West Virginia
PO Box 3923, Charleston, WV 25339 • (

July 18, 2017

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street
Charleston, WV 25304
Via Electronic Mail: Charles.S.Sturey@wv.gov
dep.comments@wv.gov

Re: Public Comment Period on Proposed Revisions to the Surface Coal Mining & Reclamation Rule, 38 CSR 2.

Dear Mr. Sturey:

Pursuant to the public notice published by the Division of Mining & Reclamation (DMR), the West Virginia Coal Association (WVCA) offers the following comments regarding the agency's proposed revisions to the state's Surface Mining Reclamation Rules, 38 CSR 2.

The West Virginia Coal Association (WVCA) is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 98 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal

industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

Introduction

Beginning in 2015, the West Virginia Legislature has made several revisions to the comprehensive statutes that regulate coal mining within the State of West Virginia to help stabilize the regulatory programs and provide predictability for the state's coal mining industry and its employees. Included in these changes were revisions to the West Virginia Water Pollution Control Act (WV WPCA) and, specific to the current comment period, the West Virginia Surface Coal Mining & Reclamation Act (WV SCMRA).[1] The most recent revisions to the state's surface mining program were enacted in March 2017 as part of Senate Bill (SB) 687.[2]

The changes to the WV SCMRA were intended to address certain provisions of West Virginia's mining statute that were substantially different than the corresponding provisions of the federal Surface Mining Control & Reclamation Act (SMCRA) and its implementing regulations maintained by the federal Office of Surface Mining (OSM). These differences made West Virginia's mining regulatory program more stringent than the federal program and most of our surrounding states.

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[1] See generally Senate Bill 357 enacted by the Legislature in 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/SB357%20SUB1%20enr.pdf and House Bill 4726 enacted by the Legislature in 2016 http://www.legis.state.wv.us/Bill_Text_HTML/2016_SESSIONS/RS/bills/hb4726%20ENR.pdf

[2] See generally http://www.legis.state.wv.us/Bill_Text_HTML/2017_SESSIONS/RS/bills/sb687%20enr.pdf

Additionally, the complexity of the statutory provisions and rules provided opportunities for entirely different interpretations and application of the standards by OSM in their mining oversight role. The lack of equivalent standards in the federal regulatory program invites mischief, leaving the state program open to the subjective interpretations of OSM and others. In many cases, these interpretations were directly contrary to the desired intent of the Legislature and WV DEP in enacting the provisions, allowing federal oversight agencies or anti-mining groups and activist judges to hijack the state's regulatory program.

In the case of the revisions to the WV WPCA, these statutory changes were intended to strengthen the state's environmental regulatory programs by creating an enforcement process for Clean Water Act (CWA) Section 402 NPDES permits issued by the West Virginia Department of Environmental Protection (WV DEP) for coal mining operations. [3] WV DEP promulgated a new administrative rule, 47 CSR 30B, to fully implement the statutory changes to the WV WPCA which was approved by the West Virginia Legislature in 2016.[4] Coupled with statutory changes contained in SB 357 (passed in 2015), the new rule established an enforcement process that corresponds to the requirements of the federal regulatory program implemented by the Environmental Protection Agency (EPA).

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[3] See generally §22-11-22a, enacted by the Legislature in 2015 with the passage of Senate Bill 357 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/SB357%20SUB1%20enr.pdf

[4] See generally 47 CSR 30B, Administrative Proceedings and Civil Penalty Assessments for Coal Mining NPDES Permits.

While the statutory revisions and the rulemaking processes completed by the agency in 2015 and 2016 have substantially improved the mining regulatory program's stability, WVCA believes the current proposal by the agency does not fully implement the intent of the Legislature to conform the state's programs to their federal counterparts. More specifically, by failing to revise several individual sections of the state rule in the current proposal, WVCA feels that WV DEP has failed to satisfy the mandates of SB 687.

The statutory changes enacted by the Legislature and the subsequent WV WPCA rulemaking by WV DEP were intended to recognize the distinct regulatory and enforcement functions established by SMCRA, the CWA and the corresponding state programs. Unfortunately, WV DEP's administration of its mining regulatory program has muddled the two, with a reliance on its SMCRA-based program to implement CWA and NPDES-like controls. As we explain in more detail in subsequent sections, this is counter to intended purpose of the two programs as declared by Congress and years of regulatory interpretation and implementation by OSM and EPA. As noted in an early federal court decision regarding the scope of SMCRA and its implementing regulations:

> Congress meant exactly what it said in Section 702(a)(3) of the Act [SMCRA], that where there is an overlap of regulation, the Surface Mining Act is not to be interpreted as altering in any fashion the Federal Water Pollution Control Act.[5]

[5] *See generally* re Surface Mining Regulation Litigation, 627 F.2d 1346, 1366 (D.C. Cir. 1980).

WV DEP's historic practice of relying on its SMCRA program in an attempt to implement the CWA has placed the mining regulatory program in peril, particularly as it regards the bonding provisions of the state program and its alternative bonding system (ABS). The Legislature recognized that WV DEP was not using its SMCRA program to address an "absence of regulation" or a "regulatory gap"[6], but instead was executing its mining rules as though the CWA and the extensive NPDES permitting and enforcement program does not exist and sought to correct the situation with the passage of SB 357 and SB 687.

As illustrated by the rule provisions that were left unchanged in the agency's current proposal, *WV DEP erroneously seems to believe that bond forfeiture under SMCRA ends a permittee's responsibility to comply with their NPDES permits and prevents enforcement by the agency under the CWA and WV WPCA.*

In essence, WV DEP fails to acknowledge that compliance with the terms and conditions of the CWA and its NPDES permits and effluent limits occurs throughout the country and within the state of West Virginia at facilities that are not and were never subject to regulation under SMCRA and the state mining regulatory program. Similarly, if the entire SMCRA regulatory structure and its counterpart state primacy programs were to suddenly disappear, it would have no effect or any in way alter a coal mining operation's responsibility to maintain compliance with its NDPES permits and associated effluent limits.

[6] *See generally* re Surface Mining Regulation Litigation, 627 F.2d 1346, 1366 (D.C. Cir. 1980).

As we detail in our subsequent comments, several of the rule provisions retained by WV DEP continue to scramble the two programs, falling far short of SMCRA's instruction to only "fill gaps" between the CWA and SMCRA and where the two overlap, "the [CWA] and its regulatory framework are to control so as to afford consistent standards ... nationwide."[7] ***With the revisions to the WV WPCA, the promulgation of a comprehensive NPDES enforcement rule for coal mining operations and the changes to WV SCMRA there is simply no conceivable "gap" between the CWA and SMCRA for the state mining regulatory program to fill.***

General Comments: SB 687

Since the statutory revisions included in SB 687 should have controlled and directed the proposed changes contained in the current proposal, WVCA believes a review of its provisions is warranted.

SB 687, in addition to containing a broad requirement that WV DEP "specifically consider the adoption of corresponding federal requirements", made several changes to the provisions related to bonding requirements and the operation of the state's alternative bonding system (ABS), the Special Reclamation Fund (SRF).

These revisions were intended to clarify WV SCMRA's relationship to the CWA, the WV WPCA and the SRF's liability for NPDES discharges. Entirely consistent with federal policy and regulation regarding SMCRA reclamation bonding liability, the amended sections limit the responsibility of the SRF to treat water to sites where the

[7] *See generally* re Surface Mining Regulation Litigation, 627 F.2d 1346, 1366 (D.C. Cir. 1980).

agency has obtained NPDES permits under the WV WPCA. The changes acknowledge, as does OSM and the federally-approved regulatory programs of surrounding states, the existence of the comprehensive permitting and enforcement platforms under the CWA and its state counterparts. SB 687's modifications to WV SCMRA also recognize, as does OSM, the need to maintain a distinction between the requirements of SMCRA and the CWA:

> ...in adopting these rules, we reiterate that nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the Clean Water Act or the authority to determine when a permit or authorization is required under the Clean Water Act. Under paragraphs (a) and (a)(2) of section 702 of SMCRA, nothing in SMCRA (and by extension regulations adopted under SMCRA) may be construed as superseding, amending modifying or repealing the Clean Water Act or any state laws or state or federal rules adopted under the Clean Water Act. In addition, nothing in the Clean Water Act vests the SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law.[8]
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> ...we believe that maintaining the distinction between the SMCRA and Clean Water Act regulatory programs is both administratively and legally appropriate.[9]

Before the changes to §22-3-11 contained in SB 687, the SRF was assumed to be responsible for maintaining compliance with NPDES effluent limits at future bond forfeiture sites, essentially ignoring the duties and responsibilities imposed on those permit holders by the CWA and the WV WPCA. By doing so, West Virginia essentially "canceled out", through its ABS program under the guiding framework of SMCRA

[8] 73 FR 75842, December 12, 2008.
[9] 73 FR 75821, December 12, 2008.

through WV SCMRA, the enforcement program and liability provisions under the CWA and WV WPCA despite the admonition from Congress that "...nothing in SMCRA may be construed as amending, modifying, repealing, or superseding any Clean Water Act requirement" and OSM's acknowledgment that it "cannot, in its approval of a State program amendment alter existing CWA laws in any State."[10] As detailed by OSM (and endorsed by the U.S. Department of the Interior) in a 1991 exchange:

> The report implies that the RA [OSM] is responsible for treating pollutional discharges when an operator or permittee is no longer able or willing to do so. ***SMCRA lacks the authority to enable the Secretary to require states to undertake such responsibilities. The IG [Inspector General] is proposing a significant fundamental shift in Government policy regarding liability under the Federal Water Pollution Control Act which could only be accommodated through legislative action...***
>
> At no time is the RA [SMCRA regulatory authority] directly responsible for treatment of any pollutional discharges resulting from a proposed mining operation...[11]

OSM has consistently acknowledged the inability of SMCRA, its implementing federal regulations and primacy state programs to achieve this "significant fundamental shift regarding liability." For example, in responding to comments on proposed revisions to the federal mining regulations, OSM stated:

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[10] 73 FR 78970, December 24, 2008.

[11] Response dated June 18, 1991 of the federal Office of Surface Mining to Final Audit Report 91-655.

> A State regulatory authority questioned whether in accepting a permittee's obligation for reclamation after forfeiture, the State or surety assumes the obligation for phase releases, water quality control, National Pollution Discharge Elimination System (NPDES) monitoring, and revegetation...***neither the regulatory authority nor the contractor assumes the liability of the permittee.***[12]

OSM has confirmed this interpretation in more recent rulemaking exercises:

> We [OSM] are not the permittee, and we do not become the permittee when the permittee defaults on reclamation obligations, which means we do not assume the permittee's NPDES compliance duties.[13]

Under the federal regulations governing alternative bonding systems like those of West Virginia, OSM has found:

> The regulations do not specifically require that the regulatory authority must treat water to NPDES effluent limits. The obligation rests with the permittee pursuant to the Clean Water Act...[14]

Fundamentally shifting an NPDES permittee's duties and responsibilities under the CWA and WV WPCA to the SRF, in addition to being contrary to the specific mandate that nothing in SMCRA supersede, amend, modify or repeal the CWA, is also potentially at odds with the federal requirements governing state implemented ABS programs. By removing an individual permit holder's responsibility to maintain compliance with any NPDES permit imposed effluent limitations, prior to the changes contained in SB 687,

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[12] 48 FR 32956, July 19, 1983.
[13] 72 FR 9629, March 2, 2007.
[14] Letter dated January 15 1993 from the Office of Surface Mining to the West Virginia Department of Environmental Protection.

could have compromised the ability of its ABS to "provide a substantial economic incentive for the permittee to comply..." as required by 30 CFR 800.11(e)(2).

Specific Comments: Proposed Rule Changes

As previously noted, WVCA believes that several additional revisions are needed to West Virginia's rules to fully implement the statutory changes contained in SB 687 and to implement the Legislature's instructions regarding the adoption of corresponding federal requirements.

38 CSR 2.11.3.f.

In the current proposal WV DEP would retain this section regarding trusts for mining sites with "long-term pollutional discharges." This entire section should be deleted from the state's mining rules.

Retention of the sections in the state's mining regulatory program infers that it is the responsibility of the surface mining regulatory program to ensure compliance with the CWA, WV WPCA and specific NPDES permits. As noted in earlier comments regarding SB 687, this is clearly not the case and preserving any language making such a suggestion continues to place West Virginia's regulatory program at odds with the CWA and SMCRA's express instruction against amending, modifying, repealing, or superseding any CWA requirement.

Additionally, retaining this language is contrary to the specific changes contained in SB 687 regarding the SRF and its potential liability. As recognized by OSM, "states

could legally structure their [alternative bonding systems] to limit discharge treatment..."[15] SB 687 has done that, consistent with OSM's previous determination that West Virginia's ABS exceeded the corresponding federal requirements for bonding:

> Unlike the federal rules, paragraphs (c) and (d) of Subsection 12.4 [of the West Virginia regulations] require the Commissioner to use bond forfeiture proceeds and the Special Reclamation Fund (bond pool) to treat discharges from forfeited sites to meet effluent limitations. ***Although there are no federal counterparts to these provisions,*** the Secretary finds that they do not conflict with any Federal requirements or adversely impact other aspects of the program and they are therefore not inconsistent with SMCRA and the Federal regulations at 30 CFR 800.40 and 800.50 governing bond release and bond forfeiture.[16]

The SRF is an integral component of the state's ABS, and the Legislature has clearly limited its liability in SB 687 consistent with federal requirements under SMCRA and the CWA. Any state rule language on bonding such as 38 CSR 2.11.3.f that continues to suggest such an obligation is contrary to the statute and should be removed.

Moreover, the provisions of 38 CSR 2.11.3.f. also conflict with federal regulations governing bond release and termination of jurisdiction (see subsequent comments on 38 CSR 2.12.a.4).

38 CSR 2.12.a.4. and related subsections (previously codified at 38 CSR 12.2.e.)

WVCA believes these sections of the rule ***must*** be deleted to conform the state's mining regulatory program to the corresponding federal regulations and to comply with amendments to WV SCMRA made in SB 687.

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[15] Response dated June 18, 1991 of the federal Office of Surface Mining to Final Audit Report 91-655.
[16] 55 FR 21324, May 23, 1990.

There is nothing remotely similar to the provisions of 38 CSR 2.12.a.4 in the equivalent federal regulations, and the provisions of the state rule are directly counter to the interpretation and implementation of OSM's regulations and SB 687.

For example, the provisions of 38 CSR 2.12.a.4 are in direct conflict with and do not conform to OSM's termination of jurisdiction rule, which expressly recognizes final bond release and termination of SMCRA jurisdiction over reclaimed mines where an area may require long-term treatment to meet applicable effluent limitations.[17] As explained by OSM:

> One commenter questioned how OSMRE will apply the rule to mining operations with post-closure drainage which will continue to require chemical and physical treatment to meet effluent limitations.
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> This rule does not affect the standard required for full bond release which requires full compliance with the applicable performance standards. In order for a release to be appropriate under such circumstances, it should include assurances which provide through a contract or other mechanism enforceable under other provisions of law to provide, for example, long-term treatment of an alternative water supply or acid discharge. When such assurances are provided, the failure of such maintenance following bond release is not sufficient reason to reassert regulatory jurisdiction under the regulatory program.
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> If, subsequent to bond release, a problem occurs related to inadequate maintenance, the contract or agreement would be enforceable through other provisions of law. Should such contract or agreement prove unenforceable, then the bond release would have been based on misrepresentation and jurisdiction should be reasserted.[18]

[17] 30 CFR 700.11(d).
[18] 53 FR 44356, November 2, 1988.

OSM's clarification that the termination of jurisdiction rule "does not affect the standard required for full bond release which requires full compliance with the applicable performance standards" signifies that ongoing treatment (and the associated costs with such treatment) is not an applicable performance standard that must be achieved for complete reclamation.

Unlike the state rules, the federal regulations do not mention "financial resources" and certainly not with respect to traditional SMCRA bonding requirements. Instead, the federal regulations speak in terms of contracts or other agreements for assuring treatment "under other provisions of law" (obviously not SMCRA or any state primacy program). ***And clearly an NPDES permit and the resulting obligations under the CWA and WV WPCA constitute "mechanisms enforceable under other provisions of law" that provide the assurances that the treatment of the point source discharge will continue until such discharge complies, without treatment, with the effluent limitations set in any applicable NPDES permit.***

Much like the provisions of 38 CSR 2.11 (see previous comments), maintaining the language of 38 CSR 2.12.a.4 and its related subsections would be contrary to the language of WV SCMRA as modified in SB 687 by implying a liability to one part of the state's ABS (the SRF) that is now clearly limited by the plain wording of the statute.

Acknowledging the existence of the CWA, WV WVPCA and NPDES enforcement programs is consistent with the changes to WV SCMRA contained in SB 687 and the

conclusion that "Congress meant exactly what it said in [SMCRA], that where there is an overlap of regulation, the Surface Mining Act is not to be interpreted as altering in any fashion the Federal Water Pollution Control Act." [19]

38 CSR 2.12.b. 38 CSR 2.12.4.a.1. and 38 CSR 2.12.4.e.

In SB 687 the Legislature modified the bonding related sections of WV SCMRA to mirror, with a few exceptions, the wording of federal SMCRA. However, WV DEP has proposed to retain language in this rule section and its related subsections that do not match the corresponding federal regulations. These sections should be revised as appropriate to match the language in the federal program to mirror the changes to WV SCMRA.

38 CSR 2.11.e.

This provision has no parallel in the federal regulations and is contrary to the termination of jurisdiction regulations of OSM (see previous comments). Without specific, defined criteria, we question the ability of the agency to make such an evaluation that is any anything but subjective. WVCA suggests the agency delete this provision from the state's regulatory program.

[19] *See generally* re Surface Mining Regulation Litigation, 627 F.2d 1346, 1366 (D.C. Cir. 1980).

38 CSR 2.7.6

The existing state rule at 38 CSR 2.7.6.b. contains a reference to a planting plan prepared by registered professional forester. WVCA believes this requirement exceeds the corresponding federal regulations and the guidelines established by the Appalachian Regional Reforestation Initiative and should be deleted.

38 CSR 2. 7.6.c.1 and 38 CSR 2.7.7.c.2

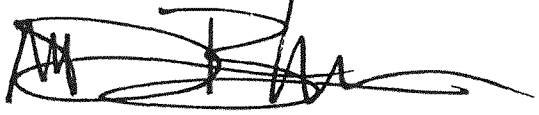
The current rules in both sections contain references to the soluble salt level of topsoil substitutes. These references are unnecessary and duplicative given the other technical requirements of the two sections and should be removed from the rule.

Conclusion

WVCA appreciates the efforts of WV DEP to revise the state's mining rules to provide the certainty and predictability that is so desperately needed to stabilize the coal industry in West Virginia. However, as we detail in our above comments, the changes stop short of achieving the clarity and confidence as it regards the WV SCMRA program's relationship to the CWA, WV WPCA and the NPDES permitting and enforcement process as sought by the Legislature. Instead of remedying the problems that have emanated from the meshing of the two programs, the proposed revisions maintain several provisions of the existing rule that will prolong this untenable situation.

To conform to the mandates of SB 687 and to stabilize the regulatory environment for the coal industry, WVCA encourages WV DEP to further revise the rule as described in these comments.

Respectfully Submitted,



Jason D. Bostic
Vice-President

cc: Legislative Rulemaking Review Committee

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