


## MEMORANDUM

To: President Jeff Kessler, Chair  
Speaker Richard Thompson, Chair  
Joint Committee on Government and Finance

cc: Jason Pizatella, Legislative Director  
Keith Burdette, Cabinet Secretary, West Virginia Department of Commerce  
Joshua Jarrell, Deputy Secretary/General Counsel, West Virginia Department of Commerce

From: Jeff Herholdt, Director  
West Virginia Division of Energy 

Date: May 13, 2013

Re: Quarterly Report Ending March 31, 2013  
Legal Challenges Potentially Impacting the Energy Industry

As mandated by West Virginia Code §5B-2F-2(s), the following information presents legal challenges with the potential to impact the state's energy industry. This submission has been summarized by the West Virginia Chamber of Commerce's Energy Committee. Future reports will be submitted on a quarterly basis.

**REPORT ON LITIGATION RELATED TO**  
**ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA**

**FIRST QUARTER 2013**  
**(Period ending March 31, 2013)**

**1. D.C. Circuit Court Denies Request to Rehear Greenhouse Gas Cases**

On December 20, 2012, the United States Court of Appeals for the District of Columbia Circuit, set the stage for an appeal to the United States Supreme Court by denying the petitions of various energy industry advocates and states for a rehearing “en banc” in the case styled *Coalition for Responsible Regulations, Inc., et al. v. Environmental Protection Agency*, No. 09-1322.

The petitions for rehearing stemmed from the D.C. Circuit Court’s June 26, 2012 decision which upheld the Environmental Protection Agency’s (“EPA”) finding that greenhouse gases endanger human health and welfare, thereby triggering coverage under the Clean Air Act (“CAA”). While the Circuit Court’s entire June 26, 2012 opinion can be viewed, [here](#), the Circuit Court’s *per curium* decision focused predominantly on four rules promulgated by the EPA under the CAA: (1) the Endangerment Finding, (2) the Tailpipe Rule, (3) the Timing Rule, and (4) the Tailoring Rule. In upholding the rules set forth by the EPA, the Court dismissed challenges to the “Endangerment Finding” and the “Tailpipe Rule” on their merits and further found that petitioners lacked standing to challenge the Timing and Tailoring Rules. *See Coalition for Responsible Regulations, Inc., et al.*, 684 F.3d 102, 113-14 (C.A. D.C. 2012)

The issues in *Coalition for Responsible Regulations, Inc.*, originated following the United States Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) “that greenhouse gases unambiguously may be regulated as an air pollutant under the Clean Air Act (“CAA”). *Id.* at 114 (internal quotations omitted). As a result of the directives set forth by the Supreme Court in *Massachusetts*, the EPA issued an Endangerment Finding for greenhouse gases [74 Fed. Reg. 66, 496 (Dec. 15, 2009)] and promulgated the Tailpipe Rule which “set greenhouse gas emissions standards for cars and light trucks as part of a joint rulemaking with fuel economy standards issued by the National Highway Traffic Safety Administration.” *Id.* at 114-15. Additionally, “under the EPA’s longstanding interpretation of the CAA, the Tailpipe Rule automatically triggered regulation of stationary greenhouse emitters” under the Prevention of Significant Deterioration of Air Quality (PSD) Program and Title V. Accordingly, the EPA promulgated the Timing Rule and the Tailoring Rule in an effort to “phase in” the stationary source greenhouse gas regulation. *Id.* at 115-16.

In analyzing the EPA's rules, the D.C. Circuit Court first affirmed the EPA's Endangerment Finding holding that it was "consistent with *Massachusetts* and the text and structure of the CAA..." *Id.* at 117. Among others, the Circuit Court rejected the petitioner's argument that the EPA had failed to show "certain" endangerment of public health or welfare stating that "requiring that EPA find 'certain' endangerment of public health or welfare before regulating greenhouse gases would effectively prevent EPA from doing the job Congress gave it in [CAA] §202(a) – utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm." *Id.* at 122. Next, the Circuit Court upheld the Tailpipe Rule holding, that the EPA was, in essence, required to set forth the regulation having "determined that motor-vehicle emissions contribute to greenhouse gas emissions that, in turn, endanger the public health and welfare." *Id.* at 126-27. Finally, the D.C. Circuit Court dismissed challenges to the EPA's Timing and Tailoring Rules finding that the petitioners lacked standing to challenge the rules. Specifically, the Circuit Court held that the petitioners "failed to establish that the Timing and Tailoring Rules caused them 'injury in fact,' much less injury that could be redressed by the Rules' vacatur." *Id.* at 146.

Following dismissal, petitioners sought a rehearing "en banc" to overturn the June 26, 2012 decision. Writing for the majority, which denied the petitions for rehearing in an opinion containing strong dissents by Judges Brown and Kavanaugh, Chief Judge Sentelle acknowledged the "exceptional importance" of the Court's June decision, but further held "[t]here [was] no cause for en banc review." *Coalition for Responsible Regulation, Inc., et al. v. EPA*, No. 09-1322, p. 4 (Dec. 20, 2012) In short, Judge Sentelle wrote, on behalf of the majority, that "[t]he legal issues presented...are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent." *Id.*

In what will perhaps set the stage for a Petition for Writ of Certiorari to the Supreme Court, both Judge Brown and Judge Kavanaugh wrote lengthy and impassioned dissents to the denial of the petitions for rehearing. Judge Brown first argues that the Supreme Court decision in *Massachusetts* was incorrectly decided. Recognizing she is, however, bound by the decision, Judge Brown provides a statement of the case's "shortcomings in the hope that either Court or Congress will restore order to the CAA." *Id.* at p. 2 (*Brown, J. dissenting*). Alternatively, Judge Brown further stated that even under *Massachusetts*, the EPA did not have the authority to regulate greenhouse gases under the PSD and Title V programs. In short, Judge Brown wrote, "we need not follow *Massachusetts* off the proverbial cliff and apply its reasoning to the unique Title V and PSD provisions not considered in that case. The cascading layers of absurdity that flow from that interpretive exercise make clear that the plain language of the CAA compels no such result." *Id.* at p. 12 (*Brown, J. dissenting*).

Judge Kavanaugh focused much of his dissent on the EPA's broad interpretation of the term "air pollutant," indicating that he would interpret the PSD provision of the CSA as

only applying to the six pollutants set forth by the National Ambient Air Quality Standards (“NAAQS”). Judge Kavanaugh wrote,

In my view, the statutory issue here is reasonably straightforward. The Prevention of Significant Deterioration statute’s definition of “majority emitting facility” subjects a facility to the permitting requirement based on the facility’s emissions of “air pollutants.” *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). In the context of the Prevention of Significant Deterioration program as a whole, it seems evident that the term “air pollutant” refers to the NAAQS air pollutants.

To begin with...interpreting “air pollutant” in this context to refer to the NAAQS air pollutants would avoid the absurd consequences that EPA’s broader interpretation creates...

*Id.* at p. 6 (*Kavanaugh, J. dissenting*). In short, “EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that.” *Id.* at p. 17 (*Kavanaugh, J. dissenting*).

The D.C. Circuit December 20, 2012 decision can be accessed by clicking [here](#).

## 2. EPA Finalizes Air Quality Standard for Fine Particles

On December 14, 2012, the U.S. Environmental Protection Agency (EPA) finalized national ambient air quality standards for particle pollution. EPA tightened the standards by revising the “primary” annual fine particle (PM<sub>2.5</sub>) standard from 15 micrograms per cubic meter (µg/m<sup>3</sup>) to 12µg/m<sup>3</sup> and retained the 24-hour fine particle standard of 35 µg/m<sup>3</sup>. EPA is also retaining the existing standards for coarse particle pollution (PM<sub>10</sub>) of 150 µg/m<sup>3</sup>. Fine particles can be emitted directly from motor vehicles, smoke stacks, fires, and other sources. They also form when gases emitted by power plants, industrial processes, gasoline and diesel engines, and other sources react in the atmosphere. “Primary” standards like the revised annual PM<sub>2.5</sub> standard of 12 µg/m<sup>3</sup> provide public health protection, including protecting the health of “sensitive” populations such as asthmatics, children, and the elderly, while “secondary” standards provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings.

Background: In February 2009, the U.S. Court of Appeals for the District of Columbia Circuit remanded the 2006 primary annual PM<sub>2.5</sub> standard of 15µg/m<sup>3</sup> and the secondary PM<sub>2.5</sub> standards to the Agency. *American Farm Bureau Federation v. EPA*, 559 F. 3d 512 (D.C. 2009). For the primary annual PM<sub>2.5</sub> standard, the D.C. Circuit concluded that

EPA had failed to explain why the annual standard that the Agency promulgated deviated from the recommendations of EPA's science advisors. For the secondary PM<sub>2.5</sub> standards, the D.C. Circuit said EPA had failed to adequately explain why the secondary standards provided the required protection from visibility impairment. The D.C. Circuit also said EPA had failed to identify a target level of visibility impairment that would be requisite to protect public welfare.

Three years later, in February 2012, environmental groups sued EPA in the U.S. District Court for the District of Columbia for not completing the review of the standards within 5 years or by October 2011. Certain states also filed a separate suit. In June 2012, the district court issued a preliminary injunction ordering EPA to issue a proposed rule by June 14, 2012. Thereafter, the parties entered into a consent decree that required EPA to issue final standards by December 14, 2012. *American Lung Association et al. v. EPA*, No. 1:12-cv-00243-RLW (D.D.C.).

Implementation Schedule: In the final rule, EPA sets forth its schedule for designating areas and implementing the revised primary annual PM<sub>2.5</sub> standard of 12µg/m<sup>3</sup>. By 2013, states must make recommendations for areas to be designated as meeting the standards (called "attainment" areas), not meeting them (called "nonattainment" areas), or if there is not enough data to make a determination (called "unclassifiable" areas). By August 2014, EPA issues to states its so-called 120-day letters, responding to states' recommendations for attainment and nonattainment areas. States then have 120 days to comment on any modifications to their recommendations, and to provide new information and analyses to EPA if appropriate. EPA will then make final designations by December 2014, and those designations would likely become effective in early 2015, i.e., 60 days after the final designations are published in the *Federal Register*. The effective date of designations is important because it starts the clock running for attainment demonstrations and deadlines. Three years after designations, states are required to submit their state implementation plans (SIPs) outlining how they will reduce pollution to meet the revised standards. These SIPs would be due in early 2018. EPA states it plans to propose additional guidance and implementing regulations for the revised PM<sub>2.5</sub> standard, relating to SIP requirements and permitting requirements for the revised standards and intends to issue a final implementation rule around the same time the Agency makes final designations in late 2014. States would be required to meet the revised PM<sub>2.5</sub> NAAQS by early 2020 or not later than 5 years after designations but may request an extension until 2025.

Nonattainment Areas: EPA projects that by 2020, 99% of U.S. counties, including all counties in West Virginia, will meet the revised health standard without any additional actions. For a map and table of counties with monitors that EPA projects would meet the new final annual PM<sub>2.5</sub> NAAQS of 12 µg/m<sup>3</sup> in 2020, click [here](#) and [here](#). According to EPA's [press release](#) "fewer than 10 counties, out of more than 3,000 counties in the United States, will need to consider any local actions to reduce fine particle pollution in order to meet the new standards by 2020.... the rest can rely on air quality improvements

from federal rules already on the books to meet this standard.” Based on 2009-2011 air quality data, 66 counties do not currently meet the revised annual standard of  $12\mu\text{g}/\text{m}^3$ . In West Virginia, the counties that do not meet the revised annual standard of  $12\mu\text{g}/\text{m}^3$  are: Brooke; Cabell; Kanawha; Marion; Marshall; and Wood. Of these counties, except for Marion County, all are currently in  $\text{PM}_{2.5}$  nonattainment areas. For a map and table of counties with monitors that currently do not meet the revised annual  $\text{PM}_{2.5}$  NAAQS of  $12\mu\text{g}/\text{m}^3$ , click [here](#) and [here](#).

Monitoring: EPA is updating the nation’s  $\text{PM}_{2.5}$  monitoring network. EPA is not requiring additional monitors but is requiring states to relocate “a small number of monitors” to measure fine particles near heavily traveled roads in areas with populations of 1 million or more. Under the final rule, the relocations will be phased in over a two year period from 2015 to 2017. EPA notes that particle pollution near heavily traveled roads and large urban areas can be higher as a result of emissions from cars and heavy-duty diesel trucks and busses. This may signal that EPA will be looking to mobile sources and the transportation sector for any needed local or other emission reductions. According to EPA, the existing national  $\text{PM}_{2.5}$  monitoring network consists of about 900 monitors. EPA estimates the number of existing monitors needed to be relocated to meet the near-roadway requirement to be about 52.

Permitting: EPA addresses permitting in the final rule and states it will grandfather pending Prevention of Significant Deterioration (PSD) permit applications if: (1) the permitting agency has deemed the application complete by December 14, 2012; or (2) the public notice for a draft permit or preliminary determination has been published before the date the revised  $\text{PM}_{2.5}$  standards become effective, *i.e.*, 60 days after publication of the final rule in the *Federal Register*. PSD is EPA’s preconstruction permitting program and is designed to ensure that emissions from the addition of new or modified factories, industrial boilers, power plants and other stationary sources of pollution do not significantly worsen air quality in areas with clean air. The grandfathering provision is intended to insure that changes to the PM standards will not delay certain pending permits and reduce potential burdens to permit applicants and state permitting agencies. The grandfathering provision applies to only the revised  $\text{PM}_{2.5}$  NAAQS and does not apply to the 2006 24-hour  $\text{PM}_{2.5}$  NAAQS. Permit applications that have not reached the public notice stage must demonstrate compliance with the revised standards.

Secondary Standard: EPA had proposed to set a separate secondary 24-hour standard to provide protection against PM-related visibility effects or haze in cities in some of the nation’s national parks and wilderness areas; however, EPA concluded that the current secondary 24-hour  $\text{PM}_{2.5}$  standard of  $35\mu\text{g}/\text{m}^3$  will provide visibility protection equal to, or greater than 30 deciviews. A deciview is the yardstick EPA uses for measuring visibility (*e.g.*, the higher the deciview level, the hazier the air appears), and 30 deciviews is the target level of protection of visibility impairment that EPA determined in the final rule would be requisite to protect public welfare. The existing secondary standards for  $\text{PM}_{2.5}$  and  $\text{PM}_{10}$  that EPA is retaining are: an annual  $\text{PM}_{2.5}$  standard of  $15\mu\text{g}/\text{m}^3$ ; a 24-

hour PM<sub>2.5</sub> standard of 35µg/m<sup>3</sup>; and a 24-hour standard of 150µg/m<sup>3</sup> for PM<sub>10</sub>. For a more information on EPA's proposed secondary PM<sub>2.5</sub> NAAQS, see article titled "[U.S. EPA Proposes Fine Particulate Matter Air Quality Standards](#)," posted on the Jackson Kelly PLLC Energy & Environment Monitor on July 9, 2012.

Cost-Benefit Analysis: EPA estimates the annual cost of implementing the revised annual PM<sub>2.5</sub> NAAQS to range from a low of \$53 million to a high of \$350 million. EPA further estimates that the value of health benefits to be between \$4 billion to \$9.1 billion per year in 2020 or a return of \$12.00 to \$171.00 for every dollar invested in pollution reduction.

### 3. **January 4, 2013 D.C. Circuit Court Opinion Threatens PM 2.5 Re-designations to Attainment for West Virginia**

In late 2012, EPA took significant action regarding the areas in West Virginia which are nonattainment for the fine particulate ("PM 2.5") National Ambient Air Quality Standard (NAAQS) under the Clean Air Act (CAA). Two types of actions were taken:

- All West Virginia PM<sub>2.5</sub> nonattainment areas were determined to have attained both the 1997 annual average PM 2.5 standard (Charleston, Huntington, Martinsburg, Parkersburg, Weirton, Wheeling) and the 2006 24-hour PM<sub>2.5</sub> standard (Charleston, Weirton) based upon complete quality-assured, and certified ambient air monitoring data for the 2007–2009 period and upon data available for 2010 in the EPA Air Quality System database. EPA's determination releases these areas from the requirements to submit attainment demonstrations and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning State Implementation Plan (SIP) revisions related to attainment of the PM<sub>2.5</sub> standards for so long as the areas continues to attain the standards. However, these determinations of attainment are not equivalent to re-designations of the areas to attainment, and West Virginia must still meet the statutory requirements for re-designation in order to be re-designated to attainment. These statutory criteria for re-designation are:
  - EPA's final determination that the relevant NAAQS has been attained as evidenced by both ambient monitoring data and EPA approved air quality modeling.
  - EPA has fully approved the SIP
  - EPA has determined that improvement in air quality is due to permanent and enforceable reductions in emission, not temporary reductions due to adverse economic conditions or unusually favorable meteorology
  - The State has met all applicable requirements for the area and a maintenance plan including a contingency plan if required has been approved

- Request for re-designations to attainment for both the 1997 and 2006 annual average PM2.5 standard have been submitted by the West Virginia Division of Air Quality (WV DAQ) to U.S. EPA for all PM2.5 nonattainment areas, with the exception of Martinsburg.
- Effective December 28, 2012 (77 Fed Reg. 76415), the Huntington PM2.5 1997 annual average nonattainment area was re-designated as attainment for the 1997 annual PM2.5. EPA also approved the maintenance plan SIP revision including the insignificance determination for transportation conformity. Huntington was already attainment for the 2006 24 hour PM2.5 standard.
- December 11, 2012 EPA proposed approval of re-designations to attainment for the Parkersburg (77 Fed Reg. 73560) and Wheeling (77 Fed Reg. at 73575) 1997 PM 2.5 annual average standard nonattainment areas including approval of maintenance plans and insignificance determinations for on-road motor vehicle contributions. The comment period ended January 10, 2013.

In addition to relieving the burden of further attainment demonstrations, RACM and RFP and contingency measures, the determination that an area is attainment takes new and modified sources out of the more onerous non-attainment New Source Review permitting program so attainment designations are useful for encouraging new and expanded development.

The major wrinkle in EPA's approval of WVDAQ's re-designation request submittals is the January 4, 2013, decision of the D. C. Circuit Court ruling in NRDC and Sierra Club v. EPA (No. 08-1250) that the CAA requires implementation of the PM2.5 NAAQS under CAA, Title I, Part D, Subpart 4 rather than implementation under Part D, Subpart 1. Subpart 1 deals with general nonattainment requirements while Subpart 4 is specific to "Particulate Matter Nonattainment Areas". (Note NRDC/Sierra Club v. EPA does not affect EPA's December 14, 2012 strengthening of the annual PM2.5 standard to 12 ug/m3.

The background of NRDC/ Sierra Club v EPA is as follows:

- In April 2007, EPA issued a detailed implementation rule to assist states with the development of SIPs to demonstrate attainment with the 1997 annual and 24-hour PM2.5 NAAQS. [72 Fed. Reg. 20,586 (Apr. 25, 2007)]. In May 2008, EPA finalized regulations to implement the NSR program for PM2.5. [73 Fed. Reg. 28,321 (May 16, 2008)] In March 2012, the EPA issued guidance regarding the development of SIPs to demonstrate attainment with the 2006 24-hour PM2.5 NAAQS and the Implementation of the New Source Review (NSR) Program for PM2.5.
- The Natural Resources Defense Council, Sierra Club, American Lung Association, and Medical Advocates for Healthy Air challenged EPA's 2007



implementation rule for the 1997 PM<sub>2.5</sub> NAAQS and the separate 2008 NSR/PSD rule for the 1997 PM<sub>2.5</sub> NAAQS before the DC Circuit Court.

- On January 4, 2013, the Court ruled that the CAA requires implementation of the PM<sub>2.5</sub> NAAQS under CAA Part D Subpart 4 rather than implementation under Subpart 1. Subpart 1 deals with general nonattainment requirements while Subpart 4 is more specific “Particulate Matter Nonattainment Areas” and remanded the rules to EPA, but did not nullify them without a specific timeline for re-promulgation.
- In the challenged rulemakings EPA had concluded that Congress did not intend the Agency to implement particulate matter NAAQS other than those using PM<sub>10</sub> as the indicator in accordance with Subpart 4 of Part D of Title 1 . . . .”); PM<sub>2.5</sub> NSR Implementation Rule, 73 Fed. Reg. at 28,332 “We do not agree that subpart 4 of part D applies to PM<sub>2.5</sub> nonattainment areas. Subpart 4 was added to the Act by Congress specifically to address the PM<sub>10</sub> NAAQS. We believe that the PM<sub>2.5</sub> standard should be implemented under Subpart 1 of part D, which is the general provision of the Act related to NAAQS implementation.”
- One important effect of the EPA’s utilization of Subpart 1 instead of the more specific Subpart 4 was the EPA’s treatment of precursors to PM 2.5. Ammonia is a precursor to fine particulate matter, both PM<sub>2.5</sub> and PM<sub>10</sub> . For a PM nonattainment area governed by Subpart 4, a precursor is presumptively regulated. *See* 42 U.S.C. §7513a(e). But under the challenged PM 2.5 rules EPA established a rebuttable presumption against regulating ammonia unless a State or the EPA “provides an appropriate technical demonstration” that shows emissions from ammonia “significantly contribute to PM concentration in the nonattainment area.” 40C.F.R. §51.1002(c)(4)(i). The D. C. Circuit Court characterized this as “administrative gamesmanship”.
- Both rules were remanded to the EPA, but the Court set no date for re-promulgation of the rule. EPA states on its website that it will be seeking input from States and other stakeholders regarding how it should handle the numerous previously submitted State petitions for re-designation for PM 2.5 nonattainment areas.
- According to a WVDEP representative, the monitoring/ modeling air quality data submitted to support the pending re-designation requests for Charleston, Parkersburg, Weirton and Wheeling did not include ammonia or VOCs both of which are deemed PM 2.5 precursors. It was understood that since the Court’s opinion post-dated the re-designation of Huntington to attainment, it would not be affected.

The following charts provide a summary of the PM 2.5 WV re-designation status:

<b>West Virginia PM-2.5 (1997) Areas</b>								
Area	Status	Designation Date	Meets NAAQS Basis	Design Value Annual ( $\mu\text{g}/\text{m}^3$ ) (entire area)	Meets NAAQS	Clean Air Determination Effective Date	Redesignation Request Date	Redesignation Effective Date
						Citation (link to GPO website)		Citation (link to GPO website)
<a href="#">Charleston</a>	Nonattainment	04/05/2005	2009-2011	12.5	Yes	11/10/2011 <a href="#">76 FR 62640</a>	12/07/2012	
<a href="#">Huntington-Ashland</a>	Maintenance; Redesignated to Attainment 12/28 /12 77 FR 76415	04/05/2005	2009-2011	12.1	Yes	10/07/2011 <a href="#">76 FR 55542</a>	07/05/2011	12/28/2012 <a href="#">77 FR 76415</a>
<a href="#">Martinsburg-Hagerstown</a>	Nonattainment	04/05/2005	2009-2011	11.8	Yes	02/09/2012 <a href="#">77 FR 1411</a>		
<a href="#">Parkersburg-Marietta</a>	Nonattainment	04/05/2005	2009-2011	12.3	Yes	01/03/2012 <a href="#">76 FR 75464</a>	03/06/2012	
<a href="#">Steubenville-Weirton</a>	Nonattainment	04/05/2005	2009-2011	13.0	Yes	10/14/2011 <a href="#">76 FR 56641</a>	04/17/2012	
<a href="#">Wheeling</a>	Nonattainment	04/05/2005	2009-2011	13.0	Yes	01/03/2012 <a href="#">76 FR 75464</a>	03/13/2012	
<b>West Virginia 2006 PM 2.5 24-hr Standard</b>								
Area	Status	Designation Date	Meets NAAQS Basis		Meets NAAQS	Clean Air Determination Effective Date	Redesignation Request Date	Redesignation Effective Date
						Citation (link to GPO website)		Citation (link to GPO website)
<a href="#">Charleston</a>	Nonattainment	12/14/2009	2009-2011		Yes	12/19/2011 <a href="#">76 FR 71450</a>	12/07/2012	
<a href="#">Steubenville-Weirton</a>	Nonattainment	12/14/2009	2009-2011		Yes	06/13/2012 <a href="#">77 FR 28264</a>	06/12/2012	

4. **Sierra Club Threatens to Sue EPA over West Virginia's Failure to Use Genus Level Aquatic Insect Index to Identify Biologically Impaired Streams**

On January 25, 2013, the Sierra Club, West Virginia Highlands Conservancy, and Ohio Valley Environmental Coalition submitted a 60-day Notice of Intent to sue the Administrator of the U.S. Environmental Protection Agency for allegedly violating her non-discretionary duty under the Clean Water Act to approve or disapprove West Virginia's list of impaired streams in a timely manner, and arguing that EPA must reject the list in part because the West Virginia Department of Environmental Protection did not use the proper protocol in identifying biologically impaired streams.

Streams identified as "biologically impaired" are placed on the Clean Water Act Section 303(d) list of "impaired" waters for which WVDEP must prepare a "pollution diet" known as a Total Maximum Daily Load (TMDL). The term "biological impairment" is shorthand for conditions considered to constitute a violation of West Virginia's so-called "narrative" water quality standard. The operative parts of that standard provide:

[T]he following general conditions are not to be allowed in any of the waters of the state.

3.2.e. Materials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life;

3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

WVCSR §§47-2-3.2.e & 3.2.i.

For years, WVDEP has used the West Virginia Stream Condition Index (WVSCI), an index that relies on pollution- and disturbance-intolerant aquatic insects, as the sole determinant of 303(d) listing decisions for "biological impairment." EPA, on the other hand, has advised WVDEP that it should use a more "finely tuned" index that would add more streams to the 303(d) list. The WVSCI looks at insects at the "family level." EPA and the Sierra Club contend that WVDEP should use a "genus level" index which amplifies the importance of highly sensitive insects.

WVDEP has announced that it will no longer mechanically apply the WVSCI, and last year, the West Virginia Legislature passed Senate Bill 562, which amended the state Water Pollution Control Act by directing WVDEP to propose rules measuring compliance with the biologic component of the narrative standard by evaluating the

“holistic health of the aquatic ecosystem,” rather than focusing solely on an insect index. *See* W. Va. Code §22-11-7b(f). WVDEP has not yet proposed any rules.

Also at issue is the role of “conductivity”—the electrical conductance caused by the ions associated with elevated levels of total dissolved solids frequently seen near any major earth disturbing activity, including mining. The Sierra Club and EPA have contended that these ions are contributing to low WVSCI scores and that the TMDLs, which must be developed after a 303(d) listing, must require treatment to remove total dissolved solids—treatment that is prohibitively expensive. WVDEP has listed hundreds of streams as biologically impaired, and in a few cases has further identified “ionic toxicity” as a contributor to the impairment. To date, however, it has declined to prepare TMDLs for “ionic toxicity,” claiming that it has not yet identified the particular ions at fault or the appropriate thresholds for controlling them. The Sierra Club has been independently filing citizen suits against mine operators arguing that they are violating the narrative standards at these locations and have an obligation to treat conductivity.

Against this backdrop, the new Notice of Intent (NOI) to sue EPA makes the following arguments:

1. WVDEP submitted its 2012 303(d) list to EPA on December 21, 2012, and EPA had 30 days to approve or disapprove the list, but has failed to act in a timely manner.
2. WVDEP’s Senate Bill 562, passed last year, was effectively a change to WVDEP’s water quality standards that WVDEP was required to submit to EPA for approval.
3. EPA must disapprove WVDEP’s 303(d) list as submitted because:
  - a. The list does not identify all biologically impaired waters. Here, the Sierra Club notes that the current proposed 303(d) list advises that “in response to the legislation [SB 562], DEP is not adding new biological impairments to the 2012 303(d) List.” This failure, according to the Sierra Club, means that WVDEP has failed to identify 173 streams that are biologically impaired under the WVSCI standard.
  - b. By refusing to place new streams on the list [presumably using the WVSCI] based on SB 562, WVDEP has illegally changed its water quality standards without EPA approval.

- c. WVDEP has unlawfully declined to use a genus-level protocol for evaluating biological impairment. The Sierra Club claims that WVDEP would have added 546 streams to the 303(d) list if a genus-level protocol had been used in lieu of the WVSCI.
  - d. WVDEP has used a statistically invalid method to inflate the WVSCI score necessary for identifying biological impairment. The WVSCI considers streams with scores of 68 and above as meeting the narrative standard and scores of 60.6 and below as “impaired.” Historically, it has only placed streams on the 303(d) list if the score is 60.6 or lower. WVDEP considers the zone in between 60.6 and 68 to be a “gray zone,” because of the variability that can be shown by any two WVSCI scores taken at the same time and place. The Sierra Club argues that any stream with a score below 68 should be listed as impaired.
4. WVDEP’s exclusion of new streams from the 303(d) list based on its failure to apply the WVSCI or a genus-level approach eliminates required protection for these additional streams. Sierra Club argues that conductivity and sulfates are the primary culprits in biological impairment and that WVDEP’s new list is allowing the mining industry to escape scrutiny.

At issue here is who gets to identify the conditions that constitute compliance with a State’s narrative water quality standard and what tools must they use. The NOI states that if EPA does not remedy its alleged failures within 60 days (by March 26, 2013), Sierra Club will file suit against EPA.

[A link to the NOI can be found here.](#)

#### **5. State Court Reverses WV Environmental Quality Board For Second Time Over Conductivity and Narrative Water Quality Standards**

By [Order dated February 13, 2013](#), the Circuit Court of Kanawha County (WV) reversed the West Virginia Environmental Quality Board’s (“EQB”) latest decision in a case involving an NPDES permit for a small surface mine in the northern part of the State. *See Sierra Club v. WVDEP and Patriot Mining*, No. 11-AA-02 (Feb. 13, 2013). There, the permit had been issued without limits on conductivity, total dissolved solids (“TDS”) or sulfate. The Sierra Club challenged the permit before the EQB, arguing that the permit should include numeric limits on conductivity, TDS and sulfate in order to ensure that the State’s narrative water quality standard (as measured by an aquatic insect index known as the West Virginia Stream Condition Index—or “WVSCI”—was protected.

In an [initial decision from March 2011](#), the EQB ruled that WVDEP should conduct a “reasonable potential” analysis as to whether the permit would likely violate the narrative standard as a result of conductivity, TDS and sulfate discharges—an easier task to delegate than to explain, because the correlation between WVSCI scores and levels of conductivity, TDS and sulfates is relatively low until levels of conductivity and concentrations of TDS and sulfate are quite high. Simultaneously, though, it also ordered that WVDEP impose enforceable limits for conductivity, TDS and sulfate. Thus, the decision ordered WVDEP on the one hand to determine if the discharges of conductivity, TDS and sulfate posed a sufficient risk of violating the narrative standard that they should be regulated, but on the other hand, seemingly answered the question itself and ordered WVDEP to impose numeric limits on conductivity, etc.

At stake in the case was whether and to what extent the State must limit conductivity and who gets to determine what level of impacts on aquatic insects is permissible. WVDEP has taken the position that in the conductivity ranges the Sierra Club argues must be maintained (~ 300 microsiemens per centimeter) there is a poor correlation between conductivity and WVSCI scores, and the use of a conductivity standard in this range is unreasonably overprotective because there are still many high WVSCI scores. While the correlation tightens as conductivity increases, the policy question here is who gets to decide whether a correlation is sufficiently tight to regulate a substance and at what threshold.

Both WVDEP and the Permittee challenged the ruling as to the narrative standard and its relationship to conductivity, TDS and sulfate. They claimed that the EQB’s ruling was internally inconsistent and that the Board had not articulated the basis of its decision sufficiently for the Court to review it. The Circuit Court of Kanawha County agreed and, in September 2011, [remanded the matter](#) to the EQB. The Court expressly directed the EQB on remand to explain the role of the WVSCI and how WVDEP should develop threshold values for conductivity, TDS and sulfate if it continued to insist that WVDEP must regulate them.

On remand, the EQB issued another lengthy [decision in July 2012](#) in which it ordered both a “reasonable potential” analysis and the imposition of numeric limits on conductivity, TDS and sulfate. The EQB ruled that the limits should not increase the conductivity by more than 2% in the receiving stream, but also ordered WVDEP to use EPA’s “Field-Based Aquatic Life Benchmark for Conductivity” in this effort.

That EPA benchmark suggested that conductivity values should not exceed 300-500 uS/cm to protect aquatic insects. Both WVDEP and the Permittee appealed again to the Circuit Court. They both argued that the EQB had failed to consider and defer to the reasonable interpretations WVDEP had given to the ambiguous narrative standard, and had instead directed it to use EPA’s benchmark as a water quality standard. By [Order of February 13, 2013](#), the Circuit Court agreed and reversed the EQB’s second order.

## 6. Court Rejects EPA's Attempt to Set TMDL Based upon NonPollutant

On January 3, 2013, U.S. District Judge Liam O'Grady of the Eastern District of Virginia ruled that EPA exceeded its clearly limited statutory authority by regulating the level of a pollutant in a creek by establishing a Total Daily Maximum Load ("TMDL") for the flow of a nonpollutant into the creek.

The Clean Water Act requires states to maintain a list—subject to EPA approval or modification—of their waterbodies that are “impaired” because they do not meet their respective water quality criteria. TMDLs are required to be set for any waterbody on the impaired list. The TMDLs must be sufficient to bring the waterbody back into compliance with its water quality criteria. Each TMDL establishes the maximum amount of a pollutant that may be added to the waterbody daily from all sources.

In this case, Accotink Creek, in Fairfax, Virginia, had been identified as having “benthic impairments.” Essentially, the community of organisms living on or near the bottom of the creek were not as numerous or healthy as they should be. To remedy this, EPA was required to set a TMDL to improve the health of the benthic community. The TMDL was designed to regulate the amount of sediment entering Accotink Creek, because EPA believed sediment was a primary cause of the benthic impairment. Rather than limiting the amount of sediment directly, EPA decided to limit the flow rate of stormwater, because EPA believed that stormwater flow rate was a “surrogate” for sediment. According to EPA, sediment load in the Creek was a function of the amount of stormwater runoff generated within the watershed. Thus, EPA believed that framing the TMDL in terms of stormwater flow rate was superior to simply expressing it in terms of maximum sediment load. However, stormwater runoff is not a pollutant.

The Court examined the language of the statute at issue. The text of the statute that requires states to establish their own TMDLs (subject to EPA approval or modification), 33 U.S.C. § 1313(d)(1)(C), states:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, **the total maximum daily load, for those pollutants which the Administrator identifies** under section 1314(a)(2) of this title as suitable for such calculation.

Using the *Chevron* analysis, the Court determined that there was no ambiguity in the wording of the statute at issue. The statute was held to solely grant authority for EPA to establish TMDLs for pollutants. The Court refused to hold the statute as extending EPA's authority to establishing TMDLs for nonpollutants as surrogates for pollutants.

This ruling was a critical ruling for the Clean Water Act as the Court paid no attention to EPA's claim that a stormwater flow rate TMDL was a better way of limiting sediment

load than a sediment load TMDL. The Court refused to allow EPA to exceed its clearly limited statutory authority.

A link to the opinion can be found [here](#).

**7. Eastern District of Kentucky: SMCRA May Not Be Used to Circumvent the CWA**

On January 11, 2013, Judge Van Tatenhove, federal District Court Judge for the Eastern District of Kentucky, granted summary judgment to ICG Hazard, LLC on Counts Three, Four, and Five of Sierra Club's Complaint in Civil Action No. 11-148-GFVT. For a discussion of Judge Van Tatenhove's September 30, 2012 Memorandum Opinion and Order, in which he granted summary judgment on Counts One and Two, see <http://eem.jacksonkelly.com/2012/10/federal-district-court-upholds-applicability-of-cwa-permit-shield-to-general-permits-for-coal-indust.html>.

In the September 30, 2012 Order, the Court denied both parties' motions for summary judgment with respect to Counts Three, Four, and Five of Sierra Club's complaint. The Court was not clear that the allegations (of violations of water quality standards) were tied to "point source" discharges. The Court suggested that there may be contributions to violations of water quality standards caused by non-point sources which are not regulated under the NPDES program and which, as a result, could be susceptible to a SMCRA-based citizens suit. Subsequently, however, the Sierra Club clarified that all of its claims related solely to "point source" discharges and that there were no claims made as to "non-point" discharges. As a result, the Court granted ICG Hazard, LLC summary judgment on all remaining claims and reiterated that SMCRA may not be used to circumvent the protections afforded NPDES permit holders by the CWA:

Section 702 of the SMCRA (30 U.S.C. §1292) states that nothing in the SMCRA "shall be construed as superseding, amending, modifying, or repealing" the CWA, among other statutes. Thus, SMCRA-based regulations are only allowed where there are regulatory gaps in the CWA. As to point source discharges, the CWA clearly regulates, undermining any effort to bring a claim premised on a violation of the SMCRA. *See In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1366-69 (D.C. Cir. 1980) (explaining the relationship between the CWA and the SMCRA).

The Court also reaffirmed its rejection of Sierra Club's attempt to use SMCRA to enforce water quality standards against an NPDES permittee:

In other words, as between these two parties in an enforcement action, effluent limitations for point source



discharges established pursuant to the CWA's regulatory scheme supersede the SMCRA's water quality standard requirements. Water quality standards formed the basis for the effluent limitations and then effectively "dropped out." To hold that water quality standards for point source discharges are subject to enforcement would modify and/or supersede the CWA in a manner that would violate §702 of the SMCRA.

See [[Link to Opinion](#)].

The Court also entered its final Judgment. See [[Link to Final Judgment](#)]. The Court's opinions confirm that CWA Section 402(k)'s "permit shield" provision affords permit-holders the certainty of knowing that compliance with the terms of their permits will shield them from legal actions.