

PREVENTING COAL COMPANIES FROM USING COMPLIANCE SCHEDULES TO LOOPHOLE AROUND THE MOUNTAINS

BY
JESSICA MORGAN*

Surface coal mining causes significant environmental damage to West Virginia. Selenium, just one pollutant of surface mining, causes reproductive impairment and birth defects in aquatic species. Despite federal statutes to protect the waters of West Virginia from the harmful effects of selenium, the coal industry in West Virginia used compliance schedules in its NPDES permits to delay compliance with costly selenium effluent limitations. This Comment examines the coal mining industry's abuse of compliance schedules to avoid costly selenium effluent treatment. This Comment argues that the Clean Water Act and its regulations still enable public citizens and the Environmental Protection Agency to enforce selenium effluent limitation despite the selenium compliance schedules.

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I. INTRODUCTION

The purple mountain majesty of the Appalachian Mountains is turning black from environmentally destructive mountaintop removal mining. This method of mining discharges a considerable number of pollutants into the streams of the region.¹ The Clean Water Act (CWA)² requires the Environmental Protection Agency (EPA) to prevent coal mining point source discharges from negatively affecting water quality.³ However, the rivers of

* Associate, Morgan & Associates, P.C., San Antonio, Texas; Associate Editor, *Environmental Law*, 2010–2011; Member, *Environmental Law*, 2009–2010; J.D. 2011, Lewis & Clark Law School; Certificate in Environmental & Natural Resources Law, Lewis & Clark Law School; B.A. 2006, Trinity University. The author extends a special thanks to Professor Melissa Powers for her instrumental guidance and assistance in reviewing earlier drafts of this Comment. The author also thanks the staff of *Environmental Law* for their diligent work editing this Comment. Finally, the author thanks her family and friends for their love, support, and patience.

¹ See Gregory J. Pond et al., *Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family- and Genus-Level Macroinvertebrate Bioassessment Tools*, 27 J. N. AM. BENTHOLOGICAL SOC'Y 717, 717 (2008) (citing to a number of studies showing “that coal mining activities negatively affect stream biota in nearly all parts of the globe”).

² Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

³ Memorandum from Peter S. Silva, Assistant Adm'r for Water, U.S. Env'tl. Prot. Agency, & Cynthia Giles, Assistant Adm'r for Enforcement & Compliance Assurance, U.S. Env'tl. Prot. Agency, to Shawn Garvin, Reg'l Adm'r, U.S. Env'tl. Prot. Agency Region 3, A. Stanley Meiburg, Acting Reg'l Adm'r, U.S. Env'tl. Prot. Agency Region 4, & Bharat Mathur, Acting Reg'l Adm'r, U.S. Env'tl. Prot. Agency Region 5, at 2 (Apr. 1, 2010), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_summary.pdf [hereinafter Memorandum from Peter S. Silva to Shawn Garvin]; Sophia Yan, *In West Virginia, a Battle Over Mountaintop Mining*, TIME, Mar. 12, 2010, <http://www.time.com/time/>

Appalachia continue to decline and now “nine out of every 10 streams downstream of surface mining operations exhibit significant impacts to aquatic life.”⁴ Some blame the coal industry for manipulating the system and EPA for failing to use its full statutory authority.⁵

For many, the golden-brown algae bloom in September 2009 in Dunkard Creek along the West Virginia and Pennsylvania border is just one example of how coal companies are exploiting the CWA and its regulations to their advantage.⁶ The algae bloom killed nearly all of the aquatic life for a thirty-mile stretch of Dunkard Creek.⁷ These toxic algae flourished because of high chloride levels in Dunkard Creek⁸ suspected to have come from Consolidation Coal Company’s (Consol) mining operations.⁹ Consol’s discharge points from these mines were subject to National Pollutant Discharge Elimination System (NPDES) permits.¹⁰ However, the permits lacked an enforceable effluent limitation for chloride because chloride was subject to a compliance schedule.¹¹ A compliance schedule is “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.”¹² Permitting authorities use compliance schedules to allow an industry time to comply with newly adopted water quality standards.¹³ Essentially, a compliance schedule allows a permittee to

health/article/0,8599,1971709,00.html (last visited Sept. 19, 2011); U.S. Env’tl. Prot. Agency, *Mining*, <http://cfpub.epa.gov/npdes/indpermitting/mining.cfm> (last visited Sept. 19, 2011).

⁴ Memorandum from Peter S. Silva to Shawn Garvin, *supra* note 3, at 2.

⁵ See Patrick Reis, *Critics on Both Sides of Coal Mining Debate Assail EPA on Mountaintop Regulation*, N.Y. TIMES, Mar. 18, 2010, <http://www.nytimes.com/gwire/2010/03/18/greenwire-critics-on-both-sides-of-coal-mining-debate-as-87304.html> (last visited Nov. 12, 2011) (quoting Kate Rooth from the Rainforest Action Network as desiring EPA to exercise its full authority under the CWA to prevent mining companies from destroying the environment); Ken Ward, Jr., *30-Mile Fish Kill at Dunkard Creek*, CHARLESTON GAZETTE, Sept. 26, 2009, <http://wvgazette.com/News/200909260767> (last visited Nov. 12, 2011) (quoting Derek Teaney, a lawyer for the Appalachian Center for the Economy and the Environment, in his warnings to the West Virginia Department of Environmental Protection about the coal companies’ compliance schedule extensions).

⁶ See Ward, *supra* note 5.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; Consolidation Coal Company, Order No. M-09-070, at 1 (W. Va. Dep’t of Env’tl. Prot. Dec. 18, 2009) (order), *available at* http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Documents/Dunkard/Dunkard_Consolidated_Coal_Co_Unilateral_order_12-18-2009.pdf.

¹⁰ See Ward, *supra* note 5.

¹¹ Consolidation Coal Company, Order No. M-09-070, at 1–2 (W. Va. Dep’t of Env’tl. Prot. Dec. 18, 2009) (order), *available at* http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Documents/Dunkard/Dunkard_Consolidated_Coal_Co_Unilateral_order_12-18-2009.pdf (showing Consol entered into several agreements with West Virginia Department of Environmental Protection to only require monitoring under the NPDES permit for chloride).

¹² Federal Water Pollution Control Act, 33 U.S.C. § 1362(17) (2006).

¹³ See *generally* Letter from Jon M. Capacasa, Dir., Water Prot. Div., U.S. Env’tl. Prot. Agency Region 3, to Lisa A. McClung, Dir., Div. of Water & Waste Mgmt, W. Va. Dep’t of Env’tl. Prot., & Randy Huffman, Dir., Div. of Mining & Reclamation, W. Va. Dep’t of Env’tl. Prot. 1 (Nov. 16, 2007), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_

put an effluent limitation on layaway until a time certain in the future.¹⁴ Simply put, the compliance schedules in Consol's NPDES permits allowed Consol to legally discharge high levels of chloride creating an atmosphere ripe for an environmental disaster.¹⁵

Consol and other companies discharging pollutants into waters of the United States must apply for an NPDES permit to legally discharge the pollutants.¹⁶ Typically, the permit contains immediately enforceable effluent limitations restricting the quantity, rate, and concentration of the discharges.¹⁷ However, the inclusion of compliance schedules into NPDES permits delays the enforceability of the effluent limitations.¹⁸ Citing a lack of technology and the necessity of discharging water for miner safety, the coal mining industry continually receives extensions on compliance schedules.¹⁹ The coal companies continue to pollute without legal ramifications upon receiving an extension of the compliance schedule.²⁰ These continual extensions of compliance schedules in coal company NPDES permits present obstacles to preventing the further degradation of the Appalachian rivers.²¹

Coal companies in the Appalachian region are masters at using compliance schedules to avoid complying with effluent limitations for certain pollutants. This Comment analyzes ways to thwart the manipulation of compliance schedules by coal companies. In particular, this Comment examines the clash over selenium effluent limitations in West Virginia. The West Virginia Department of Environmental Protection (WVDEP) began

01_wetlands_guidance_signed-capacasa-letter.pdf [hereinafter Letter from Jon M. Capacasa to Lisa A. McClung].

¹⁴ See 33 U.S.C. § 1362(17) (2006).

¹⁵ Consolidation Coal Company, Order No. M-09-070, at 2–3 (W. Va. Dep't of Env'tl. Prot. Dec. 18, 2009) (order), available at http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Documents/Dunkard/Dunkard_Consolidated_Coal_Co_Unilateral_order_12-18-2009.pdf (describing the level of chlorides downstream from the two mines exceeding water quality standards).

¹⁶ 33 U.S.C. §§ 1311(a), 1342 (2006).

¹⁷ *Id.* § 1362(11); see *Env'tl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976) (stating that permitting under the CWA “serves to transform generally applicable effluent limitations” into obligations).

¹⁸ See *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (A.L.J. 1990).

¹⁹ Consolidation Coal Company, Order No. M-09-070, at 2 (W. Va. Dep't of Env'tl. Prot. Dec. 18, 2009) (order), available at http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Documents/Dunkard/Dunkard_Consolidated_Coal_Co_Unilateral_order_12-18-2009.pdf (finding that worker safety requires water removal); Ken Ward, Jr., *Selenium: It's the New Mitigation Bill*, COAL TATTOO, Mar. 18, 2009, <http://blogs.wvgazette.com/coaltattoo/2009/03/18/selenium-its-the-new-mitigation-bill> (last visited Nov. 12, 2011) (discussing the coal industry's argument for extending compliance schedules because “they don't know how to meet the water quality limits yet”); *Ohio Valley Env'tl. Coal, Inc. v. Apogee Coal Co.*, 744 F. Supp. 2d 561, 564–65 (S.D.W. Va. 2010) (discussing the novelty of developing effective treatment technology for selenium).

²⁰ A compliance schedule is part of the NPDES permit. See Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 1–3 & enclosures.

²¹ See ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT 20 YEARS LATER* 238 (1993) (discussing how compliance schedules reduce the effectiveness of enforcement actions).

including selenium compliance schedules in NPDES permits in 2004.²² Many of the coal companies received extensions of the selenium compliance schedules in 2007 delaying the effective date for the selenium effluent limitation until April 6, 2010.²³ The coal companies sought a second extension of the compliance schedules, but the WVDEP denied the requests.²⁴

The stage was set for the selenium effluent limitations to become effective on April 6, 2010 when the agency's appeals board issued stays to prevent the compliance schedules from expiring.²⁵ The stays issued by the agency's appeals board generated citizen suits seeking to enforce the selenium effluent limitations regardless of the stay.²⁶ The citizens challenged the authority of the agency's appeals board to suspend the effluent limitations.²⁷ One federal district court in West Virginia agreed with the citizen groups and found the stays exceeded the appeals board's authority.²⁸ This Comment examines the strength of this argument as a way to force the coal industry to comply with the selenium effluent limits.

The anti-backsliding provision of the CWA presents another avenue for EPA and the citizens of Appalachia to hold the coal industry responsible for toxic discharges of selenium.²⁹ Anti-backsliding prohibits the renewal, reissuance, or modification of a permit containing "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."³⁰ Compliance schedules are effluent limitations, and case law supports the notion that issuing an extension of a compliance schedule

²² See, e.g., *Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co.*, 555 F. Supp. 2d 640, 644 (S.D.W. Va. 2008) (describing Hobet Mining's NPDES permit that issued in 2004 and included a compliance schedule for selenium with effluent limits to become effective in 2007).

²³ Motion for Summary Judgment at exhibit 3, *Ohio Valley Envtl. Coal, Inc. v. Coal-Mac, Inc.* (*Coal-Mac*), 775 F. Supp. 2d 900 (S.D.W. Va. 2011) (No. 3:10-cv-00836), ECF No. 15-3 (WVDEP Order No. 47) [hereinafter Order No. 47]; Motion for Summary Judgment at exhibit 7, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 15-7 (WVDEP Order No. 1066) [hereinafter Order No. 1066]; Motion for Summary Judgment at exhibit 11, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 16-3 (WVDEP Order No. 18).

²⁴ Memorandum from Jeff Herholdt, Dir., W. Va. Div. of Energy, to President Earl Ray Tomblin, Chair, Joint Comm. on Gov't & Fin., & Speaker Richard Thompson, Chair, Joint Comm. on Gov't & Fin. 3 (Oct. 6, 2010), available at http://www.legis.state.wv.us/reports/agency_reports/agency_reports_docs/E08_FY_2010_831.pdf [hereinafter Memorandum from Jeff Herholdt to Earl Ray Tomblin].

²⁵ *Id.*

²⁶ See Complaint for Declaratory & Injunctive Relief & for Civil Penalties, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 1 [hereinafter Independence Coal Complaint]; Complaint for Declaratory & Injunctive Relief & for Civil Penalties, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 1 [hereinafter Coal-Mac Complaint].

²⁷ See Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment & for Declaratory & Injunctive Relief & Response in Opposition to Coal-Mac's Cross Motion for Summary Judgment at 8–12, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 20; see also Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Plaintiffs' Response to Defendants' Cross-Motion for Partial Summary Judgment at 20–25, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 32.

²⁸ *Coal-Mac*, 775 F. Supp. 2d at 926.

²⁹ See generally Federal Water Pollution Control Act, 33 U.S.C. § 1342(o) (2006).

³⁰ *Id.* § 1342(o)(1).

about to come into effect is indeed less stringent.³¹ Thus, the anti-backsliding provision is a potential means to force the coal mining industry to comply with selenium effluent limitations regardless of the state appeals board stays.

This Comment explores the coal industry's abuse of compliance schedules, concluding that the CWA and its regulations leave the door open for enforcement of effluent limitations despite the coal industry's abuse. Part II of this Comment discusses the CWA statutory and regulatory framework for issuing NPDES permits to coal companies. Part III explains the structure of compliance schedules and restrictions on the use of compliance schedules. Part IV provides background on coal mining NPDES permits, the history of selenium regulation in West Virginia, and the current status of the selenium effluent limitations. Part V examines the authority of a state to suspend the operation of a coal company's NPDES permit. Part VI evaluates the legality of compliance schedules in considering the anti-backsliding provisions of the CWA.

II. THE CLEAN WATER ACT

Knowing the role of NPDES permitting within the CWA helps in understanding how the coal giants of Appalachia continue to degrade the water quality of the region. The overarching purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³² This goal is achieved primarily by prohibiting the "discharge of any pollutant by any person" into waters of the United States.³³ One of the exceptions to the general prohibition of discharging pollutants is for discharge in compliance with an NPDES permit.³⁴

To receive a permit, a discharger must apply to EPA or an authorized state.³⁵ EPA issues NPDES permits, but EPA may also grant authority to a state to administer its own NPDES program.³⁶ EPA's authorization of a state NPDES program suspends EPA's issuance of NPDES permits in the state.³⁷ The state becomes the primary administrator of the NPDES program in the

³¹ See, e.g., *Citizens for a Better Env't—Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996) (holding that the modification of a compliance schedule about to come into effect violates the anti-backsliding provisions of the CWA); *Pub. Interest Research Grp. of N.J., Inc. v. N.J. Expressway Auth.*, 822 F. Supp. 174, 178, 185 (D.N.J. 1992) (holding a relaxing of interim and final effluent limitations to be an ineffective modification of a permit).

³² 33 U.S.C. § 1251(a) (2006).

³³ *Id.* §§ 1311(a), 1362(7), (11).

³⁴ *Id.* §§ 1311(a), 1342(a).

³⁵ See *id.* § 1342 (a)–(b).

³⁶ *Id.* § 1342(b). EPA authorized the NPDES permitting programs of all the states located in the Appalachian region. See *Approval of West Virginia's NPDES Program*, 47 Fed. Reg. 22,363, 22,363 (May 24, 1982) (to be codified at 40 C.F.R. pt. 123); *Approval of Kentucky's NPDES Program*, 48 Fed. Reg. 45,597, 45,597 (Oct. 6, 1983); *Revision of the Tennessee National Pollutant Discharge Elimination System (NPDES) Program to Issue General Permits*, 56 Fed. Reg. 21,376, 21,376 (May 8, 1991).

³⁷ 33 U.S.C. § 1342(c)(1) (2006).

state.³⁸ However, EPA retains a limited supervisory role.³⁹ EPA exercises supervisory authority over the state programs by vetoing individual state-issued permits or withdrawing the state's authorization.⁴⁰ This Part describes the contents of the state-issued permits and the methods by which to change the contents of the state-issued permits.

A. Contents of an NPDES Permit

The NPDES permit regulates the discharge of pollutants through technology-based and water quality-based standards.⁴¹ Water quality standards identify the water quality goals of a water body by designating certain uses of the water body and establishing criteria to protect those uses.⁴² The water quality standards consist of 1) a classification system based upon expected beneficial use of the water, 2) water quality criteria necessary to support the designated uses, and 3) an antidegradation policy.⁴³ States develop water quality standards applicable to state waters, which EPA then reviews and approves as meeting CWA requirements.⁴⁴

The CWA requires all NPDES permits to include effluent limitations necessary to comply with EPA-approved water quality standards.⁴⁵ Effluent limitations are the primary mechanism for ensuring compliance with water quality standards. Effluent limitations restrict the quantity, rate, and concentration of discharges.⁴⁶ If a technology-based effluent limitation fails to achieve the established water quality standards, then the state authority must develop water quality-based effluent limitations designed to ensure

³⁸ Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 650 (2007) (explaining the role of the state permitting authority as primarily responsible for reviewing and approving NPDES permits once authorized by EPA); see also ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION* 9–10 (2d ed. 2009) (noting Congress's goal for the states to retain authority to "lead the effort to control water pollution" within the state).

³⁹ 33 U.S.C. § 1342(c)–(d) (2006); see also *Save the Bay, Inc. v. Adm'r of U.S. Env'tl. Prot. Agency*, 556 F.2d 1282, 1285 (5th Cir. 1977) (describing EPA's role as supervisory once a state plan is approved).

⁴⁰ 33 U.S.C. § 1342(c)(3), (d)(2) (2006). EPA may withdraw permitting authorization from the state "upon determining, after notice and an opportunity to respond, that the program is not being administered in compliance with" CWA requirements. *Save the Bay*, 556 F.2d at 1285. EPA also supervises the state program by objecting to any permits deemed by EPA to lack conformance with federal NPDES guidelines and requirements. *Id.*

⁴¹ 33 U.S.C. § 1311(b)(1) (2006); see also *Am. Paper Inst., Inc. v. U.S. Env'tl. Prot. Agency*, 996 F.2d 346, 349 (D.C. Cir. 1993) (describing NPDES permits as requiring two primary elements—effluent limitations using technologically practicable controls and more stringent effluent limitations as needed to meet water quality standards). Technology-based standards are beyond the scope of this Comment because permitting authorities can only issue compliance schedules for water quality-based effluent limitations. *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (A.L.J. 1990).

⁴² 40 C.F.R. § 131.2 (2011).

⁴³ U.S. ENVTL. PROT. AGENCY, EPA-833-K-10-001, NPDES PERMIT WRITERS' MANUAL § 6.1.1.1–6.1.1.3 (2010), available at http://www.epa.gov/npdes/pubs/pwm_2010.pdf.

⁴⁴ 33 U.S.C. § 1313(c) (2006).

⁴⁵ *Id.* §§ 1311(b)(1)(C), 1313(e)(3)(A).

⁴⁶ *Id.* § 1362(11).

attainment of the water quality standards.⁴⁷ Thus, the NPDES permit contains water quality-based effluent limitations as an additional protection of water quality.

B. Changing the Permit Terms

The NPDES permit goes through a public notice and comment process before being issued.⁴⁸ The NPDES permit is final and effective after the state permitting authority addresses the public comments and makes a final permitting decision.⁴⁹ Because the permit has finality, compliance with the NPDES permit insulates permittees from enforcement actions.⁵⁰ If dissatisfied with certain effluent limitations included in the permit, the permittee can seek to change the permit terms by appealing the final permitting decision, seeking a modification, or violating the permit.

1. Appealing the Final Permitting Decision

Once the state permitting authority issues the final permit, the permittee has thirty days to challenge the permit's terms.⁵¹ The permittee appeals to the state agency's appeals board.⁵² If unsuccessful, the permittee may seek judicial review of the final NPDES permit.⁵³ The permittee must challenge the terms of the permit within the thirty days permitted by the state agency. Otherwise, the permit is final and any noncompliance with those terms is grounds for an enforcement action.⁵⁴

2. Modification

The permittee may also seek to change the permit terms through modification procedures. CWA regulations allow modification in limited circumstances.⁵⁵ Specifically, the CWA regulations only allow modification

⁴⁷ U.S. ENVT. PROT. AGENCY, *supra* note 43, § 6.

⁴⁸ 40 C.F.R. § 124.10 (2011).

⁴⁹ *Id.* § 124.15 (describing the procedure applicable to EPA issuance of NPDES permits); *see also* W. VA. CODE ANN. § 47-10-12.8.a–b (West 2011) (describing the procedure in West Virginia for issuing NPDES permits).

⁵⁰ Compliance with the NPDES permit is compliance with the CWA. 33 U.S.C. § 1342(k) (2006); *see also* E.I. Du Pont De Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977); Walter G. Wright, Jr. & Albert J. Thomas III, *The Federal/Arkansas Water Pollution Control Programs: Past, Present, and Future*, 23 U. ARK. LITTLE ROCK L. REV. 541, 674–75 (2001).

⁵¹ 40 C.F.R. § 124.19 (2011); *see also* W. VA. CODE ANN. § 22B-1-7(c) (West 2011).

⁵² West Virginia allows a party “aggrieved by the terms and conditions of a permit” to appeal to the Environmental Quality Board. Water Pollution Control Act, W. VA. CODE ANN. § 22-11-21 (West 2011).

⁵³ 40 C.F.R. § 124.19(e)–(f) (2011) (requiring the permittee to petition the Environmental Appeals Board as a prerequisite to seeking judicial review); *see also* W. VA. CODE ANN. § 22B-1-9 (West 2011) (allowing any party adversely affected by the state agency's appeals board to seek judicial review in state court).

⁵⁴ 40 C.F.R. § 122.41(a) (2011); *see also* W. VA. CODE ANN. § 47-30-5.1.a (West 2011).

⁵⁵ A permittee may seek to modify the permit for specific reasons such as if the facility or activity materially and substantially changes, EPA or state agency issues new regulations,

of compliance schedules if good cause exists.⁵⁶ Good cause includes “an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy.”⁵⁷ Thus, a permittee must show good cause in seeking to modify a compliance schedule.

In modifying the permit, the permitting authority must also comply with specific procedures.⁵⁸ To modify the permit, the permitting authority must prepare a draft permit incorporating the modifications.⁵⁹ The permitting authority must make the draft permit available for public notice and comment before issuing a modified final permit.⁶⁰ The draft permit is submitted to EPA;⁶¹ it may object to the permit modification within ninety days of receiving notification from the authorized state.⁶² If the permitting authority fails to follow the modification procedures or EPA objects, the permit is not legally modified and an enforcement action may proceed on the basis of the original permit terms.⁶³ Additionally, the permittee must comply with all other requirements of the permit when seeking a modification.⁶⁴ The effluent limitations in the NPDES permit are final unless the permittee successfully modifies the permit. Otherwise, the permittee must comply with all terms in the permit until the permit expires.

3. *Enforcement*

The permittee must comply with all terms of the NPDES permit once issued.⁶⁵ Compliance with the permit constitutes compliance with the CWA, creating a permit shield.⁶⁶ The permit shield prevents EPA, the state agency, and citizens from claiming a violation of the CWA so long as the permittee is in compliance with the terms of its NPDES permit.⁶⁷ The permit shield benefits coal companies because they escape liability for any damages the pollutant discharges cause so long as they discharge pollutants in

discovery of new information, good cause to extend compliance schedules, or permittee requested variance. 40 C.F.R. § 122.62(a) (2011); *see also* W. VA. CODE R. § 47-30-8.2.c.2 (West 2011). This Comment focuses on the ability of permittees to modify compliance schedules. 40 C.F.R. § 122.62(a)(4) (2011); *see also* W. VA. CODE ANN. § 47-30-8.2.c.2.D (West 2011).

⁵⁶ 40 C.F.R. § 122.62(a)(4) (2011).

⁵⁷ *Id.*

⁵⁸ *See id.* § 124.5 (describing procedures applicable to state NPDES programs).

⁵⁹ *Id.* § 124.5(c) (describing procedures applicable to state NPDES programs).

⁶⁰ *Id.* § 124.6(e) (describing procedures applicable to state NPDES programs).

⁶¹ Federal Water Pollution Control Act, 33 U.S.C. § 1342(d)(1) (2006).

⁶² *Id.* § 1342(d)(2).

⁶³ *See* United States v. Smithfield Foods, Inc., 191 F.3d 516, 519, 524 (4th Cir. 1999); Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co., 531 F. Supp. 2d 747, 754–55 (S.D.W. Va. 2008); *Citizens for a Better Env't—Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996). A state agency cannot issue the NPDES permit after EPA's objection to the modification. *See* 33 U.S.C. § 1342(d)(4) (2006).

⁶⁴ Modification procedures only reopen those provisions of the permit being modified. 40 C.F.R. § 124.5(c)(2) (2011) (applicable to state NPDES programs); *see also* W. VA. CODE ANN. § 47-30-8.2.a (West 2011).

⁶⁵ 40 C.F.R. § 122.41(a) (2011).

⁶⁶ 33 U.S.C. § 1342(k) (2006).

⁶⁷ Piney Run Pres. Ass'n v. Cnty. Comm'rs, 268 F.3d 255, 264–65 (4th Cir. 2001).

compliance with the terms of their NPDES permits.⁶⁸ Thus, it is imperative for the permitting authority to incorporate effective effluent limitations in the permit, which adequately protect water quality, because the permit shield protects the companies from liability.

However, a permittee's failure to comply with the permit violates the CWA and subjects the permittee to enforcement actions.⁶⁹ EPA, the state permitting authority, and concerned citizens may bring enforcement actions against the permit violator.⁷⁰ In some instances, the permit terms may change through a settlement agreement of an enforcement claim.⁷¹ However, to legally change the permit, the settlement terms must go through the CWA modification procedures.⁷² Moreover, the permittee still faces substantial penalties for the violations occurring prior to the settlement.⁷³ The enforcement process is reflective of the purpose of the NPDES permitting process to eliminate discharges that violate water quality standards. And yet, even with all of the requirements of NPDES permits, the coal industry discovered a means by which to discharge pollutants that degrade the water quality in the Appalachian Mountains.

III. COMPLIANCE SCHEDULES

NPDES permitting conditions become even more complicated when a permit includes a compliance schedule for a water quality-based effluent limitation rather than an immediately effective effluent limitation. A compliance schedule is "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard."⁷⁴ The permitting authority has the discretion to determine whether to include a compliance schedule, but must ensure that the compliance schedule leads to attainment of the final effluent limitation as soon as possible.⁷⁵ This discretion is not unlimited. The inclusion of the compliance schedule must

⁶⁸ See *id.* (applying the permit shield not only to pollutants listed in the NPDES permit, but also to discharges disclosed to the permitting authority and "within the reasonable contemplation" of the permitting authority).

⁶⁹ 40 C.F.R. § 122.41(a) (2011).

⁷⁰ 33 U.S.C. § 1319(a)–(b) (2006) (establishing state and EPA enforcement); *id.* § 1365 (authorizing civil actions by citizens).

⁷¹ See, e.g., *Pub. Interest Research Grp. of N.J.*, 822 F. Supp. 174, 178 (D.N.J. 1992) (settling state enforcement action through a memorandum of understanding).

⁷² *Id.* at 185 (holding the memorandum of understanding settling state enforcement failed to prohibit a citizen suit based upon the original terms of the permit because the settlement did not go through the required modification procedures).

⁷³ 33 U.S.C. § 1319(d) (2006) (stating civil penalties are not to exceed \$25,000 per day per violation).

⁷⁴ 33 U.S.C. § 1362(17) (2006).

⁷⁵ See Memorandum from James A. Hanlon, Dir., Office of Wastewater Mgmt., U.S. Env'tl. Prot. Agency, to Alexis Strauss, Dir., Water Div., U.S. Env'tl. Prot. Agency Region 9, at 2 (May 10, 2007), available at http://www.epa.gov/npdes/pubs/memo_complianceschedules_may07.pdf [hereinafter Memorandum from James A. Hanlon to Alexis Strauss].

properly modify the permit and must not violate the anti-backsliding provision of the CWA.⁷⁶

A. What Is a Compliance Schedule?

Compliance schedules “allow the discharger to postpone immediate compliance with more stringent effluent limitations specifically tailored to meet the applicable State water quality standards.”⁷⁷ The compliance schedule comprises an enforceable final effluent limitation and a date for achieving the final effluent limitation.⁷⁸ The term final effluent limitation refers to the effluent limitation the permittee must achieve once the compliance schedule expires.⁷⁹ Interim limitations in the compliance schedule may include a less stringent effluent limitation or construction deadlines to assist in achieving the final effluent limitation by the compliance schedule’s expiration.⁸⁰ Customarily, permitting authorities used compliance schedules in enforcement orders.⁸¹ NPDES permits may also include compliance schedules directly in the permit’s terms.⁸² State water quality standards or a state’s CWA implementing regulations dictate whether NPDES permits may include a compliance schedule.⁸³

If state law allows permits to include compliance schedules, the permitting authority must make several findings before inserting a compliance schedule into a permit.⁸⁴ The permitting authority must first find that the discharger cannot immediately comply and that the compliance schedule will lead to an effluent limitation meeting the state’s water quality standards.⁸⁵ The permitting authority must also find the compliance schedule appropriate based on the amount of time the discharger has already had to meet the effluent limitations, the discharger’s good faith efforts to comply, and the modifications needed at the facility to meet the effluent limitations.⁸⁶ The permit authority must also ensure that the compliance schedule requires compliance with the final effluent limitations as soon as possible.⁸⁷ The permittee must comply with the interim limitations and the final effluent limitation by the compliance schedule’s expiration date once the schedule is included in an NPDES permit.⁸⁸

⁷⁶ *Id.*; 33 U.S.C. § 1342(o)(1) (2006).

⁷⁷ *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 174 (A.L.J. 1990).

⁷⁸ Memorandum from James A. Hanlon to Alexis Strauss, *supra* note 75, at 2. The compliance schedule contains an “enforceable sequence of actions or operations leading to compliance.” 33 U.S.C. § 1362(17) (2006); 40 C.F.R. § 122.2 (2011).

⁷⁹ Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 1.

⁸⁰ 40 C.F.R. § 122.47(a)(3) (2011).

⁸¹ Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2; *see also* 40 C.F.R. § 122.47(a)(1) (2011).

⁸⁸ Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 2.

B. Restrictions on Compliance Schedule Extensions

A permittee may seek to extend the compliance schedule, but the permitting authority's power to extend compliance schedules is not unlimited. The permitting authority possesses minimal control over extending compliance schedules because compliance schedules "implicitly sanction pollutant discharges that violate applicable State water quality standards."⁸⁹ Compliance schedules, as part of an NPDES permit, must follow the procedures for modification and comply with the anti-backsliding provision of the CWA.⁹⁰ The federal regulations for modifications and the anti-backsliding provision operate as restrictions on the permitting authority's power to extend compliance schedules.

Federal regulations for modifying NPDES permits apply to the modification of compliance schedules because compliance schedules are part of the NPDES permit.⁹¹ Although the permitting authority possesses the ability to extend a compliance schedule, the extension must follow the federal and state procedures for modifications to extend the compliance schedule legally.⁹² The modification procedures limit the discretion of the permitting authority because the process opens the door to public participation through notice and comment.⁹³

The anti-backsliding provision of the CWA acts as another restriction on the permitting agency's authority to extend a compliance schedule in the NPDES permit.⁹⁴ In 1987, Congress amended the CWA establishing an anti-backsliding provision to combat "the weakening of permits."⁹⁵ Section 402(o) of the CWA prohibits the modification of a permit containing "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."⁹⁶ Thus, the anti-backsliding provision acts as a restriction on the extension of a compliance schedule because the extension of the compliance schedule cannot constitute a less stringent effluent limitation.

However, the anti-backsliding provision allows for a less stringent effluent limit in six limited circumstances.⁹⁷ The permitting authority may

⁸⁹ *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 174 (A.L.J. 1990).

⁹⁰ See Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 2–3; Federal Water Pollution Control Act, 33 U.S.C. § 1342(o)(1) (2006) (prohibiting permit modifications containing less stringent effluent limitations).

⁹¹ Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 2.

⁹² See *supra* Part II.B.2.

⁹³ Karl S. Coplan, *Of Zombie Permits and Greenwash Renewal Strategies: Ten Years of New York's So-Called "Environmental Benefit Permitting Strategy"*, 22 PACE ENVTL. L. REV. 1, 8 (2005) (describing the public's role in the CWA as "back-stopping the regulatory efforts of the state and federal governments, which both are compromised by lack of resources and political and economic concerns that militate against strict application of the Act").

⁹⁴ 33 U.S.C. § 1342(o)(1) (2006); *Citizens for a Better Env't—Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996).

⁹⁵ ADLER ET AL., *supra* note 21, at 158.

⁹⁶ 33 U.S.C. § 1342(o)(1) (2006).

⁹⁷ *Id.* § 1342(o)(2). Some of the exceptions do not apply to water quality-based effluent limitations and thus are outside the scope of this Comment. The exceptions allowing

issue a permit containing a less stringent effluent limitation if “material and substantial” changes occurred at the permitted facility after the permitting authority issued the permit.⁹⁸ The new permit may backslide on the prior permit if new information becomes available after permit issuance.⁹⁹ The permit can also contain a less stringent effluent limitation as made necessary by events over which the permittee had no control.¹⁰⁰ Finally, the new permit may backslide on the prior permit if the permittee installed treatment facilities, properly operated and maintained those treatment facilities, yet fails to achieve the permit’s effluent limitation.¹⁰¹ Even with an exception, the less stringent effluent limitation must not result in the violation of a water quality standard.¹⁰² The anti-backsliding provision ultimately restricts a permitting authority from extending a compliance schedule that backslides on a prior effluent limitation without qualifying for an exception.

IV. WEST VIRGINIA’S STORY

In West Virginia, the battle to rid the waters of toxic coal mining discharges largely involves combating dredge and fill permits under the CWA.¹⁰³ However, challenging coal mining NPDES permits presents another avenue for combating the water quality degradation caused by coal mining

backsliding where the effluent limitation resulted from a technical mistake or from mistaken interpretation do not apply to water quality-based effluent limitations. *Id.* § 1342(o)(2)(B)(ii); Memorandum from James R. Elder, Dir., Office of Water Enforcement & Permits, U.S. Env’tl. Prot. Agency, to Water Mgmt. Div. Dirs., Regions I–X, Draft Interim Guidance on Implementation of Section 402(o) Anti-Backsliding Rules for Water Quality-Based Permits 7 (Sept. 29, 1989), *available at* <http://www.epa.gov/npdes/pubs/owm0354.pdf> [hereinafter Memorandum from James R. Elder to Regions I–X]. The anti-backsliding provision exceptions for permit modifications or variances also do not apply to water quality-based effluent limitations. *Id.*

⁹⁸ 33 U.S.C. § 1342(o)(2)(A) (2006).

⁹⁹ *Id.* § 1342(o)(2)(B)(i).

¹⁰⁰ *Id.* § 1342(o)(2)(C).

¹⁰¹ *Id.* § 1342(o)(2)(E).

¹⁰² *Id.* § 1342(o)(3).

¹⁰³ Mountaintop mining involves blasting mountaintops to expose coal seams and disposing of the excess rock through valley fills. U.S. Env’tl. Prot. Agency, *Mid-Atlantic-Mountaintop Mining*, <http://www.epa.gov/region3/mtntop/index.htm> (last visited Nov. 12, 2011). These valley fills require dredge and fill permits issued by the United States Army Corps of Engineers. *See* U.S. ENVTL. PROT. AGENCY, EPA 9-03-R-05002, MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 3 (2005), *available at* http://www.epa.gov/region3/mtntop/pdf/mtm-vf_fpeis_full-document.pdf; *see also* 33 U.S.C. § 1344(c) (2006) (allowing the Administrator to prohibit the specification of a disposal site if, after the public hearing process, it is determined “that the discharge of such materials into such area will have an unacceptable adverse effect”). Several nonprofits focus their efforts on challenging the dredge and fill permits to combat the environmental hazards created by mountaintop mining. *See* MICHAEL SHNAYERSON, COAL RIVER 13–15 (2008) (describing the Appalachian Center for Economy and the Environment’s fight to stop valley fills); Earthjustice, *Mountaintop Removal in West Virginia*, http://earthjustice.org/our_work/cases/2005/mountaintop-removal-in-west-virginia (last visited Nov. 12, 2011) (explaining cases Earthjustice is currently pursuing to challenge dredge and fill permits on behalf of Coal River Mountain Watch, Ohio Valley Environmental Coalition, and West Virginia Highlands Conservancy).

to effectively treat selenium before the effluent is discharged into the water.¹¹²

EPA first promulgated a water quality criterion for selenium in 1987 to protect wildlife threatened by selenium toxicity.¹¹³ In 2003, EPA recognized the potential for coal mining discharges in West Virginia to cause violations of the water quality standard for selenium.¹¹⁴ One year later, WVDEP, the NPDES permitting authority in West Virginia, recognized selenium had already impaired some of the waters in the state.¹¹⁵ West Virginia began regulating selenium by including compliance schedules in NPDES permits, with water quality-based effluent limitations becoming effective in 2006.¹¹⁶ These first compliance schedules only required the permittees to monitor and report selenium discharges for three years until the final effluent limits became effective upon expiration of the compliance schedule.¹¹⁷ In April 2007, using administrative orders, the WVDEP extended the original compliance schedules for selenium until April 5, 2010.¹¹⁸ The extended compliance schedules still required monitoring and reporting of selenium discharges.¹¹⁹ However, the extended compliance schedules also required the coal industry to submit a treatment plan for selenium by April 5, 2008 and to begin construction of a pilot scale treatment system by October 5, 2008.¹²⁰

In March and April 2010, coal companies began seeking modifications of their NPDES permits to extend the compliance schedules for selenium.¹²¹ However, due to the high levels of selenium in coal mining discharges,¹²² EPA began to pressure the WVDEP to cease extending the selenium compliance schedules.¹²³ In contrast, the West Virginia legislature authorized WVDEP to

¹¹² U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 51 (2011), *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-1_Mine_Final_Determination_011311_signed.pdf.

¹¹³ *Apogee Coal*, 531 F. Supp. 2d at 749.

¹¹⁴ U.S. ENVTL. PROT. AGENCY ET AL., DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA at III.D-17 (2003), *available at* http://www.epa.gov/region3/mtntop/pdf/III_affected-envt-consequences.pdf.

¹¹⁵ *Apogee Coal*, 531 F. Supp. 2d at 750.

¹¹⁶ *OVEC v. Hobet Mining*, 723 F. Supp. 2d at 901.

¹¹⁷ *See, e.g.*, Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

¹¹⁸ *E.g.*, Independence Coal Complaint, *supra* note 26, at 9–10; Coal-Mac Complaint, *supra* note 26, at 11; Complaint for Declaratory & Injunctive Relief & for Civil Penalties at 11–14, Complaint for Declaratory and Injunctive Relief for Civil Penalties at 11, Ohio Valley Envtl. Coal, Inc. v. Catenary Coal Co., 2010 WL 5821443 (S.D.W. Va. 2010) (No. 3:10-cv-00847), ECF No. 1. WVDEP issued a separate administrative order to extend the compliance schedules for each NPDES permit. *See, e.g.*, Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

¹¹⁹ *E.g.*, Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

¹²⁰ *E.g.*, Order No. 47, *supra* note 23, at exhibit 3, attachment B; Order No. 1066, *supra* note 23, at exhibit 7, attachment B.

¹²¹ *See, e.g.*, Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Defendants' Cross-Motion for Partial Summary Judgment, *Coal-Mac*, 755 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 24 [hereinafter Independence Coal Notice of Appeal].

¹²² *OVEC v. Hobet Mining*, 723 F. Supp. 2d 886, 900 (S.D.W. Va. 2010).

¹²³ Letter from Jon M. Capacasa to Lisa A. McClung, *supra* note 13, at 1.

extend selenium compliance schedules until July 1, 2012.¹²⁴ Despite the ability to extend the compliance schedules, the WVDEP denied most of the requests for compliance schedule extensions.¹²⁵ The WVDEP based the modification denials on finding no good cause to issue the modifications.¹²⁶ Specifically, WVDEP found the limited efforts of the companies to comply with interim requirements in the compliance schedule failed to create a situation where events out of the control of the coal companies caused the lack of compliance.¹²⁷ EPA also objected to the few extensions approved by WVDEP.¹²⁸ Since WVDEP cannot issue an NPDES permit over EPA's objection, all of the compliance schedules for selenium were set to expire April 5, 2010.¹²⁹

B. How the Selenium Effluent Limits Arguably Disappeared

Once the coal companies realized the days of merely reporting selenium discharges were over, the docket at the Environmental Quality Board (EQB), WVDEP's appeals board, filled with appeals seeking to reverse WVDEP's denials of modifications to extend the final effluent limitations.¹³⁰ EQB hears

¹²⁴ Water Pollution Control Act, W. VA. CODE ANN. § 22-11-6 (West 2011).

¹²⁵ See, e.g., Coal-Mac, Inc. & Mingo Logan Coal Company's Cross-Motion for Partial Summary Judgment at exhibits 10–11, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 37.

¹²⁶ See *supra* notes 55–56 and accompanying text (requiring good cause to modify a compliance schedule); see also Motion for Summary Judgment at exhibit 4, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 16-4 [hereinafter WVDEP Denial Letter to Jacks Branch Coal]; Motion for Summary Judgment at exhibit 8, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 15-8 [hereinafter WVDEP Denial Letter to Independence Coal I].

¹²⁷ The compliance schedules required coal companies to create a pilot-scale program to test treatment options. Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7. The extent of Independence Coal Company's pilot project is unknown. WVDEP only described the project as being initiated after the date set in the compliance schedule and discontinued shortly thereafter. Motion for Summary Judgment at exhibit 4, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 15-4. The compliance schedules arguably allowed for pilot-scale projects because of the expense of treatment technology and the uncertainties of how best to treat selenium. See *Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co.*, 774 F. Supp. 2d 561, 566, 568–69, 574 (S.D.W. Va. 2010) (discussing how the coal company dragged its feet in implementing pilot projects due to costs).

¹²⁸ Memorandum from Jeff Herholdt to Earl Ray Tomblin, *supra* note 24, at 3. In July 2009, EPA revoked its waiver of review for discharges associated with surface coal mining permits. Plaintiffs' Response to Defendants' Supplemental Authority in Support of Defendants' Cross Motions for Summary Judgment & Response to the Court's January 31, 2011 Order at exhibit 2, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 74-2 [hereinafter Letter from Jon M. Capacasa to Scott Mandirola].

¹²⁹ Memorandum from Jeff Herholdt to Earl Ray Tomblin, *supra* note 24, at 3.

¹³⁰ See, e.g., Plaintiffs' Reply Exhibits Supporting Their Second Motion for Partial Summary Judgment at exhibit 2, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 44-2 [hereinafter Mingo Logan Notice of Appeal]; Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Defendants' Cross-Motion for Partial Summary Judgment at exhibit 2, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 24-2 [hereinafter Jacks Branch Notice of Appeal]; Independence Coal Notice of Appeal, *supra* note 121, at exhibit 1. Any person adversely aggrieved by WVDEP may appeal to EQB. Water Pollution Control Act, W. VA. CODE ANN. § 22-11-21 (West 2011).

all of the appeals to permitting decisions made by WVDEP.¹³¹ The coal companies sought to stay the expiration of the compliance schedules during their appeals to EQB.¹³² EQB granted the stays delaying the expiration of the selenium compliance schedules.¹³³

With no definitive time requirements on when EQB must hold a hearing and subsequently issue a written order, the coal companies may continue to discharge toxic amounts of selenium—further degrading the water quality in the Appalachian region.¹³⁴ The coal companies claim the EQB's stay relieves the companies of any requirements to comply with a final selenium limit.¹³⁵ Thus, EPA or environmental groups seeking to establish violations for the selenium discharges must challenge the EQB's authority to stay the expiration of the compliance schedules.¹³⁶

V. CHALLENGING THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD'S AUTHORITY

The battle to prevent coal companies from continuing to use compliance schedules to legally discharge pollutants that degrade the water quality in Appalachia has come to a boiling point. Extended compliance schedules for selenium in West Virginia sparked a number of environmental lawsuits when EQB, the state agency's appeals board, stayed the selenium effluent limitations in several NPDES permits from coming into effect on April 6, 2010.¹³⁷ Despite the stays, the environmental groups sued to enforce the excessive discharges of selenium as violations.¹³⁸

¹³¹ W. VA. CODE ANN. § 22-11-21 (West 2011); *see also Id.* §§ 22B-1-1 to -12.

¹³² *Id.* § 22B-1-7(d) (filing the notice of appeal does not automatically stay the effectiveness of the denial of the permit modification); Mingo Logan Notice of Appeal, *supra* note 130, at exhibit 2; Jacks Branch Notice of Appeal, *supra* note 130, at exhibit 2; Independence Coal Notice of Appeal, *supra* note 121, at exhibit 1.

¹³³ *See* Coal-Mac, Inc.'s Response to Plaintiffs' Motion for Partial Summary Judgment & Coal-Mac's Cross-Motion for Partial Summary Judgment at exhibit 2, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00833), ECF No. 18 [hereinafter Coal-Mac Order Granting Stay]; Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Defendants' Cross Motion for Partial Summary Judgment at exhibit 4, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 24 [hereinafter Jacks Branch Order Granting Stay].

¹³⁴ *See infra* Part V.A (discussing the procedures for appeals in EQB).

¹³⁵ Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Defendants' Motion for Partial Summary Judgment 5–6, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 24.

¹³⁶ Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment & for Declaratory & Injunctive Relief & Response in Opposition to Coal-Mac's Cross Motion for Summary Judgment, *supra* note 27, at 5–11; Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Plaintiffs' Response to Defendants' Cross-Motion for Partial Summary Judgment, *supra* note 27, at 18–25.

¹³⁷ Memorandum from Jeff Herholdt to Earl Ray Tomblin, *supra* note 24, at 3.

¹³⁸ *See* Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment & for Declaratory & Injunctive Relief & Civil Penalties at 4–5, *Coal-Mac*, 775 F. Supp. 2d 900 (No. 3:10-cv-00836), ECF No. 21 (alleging more than 1000 violations of the selenium effluent limitation since April 2010).

The CWA imposes strict liability for exceeding effluent limitations in NPDES permits.¹³⁹ To prove a violation of the NPDES permit, the enforcing party must first prove the permit contains an enforceable effluent limitation.¹⁴⁰ Thus, EPA and environmental groups seeking to enforce violations of the selenium effluent limitations face an uphill climb in establishing that the selenium effluent limitations became enforceable despite EQB's stays. However, the citizen groups successfully convinced one federal district court of the effluent limitations' enforceability despite the EQB's stays.¹⁴¹ After explaining EQB's procedures for issuing a stay, this Part analyzes the legality of the EQB's stays with respect to state administrative procedures and the CWA.

A. Environmental Quality Board Procedures

The West Virginia Water Pollution Control Act¹⁴² establishes the NPDES program for the State of West Virginia. The NPDES program includes the provisions for challenging state-issued NPDES permits and the process for appealing such decisions to EQB.¹⁴³ These provisions provide anyone adversely affected by the denial of a permit modification with the ability to appeal to EQB within thirty days of receiving a notice of denial.¹⁴⁴ At the time of requesting an appeal, the aggrieved party may also request a stay.¹⁴⁵ EQB has five days to grant or deny the request upon receipt of a stay request.¹⁴⁶ EQB may only grant a stay if the board finds "an unjust hardship" to the aggrieved party,¹⁴⁷ and then has thirty days to hold an evidentiary hearing unless the board grants a continuance.¹⁴⁸

After a filing of a notice of appeal, EQB has the authority to grant a continuance on its own motion or at the request of the parties to the appeal.¹⁴⁹ The only limitation to the EQB's authority to grant continuances is a showing of good cause for the continuance.¹⁵⁰ Following the hearing and consideration of the evidence, EQB issues a "written order affirming,

¹³⁹ *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d 536, 540 (4th Cir. 2005).

¹⁴⁰ As noted earlier, compliance schedules contain effluent limitations that become effective on a specific date. *See supra* notes 77–80 and accompanying text. If this date passes and the permittee discharges in excess of the final effluent limitation, then the permittee is liable for violations of NPDES permits. *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (A.L.J. 1990); Memorandum from James A. Hanlon to Alexis Strauss, *supra* note 75, at 2.

¹⁴¹ *Coal-Mac*, 775 F. Supp. 2d at 926 (granting summary judgment in favor of the citizen groups by finding the selenium effluent limitations effective despite the EQB's stays).

¹⁴² W. VA. CODE ANN. §§ 22-11-1 to -30 (West 2011).

¹⁴³ *Id.* §§ 22B-1-1 to -12.

¹⁴⁴ *Id.* § 22B-1-7(c).

¹⁴⁵ *Id.* § 22B-1-7(d).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 22B-1-7(f).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

modifying or vacating” the denial of the permit modifications.¹⁵¹ The stays at issue in the current lawsuits brought by citizen groups in West Virginia followed all of the required procedures.¹⁵² Thus, the battle to enforce selenium effluent limitations despite the EQB’s stays focuses on challenging the scope of EQB’s authority under state administrative law and the CWA.

B. Challenging the Environmental Quality Board’s Authority Under State Law

An effective stay of the selenium effluent limitations in the Coal Industry’s NPDES permits shields the companies from liability for the selenium discharges.¹⁵³ EPA and citizens can enforce violations of selenium effluent limitations by disputing the EQB’s authority to grant a stay of the selenium effluent limitations.¹⁵⁴ Challengers to EQB’s authority must allege that the board violated a procedural requirement or acted outside of the scope of authority granted by statute in issuing the stays of the selenium effluent limitations.¹⁵⁵ Once the party seeking an appeal of WVDEP’s decision requests a stay, EQB must grant or deny the stay within five days.¹⁵⁶ If EQB grants a stay after five days, then a court may reverse or vacate the stay for the EQB’s failure to follow the statutory procedures.¹⁵⁷ The EQB’s decisions to stay WVDEP’s denial of the modifications to extend the selenium compliance schedules occurred within the five-day requirement.¹⁵⁸ Thus, the

¹⁵¹ *Id.* § 22B-1-7(g)(1).

¹⁵² See Coal-Mac, Inc.’s Response to Plaintiffs’ Motion for Partial Summary Judgment & Coal-Mac’s Cross-Motion for Partial Summary Judgment at exhibit 3, *Coal-Mac*, 775 F. Supp. 2d 900 (S.D.W. Va. 2011) (No. 3:10-cv-00833), ECF No. 18-3 [hereinafter Coal-Mac Reconsideration Order] (asserting receipt of WVDEP denial notice on March 8, 2010, appeal filed on April 6, 2010, and stay issued on April 9, 2010); Independence Coal Notice of Appeal, *supra* note 121, at exhibit 1 (appealing the decision of WVDEP denials of March 8, 2010 and requesting a stay on March 10, 2010); Defendants’ Response in Opposition to Plaintiffs’ Motion for Partial Summary Judgment & Defendants’ Cross-Motion for Partial Summary Judgment at exhibit 3, *Coal-Mac*, 775 F. Supp. 2d (No. 3:10-cv-00836), ECF No. 24-3 [hereinafter Independence Coal Order Granting Stay] (issuing stay on March 11, 2010); Jacks Branch Notice of Appeal, *supra* note 130, at exhibit 2 (asserting receipt of WVDEP denials on March 25, 2010 and notice of appeal on April 1, 2010); Jacks Branch Order Granting Stay, *supra* note 133, at exhibit 4 (issuing stay on April 1, 2010).

¹⁵³ West Virginia law authorizes an EQB stay to delay “the effectiveness or execution” of WVDEP’s decision. W. VA. CODE ANN. § 22B-1-7(d) (West 2011).

¹⁵⁴ Without the EQB stays, the selenium effluent limitations, as in the case for Independence Coal Company, would have become enforceable on April 6, 2010. Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

¹⁵⁵ A court may reverse, vacate, or modify an agency’s order or decision if the agency makes the decision “upon unlawful procedures.” West Virginia Administrative Procedures Act, W. VA. CODE ANN. § 29A-5-4(g)(3) (West 2011). An agency only has the authority delegated to it by statute. *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env’tl. Prot.*, 567 S.E.2d 629, 637 (W. Va. 2002).

¹⁵⁶ W. VA. CODE ANN. § 22B-1-7(d) (West 2011).

¹⁵⁷ W. VA. CODE ANN. § 29A-5-4(g)(3) (West 2011).

¹⁵⁸ See Coal-Mac Reconsideration Order, *supra* note 152, at exhibit 3 (asserting receipt of WVDEP denial notice on March 8, 2010, appeal filed on April 6, 2010, and stay issued on April 9, 2010); Independence Coal Notice of Appeal, *supra* note 121, at exhibit 1 (appealing the decision

ability to challenge EQB's authority to grant the stays turns on whether the stays are outside the scope of authority granted by statute.

1. Environmental Quality Board's Scope of Authority Determined Under State Law

Since EPA authorized West Virginia's NPDES permitting program,¹⁵⁹ EPA only retains oversight authority while West Virginia administers the NPDES program.¹⁶⁰ An attack on WVDEP's procedures and associated authority under state procedures becomes an issue settled by state law rather than federal law. The citizen group in *ONRC Action v. Columbia Plywood, Inc.*¹⁶¹ challenged the authority of the Oregon Department of Environmental Quality, Oregon's NPDES permitting agency, to accept a late permit renewal application.¹⁶² The Ninth Circuit certified a question to the Supreme Court of Oregon to interpret the procedures required for renewing a permit under Oregon's administrative rules.¹⁶³ Specifically, the Supreme Court of Oregon was to determine whether the state agency had the authority under the state statute to accept a late permit application.¹⁶⁴ Even though the question arose through a federal citizen lawsuit challenging a permittee's compliance with the CWA rather than the Oregon Administrative Procedures Act,¹⁶⁵ the court's analysis still interpreted the scope of authority of the state agency according to state law.¹⁶⁶ The citizens in West Virginia attempt the same argument as the citizens in Oregon by challenging the authority of EQB to stay the selenium effluent limitations.¹⁶⁷ Thus, if EPA and

of WVDEP denials of March 8, 2010 and requesting a stay on March 10, 2010); Independence Coal Order Granting Stay, *supra* note 152, at exhibit 3 (issuing stay on March 11, 2010); Jacks Branch Notice of Appeal, *supra* note 130, at exhibit 2 (asserting receipt of WVDEP denials on March 25, 2010 and notice of appeal on April 1, 2010); Jacks Branch Order Granting Stay, *supra* note 133, at exhibit 4 (issuing stay on April 1, 2010).

¹⁵⁹ Approval of West Virginia's NPDES Program, 47 Fed. Reg. 22,363, 22,363 (May 24, 1982) (to be codified at 40 C.F.R. pt. 123).

¹⁶⁰ Federal Water Pollution Control Act, 33 U.S.C. § 1342(c)(1) (2006); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 650 (2007) (transferring authority for NPDES permits to the state authority results in the state officials, not EPA, having "primary responsibility for reviewing and approving NPDES discharge permits").

¹⁶¹ 286 F.3d 1137 (9th Cir. 2002).

¹⁶² *Id.* at 1139; *see also* *ONRC Action v. Columbia Plywood, Inc.*, 26 P.3d 142, 144 (Or. 2001) (outlining the Oregon Supreme Court opinion on certified questions from Ninth Circuit). For a permit renewal in Oregon, the permittee must file an application for renewal 180 days before the permit expires. OR. ADMIN. R. 340-045-0030(1) (2011).

¹⁶³ *ONRC Action*, 286 F.3d at 1141.

¹⁶⁴ *Id.*

¹⁶⁵ OR. REV. STAT. §§ 183.310–.690 (2009).

¹⁶⁶ *See ONRC Action*, 26 P.3d at 144–45.

¹⁶⁷ *See* Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment & for Declaratory & Injunctive Relief & Response in Opposition to Coal-Mac's Cross Motion for Summary Judgment, *supra* note 27, at 8–12; Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Plaintiffs' Response to Defendants' Cross-Motion for Partial Summary Judgment, *supra* note 27, at 20–25.

citizen groups argue the stays violated the EQB's state statutory authority, EPA and citizens must show the stays violated state law.

2. Stays Outside the Scope of Authority

Challenges to the authority of EQB to stay the selenium effluent limitations may succeed in a West Virginia state court. The statutes grant EQB the authority to issue a stay in limited circumstances. EQB is an agency "created by statute and given specific powers including the power to make rules and to hear appeals of certain decisions."¹⁶⁸ The statute creating EQB's authority clearly provides the appeals board with the authority to stay an "order, permit or official action" of the WVDEP.¹⁶⁹ The only prerequisite to granting a stay is for the board to believe the appellant will suffer an "unjust hardship" from the implementation of WVDEP's action.¹⁷⁰ EQB identifies both financial hardship and due process violations as unjust hardships to grant a stay.¹⁷¹ Thus, challengers to EQB's authority must argue EQB acted outside the scope of authority in determining whether financial hardship and due process qualify as unjust hardship.

a. Financial Hardship

EQB identifies financial hardship alone as enough to result in an unjust hardship.¹⁷² The statute fails to define unjust hardship, EQB regulations neglect to define the term, and case law in the state has yet to address the issue, which leaves the meaning of unjust hardship to statutory interpretation. When interpreting a statute, a court gives a term its "common, ordinary and accepted meaning" if the legislature neglected to

¹⁶⁸ *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 567 S.E.2d 629, 637 (W. Va. 2002). The West Virginia Administrative Procedures Act defines agency to include "any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches." W. VA. CODE ANN. § 29A-1-2(a) (West 2011).

¹⁶⁹ W. VA. CODE ANN. § 22B-1-7(d) (West 2011). In *Coal-Mac*, a federal district court determined the EQB exceeded its statutory authority by issuing stays in the state proceedings challenging WVDEP's denials of selenium compliance schedule extensions. 775 F. Supp. 2d 900, 926 (S.D.W. Va. 2011). The court held EQB lacked the statutory authority to issue a stay with the effect of suspending the original selenium compliance schedule orders which were not the subject of the coal industry's appeals. *Id.* at 922-26. According to the court, EQB's only statutory authority is to issue a stay of the appeal before it, not the underlying permits. *Id.* at 926. As a clarification, this Comment analyzes other potentially successful arguments EPA and citizen groups may make in challenging EQB's stays of compliance schedule orders.

¹⁷⁰ *Id.*

¹⁷¹ See *Coal-Mac Reconsideration Order*, *supra* note 152, at exhibit 3 (showing that EQB granted stay because of financial harm the coal company faces in having to comply with the final effluent limitation for selenium); *Jacks Branch Order Granting Stay*, *supra* note 133, at exhibit 4 (showing that EQB granted stay because of due process concerns).

¹⁷² See, e.g., *Coal-Mac Reconsideration Order*, *supra* note 152, at exhibit 3 (showing that EQB granted stay because of financial harm the coal company faces in having to comply with the final effluent limitation for selenium).

define it.¹⁷³ Hardship requires suffering or privation.¹⁷⁴ The great expense of investing in technology to prevent discharges of selenium diminishes coal companies' expected profits,¹⁷⁵ and the financial impact of such an immediate investment is certainly a hardship.

However, this financial hardship is not unjust. Unjust commonly means "deficient in justice and fairness."¹⁷⁶ Coal mining NPDES permits have included selenium effluent limitations since 2004.¹⁷⁷ Requiring coal mining operations to spend money to reduce selenium discharges during the appeals process would appear to be fair because coal mining NPDES permits have included requirements to reduce selenium discharges for the past six years.¹⁷⁸ In addition, any EQB decision will not eliminate selenium effluent limitations. EQB only possesses the authority to affirm, modify, or vacate WVDEP's denial of the permit modification.¹⁷⁹ EQB lacks the authority to eliminate the selenium effluent limitations from the NPDES permits because the time to challenge the selenium limits has passed.¹⁸⁰ Thus, an EQB decision, at a minimum, must require the coal industry to install and maintain selenium treatment technology at some point in the future.¹⁸¹ The industry will be required to spend the money on implementing treatment systems now or in the future to reduce the selenium in its discharges. The EQB's stays, premised on financial hardship alone as unjust hardship, potentially fail to qualify as unjust hardships under the ordinary meaning of the term. Therefore, the stays issued as a result of financial hardship are outside the scope of authority granted to EQB by state law.

b. Due Process

EQB also identifies a violation of the aggrieved party's due process rights as causing an unjust hardship.¹⁸² The Due Process Clauses of the Fifth

¹⁷³ State *ex rel.* Prosecuting Att'y v. Bayer Corp., 672 S.E.2d 282, 293 (W. Va. 2008).

¹⁷⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1033 (Philip Babcock Gove ed., unabridged, 2002).

¹⁷⁵ One coal company claims selenium treatment systems will cost \$50 million initially, plus \$3 million annually for operating expenses. *Patriot Coal Ordered to Clean Up Selenium*, ST. LOUIS BUS. J., Sept. 1, 2010, <http://www.bizjournals.com/stlouis/stories/2010/08/30/daily27.html> (last visited Nov. 12, 2011).

¹⁷⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 174, at 2502.

¹⁷⁷ See, e.g., *Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co.*, 555 F. Supp. 2d 640, 644 (S.D.W. Va. 2008) (describing Hobet Mining's NPDES permit that issued in 2004 and included a compliance schedule for selenium with effluent limits to become effective in 2007).

¹⁷⁸ Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

¹⁷⁹ W. VA. CODE ANN. § 22B-1-7(g)(1) (West 2011).

¹⁸⁰ See *supra* Part II.B.1.

¹⁸¹ Removing any selenium requirement violates anti-backsliding as a less stringent effluent limitation. See Federal Water Pollution Control Act, 33 U.S.C. § 1342(o) (2006). Even if EQB extended the compliance schedules, EPA may still veto the modifications requiring the coal companies to meet the current compliance schedule regardless of EQB's decision. See Memorandum from Jeff Herholdt to Earl Ray Tomblin, *supra* note 24, at 3.

¹⁸² Jacks Branch Order Granting Stay, *supra* note 133, at exhibit 4.

and Fourteenth Amendments prohibit federal and state governments from depriving a person of “life, liberty, or property, without due process of law.”¹⁸³ The first inquiry of due process is determining whether the deprived interest is a protected interest in life, liberty, or property.¹⁸⁴ A protected property interest arises when a law creates a reasonable expectation of a benefit in the future.¹⁸⁵ Neither the CWA nor West Virginia law guarantees a coal mining permit modification.¹⁸⁶ Thus, the coal companies cannot possess a justifiable expectation of the benefit of a permit modification.¹⁸⁷ The coal companies do possess a strong economic interest in the permitting decision.¹⁸⁸ However, an economic interest in the outcome of a permitting decision is not a protected liberty or property interest because the economic consequences to denying a stay during the appeal are indirect effects of the denial.¹⁸⁹ This suggests a lack of a protected interest in the modification of the compliance schedule for a constitutional violation of their due process rights if EQB fails to grant the stay.

However, it is within the realm of possibility that a court may find a protected due process interest. If so, then denying the stays requested by the coal companies might violate procedural due process. The Due Process Clauses impose both a procedural and substantive requirement on the government.¹⁹⁰ Procedural due process requires the government to provide for notice and hearing procedures prior to the deprivation of life, liberty, or property.¹⁹¹ The NPDES permits provide the coal companies with the requisite notice of the expiration date of the compliance schedules.¹⁹² However, procedural due process also requires a meaningful opportunity for

¹⁸³ U.S. CONST. amend. V & amend. XIV, § 1.

¹⁸⁴ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

¹⁸⁵ *See id.* at 989–90.

¹⁸⁶ West Virginia law allows WVDEP to extend the compliance schedules until July 1, 2012, but does not mandate WVDEP to extend the compliance schedules. Water Pollution Control Act, W. VA. CODE ANN. § 22-11-6 (West 2011).

¹⁸⁷ The coal companies also cannot possess a justifiable expectation of the benefit of an EQB appeal upon denial of the modification because a permittee does not possess a protected interest in a procedural right. *Water Works & Sewer Bd. v. U.S. Dep’t of Army Corps of Eng’rs*, 983 F. Supp. 1052, 1062–63 (N.D. Ala. 1997) (citing *Olim v. Wakinekona*, 461 U.S. 238, 250–51 (1983)), *aff’d*, 162 F.3d 98 (11th Cir. 1998).

¹⁸⁸ The denial of the modification request results in exposure to penalties and expense in coming into compliance. Civil penalties amount up to \$25,000 per day per violation of the permit. Federal Water Pollution Control Act, 33 U.S.C. § 1319(d) (2006); *see also Patriot Coal Ordered to Clean Up Selenium*, ST. LOUIS BUS. J., Sept. 1, 2010, <http://www.bizjournals.com/stlouis/stories/2010/08/30/daily27.html> (last visited Nov. 12, 2011) (coming into compliance with selenium effluent limitations is expected to cost one coal mining company \$50 million).

¹⁸⁹ *Water Works & Sewer Bd.*, 983 F. Supp. at 1063 (citing *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980), for the principle that indirect deprivations of interest, such as economic loss resulting from the denial of a hearing, are “outside of the purview of the due process clause”).

¹⁹⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 945 (3d ed. 2009).

¹⁹¹ *Id.* at 1158.

¹⁹² *See, e.g.,* Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

some type of hearing prior to the deprivation.¹⁹³ Coal companies argue the expiration of the compliance schedules while the coal companies appeal the denial of the modifications renders the appeals process meaningless.¹⁹⁴ The expiration of the compliance schedule forces the coal companies to achieve the selenium effluent limitation, face enforcement actions with significant penalties, or stop discharging without a meaningful hearing to challenge the denial of the modifications.¹⁹⁵ This harm falls within the plain meaning of the term “unjust,” because the harm to procedural due process rights relates to overall justice.¹⁹⁶

On the other hand, EPA or citizen groups may counter the coal mining industry’s arguments by asserting that procedural due process requirements are met through the CWA’s procedures for issuing a final NPDES permit. The CWA permitting procedures for issuing a permit provide for the permittees to challenge the contents of the permit before and after the permitting agency issues the permit.¹⁹⁷ Once issued, the NPDES permits are final and effective.¹⁹⁸ EPA and citizen groups can assert that the coal industry benefits from the finality of the NPDES permits under the permit shield, but the consequence of the procedure that leads to this finality precludes the coal industry from later claiming a violation of due process rights when attempting to change the final NPDES permit.¹⁹⁹ The coal permittee has notice of the compliance schedule’s expiration date from the date the permitting agency made the final permit decision. EPA and citizen groups can argue that allowing the compliance schedules to expire during the appeals process does not violate procedural due process because the permittees have the opportunity to challenge the permit terms before and after the permit is issued.²⁰⁰ Thus, a court may find the procedural due process rights of the coal permittees protected by the CWA procedures for issuing and challenging the NPDES permit. EPA and citizen groups attempting to enforce selenium effluent limitations on the coal mining industry can attack the legality of EQB’s stays under state law.

¹⁹³ CHEMERINSKY, *supra* note 190, at 1197.

¹⁹⁴ *Cf.* WVDEP Denial Letter to Jacks Branch Coal, *supra* note 126, at exhibit 4; WVDEP Denial Letter to Independence Coal, *supra* note 126, at exhibit 4.

¹⁹⁵ *See* United States v. City of Hoboken, 675 F. Supp. 189, 198 (D.N.J. 1987) (describing the options of a permit holder to “achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging”).

¹⁹⁶ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 174, at 2502.

¹⁹⁷ All NPDES permits go through a public notice and comment process before becoming final. 40 C.F.R. § 124.10 (2011). Permittees can challenge the final decisions for up to thirty days after the final permit is issued. *Id.* § 124.19.

¹⁹⁸ *Id.* § 124.15.

¹⁹⁹ *See* Federal Water Pollution Control Act, 33 U.S.C. § 1342(k) (2006); CHEMERINSKY, *supra* note 190, at 1197.

²⁰⁰ *See* 40 C.F.R. §§ 124.10, 124.19 (2011).

C. Challenging Environmental Quality Board's Authority Under the Clean Water Act

EPA and citizen groups may find better success proving enforceability of the selenium effluent limitations by asserting EQB acted outside the scope of authority granted by the CWA. EPA regulations implementing the CWA recognize the use of a stay during agency review of contested permit conditions.²⁰¹ However, the authority must not violate provisions of the CWA and EPA regulations.²⁰² EPA and environmental groups can challenge the scope of authority granted to EQB because the stays modify the permits in violation of the CWA and tromp on the spirit of the CWA.

1. Stays Violate the Clean Water Act

The EQB's stays suspending the expiration of the selenium compliance schedules violate the CWA because the stays modify the terms of the permit without following the federally required modification procedures and render EPA's objection power meaningless. The coal mining industry argues the EQB's stays are narrow in scope, temporary in effect, and fail to substantively modify the permit terms.²⁰³ In *Ohio Valley Environmental Coalition, Inc. v. Coal-Mac, Inc.*,²⁰⁴ the federal district court agreed with the coal mining industry and found the EQB's stays did not modify the permit terms.²⁰⁵ The court defined stays as judicial tools that do not "purport to rewrite or fundamentally alter the underlying permits."²⁰⁶ The court determined the EQB's stays only provided EQB with time to review the denial of the modification requests rather than modifying the permit terms.²⁰⁷ However, the decision by the court misplaces the emphasis on the definition of a stay rather than focusing on the effect of the state agency's stay.

Here, the EQB's stays modify the permit terms in violation of the CWA. A modification is simply an "act or action changing something."²⁰⁸ EQB changes the provisions of the permits by delaying the effective date of the selenium effluent limitations.²⁰⁹ The coal companies concede the stays change the permit terms by asserting their compliance with the permits on

²⁰¹ *Id.* § 124.16.

²⁰² A state may issue permits so long as the state program "complies with the federal standards set forth by the [CWA] and the regulations promulgated under that act." *Ohio Valley Envtl. Coal. v. Miano*, 66 F. Supp. 2d 805, 807 (S.D.W. Va. 1998); 40 C.F.R. § 123.25(a)(25) (2011) (requiring state programs to administer modification procedures in accordance with 40 C.F.R. § 124.5(a),(c),(d), and (f)).

²⁰³ Defendants' Reply in Support of its Cross-Motion for Partial Summary Judgment at 6–7, *Coal-Mac*, 775 F. Supp. 2d 900 (S.D.W. Va. 2011) (No. 3:10-cv-00836), ECF No. 34.

²⁰⁴ 775 F. Supp. 2d 900 (S.D.W. Va. 2011).

²⁰⁵ *Id.* at 922.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 174, at 1452.

²⁰⁹ See *Coal-Mac Reconsideration Order*, *supra* note 152, at exhibit 3 (suspending the selenium effluent limits until further order by EQB).

the basis the stays prevent the otherwise enforceable selenium effluent limitations from coming into effect.²¹⁰ Thus, the stays substantively modify the permit terms by changing the coal industry's selenium effluent limitation from an enforceable effluent limitation to mere monitoring and reporting requirements.

The EQB's stays are analogous to other state agency actions found to modify the permits without following the required modification procedures. In *United States v. Smithfield Foods, Inc.*,²¹¹ the Fourth Circuit held a permittee could not rely on orders and letters issued by Virginia's NPDES permitting authority as the enforceable effluent limitation because the orders failed to follow the permit modification procedures.²¹² Similarly, a district court held that a memorandum of understanding to settle a state enforcement action failed to modify the NPDES permit.²¹³ As a result, the discharger's compliance with the memorandum of understanding was not compliance with the CWA.²¹⁴ Likewise, a permittee, defending against liability for discharges exceeding permit limitations, could not escape liability by relying on orders issued to extend compliance schedules for zinc and copper when the orders did not go through notice and comment.²¹⁵ EQB's stays are similar to the letters, orders, and memoranda of understanding in the case law in that the stays change the effluent limitations the coal mining operations must achieve by requiring less from the permittee. The stays do more than "give the deciding entity the time to properly decide [the] issue"²¹⁶ by allowing the coal industry to continue to pollute the Appalachian waters. Since the EQB's stays modify the permits, EQB's order granting the stay must go through the modification procedures of creating a draft permit and making the permit available for public comment.²¹⁷ However, EQB failed to follow these procedures in issuing the stays.

The EQB's stays also violate the CWA by stripping EPA of its power to review permit modifications. The structure of the CWA establishes cooperative federalism where authorized states administer the NPDES program and EPA retains a limited supervisory role.²¹⁸ One supervisory role for EPA under the CWA is to review draft permits for modifications.²¹⁹ EPA has ninety days to object to the permit modification terms in the draft

²¹⁰ See *Coal-Mac, Inc. & Mingo Logan Coal Company's Response in Opposition to Plaintiffs' Second Motion for Partial Summary Judgment & Coal-Mac & Mingo Logan's Cross-Motion for Partial Summary Judgment* at 6–7, *Coal-Mac*, 775 F. Supp. 2d 900 (S.D.W. Va. 2011) (No. 3:10-cv-00833), ECF No. 38; Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Defendants' Motion for Partial Summary Judgment, *supra* note 135, at 6.

²¹¹ 191 F.3d 516 (4th Cir. 1999).

²¹² *Id.* at 520, 524, 526.

²¹³ *Pub. Interest Research Grp. of N.J.*, 822 F. Supp. 174, 184–85 (D.N.J. 1992).

²¹⁴ *Id.* at 185.

²¹⁵ *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1580 (N.D. Ga. 1995).

²¹⁶ *Coal-Mac*, 775 F. Supp. 2d 900, 922 (S.D.W. Va. 2011).

²¹⁷ 40 C.F.R. §§ 124.5(c), 124.6(e) (2011) (describing procedures applicable to state NPDES programs).

²¹⁸ See *supra* notes 35–40 and accompanying text.

²¹⁹ Federal Water Pollution Control Act, 33 U.S.C. § 1342(d)(1) (2006).

permits.²²⁰ In the event EPA does make an objection, a permittee may seek a public hearing to appeal the objection.²²¹

In West Virginia, the coal industry violated the CWA by using the state administrative appeals process rather than appealing EPA's objections by public hearing. In 2009, EPA required West Virginia to submit draft permits related to coal mining for review.²²² EPA objected to the modifications for extending the selenium compliance schedules approved by WVDEP.²²³ The coal mining industry appealed both the denials and objections to EQB rather than to EPA.²²⁴ The federal district court in West Virginia found that the EQB's stays rendered EPA's objections meaningless by allowing the permittees to continue discharging selenium beyond the expiration of the compliance schedule.²²⁵ The court determined that the EQB's stays "resulted in a de facto extension of the compliance schedule in contravention of the EPA objections."²²⁶ Thus, the EQB's stays violate the CWA because the stays remove EPA's authority to object to the NPDES permits. Because the stayed selenium effluent limitations were not legally modified and strip EPA of federally mandated review authority, an enforcement action may proceed on the basis of seeking violations from the point when the permits expired.²²⁷

2. *Tromping on the Spirit of the Clean Water Act*

Not only do the EQB's stays legally violate the provisions of the CWA and its implementing regulations, but also West Virginia's procedural process undermines the spirit of the CWA. Congress drafted the CWA with the intention of completely eliminating the discharge of pollutants in a fairly short period of time.²²⁸ To achieve this goal, Congress included ample opportunity for citizens to participate.²²⁹ The EQB's stays and delays to the evidentiary proceedings undercut the goals of the CWA by authorizing continued discharges of pollution and preventing public and EPA participation.

EQB stays of the selenium effluent limitations endorse the coal mining industry's continued discharge of high levels of selenium. The structure of the CWA establishes a process for "moving the nation towards the expressed goal of eliminating all discharges of pollutants" by envisioning the inclusion

²²⁰ *Id.* § 1342(d)(2).

²²¹ 40 C.F.R. § 123.44(e) (2011).

²²² Letter from Jon M. Capacasa to Scott Mandirola, *supra* note 128, at exhibit 2. Previous to 2009, EPA waived its authority to review NPDES permits. *See id.*

²²³ Memorandum from Jeff Herholdt to Earl Ray Tomblin, *supra* note 24, at 3.

²²⁴ *See id.*

²²⁵ *Coal-Mac*, 775 F. Supp. 2d 900, 925 (S.D.W. Va. 2011).

²²⁶ *Id.*

²²⁷ *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 524, 526 (4th Cir. 1999); *Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co.*, 531 F. Supp. 2d 747, 754 (S.D.W. Va. 2008); *Citizens for a Better Env't—Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996).

²²⁸ Federal Water Pollution Control Act, 33 U.S.C. § 1251(a)(1) (2006) (passing the CWA in 1972, Congress intended on meeting this goal by 1985).

²²⁹ *See* Coplan, *supra* note 93, at 5 (remarking that Congress desired active public participation "as a means of ensuring full implementation of its goals").

of greater permitting controls each time the permitting authority reissues permits.²³⁰ The CWA improves the permits by requiring permits to expire at least every five years.²³¹ The purpose for this periodic review is to improve the permit terms by requiring cleaner discharges for each reissued NPDES permit to achieve the goal of eliminating pollutant discharges.²³² The stays allow the companies to maintain the status quo rather than moving the Appalachian waters toward compliance with water quality standards for selenium.

The stays enable the coal companies to challenge WVDEP's denials of their modifications requests. At the same time, the stays only exacerbate the problem of failing to move the region towards compliance with the CWA by allowing a disingenuous attempt to avoid compliance with an effluent limitation. Through the appeals process, the coal mining operations have effectively challenged the validity of their final permit terms years late, rather than having challenged the validity of the terms upon the permit's issuance.²³³ Considering the lofty goals of the CWA, EQB should practice restraint in these proceedings—the health of the water in Appalachia depends upon it.

While impeding progress towards eliminating pollutant discharges in West Virginia, the EQB's actions also undercut public participation in achieving the reduction of pollutant discharges. In creating the CWA, Congress anticipated the assistance of an involved public to implement the goals of the CWA.²³⁴ The public participates via comments during permitting and citizen suits to assist in the enforcement of the act.²³⁵ Congress, recognizing the potential political and economic limitations on the state and federal governments, injected public participation into crucial parts of the permitting process in order to attain the goals of the CWA.²³⁶ Yet the EQB's actions in delaying the proceedings obstruct the ability of the public to adequately participate as Congress intended by possibly allowing the coal companies to avoid citizen suits.

²³⁰ *Id.* at 6.

²³¹ 33 U.S.C. § 1342(b)(1)(B) (2006).

²³² Coplan, *supra* note 93, at 7.

²³³ Memorandum in Support of Motion for Leave to File Supplemental Authority in Support of Defendants' Cross Motions for Summary Judgment at 4–6, *Coal-Mac*, 775 F. Supp. 2d 900 (S.D.W. Va. 2011) (No. 3:10-cv-00833), ECF No. 69 (arguing EQB is allowed to stay any of WVDEP's orders).

²³⁴ Coplan, *supra* note 93, at 7. The Congressional Declaration enunciates the goals of the CWA: "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e) (2006).

²³⁵ 33 U.S.C. §§ 1365, 1342(b)(3) (2006) (requiring state programs to insure the public receives notice of permits and an opportunity to comment). The regulations implementing the CWA require state programs to comply with the notice and comment requirements for modifications. 40 C.F.R. § 124.10–11 (2011).

²³⁶ Coplan, *supra* note 93, at 8.

The coal industry proclaims that no selenium effluent limitation applies as a result of the EQB's stays.²³⁷ This is problematic because to proceed in a citizen suit the citizens must allege an "ongoing violation."²³⁸ With no selenium effluent limitation to violate, citizens must await the EQB's final decision before seeking to enforce the selenium effluent limitations.²³⁹ Meanwhile, the coal mining companies continue to discharge selenium until EQB issues a final decision.²⁴⁰ If the coal companies are correct that no selenium effluent limitation exists during the stay, the EQB stays effectively prevent citizen groups from initiating a citizen suit simply because the coal companies have no ongoing violations.

The EQB's stays also render the EPA's review of the state issued permits pointless. Thus, the participation of the public in the permitting process and enforcement is inhibited by the EQB's stays of the selenium effluent limitations. Such stays are contrary to the spirit of the CWA.

VI. RELYING ON ANTI-BACKSLIDING TO ADDRESS SELENIUM DISCHARGES

Regardless of the effectiveness of the EQB's stays, EPA and citizen groups may still enforce the selenium effluent limitations because an extension of the compliance schedules violates the anti-backsliding provision of the CWA. The anti-backsliding provision prohibits a permit modification that implements a less stringent effluent limitation.²⁴¹ An extension of the compliance schedules violates the anti-backsliding provision because the extension is a less stringent effluent limitation and the exceptions to the prohibition likely do not apply to the current issues in West Virginia.

A. Extended Compliance Schedule Equals a Less Stringent Effluent Limitation

The anti-backsliding provision, aside from a few narrow exceptions, prohibits the reissuance or modification of a permit that contains a less stringent effluent limitation than the previous permit.²⁴² When an NPDES permit contains an immediately effective effluent limitation for a particular pollutant, the anti-backsliding provision clearly prohibits the reissuance or

²³⁷ See Coal-Mac, Inc. & Mingo Logan Coal Company's Response in Opposition to Plaintiffs' Second Motion for Partial Summary Judgment & Coal-Mac & Mingo Logan's Cross-Motion for Partial Summary Judgment, *supra* note 210, at 6-7; Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment & Defendants' Cross-Motion for Partial Summary Judgment, *supra* note 135, at 5-6.

²³⁸ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987).

²³⁹ See W. VA. CODE ANN. § 29A-5-4(a) (West 2011) ("Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter.").

²⁴⁰ The statute only requires EQB to hold an evidentiary hearing "within thirty days . . . unless there is a postponement or continuance." *Id.* § 22B-1-7(f). EQB issues a final order after the hearing and considering all the evidence. *Id.* § 22B-1-7(g).

²⁴¹ Federal Water Pollution Control Act, 33 U.S.C. § 1342(o) (2006).

²⁴² *Id.*

modification of the NPDES permit to insert a compliance schedule for the pollutant.²⁴³ Some coal mining operators failed to receive a stay from EQB prior to the compliance schedule expiring on April 5, 2010.²⁴⁴ The final effluent limitations for selenium in these NPDES permits took effect and thus the CWA prohibits the WVDEP or EQB from issuing a permit omitting the effective selenium effluent limitation. Thus, in situations where the compliance schedule expired prior to the EQB's stay, EPA and citizen groups may seek to enforce violations of the selenium effluent limitation.

A trickier issue occurs when the compliance schedule has yet to expire and thus the final effluent limitation is not yet in effect. For example, Jacks Branch Coal Company's compliance schedule for selenium was set to expire April 5, 2010, but the company received a stay from EQB on April 1, 2010.²⁴⁵ The selenium effluent limitation arguably never came into effect as a result of the stay.²⁴⁶ In these cases, to mount a successful challenge, the party must establish that the anti-backsliding provision applies to compliance schedules and an extended compliance schedule is a less stringent effluent limitation.

1. Compliance Schedules Are Effluent Limitations

The prohibition against backsliding applies to compliance schedules in NPDES permits because compliance schedules are effluent limitations. As defined in the CWA, effluent limitation "means any restriction established by a State or the Administrator . . . including schedules of compliance."²⁴⁷ Further, EPA interprets the anti-backsliding provision as applying "to limits with a delayed implementation date."²⁴⁸

Conversely, EQB concluded anti-backsliding does not apply to extensions of compliance schedules.²⁴⁹ In May 2007, environmental groups appealed to EQB challenging the WVDEP's extension of the selenium compliance schedules in April 2007.²⁵⁰ EQB denied that the extension of unexpired selenium compliance schedules violated anti-backsliding because the effluent limitations were never "established."²⁵¹ EQB's conclusion misinterprets the use of the word "established" in the anti-backsliding provision. The anti-backsliding provision applies to "effluent limitations *established* on the basis of subsection (a)(1)(B)."²⁵² The statutory text uses "established" as a verb to describe how the effluent limitation became a term

²⁴³ See *id.*

²⁴⁴ Coal-Mac Order Granting Stay, *supra* note 133, at exhibit 2 (granting a stay on April 9, 2010).

²⁴⁵ Jacks Branch Order Granting Stay, *supra* note 133, at exhibit 4.

²⁴⁶ See *supra* Part V (arguing the legality of the EQB stays).

²⁴⁷ 33 U.S.C. § 1362(11) (2006).

²⁴⁸ Memorandum from James R. Elder to Regions I–X, *supra* note 97, at 3.

²⁴⁹ W. Va. Highlands Conservancy, Appeal Nos. 07-10-EQB, 07-12-EQB, at 40 (W. Va. Env'tl. Quality Bd. June 12, 2008) (final order), available at <http://www.wveqb.org/finalorders/07-10-eqb%20and%2007-12-eqb.pdf>.

²⁵⁰ *Id.* at 10.

²⁵¹ *Id.* at 40.

²⁵² 33 U.S.C. § 1342(o)(1) (2006).

in the NPDES permit.²⁵³ “Established” refers to the action of the permitting authority in deciding to include the effluent limitation, not the effectiveness of the effluent limitation.²⁵⁴

Even if the provision required an “established” effluent limitation, an effluent limitation subject to a compliance schedule is established.²⁵⁵ A compliance schedule is “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation.”²⁵⁶ Nothing in the statutory definition suggests a compliance schedule lacks establishment when included in an NPDES permit. Thus, an effluent limitation subject to a compliance schedule is no less established in an NPDES permit than a traditional, immediately effective effluent limitation.²⁵⁷ Despite the EQB’s conclusion, the anti-backsliding provision clearly applies to compliance schedules because the CWA defines compliance schedules as effluent limitations regardless of whether the schedule expired.

2. *Less Stringent Effluent Limitation*

The anti-backsliding provision prohibits the extension of compliance schedules because an extended compliance schedule is a less stringent effluent limitation.²⁵⁸ According to EPA, “[a]n extension of the final compliance date clearly renders the permit less stringent.”²⁵⁹ An effluent limitation contains both the details of the quantity of a discharge and the temporal element to achieve the specified limit.²⁶⁰ Few cases address anti-backsliding and even fewer discuss how the extension of compliance schedules can violate the anti-backsliding provision. However, EPA and citizen groups may rely on case law in the Ninth Circuit to assert that the extension of a compliance schedule violates the anti-backsliding provision.

The Ninth Circuit specifically recognized that extension of a compliance schedule about to expire backslides on the prior effluent limitation in the permit.²⁶¹ The defendants, an oil refinery, possessed an NPDES permit modified by an order from the permitting authority to include

²⁵³ *Id.* § 1342(a)(1)(B) (stating the permitting authority determines whether the condition is necessary).

²⁵⁴ *Id.* (allowing the permitting authority to issue a permit with conditions necessary to meet the substantive requirements of the CWA).

²⁵⁵ See *Citizens for a Better Env’t—Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996) (questioning Union Oil’s assumption that “effluent standards are not effectively part of the NPDES permit until they take effect”).

²⁵⁶ 33 U.S.C. § 1362(17) (2006).

²⁵⁷ See *Citizens for a Better Env’t—Cal.*, 83 F.3d at 1120 (explaining the extended compliance schedule did not modify the effluent limitation in the NPDES permit); see also 33 U.S.C. § 1362(11) (2006) (defining compliance schedule as an effluent limitation).

²⁵⁸ The statute prohibits a modified or reissued permit from containing “effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.” 33 U.S.C. § 1342(o)(1) (2006).

²⁵⁹ 44 Fed. Reg. 32,854, 32,870 (June 7, 1979).

²⁶⁰ 33 U.S.C. § 1362(11).

²⁶¹ *Citizens for a Better Env’t—Cal.*, 83 F.3d at 1120.

a compliance schedule for selenium with a final effluent limitation to take effect in December 1993.²⁶² After unsuccessfully challenging the selenium discharge limits in 1992, the defendants petitioned a California state court to set aside the interim and final selenium limits.²⁶³ In November 1993, the defendants reached a settlement agreement comprised of a cease and desist order adopted by the permitting authority extending the compliance schedule until July 1998.²⁶⁴ The oil refinery asserted that no backsliding occurred by extending the compliance schedule because the final effluent limitations never took effect.²⁶⁵ The Ninth Circuit disagreed, finding “that a modified NPDES permit that does not contain a strict effluent limitation *that had been about to come into effect* is, indeed, ‘less stringent’ than the previous, unmodified NPDES permit—regardless of whether the limitation had yet taken effect.”²⁶⁶ Simply because a final effluent limitation is subject to a compliance schedule does not mean the effluent limitation is not effectively part of the NPDES permit.²⁶⁷

The Ninth Circuit decision paves the way for EPA and citizen groups to challenge the ability of the permitting authorities in the Appalachian region to extend compliance schedules. The WVDEP issued amended orders extending compliance schedules for selenium in 2007²⁶⁸ similar to how the NPDES permits in the Ninth Circuit opinion implemented the compliance schedules through an administrative order. Both situations involved making a compliance schedule a component of the permit requirements.²⁶⁹ Thus, the compliance schedules contained in the coal industry’s NPDES permits are not merely suggestions, but the compliance schedules are an “enforceable sequence of actions.”²⁷⁰

The Ninth Circuit case provides persuasive case law for a federal district court in West Virginia to decide whether extension of the compliance schedules for selenium violate the anti-backsliding provision. With this case as precedent, EPA and citizen groups can forcefully argue the extension of a compliance schedule is a less stringent effluent limit. If they succeed in arguing an extension of the compliance schedules violates the anti-

²⁶² *Id.* at 1114.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1120.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ *See id.*

²⁶⁸ *See* Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7.

²⁶⁹ *See* Order No. 47, *supra* note 23, at exhibit 3; Order No. 1066, *supra* note 23, at exhibit 7; *see also Citizens for a Better Env’t—Cal.*, 83 F.3d at 1114 (describing how the cease and desist order “relieve[d] [permittees] from meeting the final selenium limit” until a later date than the date originally in the permit, and thus set a compliance schedule for meeting the final selenium limit). In *Citizens for a Better Env’t—Cal.*, the Ninth Circuit did not find the cease and desist order, which included a compliance schedule for meeting the final selenium limits, to be a modification of the permit because of specific language in the cease and desist order giving prosecutorial discretion to the Attorney General. *Id.* at 1118–20. However, the Ninth Circuit found that if the cease and desist order did modify the permit, then such a modification would violate the anti-backsliding provision. *Id.*

²⁷⁰ Federal Water Pollution Control Act, 33 U.S.C. § 1362(17) (2006).

backsliding provision, then EPA and citizen groups can seek to enforce the final effluent limitations for selenium, bringing the Appalachian region closer to attaining water quality standards. This all assumes, however, none of the exceptions apply.

B. No Exceptions Apply to Coal Companies

Although extending the compliance schedules for selenium in West Virginia violates the anti-backsliding provision of the CWA, WVDEP may extend the compliance schedules if a statutory exception to anti-backsliding applies.²⁷¹ The coal mining industries unequivocally fail to qualify for most of the exceptions.²⁷² Even if an exception applies, a less stringent selenium effluent limitation likely violates West Virginia's water quality standards.²⁷³

1. Exceptions to Anti-Backsliding

NPDES permits in West Virginia include a selenium effluent limitation to meet the specific water quality standard for selenium,²⁷⁴ thus the anti-backsliding exceptions for technical mistake and permit modifications or variances do not apply here, but only to technology-based standards.²⁷⁵ The coal mining industry also fails to qualify for the exception allowing backsliding if the permittee, after installing, properly operating, and maintaining treatment facilities, still fails to achieve the effluent limitation.²⁷⁶ The coal companies neglected to install any treatment technology for selenium to qualify for this exception.²⁷⁷ The exception allowing backsliding when the permittee or permitting authority discovers new information or material alterations to the facility additionally does not apply to the coal mining permits at issue.²⁷⁸ No new information about selenium exists, in part due to the coal industry's failure to comply with the compliance schedules requiring the implementation of research and construction of treatment facilities.²⁷⁹

²⁷¹ *Id.* § 1342(o)(2); see also Memorandum from James R. Elder to Regions I–X, *supra* note 97, at 2–4 (describing the limited statutory exceptions from the prohibition against backsliding).

²⁷² See *supra* notes 97–101 and accompanying text (noting the statutory exceptions to anti-backsliding).

²⁷³ The anti-backsliding provision limits permissible less stringent effluent limitations to those that do not violate water quality standards. 33 U.S.C. § 1342(o)(3) (2006).

²⁷⁴ W. VA. DEPT. OF ENVTL. PROT., PERMIT HANDBOOK 32-17 (1999), available at <http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf>.

²⁷⁵ Memorandum from James R. Elder to Regions I–X, *supra* note 97, at 7; 33 U.S.C. § 1342(o)(2)(B)(ii), (D) (2006).

²⁷⁶ 33 U.S.C. § 1342(o)(2)(E) (2006).

²⁷⁷ WVDEP Denial Letter to Jacks Branch Coal I, *supra* note 126, at exhibit 4 (criticizing Jacks Branch for only implementing a pilot scale treatment project); WVDEP Denial Letter to Independence Coal, *supra* note 126, at exhibit 4 (criticizing Independence Coal for failing to implement any treatment facilities for selenium beyond the pilot scale treatment project).

²⁷⁸ 33 U.S.C. § 1342(o)(2)(A)–(B) (2006).

²⁷⁹ See WVDEP Denial Letter to Jacks Branch Coal, *supra* note 126, at exhibit 4 (criticizing Jacks Branch for only implementing a pilot scale treatment project); WVDEP Denial Letter to

However, the coal mining operations possibly can still avail themselves of one exception. Backsliding is allowed where events occurred over which the coal mining facilities had no control.²⁸⁰ The anti-backsliding provision enables a modified or reissued NPDES permit to backslide where “a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy.”²⁸¹ Coal companies bear the burden of proving that an exception to anti-backsliding applies.²⁸² The coal companies are likely to claim the circumstances surrounding the selenium discharges fall under this good cause exception because no practical technology currently exists to treat selenium at the outfalls.²⁸³ However, EQB identified several technologies for selenium treatment when EQB upheld the first extension of selenium compliance schedules in 2007.²⁸⁴ Thus, EPA and citizen groups in an enforcement action may combat this argument by pointing to the other remedies available to the coal companies prior to the compliance schedule expiring and WVDEP’s prior rejection of the good cause claim by the coal companies.

The coal companies had the opportunity to appeal the insertion of the compliance schedule when WVDEP initially inserted it into the permit.²⁸⁵ Appealing the initial insertion of the selenium effluent limitation was the appropriate time to make the argument that no technology existed or was likely to exist within three years. Individual coal mining operations certainly had control over the decision of whether or not to appeal the inclusion of the compliance schedule in the NPDES permit.

Similarly, a court considering whether the coal companies in West Virginia qualify for the good cause exception can rely on the reasoning by the WVDEP for denying the compliance schedule extensions. The WVDEP denied the extensions because some companies failed to “take[] any on-the-ground action on [the] permit[s] to implement” the compliance schedule.²⁸⁶

Independence Coal I, *supra* note 126, at exhibit 4 (criticizing Independence Coal for failing to implement any treatment facilities for selenium beyond the pilot scale treatment project); *see also* W. Va. Highlands Conservancy, Appeal Nos. 07-10-EQB, 07-12-EQB, at 15–17 (W. Va. Env’tl. Quality Bd. June 12, 2008) (final order), *available at* <http://www.wveqb.org/finalorders/07-10-eqb%20and%2007-12-eqb.pdf> (revealing that the difficulty of treating selenium was well known when WVDEP extended the compliance schedules back in 2007).

²⁸⁰ 33 U.S.C. § 1342(o)(2)(C) (2006).

²⁸¹ *Id.*

²⁸² *Natural Res. Defense Council v. U.S. Env’tl. Prot. Agency*, 859 F.2d 156, 201 n.101 (D.C. Cir. 1988); *Great Basin Mine Watch v. Nevada Env’tl. Comm’n*, No. 43943, 2006 WL 1668890, at *3 (Nev. Apr. 19, 2006).

²⁸³ Mingo Logan Notice of Appeal, *supra* note 130, at exhibit 2; Independence Coal Notice of Appeal, *supra* note 121, at exhibit 1.

²⁸⁴ *See* W. Va. Highlands Conservancy, Appeal Nos. 07-10-EQB, 07-12-EQB, at 17–18 (W. Va. Env’tl. Quality Bd. June 12, 2008) (final order), *available at* <http://www.wveqb.org/finalorders/07-10-eqb%20and%2007-12-eqb.pdf> (discussing experimental techniques of catalyzed cementation, biological reduction, and reduction with zero valent iron and recognizing iron hydroxide and reverse osmosis as technologies that achieve selenium effluent reduction).

²⁸⁵ *See* Water Pollution Control Act, W. VA. CODE ANN. § 22-11-21 (West 2011) (permitting any person adversely affected by an action of the WVDEP to appeal the decision).

²⁸⁶ WVDEP Denial Letter to Independence Coal I, *supra* note 126, at exhibit 4.

The WVDEP also rejected the good cause claim of other coal companies implementing pilot-scale treatment projects because the projects were short in duration and occurred well after the deadline for a pilot program in the compliance schedule.²⁸⁷ The coal companies seek to gain the protection of an exception to the anti-backsliding provision in order to acquire even more time to address selenium discharges, but these companies can only show a need for a less stringent effluent limit as a result of their own actions. To qualify for the good cause exception to anti-backsliding, the necessity must arise through no fault of the permittee.²⁸⁸ The coal companies played a role in the need for more time to comply and should be barred from its shelter.

2. *Limitation to the Exceptions*

Under no circumstances, even if an exception applies, can a reissued or modified permit contain a less stringent effluent limitation that leads to a violation of a water quality standard.²⁸⁹ Even if coal mining permits qualify for an exception to anti-backsliding, the selenium discharges likely violate water quality standards.²⁹⁰ West Virginia's water quality standards, at a minimum, require the protection of existing uses.²⁹¹ Since selenium inhibits fish propagation,²⁹² the selenium discharges likely violate the existing uses of the water by fish.²⁹³ Jacks Branch Coal Company and Coal-Mac, Inc., two of the coal companies seeking modification of their selenium compliance schedules, already discharge into waters impaired by selenium.²⁹⁴ Thus, the

²⁸⁷ *Id.* at exhibit 4; *see also* WVDEP Denial Letter to Jacks Branch Coal, *supra* note 126, at exhibit 4.

²⁸⁸ Federal Water Pollution Control Act, 33 U.S.C. § 1342(o)(2)(C) (2006). EPA Region 3 states "[t]hese companies have already had at least three years to come into compliance with selenium effluent limitation." Erica Petersen, *EPA Needs More Time to Consider Extensions for Selenium Compliance*, W. VA. PUB. BROADCASTING, April 21, 2010, <http://www.wvpubcast.org/newsarticle.aspx?id=14527> (last visited Nov. 12, 2011).

²⁸⁹ 33 U.S.C. § 1342(o)(3) (2006).

²⁹⁰ *See* EVAN HANSEN & MARGARET JANES, COAL MINING AND THE CLEAN WATER ACT: WHY REGULATED COAL MINES STILL POLLUTE WEST VIRGINIA'S STREAMS 8–9 (2003) (stating coal mining permits are issued to coal mines that violate selenium water quality criteria); U.S. ENVTL. PROT. AGENCY, *supra* note 114, at III.D-16 to -17.

²⁹¹ W. VA. CODE ANN. § 47-2-4.1.a (West 2011).

²⁹² *See supra* notes 108–09 and accompanying text.

²⁹³ *Cf.* Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co., 531 F. Supp. 2d 747, 749–50 (S.D.W. Va. 2008).

²⁹⁴ West Virginia must submit a list of impaired waters to EPA. 33 U.S.C. § 1313(d)(2) (2006); *see also* U.S. Envtl. Prot. Agency, *What Is a 303(d) List of Impaired Waters?*, <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/overview.cfm> (last visited Nov. 12, 2011) (describing the process for states to submit Section 303(d) lists every two years listing waters where current controls are insufficient to meet water quality standards). Jacks Branch Coal Company sought permit modifications for discharges into Hughes Creek, which was already impaired by selenium. Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment & for Declaratory & Injunctive Relief & Civil Penalties, *supra* note 138, at 5; U.S. Envtl. Prot. Agency, *West Virginia 303(d) Listed Waters for Reporting Year 2008*, http://iaspub.epa.gov/tmdl/attains_impaired_waters.impaired_waters_list?p_state=WV&p_cycle=2008 (last visited Nov. 12, 2011). Coal-Mac, Inc. discharges into the Left Fork of the Right Fork of Trace Fork of Pigeon Creek, which is already impaired by selenium. Plaintiffs' Memorandum

amounts of selenium discharged by the coal mining industry into the waters of Appalachia already violate West Virginia's water quality standards and make the coal mining permits ineligible for an exception to the anti-backsliding provision.

C. The Enforceable Effluent Limitation

Since an extension of the selenium compliance schedules violates the anti-backsliding provision and the surrounding circumstances fail to trigger an exception, the next step is determining the appropriate effluent limitation to apply to the coal mining operations in an enforcement action. Any attempt to insert less stringent effluent limitations into an NPDES permit will not alter the terms of the permit.²⁹⁵ An extension of a compliance schedule, as a less stringent effluent limitation, fails to effectively modify the permit and the enforcing party may proceed on the original terms of the NPDES permit.

An invalid extension of a compliance schedule is essentially an ineffective modification. When the New Jersey permitting authority settled an enforcement action against an NPDES permittee through a Memorandum of Understanding (MOU), a court found the MOU failed to effectively modify the permit because the MOU violated the anti-backsliding provisions of the CWA.²⁹⁶ The MOU violated the anti-backsliding provision because the agreement contained effluent limitations that "were less stringent than those in the permit."²⁹⁷ The court proceeded to determine the defendant's compliance with the CWA according to the terms of the permit without consideration of the less stringent effluent limits of the MOU.²⁹⁸ Based on this view, EPA and citizen groups may proceed with claims alleging violations of the final effluent limitations for selenium because any extension of the compliance schedule results in an ineffective modification for violating the anti-backsliding provision.

Likewise, the ineffectiveness of an extension of a compliance schedule for selenium is similar to an invalid NPDES permit modification where the permitting authority failed to provide for notice and comment before modifying the NPDES permit. Federal and state regulations require notice and comment before issuing a major modification.²⁹⁹ When the permitting

in Support of Plaintiffs' Motion for Partial Summary Judgment, for Declaratory & Injunctive Relief, & to Schedule Hearing on Scope of Injunctive Relief at 3, *Coal-Mac*, 775 F. Supp. 2d 900 (S.D.W. Va. 2011) (No. 3:10-cv-00833), ECF No. 6; U.S. Env'tl. Prot. Agency, *West Virginia 303(d) Listed Waters for Reporting Year 2008*, http://iaspub.epa.gov/tmdl/attains_impaired_waters.impaired_waters_list?p_state=WV&p_cycle=2008 (last visited Nov. 12, 2011).

²⁹⁵ *Pub. Interest Research Grp. of N.J.*, 822 F. Supp. 174, 185 (D.N.J. 1992).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See 40 C.F.R. §§ 124.5, 124.6, 124.10 (2011) (stating a modification is to be treated as a draft permit, which requires notice and time for commenting prior to modifying the NPDES permit); W. VA. CODE ANN. § 47-30-8.2 (West 2011) (requiring a draft permit and public notice procedures).

authority fails to follow the basic notice and comment procedures required to effectively modify the permit, the enforcing party can proceed on the original terms of the permit.³⁰⁰ Thus, EPA and citizen groups may enforce the final selenium effluent limitations written into the NPDES permits because any extension of the compliance schedule is simply an invalid modification.

VII. CONCLUSION

The profits derived from America's dependence upon cheap energy sources made several coal giants in Appalachia extremely wealthy.³⁰¹ To further increase profits, the coal companies artfully mastered the use of compliance schedules in NPDES permits to delay compliance with costly selenium effluent limitations. This use of compliance schedules in NPDES permits provides another hurdle for EPA and citizen groups to overcome in attempting to stop the degradation of the water quality in the region. Although the CWA allows the use of compliance schedules, the provisions of the CWA also provide the answers for combating the abusive use of compliance schedules by coal mining operations. The battle and potential victory for EPA and citizen groups comes down to adequately enforcing the CWA.

In West Virginia, the struggle to enforce final effluent limitations for selenium turns on the effectiveness of the compliance schedules included in the terms of the coal industry's NPDES permits. With the state agency's appeals board issuing a stay of the final effluent limitation for selenium, any party seeking to combat the discharge of selenium must either challenge the authority of EQB to issue the stays or challenge any extension of the compliance schedules as violating the anti-backsliding provision.

EQB likely possesses the legal authority to issue a stay to delay the effectiveness of selenium effluent limitations. Whether or not EQB issued the stay on a proper interpretation of what constitutes unjust hardship is a question of state law.³⁰² A West Virginia state court, aware of the vital role coal mining plays in the economy of the state, is likely to give EQB the necessary discretion to determine what qualifies as unjust hardship.³⁰³ Regardless of whether the EQB's stay falls within state statutory authority, the actions by EQB show the state's process for dealing with appeals violates the CWA by modifying the NPDES permits without following the required procedure and stripping EPA of its permit review power.

³⁰⁰ See *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999) (adopting the district court's finding of liability for violations of the permit because the state agency's orders failed to modify the permit); *Pa. Pub. Interest Research Grp., Inc. v. P.H. Glatfelter Co.*, 128 F. Supp. 2d 747, 760 (M.D. Pa. 2001) (applying the original permit terms to find violations because the adjudication failed to follow the required procedures for modification).

³⁰¹ Yan, *supra* note 3.

³⁰² See *supra* Part V.B.2.

³⁰³ SHNAYERSON, *supra* note 103, at 9 (remarking at the ability of the coal industry to buy political influence and push for loopholes in laws).

EPA and citizens may also challenge an extension of the compliance schedules for violating the anti-backsliding provision. An extension of a compliance schedule is a less stringent effluent limitation backsliding upon the original permit terms. Parties seeking to enforce violations of the final effluent limitations may proceed on the original terms of the permits. Challenging any extension of the compliance schedules for selenium is the more successful manner to attack the use of compliance schedules. The purpose of the anti-backsliding provision is to combat just these types of situations where a state is failing to move NPDES permit requirements towards the goal of zero discharges.³⁰⁴

With several cases in federal court and pending state agency appeals, the coal mining industry's abuse of compliance schedules is coming to an end. The precedent set in West Virginia for how to successfully combat the use of compliance schedules in a statutory framework that envisioned a complete elimination of pollutant discharges will have lasting impacts on how far any industry can go to delay compliance with significant effluent limitations. The compliance schedule is an incredible tool which, when coupled with the right intentions, encourages compliance where an industry is struggling to meet requirements and good faith efforts are being made to comply. The actions of the coal mining industry unfortunately illustrate how this powerful tool can be misused to blacken the beauty of the Appalachian region.

³⁰⁴ See Coplan, *supra* note 93, at 7.