# REPORT ON LITIGATION RELATED TO

# ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA

# FIRST QUARTER 2015

## 1. WV TMDL Litigation Challenging EPA

On January 7, 2015 the Ohio Valley Environmental Coalition, Inc; Sierra Club; West Virginia Highlands Conservancy, Inc; and the West Virginia Rivers Coalition filed a Complaint for Declaratory and Injunctive Relief against U.S. EPA, Region III. The action challenges six (6) final actions by EPA and seeks to compel EPA to perform non-discretionary duties under the CWA. Those stated six actions were:

- EPA's approval of TMDLs for selected streams in the Upper Ohio River South Watershed;
- EPA's approval of the TMDLs for selected streams in the Dunkard Creek Watershed;
- EPA's approval of the TMDLs for selected streams in the Lower Kanawha River Watershed
- EPA's approval of the TMDLs for selected streams in the Elk River Watershed
- EPA's approval of the TMDLs for selected streams in the Monongahela River Watershed
- EPA's approval of the TMDLs for selected steams in the West Fork River Watershed

The nondiscretionary duties they seek to compel are EPA's duties pursuant to 303(d)(2) to disapprove WVDEPs actual and/or constructive submission of no TMDLs for waters in WV that are biologically impaired by ionic stress and to develop such TMDLs for those waters. It is asserted that WVDEP refused to develop TMDLs for streams that were biologically impaired because "there is insufficient information available regarding the causative pollutants and their associated thresholds for biological TMDL development for ionic toxicity." The complaint asserts that this statement is unsupported.

## 2. EPA Moves to Dismiss Sierra Club Efforts to Rescind State NPDES Programs

Citing alleged concerns over the manner in which state agencies handle coal-related permits, the Sierra Club previously petitioned EPA to withdraw its approval of the NPDES programs in West Virginia and two other states. Earlier this year, the Sierra Club sued EPA in federal courts alleging that EPA's own rules require that it respond "in writing" to petitions to withdraw NPDES program approval. The Sierra Club contends that this "non-discretionary" duty is enforceable under the citizen suit provision of the Clean Water Act ("CWA"). In the alternative, the complaint contends that EPA's failure to respond to the petitions in writing constitutes an unreasonable failure to act that is reviewable under the Federal Administrative Procedures Act ("APA").

EPA has now moved to dismiss the case. *See Ohio Valley Environmental Coalition, et al. v. McCarthy, et al.*, No. 3:15-cv-000277 (S.D. W.Va.). Its motion to dismiss EPA claims that regulatory obligations, as opposed to statutory ones, are not enforceable under the citizen suit provision. EPA also contends that even if a rule might otherwise be enforceable in a citizen suit, this rule provides no deadline for EPA's response and, therefore, imposes no enforceable duty. EPA also says that APA claims must be filed directly in the Fourth Circuit because only the Circuit Courts have jurisdiction over the underlying efforts to withdraw state NPDES programs.

### 3. Federal Clean Air Act Does Not Preempt State Common Law

In November 2014, and in a case which has implications for West Virginia, the Kentucky Court of Appeals addressed whether the federal Clean Air Act preempts state common law nuisance claims based on emissions of air pollutants.

The trial court dismissed the case, finding that the Clean Air Act preempted the plaintiffs' state common law nuisance, trespass, and negligence claims. The Kentucky Court of Appeals, however, disagreed. In *Merrick v. Brown-Forman Corporation*, 2013-CA-002048-MR, 2014 WL 6092218 (Ky. App. Nov. 14, 2014), the court reversed the trial court's dismissal and remanded the case for further proceedings, holding that the distilleries failed to establish federal preemption.

In reaching its result, the Kentucky Court of Appeals discussed a split of authority on the issue, citing both the Fourth Circuit's opinion in *North Carolina, ex rel. Cooper v. Tennessee Valley Authority* (finding preemption) and the Third Circuit's opinion in *Bell v. Cheswick Generating Station* (finding no preemption). The court ultimately sided with the Third Circuit, finding *Bell* to be "clear, unambiguous and subject to but one interpretation." Further, because the *Bell* decision came three years after *Cooper*, the court reasoned that the newer vintage *Bell* "may reflect the most recent iteration of this evolving field of federal case law."

### 4. Gas Drilling Ruled Not an Abnormally Dangerous or Ultrahazardous Activity

In another out-of-state case which has implications for West Virginia, the U.S. District Court for the Middle District of Pennsylvania entered summary judgment in favor of Cabot Oil & Gas Corporation on February 9 in a case arising in Dimock Township, Pennsylvania. *Ely v. Cabot Oil & Gas Corporation*, 2014 WL 4071640 (M.D. Pa.).

In reaching its decision the court recognized that a strict liability cause of action in tort for abnormally dangerous and ultrahazardous activities would need meet the standards expressed in the Restatement (Second) of Torts. Section 519 of the Restatement states, in pertinent part, that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm . . . of another resulting from the activity, although he exercised the utmost care to prevent the harm." Section 520 identifies the following six factors for courts to employ to determine if an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to another person, land or chattels;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

The district court concluded that the plaintiffs failed to demonstrate that natural gas well drilling satisfied even a single of these six factors.

### 5. Clean Water Act's "Permit Shield" Provision Upheld

On January 27, 2015, and in another out-of-state case which has implications for West Virginia, the U.S. Court of Appeals for the Sixth Circuit affirmed an opinion of the U.S. District Court for the Eastern District of Kentucky that the Clean Water Act's (CWA) "permit shield" defense applies to discharges of selenium at ICG Hazard's Thunder Ridge Mine. The Sierra Club had argued that ICG's discharges of selenium were "unpermitted" - and thus illegal - because the "general" KPDES discharge permit at issue did not include a condition regarding the amount of selenium ICG was allowed to discharge.

The Sixth Circuit found the CWA's permit shield language ambiguous and therefore looked to EPA guidance interpreting the permit shield. EPA's interpretation provides that the shield exempts a permittee from CWA liability for pollutant discharges that are not mentioned in the permit if two factors are met: (1) the permittee must comply with the CWA's reporting and disclosure requirements; and (2) the discharges at issue must be within the "reasonable contemplation" of the permitting authority. The Court found EPA's interpretation to be reasonable and therefore entitled to deference.

### 6. Federal Court Declines to Require Accumulation of Emissions from Non-Contiguous Compressor Stations for CAA Permitting

In yet another out-of-state case with implications for the state, a federal court in Pennsylvania has ruled that a series of gas compressors used to move gas from wells to larger transmission lines need not be considered a single "source" of air pollution for permitting purposes. *See Citizens for Pennsylvania's Future v. Ultra Resources, Inc.*, No. 4: 11-cv-1360.

Penn Future, a citizen group, sued Ultra Resources under the Clean Air Act, claiming that Ultra had constructed a "major source" of nitrogen oxide ($NO_x$) emissions without obtaining a New Source Review permit from state authorities. Ultra had, instead, obtained 8 individual permits from PADEP.

PADEP's air program defines a "stationary source" of air pollution as a "facility" or structure that emits a regulated pollutant. "Facility" is defined as a source of air pollution "located on one

or more contiguous or adjacent properties which is owned or operated by the same person under common control." Penn Future argued that the compressors were all controlled by Ultra, and that the test for "adjacency" should be one of functional interrelatedness rather than precise physical proximity. The Court disagreed, ruling that the plain meaning of "adjacent" required that the compressor stations had to be on physically contiguous tracts in order to be adjacent.