



March 23, 2016

VIA CERTIFIED MAIL

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

**Re: 60-Day Notice of Intent to File Civil Action Under Clean Water Act
Section 505(a)(2) for Administrator's Failure to Perform Non-
Discretionary Duties Under Sections 303 and 402 of the Act**

Dear Ms. McCarthy:

You are hereby notified pursuant to § 505(b)(2) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1365(b)(2), that the West Virginia Coal Association (“WVCA”) and/or some of its members intend to file a civil action against you, as Administrator of the United States Environmental Protection Agency (“EPA”), pursuant to § 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), for failure to perform non-discretionary duties under § 303 and § 402 of the CWA. Alternatively, WVCA and/or some of its members intend to file a civil action against you, as Administrator of EPA, pursuant to § 702 of the Administrative Procedure Act, 5 U.S.C. § 702, seeking injunctive relief to compel agency action that has been unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1).

Specifically, EPA has failed to take any action with respect to amendments to the State’s Water Pollution Control Act and coal National Pollutant Discharge Elimination System (“NPDES”) permitting rule as required by the Clean Water Act. EPA has a non-discretionary duty to either approve or disapprove revisions to State NPDES programs. Nearly nine months after West Virginia submitted program revisions to EPA, EPA has failed to take any action as required by the Act.

I. BACKGROUND

West Virginia has NPDES rules for both coal facilities (WVCSR § 47-30-1, *et seq.*) and non-coal facilities (WVCSR § 47-10-1, *et seq.*). Both sets of rules are nearly identical and have long contained a “permit shield” provision providing that compliance with a permit constitutes

compliance with the CWA, just as is provided in § 402(k) of the CWA, 33 U.S.C. § 1342(k). *See* WVCSR § 47-30-3.4.a (coal) and WVCSR § 47-10-3.4.a (non-coal).¹

The coal NPDES rule, however, historically contained a separate provision that the non-coal NPDES rule has never contained. Specifically, the coal rule contained a provision that stated:

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES permits either expressly or by reference. [...]

The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47CSR2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein.

WVCSR § 47-30-5.1.f (2013). Despite WVDEP's position that the rule does not make water quality standards into permit conditions, anti-mining activists have relied on a citation to this rule in coal NPDES permits to argue that water quality standards themselves are enforceable "effluent standards or limitations," regardless of the express effluent limits contained in the permits.

The State's non-coal rule contains no such provision. Similarly, EPA regulations contain no such provision. EPA regulations specify the "standard conditions" that must "apply to all NPDES permits" issued by EPA or by states with permitting authority. *See* 40 C.F.R. § 122.41. Nowhere do these regulations provide that water quality standards are themselves enforceable effluent standards or limitations. *See id.*

During the 2015 Regular Session, the West Virginia Legislature passed Senate Bill 357, which amended the WPCA to clarify that all NPDES permittees are shielded from enforcement actions for discharges of pollutants for which their permits do not contain specific effluent limitations. The Legislature amended two sections of the WPCA. Section 22-11-6 was amended to read:

For purposes of both this article and sections 309 and 505 of the federal Water Pollution Control Act, compliance with a permit issued pursuant to this article shall be deemed compliance for

¹ WVCSR § 47-30-3.4.a, which is nearly identical to WVCSR § 47-10-3.4.a, states: "Except for any toxic effluent standards and prohibitions imposed under CWA Section 307, compliance with a permit during its term constitutes compliance, for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11. However, a permit may be modified, reissued or revoked during its term for cause as set forth in Section 8 of this rule."

purposes of both this article and sections 301, 302, 303, 306, 307 and 403 of the federal Water Pollution Control Act and with all applicable state and federal water quality standards, except for any such standard imposed under section 307 of the federal Water Pollution Control Act for a toxic pollutant injurious to human health. Notwithstanding any provision of this code or rule or permit condition to the contrary, water quality standards themselves shall not be considered “effluent standards or limitations” for the purposes of both this article and sections 309 and 505 of the federal Water Pollution Control Act and shall not be independently or directly enforced or implemented except through the development of terms and conditions of a permit issued pursuant to this article. Nothing in this section, however, prevents the secretary from modifying, reissuing or revoking a permit during its term. The provisions of this section addressing compliance with a permit are intended to apply to all existing and future discharges and permits without the need for permit modifications[.]

W. Va. Code § 22-11-6(2) (emphasis added). The Legislature also amended Section 22-11-8 by adding the sentence underlined below:

The secretary may, after public notice and opportunity for public hearing, issue a permit for the discharge or disposition of any pollutant or combination of pollutants into waters of this state upon condition that the discharge or disposition meets or will meet all applicable state and federal water quality standards and effluent limitations and all other requirements of this article and article three, chapter twenty-two-b of this code. While permits shall contain conditions that are designed to meet all applicable state and federal water quality standards and effluent limitations, water quality standards themselves shall not be incorporated wholesale either expressly or by reference as effluent standards or limitations in a permit issued pursuant to this article.

W. Va. Code § 22-11-8(a).

Also during the 2015 Regular Session, the Legislature approved WVDEP’s proposed change to the coal NPDES permitting rule. WVCSR § 47-30-5.1.f was revised to delete the sentence requiring discharges to comply with water quality standards, as shown below:

5.1.f. Any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein. However, as

provided by subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

Taken together, these provisions continue to require that NPDES permits include appropriate effluent limits based on water quality standards, but ensure that water quality standards are not separately enforceable as effluent standards or limitations.

On May 13, 2015, WVDEP notified EPA that the Legislature had approved WVDEP's proposed revision to WVCSR § 47-30-5.1.f. *See* Appendix A (May 13, 2015 Letter from Harold Ward, Acting Director of WVDEP's Division of Mining and Reclamation, to Shawn Garvin, Administrator of EPA Region 3). Subsequently, on June 15, 2015, WVDEP sent EPA another letter notifying EPA of the rule change (apparently because the previous letter had not specifically requested that EPA take any action). *See* Appendix B (June 15, 2015 Letter from Harold Ward, Acting Director of WVDEP's Division of Mining and Reclamation, to Shawn Garvin, Administrator of EPA Region 3). On March 9, 2016, WVDEP sent a third letter to EPA requesting action on the rule change and the aforementioned changes to the West Virginia Water Pollution Control Act. *See* Appendix C (March 9, 2016 Letter from Randy C. Huffman to Shawn Garvin, Administrator of Region 3).

To the best of WVCA's knowledge, EPA has taken no action in response to WVDEP's notifications.

II. EPA HAS VIOLATED ITS NON-DISCRETIONARY DUTIES

EPA has a duty to approve state NPDES programs and revisions to those programs. *See* 33 U.S.C. § 1342(c) and 40 CFR § 123.62(b). Not every change to State law constitutes a "program revision." *See Valstad v. Cipriano*, 828 N.E.2d 854, 873-75 (Ill. App. 2005). Accordingly, EPA has a non-discretionary duty to first determine whether a change to State law is a program revision and, if it is, to approve or disapprove the revision in a timely fashion. While EPA's regulations do not provide a deadline for approving program revisions, Congress mandated that EPA's review of a state's initial NPDES program submission should not exceed 90 days. 33 U.S.C. § 1342(c)(1). Based on this, any delay in approving a revision to a state's NPDES program beyond 90 days is unreasonable. *Id.* Congress intended quick action on program approval and revision issues.

We understand that WVDEP does not believe that the aforementioned changes made to WVCSR § 47-30-5.1.f or the Water Pollution Control Act constitute a program revision, because these changes do not add or remove any substantive State program requirement. *See* Appendix B, C. Instead, these changes merely clarify that water quality standards must be used in the development of effluent standards and limitations, but are not themselves enforceable effluent

standards or limitations. When WVDEP first split its coal and non-coal NPDES rules in 1984, the coal NPDES rule contained the provision that has now been deleted from WVCSR § 47-30-5.1.f. When EPA reviewed and approved that new rule, EPA's public notices stated that "[n]o substantive rights or obligations of any person will be altered by this program modification" and that the rule was being issued "without any substantive change in State regulating authorities or responsibilities." *See* 50 Fed. Reg. 2,996 (Jan. 23, 1985); 50 Fed. Reg. 28,202 (July 11, 1985).

Even if the aforementioned changes to WVCSR § 47-30-5.1.f and the West Virginia Water Pollution Control Act do constitute a program revision, it is one that EPA must approve. As explained above, EPA's regulations do not require NPDES permits to contain a condition that makes water quality standards themselves enforceable effluent standards or limitations. A rule change that merely clarifies this is therefore entirely consistent with the CWA.

EPA should either acknowledge in writing that aforementioned changes do not constitute a program revision requiring its approval or follow the required procedures for approving NPDES program revisions. For revisions that are not "substantial," EPA can approve them by letter pursuant to 40 C.F.R. § 123.62(b)(4). If a program revision is substantial, EPA must satisfy the public notice and comment provisions of 40 C.F.R. § 123.62(b)(2).

III. CONCLUSION

As described above, EPA has failed to perform duties under the CWA that are not discretionary. EPA must either find that WVDEP's changes to the coal NPDES permitting rule and West Virginia Water Pollution Control Act do not constitute a program revision requiring EPA approval or, alternatively, immediately approve those changes as a program revision that is consistent with the CWA. If you fail to perform your non-discretionary duties within sixty (60) days of the postmark date of this letter, the West Virginia Coal Association and/or some of its members intend to institute a civil action against you to compel you to perform your duties.

Sincerely,



M. Shane Harvey

Enclosure

cc: Secretary Randy Huffman
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

Patrick Morrissey, West Virginia Attorney General
Office of the Attorney General
State Capitol Complex
Bldg. 1, Room E-26
Charleston, WV 25305

Senator Shelley Moore Capito
172 Russell Senate Office Building
Washington, DC 20510

Senator Joseph Manchin III
306 Hart Senate Office Building
Washington DC, 20510

Rep. David McKinley
412 Cannon HOB
Washington, DC 20515

Rep. Alex Mooney
1232 Longworth House Office Building
Washington, DC 20515

Rep. Evan Jenkins
502 Cannon House Office Building
Washington, DC 20515

Loretta E. Lynch, United States Attorney General
Office of the U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Shawn Garvin, Regional Administrator
U.S. Environmental Protection Agency, Region 3
1650 Arch St.
Philadelphia, PA 19103



west virginia department of environmental protection

Division of Mining and Reclamation
610 57th Street Charleston, WV 25304
(304) 926-0490

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
dep.wv.gov

May 13, 2015

Shawn Garvin,
Regional Administrator
US EPA, Region 03
1650 Arch St.
Philadelphia, PA 19103

Dear Mr. Garvin:

This is to inform you that H. B. 2283 which was passed in the recent session of the West Virginia Legislature amends certain sections of 47 CSR 30 that was sent to you as proposed on June 12, 2014. These changes become effective under State Law on June 1, 2015.

This revision is the result of the passage of Senate Bill 615 by the West Virginia Legislature on March 10, 2012. We believe the language of the W.Va. Code §22-11-6 as modified by Senate Bill 615 and 47 CSR 30, as modified by this proposal, is consistent with Section 402(k) of the federal Clean Water Act.

If you or your staff has any questions, please feel free to contact Charles Sturey at (304) 926-0499 ext. 1526.

Sincerely,

Harold Ward, Acting Director

cc: Jon Capacasa

Appendix A



west virginia department of environmental protection

Division of Mining and Reclamation
610 57th Street Charleston, WV 25304
(304) 926-0490

Earl Ray Tomblin, Governor
Randy C. Huffinan, Cabinet Secretary
dep.wv.gov

June 15, 2015

Shawn Garvin,
Regional Administrator
US EPA, Region 03
1650 Arch St.
Philadelphia, PA 19103

Dear Mr. Garvin:

I am writing to inform you once again of a change to the WV/NPDES Rule for Coal Mining Facilities, 47 C.S.R. § 30, that was approved by the West Virginia Legislature during its 2015 Regular Session. You were previously notified of this change by letter dated May 13, 2015; however, that letter did not request that you take any specific action. The change to 47 C.S.R. § 30 is a clarification of existing law and as such, WVDEP does not consider it to be a "revision" to the State's NPDES program. However, to the extent EPA approval is required, WVDEP believes the change is "non-substantial" and may be approved by letter in accordance with 40 C.F.R. § 123.62(b)(4). If you disagree, WVDEP requests that you take immediate steps to satisfy the public notice and comment provisions of 40 C.F.R. § 123.62.

The change to 47 C.S.R. § 30 was approved by the Legislature on March 12, 2015, through House Bill 2283, which Governor Tomblin signed on March 18, 2015. As specified by the Legislature, HB 2283 became effective upon its passage on March 12, 2015. (A previous letter dated May 13, 2015 mistakenly stated that the bill becomes effective on June 1, 2015.) Enclosed are copies of HB 2283 and the proposed rule change that it approved.

As proposed by WVDEP, 47 C.S.R. § 30-5.1.f was changed by deleting the language shown in the strikethrough below:

~~The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein. However, as provided by subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a~~

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Appendix B

permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

As stated in WVDEP's submission of the proposed rule to the West Virginia Secretary of State, this language was deleted in order to clarify that water quality standards are ends to be achieved by the imposition of effluent limits developed by NPDES permit writers, but are not themselves to be construed as effluent limits that are directly enforceable. WVDEP never interpreted the prior rule as incorporating all water quality standards into NPDES permits as enforceable effluent limits. However, because 47 C.S.R. § 30-5 requires that §§ 5.1 through 5.19 be incorporated into permits either expressly or by reference, citizen groups have claimed that all State water quality standards are enforceable as effluent standards or limitations in a citizen suit. This rule change is intended to dispel that misconception.

WVDEP is hereby requesting that EPA acknowledge receipt of the change. We are also requesting that EPA either acknowledge that this change is not a program revision requiring its approval or find that the change is non-substantial and approve the change by letter pursuant to 40 C.F.R. § 123.62(b)(4). As stated above, If you disagree, WVDEP requests that you take immediate steps to satisfy the requirements of 40 C.F.R. § 123.62 for a program revision that EPA deems substantial and promptly notified us of approval of substantial revision.

Sincerely,



Harold Ward, Acting Director

cc: Jon Capacasa



west virginia department of environmental protection

Executive Office
601 57th Street, Southeast
Charleston, West Virginia 25304
Phone: (304) 926-0440
Fax: (304) 926-0446

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

March 9, 2016

Shawn Garvin, Regional Administrator
US EPA, Region 3
1650 Arch St.
Philadelphia, PA 19103

Re: Pending Program Revisions to West Virginia's National Pollutant Discharge Elimination System (NPDES) Program

Dear Mr. Garvin: *Shawn*

I am writing you once again to request action on the proposed revisions to West Virginia's NPDES program, which have been pending since the 2015 Regular Session of the West Virginia Legislature.

To review the history, on May 13, 2015, our Division of Mining and Reclamation (DMR) notified you of a change to the WV/NPDES Rule for Coal Mining Facilities, 47 C.S.R. 30, that was approved by the Legislature during its 2015 Regular Session. Subsequent to that notification, on June 15, 2015, DMR sent a second letter notifying you again of the amendment to the rule and requesting that you either approve the change or acknowledge that the change is not a program revision requiring EPA approval. To date, we have received no response, despite several requests and the passage of almost one year. Please consider this our third formal request for action on this proposed revision.

This letter is also to request that you promptly address two related statutory changes made by the West Virginia Legislature during the 2015 Regular Session. The Legislature passed Senate Bill 357, which amended the West Virginia Water Pollution Control Act (WPCA) to clarify that all NPDES permittees are shielded from enforcement actions for discharges of pollutants for which their permits do not contain specific effluent limitations. Pursuant to Senate Bill 357, W. Va. Code § 22-11-6 was amended as follows:

~~Notwithstanding any rule or permit condition to the contrary, and except for any standard imposed under section 307 of the federal Water Pollution Control Act for a toxic pollutant injurious to human health, For purposes of both this article and sections 309~~

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Appendix C

and 505 of the federal Water Pollution Control Act, compliance with a permit issued pursuant to this article shall be deemed compliance for purposes of both this article and sections 301, 302, 303, 306, 307 and 403 of the federal Water Pollution Control Act and with all applicable state and federal water quality standards, except for any such standard imposed under section 307 of the federal Water Pollution Control Act for a toxic pollutant injurious to human health. Notwithstanding any provision of this code or rule or permit condition to the contrary, water quality standards themselves shall not be considered "effluent standards or limitations" for the purposes of both this article and sections 309 and 505 of the federal Water Pollution Control Act and shall not be independently or directly enforced or implemented except through the development of terms and conditions of a permit issued pursuant to this article. Nothing in this section, however, prevents the secretary from modifying, reissuing or revoking a permit during its term. The provisions of this section addressing compliance with a permit are intended to apply to all existing and future discharges and permits without the need for permit modifications; ~~however, should any such modification be necessary under the terms of this article, then the secretary shall immediately commence the process to effect such modifications[.]~~

W. Va. Code § 22-11-6(2); strike-throughs indicate language that was deleted from the Code per the amendment, and underlines indicate language that was added. This amendment conforms State law verbatim to the federal Clean Water Act, so we are at a loss as to why this revision has not been approved or you have not confirmed that this amendment is not a revision that requires EPA approval.

Further, SB357 (2015) also amended W. Va. Code § 22-11-8(a) by adding the sentence underlined below:

The secretary may, after public notice and opportunity for public hearing, issue a permit for the discharge or disposition of any pollutant or combination of pollutants into waters of this state upon condition that the discharge or disposition meets or will meet all applicable state and federal water quality standards and effluent limitations and all other requirements of this article and article three, chapter twenty-two-b of this code. While permits shall contain conditions that are designed to meet all applicable state and federal water quality standards and effluent limitations, water quality standards themselves shall not be incorporated wholesale either expressly or by reference as effluent standards or limitations in a permit issued pursuant to this article.

Shawn Garvin
March 9, 2016
Page 3 of 3

Like the changes to 47 C.S.R. 30, the statutory changes effected by Senate Bill 357 (2015) clarify that water quality standards are ends to be achieved by the imposition of effluent limits established in NPDES permits, but are not themselves to be construed as effluent limits that are directly enforceable, as established by federal law.

Therefore, we again ask that EPA take immediate steps to either approve these changes made by the West Virginia Legislature or acknowledge that these changes are not program revisions requiring EPA approval.

Sincerely,



Randy C. Huffman
Cabinet Secretary

cc: Jon Capacasa
Harold D. Ward