this title, may issue a permit under section 1342 of this title 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 remining 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 1313 of this title.

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(3) Definitions

For purposes of this subsection--

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 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.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 301, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 844; amended Pub.L. 95-217, §§ 42-47, 53(c), Dec. 27, 1977, 91 Stat. 1582-1586, 1590; Pub.L. 97-117, §§ 21, 22(a)-(d), Dec. 29, 1981, 95 Stat. 1631, 1632; Pub.L. 97-440, Jan. 8, 1983, 96 Stat. 2289; Pub.L. 100-4, Title III, §§ 301(a) to (e), 302(a) to (d), 303(a), (b)(1), (c) to (f), 304(a), 305, 306(a), (b), 307, Feb. 4, 1987, 101 Stat. 29-37; Pub.L. 100-688, Title III, § 3202(b), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 103-431, § 2, Oct. 31, 1994, 108 Stat. 4396; Pub.L. 104-66, Title II, § 2021(b), Dec. 21, 1995, 109 Stat. 727.)

Notes of Decisions (351)

Footnotes

1 So in original. Probably should be "than".

2 So in original. Probably should be "contractual".

33 U.S.C.A. § 1311, 33 USCA § 1311

Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1342

§ 1342. National pollutant discharge elimination system

Effective: January 14, 2019
Currentness

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) 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 chapter.

(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 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 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 objectives of this chapter 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 October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, 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 chapter. 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 (i)(2) of section 1314 of this title, 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 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 1311, 1312, 1316, 1317, and 1343 of this title;

(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 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(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;

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(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 1317(b) of this title 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 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title 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 1284(b), 1317, and 1318 of this title.

(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 1314(i)(2) of this title. 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 1314(i)(2) of this title.

(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

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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) if 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 chapter. 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 December 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 chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, 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.

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(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 1292 of this title) 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 1319(a) of this title 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 1319 of this title.

(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 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. 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 1311, 1316, or 1342 of this title, or (2) section 407 of this title, 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 October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

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(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 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section [1] 1365(a) of this title does not apply to any non-permitting program established under 1342(p)(6) [2] of this title for the silviculture activities listed in 1342(l)(3)(A) [2] of this title, or to any other limitations that might be deemed to apply to the silviculture activities listed in 1342(l)(3)(A) [2] of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) 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 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect

State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, 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 of 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

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(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 1314(b) of this title 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 1311(b)(1)(C) or section 1313(d) or (e) of this title, 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 1313(d)(4) of this title.

(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 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; 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 chapter or for reasons otherwise unrelated to water quality.

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(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 1313 of this title 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 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 February 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 1311 of this title.

(B) Municipal discharge

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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 February 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 February 4, 1987. Not later than 4 years after February 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 February 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 February 4, 1987. Not later than 6 years after February 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.

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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 chapter after December 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 chapter 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

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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 chapter 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

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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 January 14, 2019).

(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 chapter 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 chapter.

(B) Flexibility

Nothing in this subsection reduces or eliminates any flexibility available under this chapter, 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 1313(c) of this title.

(6) Clarification of State authority

(A) In general

Nothing in section 1311(b)(1)(C) of this title 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

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In any case in which a discharge is subject to a judicial order or consent decree, as of January 14, 2019, resolving an enforcement action under this chapter, 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.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 402, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 880; amended Pub.L. 95-217, §§ 33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub.L. 100-4, Title IV, §§ 401 to 404(a), (c), formerly (d), 405, Feb. 4, 1987, 101 Stat. 65 to 67, 69; Pub.L. 102-580, Title III, § 364, Oct. 31, 1992, 106 Stat. 4862; Pub.L. 104-66, Title II, § 2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub.L. 106-554, § 1(a)(4) [Div. B, Title I, § 112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-224; Pub.L. 110-288, § 2, July 29, 2008, 122 Stat. 2650; Pub.L. 113-79, Title XII, § 12313, Feb. 7, 2014, 128 Stat. 992; Pub.L. 115-436, § 3(a), Jan. 14, 2019, 132 Stat. 5558.)

Notes of Decisions (258)

Footnotes

1 So in original. Probably should not be capitalized.

2 So in original. Probably should be preceded by “section”.

33 U.S.C.A. § 1342, 33 USCA § 1342

Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1370

§ 1370. State authority

Currentness

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 510, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 893.)

Notes of Decisions (21)

33 U.S.C.A. § 1370, 33 USCA § 1370
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

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Code of Federal Regulations
Title 30. Mineral Resources
Chapter VII. Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter K. Permanent Program Performance Standards
Part 816. Permanent Program Performance Standards—Surface Mining Activities (Refs & Annos)

30 C.F.R. § 816.41

§ 816.41 Hydrologic-balance protection.

Effective: November 17, 2017
Currentness

(a) General. All surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part. The regulatory authority may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) Ground-water protection. In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter and the following:

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

(2) Ground-water quantity shall be protected by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and fills, so as to allow the movement of water to the ground-water system.

(c) Ground-water monitoring.

(1) Ground-water monitoring shall be conducted according to the ground-water monitoring plan approved under § 780.21(i) of this chapter. The regulatory authority may require additional monitoring when necessary.

(2) Ground-water monitoring data shall be submitted every 3 months to the regulatory authority or more frequently as prescribed by the regulatory authority. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the regulatory authority and immediately take the actions provided for in §§ 773.17(e) and 780.21(h) of this chapter.

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(3) Ground-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of § 774.13 of this chapter, the regulatory authority may modify the monitoring requirements, including the parameters covered and the sampling frequency, if the operator demonstrates, using the monitoring data obtained under this paragraph, that—

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under § 780.21(i) of this chapter.

(4) Equipment, structures, and other devices used in conjuction with monitoring the quality and quantity of ground water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the operator when no longer needed.

(d) Surface-water protection. In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter, and the following:

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.

(2) Surface-water quality and flow rates shall be protected by handling earth materials and runoff in accordance with the steps outlined in the plan approved under § 780.21(h) of this chapter.

(e) Surface-water monitoring.

(1) Surface-water monitoring shall be conducted according to the surface-water monitoring plan approved under § 780.21(j) of this chapter. The regulatory authority may require additional monitoring when necessary.

(2) Surface-water monitoring data shcll be submitted every 3 months to the regulatory authority or more frequently as prescribed by the regulatory authority. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any surface-water sample indicates noncompliance with the permit conditions, the operator shall promptly notify the regulatory authority and immediately take the actions provided for in §§ 773.17(e) and 780.21(h) of this chapter. The reporting requirements of this paragraph do not exempt the operator from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

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(3) Surface-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with § 774.13 of this chapter, the regulatory authority may modify the monitoring requirements, except those required by the NPDES permitting authority, including the parameters covered and sampling frequency if the operator demonstrates, using the monitoring data obtained under this paragraph, that—

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under § 780.21(j) of this chapter.

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of surface water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the operator when no longer needed.

(f) Acid- and toxic-forming materials.

(1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by—

(i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water. Storage shall be limited to the period until burial and/or treatment first become feasible, and so long as storage will not result in any risk of water pollution or other environmental damage.

(2) Storage, burial or treatment practices shall be consistent with other material handling and disposal provisions of this chapter.

(g) Transfer of wells. Before final release of bond, exploratory or monitoring wells shall be sealed in a safe and environmentally sound manner in accordance with §§ 816.13 to 816.15. With the prior approval of the regulatory authority, wells may be transferred to another party for further use. At a minimum, the conditions of such transfer shall comply with State and local law and the permittee shall remain responsible for the proper management of the well until bond release in accordance with §§ 816.13 to 816.15.

(h) Water rights and replacement. Any person who conducts surface mining activities shall replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. Baseline hydrologic information required

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in §§ 780.21 and 780.22 of this chapter shall be used to determine the extent of the impact of mining upon ground water and surface water.

(i) Discharges into an underground mine.

(1) Discharges into an underground mine are prohibited, unless specifically approved by the regulatory authority after a demonstration that the discharge will—

(i) Minimize disturbance to the hydrologic balance on the permit area, prevent material damage outside the permit area and otherwise eliminate public hazards resulting from surface mining activities;

(ii) Not result in a violation of applicable water quality standards or effluent limitations;

(iii) Be at a known rate and quality which shall meet the effluent limitations of § 816.42 for pH and total suspended solids, except that the pH and total suspended-solids limitations may be exceeded, if approved by the regulatory authority; and

(iv) Meet with the approval of the Mine Safety and Health Administration.

(2) Discharges shall be limited to the following:

(i) Water;

(ii) Coal processing waste;

(iii) Fly ash from a coal-fired facility;

(iv) Sludge from an acid-mine-drainage treatment facility;

(v) Flue-gas desulfurization sludge;

(vi) Inert materials used for stabilizing underground mines; and

(vii) Underground mine development wastes.

AUTHORITY: 30 U.S.C. 1201 et seq.; and sec 115 of Pub.L. 98–146.

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Current through November 28, 2019; 84 FR 65606.

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Code of Federal Regulations
Title 30. Mineral Resources
Chapter VII. Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter K. Permanent Program Performance Standards
Part 816. Permanent Program Performance Standards—Surface Mining Activities (Refs & Annos)

30 C.F.R. § 816.42

§ 816.42 Hydrologic balance: Water quality standards and effluent limitations.

Effective: November 17, 2017
Currentness

Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434.

AUTHORITY: 30 U.S.C. 1201 et seq.; and sec 115 of Pub.L. 98–146.

Current through November 28, 2019; 84 FR 65606.

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KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Virginia Administrative Code
Title 4. Conservation and Natural Resources
Vac Agency NO. 25. Department of Mines, Minerals and Energy (Refs & Annos)
Chapter 130. Coal Surface Mining Reclamation Regulations (Refs & Annos)
Subchapter VK. Permanent Program Performance Standards
Part 816. Permanent Program Performance Standards--Surface Mining Activities

4 VAC 25-130-816.41

4 VAC 25-130-816.41. Hydrologic-balance protection.

Currentness

(a) General. All surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this Part. The division may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) Ground-water protection. In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under 4 VAC 25-130-780.21(h) and the following:

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

(2) Ground-water quantity shall be protected by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and fills, so as to allow the movement of water to the ground water system.

(c) Ground-water monitoring.

(1) Ground-water monitoring shall be conducted according to the ground-water monitoring plan approved under 4 VAC 25-130-780.21(i). The division may require additional monitoring when necessary.

(2) Representative monitoring.

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(i) Representative monitoring points shall be established within 100 feet downgradient from the initial disturbance within each representative area. This distance may be modified by the division if it is demonstrated in the permit application that the 100 feet distance is inappropriate for the monitoring point.

(ii) If degradation, contamination or diminution of water quality or quantity are evident through monitoring, then additional monitoring and/or remedial action may be required by the division.

(3) Source monitoring.

(i). Source monitoring shall be used near isolated acid-producing or toxic-producing material. Monitoring shall be by piezometers or other equipment suitable for monitoring in the unsaturated zone. Piezometers or alternate equipment shall be installed in backfilled material during or within 45 days after final grading of the area. Installation in fill or temporary storage areas shall be as soon as practicable. Monitoring points shall be of sufficient number and locations so that adverse impacts can be readily detected.

(ii) Representative monitoring may be required by the division in addition to source monitoring when the operation may adversely impact usable ground waters.

(4) Well drilling, construction and completion.

(i) When wells are used, they shall be drilled either to the first water-producing zone or, if no water is encountered, to a depth of 100 feet below each coal seam to be mined. The division may require deeper drilling if site conditions indicate the potential for adverse impacts to a known water-producing zone which is at greater depth.

(ii) Monitoring wells shall be drilled an additional 20 feet into the water-producing zone to aid in pumping.

(iii) Monitoring wells shall:

(A) Accommodate a four inch (4”) submersible pump for sample extraction and measurement of field parameters. Other diameters may be approved by the division if sample extraction is allowed.

(B) Be constructed in a manner which isolates the water-producing zone to be monitored and prevents the mixing of ground waters.

(C) Be grouted from the surface to at least one foot into bedrock, with all leakage around the well casing prevented.

(D) Be capped, locked, and labeled with an identification number.

(E) Be properly developed and the final yield reported.

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(F) Not be constructed or packed with materials which would adversely affect the monitoring results obtained.

(iv) Existing wells may be used for monitoring provided that:

(A) The well is located at a point where data representative of the permit or adjacent area will be obtained.

(B) The well penetrates the water-producing zone to be monitored.

(C) The well is constructed in a manner which effectively isolates the water-producing zone.

(D) The well meets the standards of Paragraph (c)(4) above.

(E) Filtering systems and water softeners are not present which may alter the quality of the water sample. Filters or softeners may be disconnected or bypassed during sampling.

(5) Ground-water monitoring data shall be submitted within 30 days after the end of the calendar quarter to the division. More frequent reporting may be prescribed by the division. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the permittee shall promptly notify the division and immediately take the actions provided for in 4 VAC 25-130-773.17(e) and 4 VAC 25-130-780.21(h).

(6) Ground-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of 4 VAC 25-130-774.13, the division may modify the monitoring requirements, including the parameters covered and the sampling frequency, if the permittee demonstrates, using the monitoring data obtained under this Paragraph, that--

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under 4 VAC 25-130-780.21(i).

(7) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of ground water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the permittee when no longer required by the division.

(d) Surface-water protection. In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under 4 VAC 25-130-780.21(h), and the following:

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(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and 4 VAC 25-130-816.42, the permittee shall use and maintain the necessary water treatment facilities or water quality controls.

(2) Surface-water quality and flow rates shall be protected by handling earth materials and runoff in accordance with the steps outlined in the plan approved under 4 VAC 25-130-780.21(h).

(e) Surface-water monitoring.

(1) Surface water monitoring shall be conducted according to the surface-water monitoring plan approved under 4 VAC 25-130-780.21(j). The division may require additional monitoring when necessary.

(2) Surface-water monitoring data shall be submitted every three months to the division or more frequently as prescribed by the division. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any surface-water sample indicates noncompliance with the permit conditions, the permittee shall promptly notify the division and immediately take the actions provided for in 4 VAC 25-130-773.17(e) and 4 VAC 25-130-780.21(h). Reporting shall be in accordance with the National Pollutant Discharge Elimination System (NPDES) permit requirements.

(3) Surface-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with 4 VAC 25-130-774.13, the division may modify the monitoring requirements in accordance with the NPDES permit, including the parameters covered and sampling frequency, if the permittee demonstrates, using the monitoring data obtained under this Paragraph, that--

(i) The operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(ii) Monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under 4 VAC 25-130-780.21(j).

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of surface water onsite and offsite shall be properly installed, maintained, and operated and shall be removed by the permittee when no longer required by the division.

(f) Acid-and toxic-forming materials.

(1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by--

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(i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water. Storage shall be limited to the period until burial and/or treatment first become feasible, and so long as storage will not result in any risk of water pollution or other environmental damage.

(2) Storage, burial or treatment practices shall be consistent with other material handling and disposal provisions of this chapter.

(g) Transfer of wells. Before final release of bond, exploratory or monitoring wells shall be sealed in a safe and environmentally sound manner in accordance with 4 VAC 25-130-816.13 through 4 VAC 25-130-816.15. With the prior approval of the division, wells may be transferred to another party, or retained by the permittee for further use. At a minimum, the conditions of such transfer shall comply with State and local law and the permittee shall remain responsible for the proper management of the well until bond release in accordance with 4 VAC 25-130-816.13 through 4 VAC 25-130-816.15.

(h) Water rights and replacement. Any person who conducts surface mining activities shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. Baseline hydrologic information required in 4 VAC 25-130-780.21 and 4 VAC 25-130-780.22 shall be used in the determination of the extent of the impact of mining upon ground water and surface water.

(i) Discharges into an underground mine.

(1) Discharges into an underground mine are prohibited, unless specifically approved by the division after a demonstration that the discharge will--

(i) Minimize disturbance to the hydrologic balance on the permit area, prevent material damage outside the permit area and otherwise eliminate public hazards resulting from surface mining activities;

(ii) Not result in a violation of applicable water quality standards or effluent limitations.

(iii) Be at a known rate and quality which shall meet the effluent limitations of 4 VAC 25-130-816.42 for pH and total suspended solids, except that the pH and total suspended solids limitations may be exceeded, if approved by the division; and

(iv) Meet the approval of the Mine Safety and Health Administration.

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(2) Discharges shall be limited to the following:

(i) Water;

(ii) Coal processing waste;

(iii) Fly ash from a coal-fired facility;

(iv) Sludge from an acid-mine drainage treatment facility;

(v) Flue-gas desulfurization sludge;

(vi) Inert materials used for stabilizing underground mines; and

(vii) Underground mine development wastes.

Official Virginia Administrative Code, current through 36:01 VA.R September 2, 2019, and fast-track regulations current through 36:01 VA.R September 2, 2019.

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KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Virginia Administrative Code
Title 4. Conservation and Natural Resources
Vac Agency NO. 25. Department of Mines, Minerals and Energy (Refs & Annos)
Chapter 130. Coal Surface Mining Reclamation Regulations (Refs & Annos)
Subchapter VK. Permanent Program Performance Standards
Part 816. Permanent Program Performance Standards--Surface Mining Activities

4 VAC 25-130-816.42

4 VAC 25-130-816.42. Hydrologic balance; water quality standards and effluent limitations.

Currentness

Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws, standards and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.

Official Virginia Administrative Code, current through 36:01 VA.R September 2, 2019, and fast-track regulations current through 36:01 VA.R September 2, 2019.

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Virginia Administrative Code
Title 9. Environment (Refs & Annos)
Vac Agency NO. 25. State Water Control Board (Refs & Annos)
Chapter 260. Water Quality Standards (Refs & Annos)
Part I. Surface Water Standards with General, Statewide Application

9 VAC 25-260-20

9 VAC 25-260-20. General criteria.

Currentness

A. State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life.

Specific substances to be controlled include, but are not limited to: floating debris, oil, scum, and other floating materials; toxic substances (including those which bioaccumulate); substances that produce color, tastes, turbidity, odors, or settle to form sludge deposits; and substances which nourish undesirable or nuisance aquatic plant life. Effluents which tend to raise the temperature of the receiving water will also be controlled. Conditions within mixing zones established according to 9 VAC 25-260-20 B do not violate the provisions of this subsection.

B. The board may use mixing zone concepts in evaluating limitations for Virginia Pollutant Discharge Elimination System permits.

1. Mixing zones evaluated or established by the board in fresh water shall not:

a. Prevent movement of or cause lethality to passing and drifting aquatic organisms through the water body in question;

b. Constitute more than one half of the width of the receiving watercourse nor constitute more than one third of the area of any cross section of the receiving watercourse;

c. Extend downstream at any time a distance more than five times the width of the receiving watercourse at the point of discharge.

2. Mixing zones evaluated or established by the board in open ocean, estuarine and transition zone waters (see 9 VAC 25-260-140 C) shall not:

a. Prevent movement of or cause lethality to passing and drifting aquatic organisms through the water body in question;

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b. Extend more than five times in any direction the average depth along a line extending 1/3 of the way across the receiving water from the discharge point to the opposite shore.

3. A subsurface diffuser shall be required for any new or expanded freshwater discharge greater than or equal to 0.5 MGD to open ocean, estuarine and transition zone waters (see 9 VAC 25-260-140 C) and the acute and chronic criteria shall be met at the edge of the zone of initial mixing. The zone of initial mixing is the area where mixing of ambient water and effluent is driven by the jet effect and/or momentum of the effluent. Beyond this zone the mixing is driven by ambient turbulence.

4. Mixing zones shall not be allowed by the board for effluents discharged to wetlands, swamps, marshes, lakes or ponds.

5. An allocated impact zone may be allowed within a mixing zone. This zone is the area of initial dilution of the effluent with the receiving water where the concentration of the effluent will be its greatest in the water column. Mixing within these allocated impact zones shall be as quick as practical and shall be sized to prevent lethality to passing and drifting aquatic organisms. The acute aquatic life criteria are not required to be attained in the allocated impact zone.

6. Mixing zones shall be evaluated or established such that acute criteria are met outside the allocated impact zone and chronic criteria are met at the edge of the mixing zone.

7. No mixing zone shall be used for, or considered as, a substitute for minimum treatment technology required by the Clean Water Act and other applicable state and federal laws.

8. The board shall not approve a mixing zone that violates the federal Endangered Species Act of 1973 (16 USCA §§ 1531-1543) or the Virginia Endangered Species Act, Article 6 (§ 29.1-563 et seq.) of Chapter 5 of Title 29.1 of the Code of Virginia.

9. Mixing zones shall not be allowed for the bacteria criteria in 9 VAC 25-260-170.

10. The board may waive the requirements of subdivisions 1 b and c, 2 b, 3 and 4 of this subsection on a case-by-case basis if:

a. The board determines that a complete mix assumption is appropriate; or

b. A discharger provides an acceptable demonstration of:

(1) Information defining the actual boundaries of the mixing zone in question; and

(2) Information and data demonstrating no violation of subdivisions B 1 a, 2 a and B 7 of this subsection by the mixing zone in question.

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11. The size of a thermal mixing zone shall be determined on a case-by-case basis. This determination shall be based upon a sound rationale and be supported by substantial biological, chemical, physical, and engineering evidence and analysis. Any such determination shall show to the board's satisfaction that no adverse changes in the protection and propagation of balanced indigenous populations of fish, aquatic life, and wildlife may reasonably be expected to occur. A satisfactory showing made in conformance with § 316(a) of the Clean Water Act shall be deemed as compliance with the requirements of this section.

12. Notwithstanding the above, no new or expanded mixing zone shall:

a. Be allowed in waters listed in 9 VAC 25-260-30 A 3 c;

b. Be allowed in waters defined in 9 VAC 25-260-30 A 2 for new or existing discharges unless the requirements outlined in 9 VAC 25-260-30 A 2 are satisfied.

Notes of Decisions (1)

Official Virginia Administrative Code, current through 36:01 VA.R September 2, 2019, and fast-track regulations current through 36:01 VA.R September 2, 2019.

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