

Legislative & Regulatory Update



Mine Drainage Task Force Symposium

Jason Bostic

West Virginia Coal Association

March 26, 2013

Overview



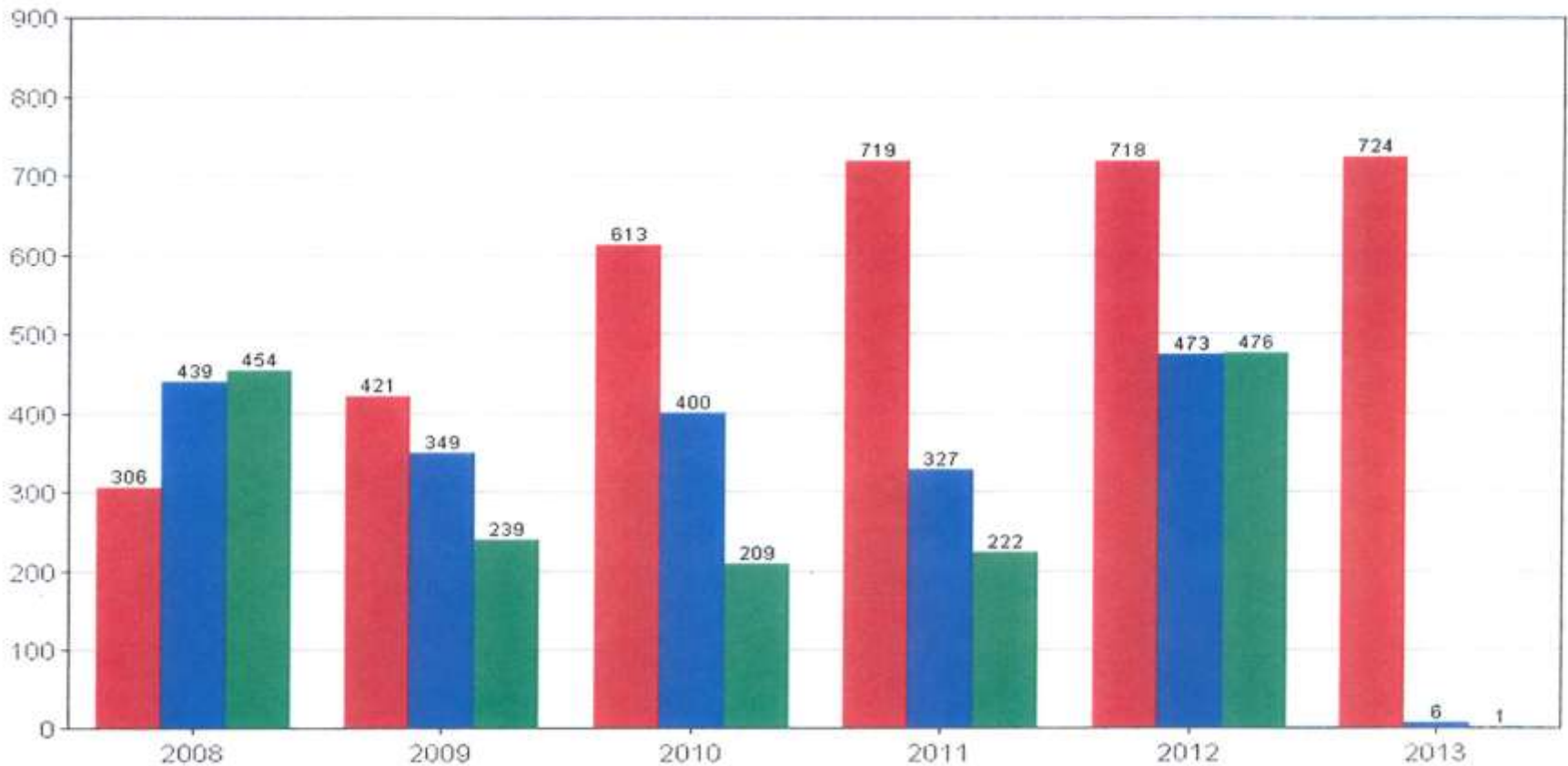
- Regulatory Update
- Legislature and the Coal Industry
- Litigation
- Outlook

Regulatory Update

NPDES Permitting

NPDES Applications - NPD, NPR & Major NPM
Pending, Received, Final Action by Year
For Week Ending 01/06/2013

■ Pending ■ Received ■ Final Actions



Regulatory Update

Water Quality Standards

DEPARTMENT OF ENVIRONMENTAL PROTECTION
EMERGENCY RULE BRIEFING DOCUMENT

Rule Title:

"Requirements Governing Water Quality Standards", 47CSR2

A. AUTHORITY:

W.Va. Code §22-11-4(a)(16); 22-11-7b

B. SUMMARY OF RULE:

This rule establishes requirements governing surface water quality standards for the waters of the State and establishes standards of purity and quality consistent with public health and the enjoyment thereof, the protection of animal, aquatic and plant life and the expansion of employment opportunities, agricultural expansion and a foundation for healthy industrial development.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

The DEP is proposing an emergency rule to revise the dissolved aluminum criteria and human health category A beryllium criterion in 47CSR2.

Current scientific studies show a direct relationship between the hardness concentration and the toxicity of dissolved aluminum in waters with a pH value of 6.5 to 9.0. This evidence provides an equation using stream hardness concentration that will accurately calculate the dissolved aluminum criteria necessary to protect the uses of warm and trout waters of WV.

The current human health Category A beryllium criterion is being updated to reflect EPA's maximum contaminant level goal (MCLG) of 0.004 mg/l. The MCLG represents the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety.

Unnecessary treatment costs for a portion of the regulated community and the inclusion of many waters on the DEP's 303(d) list that are not impaired will occur without this revised dissolved aluminum and beryllium criteria. An emergency rule is therefore justified as necessary to prevent substantial harm to the public interest.

See attached "Emergency Rule Justification" for further discussion of emergency circumstances.

Emergency Rule- Revise WQS

- **Beryllium from 0.0077 ug/L to 4 ug/L**
- **Aluminum to Hardness-based standard**

- Certified by the Secretary of State on March 12, 2013
- Public hearing on March 27, 2013
- Off to EPA for Approval (cautiously optimistic)

2013 Regular Session of the Legislature



Started Feb. 13

42 Days of the 60 Day Session

Ends April 13 at Midnight

1,700 Bills Introduced

About 100 related to coal in some form or fashion



2013 Regular Session of the Legislature



Things are a little different this year...

54 Democrats
46 Republicans
Coal Miner Elected as
Republican from Boone
County



2013 Regular Session of the Legislature

Coal Caucus



Weekly briefing for House of Delegates members:

- Coal Industry Basics
- Consumption information
- Specific legislative topics

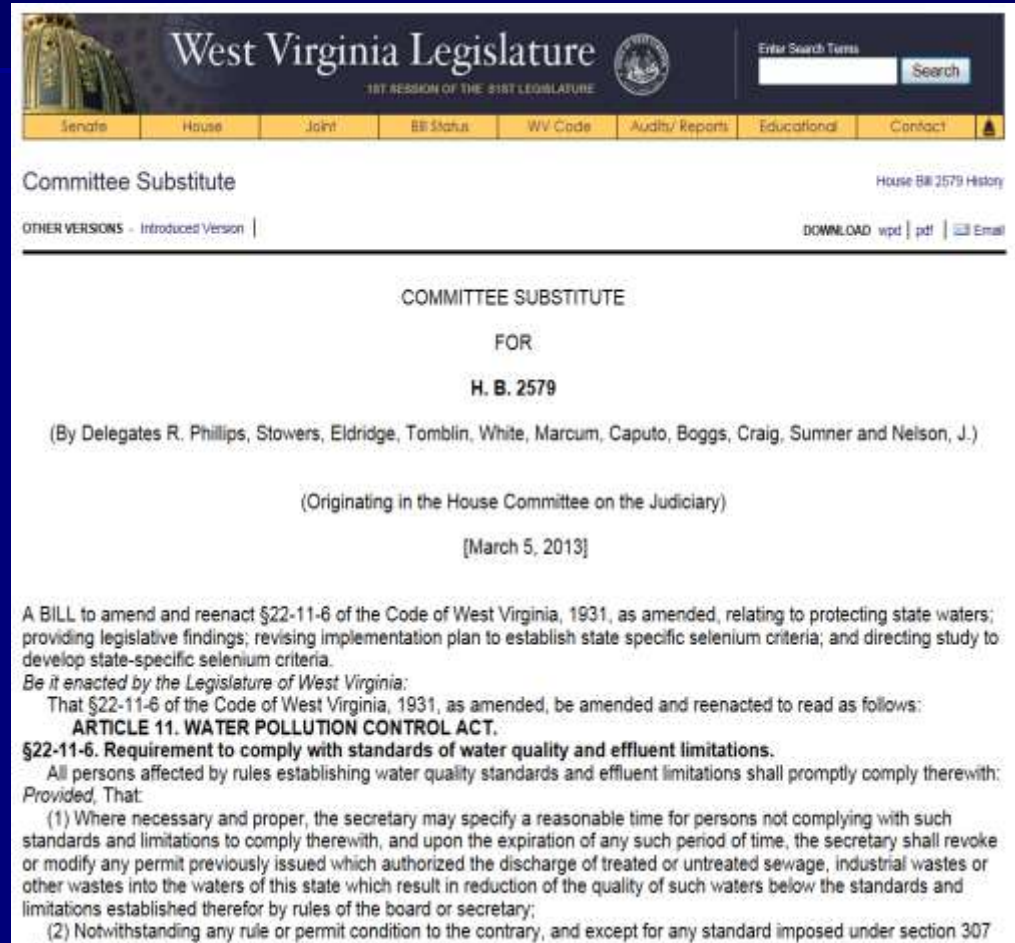
Very Successful Initiative

Attendance at first meeting– 20 members of the House

Latest meeting– 62 House members

Specifics– Legislature & Coal Water Quality

- House Bill 2579
- *Selenium*
 - Convert WQStds to threshold criteria
 - Exceed threshold, conduct monitoring
 - Impact observed, standards effective
 - Collection of information to develop state-specific standard



West Virginia Legislature
187 SESSION OF THE 51ST LEGISLATURE

Enter Search Terms

Senate House Joint BF Status WV Code Audits/ Reports Educational Contact

Committee Substitute House Bill 2579 History

OTHER VERSIONS - Introduced Version DOWNLOAD wpd | pdf | Email

COMMITTEE SUBSTITUTE
FOR
H. B. 2579

(By Delegates R. Phillips, Stowers, Eldridge, Tomblin, White, Marcum, Caputo, Boggs, Craig, Sumner and Nelson, J.)

(Originating in the House Committee on the Judiciary)

[March 5, 2013]

A BILL to amend and reenact §22-11-6 of the Code of West Virginia, 1931, as amended, relating to protecting state waters; providing legislative findings; revising implementation plan to establish state specific selenium criteria; and directing study to develop state-specific selenium criteria.

Be it enacted by the Legislature of West Virginia:

That §22-11-6 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 11. WATER POLLUTION CONTROL ACT.

§22-11-6. Requirement to comply with standards of water quality and effluent limitations.

All persons affected by rules establishing water quality standards and effluent limitations shall promptly comply therewith; *Provided, That:*

(1) Where necessary and proper, the secretary may specify a reasonable time for persons not complying with such standards and limitations to comply therewith, and upon the expiration of any such period of time, the secretary shall revoke or modify any permit previously issued which authorized the discharge of treated or untreated sewage, industrial wastes or other wastes into the waters of this state which result in reduction of the quality of such waters below the standards and limitations established therefor by rules of the board or secretary;

(2) Notwithstanding any rule or permit condition to the contrary, and except for any standard imposed under section 307

WEST VIRGINIA HOUSE OF DELEGATES

2013 FIRST REGULAR SESSION

HB 2579

Revising state water quality
standard for Selenium

RCS# 17
3/08/2013
11:30 AM

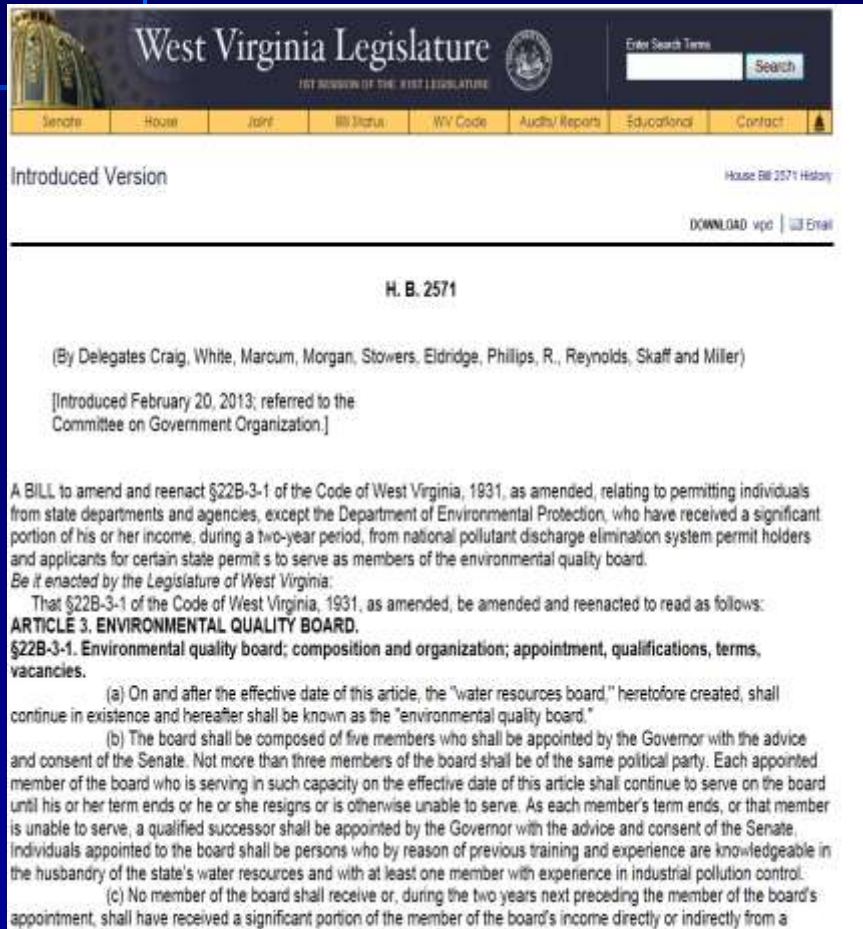
PASSAGE

YEAS: 99 NAYS: 0 NOT VOTING: 1 PASSED

YEAS: 99



Specifics— Legislature & Coal Environmental Quality Board



The screenshot shows the West Virginia Legislature website. At the top, there is a navigation bar with links for Senate, House, Joint, Bill Status, WV Code, Audio Reports, Educational, and Contact. Below this, the page is titled "Introduced Version" for "House Bill 2571 History". There are options to "DOWNLOAD" or "Email" the document. The bill number "H. B. 2571" is prominently displayed. Below the bill number, it states "(By Delegates Craig, White, Marcum, Morgan, Stowers, Eldridge, Phillips, R., Reynolds, Skaff and Miller)". The introduction date is "[Introduced February 20, 2013; referred to the Committee on Government Organization.]". The main text of the bill is as follows:

A BILL to amend and reenact §22B-3-1 of the Code of West Virginia, 1931, as amended, relating to permitting individuals from state departments and agencies, except the Department of Environmental Protection, who have received a significant portion of his or her income, during a two-year period, from national pollutant discharge elimination system permit holders and applicants for certain state permits to serve as members of the environmental quality board.

Be it enacted by the Legislature of West Virginia:

That §22B-3-1 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 3. ENVIRONMENTAL QUALITY BOARD.

§22B-3-1. Environmental quality board; composition and organization; appointment, qualifications, terms, vacancies.

(a) On and after the effective date of this article, the "water resources board," heretofore created, shall continue in existence and hereafter shall be known as the "environmental quality board."

(b) The board shall be composed of five members who shall be appointed by the Governor with the advice and consent of the Senate. Not more than three members of the board shall be of the same political party. Each appointed member of the board who is serving in such capacity on the effective date of this article shall continue to serve on the board until his or her term ends or he or she resigns or is otherwise unable to serve. As each member's term ends, or that member is unable to serve, a qualified successor shall be appointed by the Governor with the advice and consent of the Senate. Individuals appointed to the board shall be persons who by reason of previous training and experience are knowledgeable in the husbandry of the state's water resources and with at least one member with experience in industrial pollution control.

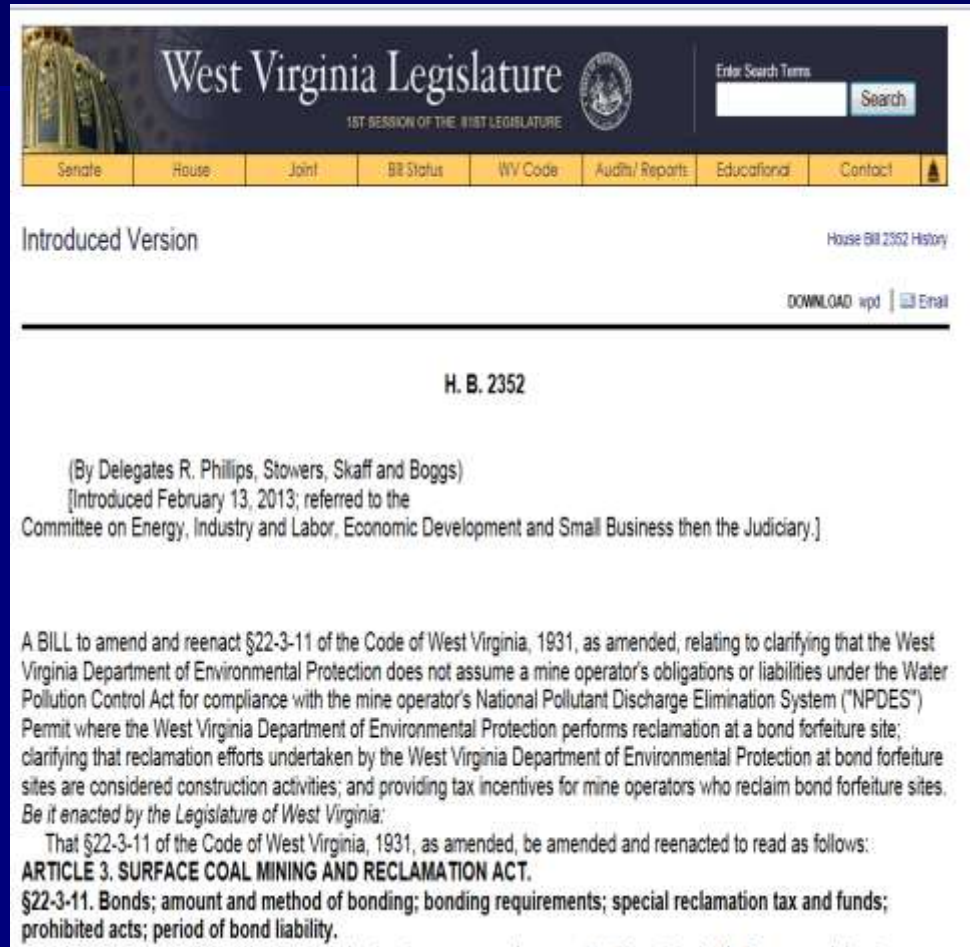
(c) No member of the board shall receive or, during the two years next preceding the member of the board's appointment, shall have received a significant portion of the member of the board's income directly or indirectly from a

- House Bill 2571 Removes more stringent language that prevents former state employees from serving on the EQB

Specifics— Legislature & Coal

"Special Reclamation Fund Fix-It"

- House Bill 2352
 - Clarifies NPDES Liability at SRF sites
 - Termination of Jurisdiction
 - Tax Credit for Voluntary Reclamation of SRF sites



The screenshot shows the West Virginia Legislature website. At the top, there is a navigation bar with links for Senate, House, Joint, Bill Status, WV Code, Audit/ Reports, Educational, and Contact. A search box is also present. Below the navigation bar, the page is titled "Introduced Version" and "House Bill 2352 History". There are links for "DOWNLOAD wpd" and "Email". The main content area displays "H. B. 2352" and its authors: "(By Delegates R. Phillips, Stowers, Skaff and Boggs)". It also notes the bill was introduced on February 13, 2013, and referred to the Committee on Energy, Industry and Labor, Economic Development and Small Business then the Judiciary. The bill's purpose is described as amending and reenacting §22-3-11 of the Code of West Virginia, 1931, to clarify that the West Virginia Department of Environmental Protection does not assume a mine operator's obligations or liabilities under the Water Pollution Control Act for compliance with the mine operator's National Pollutant Discharge Elimination System ("NPDES") Permit where the West Virginia Department of Environmental Protection performs reclamation at a bond forfeiture site; clarifying that reclamation efforts undertaken by the West Virginia Department of Environmental Protection at bond forfeiture sites are considered construction activities; and providing tax incentives for mine operators who reclaim bond forfeiture sites. The bill is enacted by the Legislature of West Virginia. The specific text of the bill is as follows: "That §22-3-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows: **ARTICLE 3. SURFACE COAL MINING AND RECLAMATION ACT.** §22-3-11. Bonds; amount and method of bonding; bonding requirements; special reclamation tax and funds; prohibited acts; period of bond liability."

Specifics— Legislature & Coal *NPDES Administrative Enforcement*



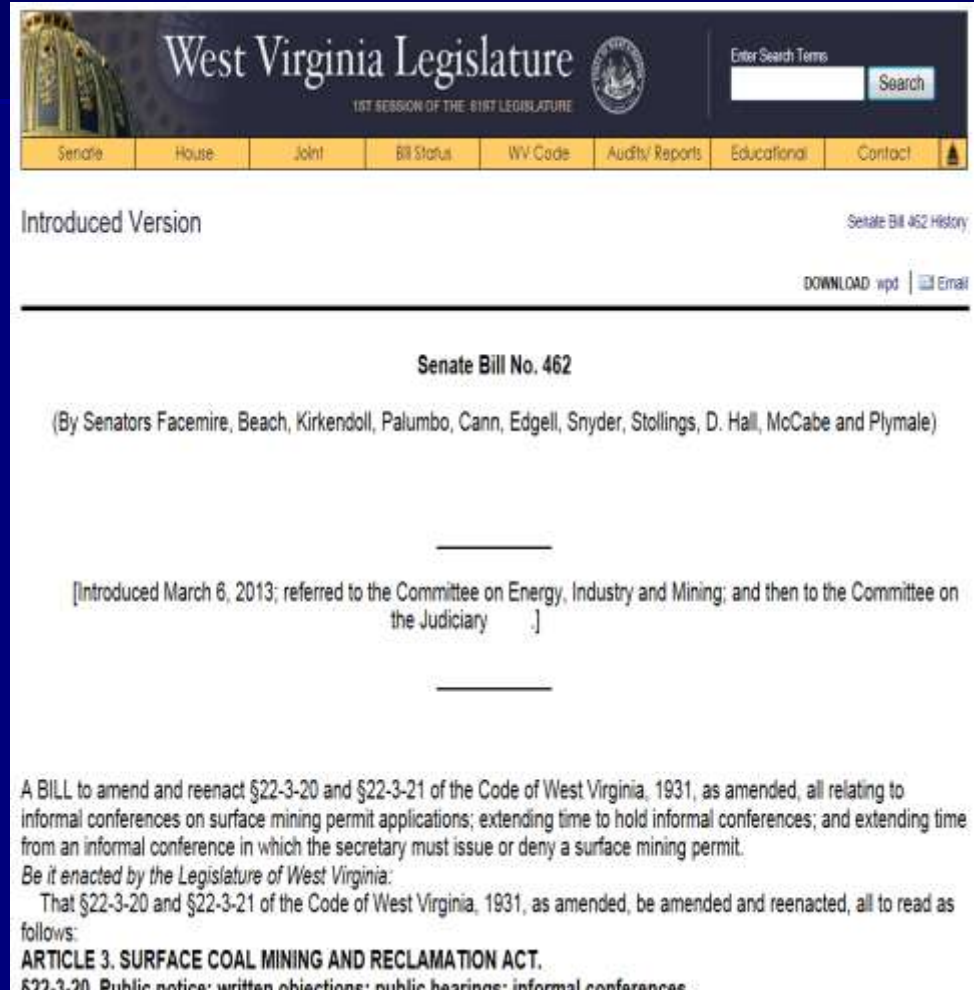
The screenshot shows the West Virginia Legislature website. At the top, there is a navigation bar with links for Senate, House, Joint, Bill Status, WV Code, Audit/Reports, Educational, and Contact. Below this, the page title is "Introduced Version" and the bill number is "House Bill 3071 History". There are links for "DOWNLOAD pdf" and "Email". The main content area displays "H. B. 3071" and "(By Delegates Pino and Perry)". Below this, it states "[Introduced March 22, 2013; referred to the Committee on the Judiciary then Finance.]". At the bottom, there is a summary: "A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §22-11-22a, relating to civil penalties and civil administrative penalties for violations of the Water Pollution Control Act."

- ****House Bill 3071****
 - Conforms CWA enforcement process for coal mining to federal standards**
 - Addresses adverse federal court decision**
 - New authority to state in administrative enforcement process**

Specifics— Legislature & Coal

SMCRA Informal Conferences

- Senate Bill 462
 - Conforms state law to federal code regarding informal conferences under SMCRA
 - Addresses adverse Surface Mine Board Decision
 - Three weeks to “reasonable time”
 - 30 days to 60 days for permit decision



The screenshot shows the West Virginia Legislature website. At the top, there is a navigation bar with links for Senate, House, Joint, Bill Status, WV Code, Audit/ Reports, Educational, and Contact. A search bar is also present. Below the navigation bar, the page title is "Introduced Version" and "Senate Bill 462 History". There are links for "DOWNLOAD wpd" and "Email". The main content area displays "Senate Bill No. 462" and lists the sponsors: "(By Senators Facemire, Beach, Kirkendoll, Palumbo, Cann, Edgell, Snyder, Stollings, D. Hall, McCabe and Plymale)". Below this, there is a line indicating the bill was introduced on March 6, 2013, and referred to the Committee on Energy, Industry and Mining, and then to the Committee on the Judiciary. The bottom section of the screenshot shows the beginning of the bill's text: "A BILL to amend and reenact §22-3-20 and §22-3-21 of the Code of West Virginia, 1931, as amended, all relating to informal conferences on surface mining permit applications; extending time to hold informal conferences; and extending time from an informal conference in which the secretary must issue or deny a surface mining permit. Be it enacted by the Legislature of West Virginia: That §22-3-20 and §22-3-21 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows: ARTICLE 3. SURFACE COAL MINING AND RECLAMATION ACT. §22-3-20. Public notice; written objections; public hearings; informal conferences."

Specifics— Legislature & Coal

NPDES Permitting

COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 615

(By Senators Kirkendoll, Hall, Wells and Stollings)

[Originating in the Committee on the Judiciary;
reported February 24, 2012.]

A BILL to amend and reenact §22-11-6 of the Code of West Virginia, 1931, as amended, relating to making West Virginia's Water Pollution Control Act consistent with the federal Water Pollution Control Act, also known as the Clean Water Act, by clarifying that compliance with the effluent limits contained in a National Pollution Discharge Elimination System permit is deemed compliant with West Virginia's Water Pollution Control Act.

- Senate Bill 243
(Rulemaking)
- *Implements SB 615 (2012) Coal Mining NPDES Conformity Act of 2012*
 - Removes Unique Provision of Coal Mining NPDES Rule that Requires Compliance with WQStds Regardless of Effluent Limits

Litigation

Conductivity Guidance Document



July 31, 2012

Judge Reggie Walton:

“The Court must conclude that the Final Guidance impermissibly sets a conductivity criterion for water quality. The EPA has, therefore, overstepped the authority afforded to it by the CWA.”

“Despite its Claims the Guidance and Permit Comments Were Non-binding Suggestions, EPA Clearly Used a Comply or Else Strategy against the States”

Litigation

Environmental Quality Board- Narrative Standard

Same days as the Walton decision, EQB held that WV DEP must include conductivity / TDS limits to protect state's narrative standard using EPA's guidance document

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PATRIOT MINING COMPANY, INC.,
Petitioner,
and
THOMAS L. CLARKE, DIRECTOR,
DIVISION OF MINING AND RECLAMATION,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Petitioner,
v.
SIERRA CLUB,
Respondent.

FILED
2012 FEB 13 PM 3:35
LARRY S. BROWN, CLERK
KANAWHA COUNTY CLERK'S OFFICE

Civil Action No. 11-AA-102
Civil Action No. 11-AA-104
(Consolidated)
Judge James C. Stucky

FINAL ORDER

This matter comes before the Court on Petitioner Patriot Mining Company, Inc. (hereinafter "Patriot") and Petitioner Thomas L. Clarke, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection (hereinafter "WVDEP") "Petitioner for Appeal" filed August 30, 2012, from a Final Order of the Environmental Quality Board (hereinafter "EQB"). After reviewing the Petition, the entire record, and the applicable legal authority, this Court **REVERSES** the decision of the EQB.

1. This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 et seq. West Virginia Code § 29A-5-4(g) states:

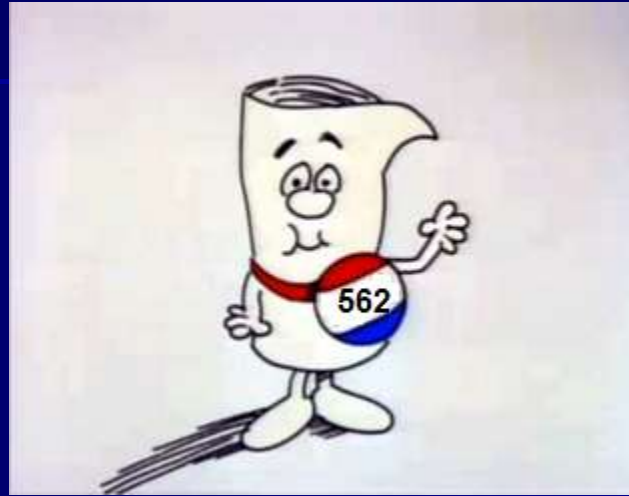
The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been

1

"...it is evident that the EQB accorded no deference to WV DEP's interpretation of water quality standards... the EQB orders that EPA's Guidance be followed... this Court finds that to apply EPA's Guidance would infringe on WV DEP's authority. Therefore, the Court concludes the EQB's decision was arbitrary and capricious."

Assessment

2009-2013



Strategy to Preserve State Authority under the CWA and SMCRA is Correct



"EPA engaged in magical thinking to reach an illogical and impractical conclusion."



Outlook / Assessment 2013



Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.

Outlook / Assessment 2013

January 25, 2013

Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: 60-Day Notice of Intent to File Citizens Suit Under Clean Water Act Section 505(a) for Failure to Perform a Non-Discretionary Duty under Section 303(d) of the Act.

Dear Ms. Jackson,

The Sierra Club, West Virginia Highlands Conservancy, and Ohio Valley Environmental Coalition (collectively "the Groups") in accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365 and 40 C.F.R. Part 135, hereby notify you that you have failed to perform acts and duties pursuant to Sections 303(c) and (d) of the Act that are not discretionary. If you do not remedy this failure within the next sixty days, the Groups intend to file suit.

- I. The EPA Administrator Has Violated Her Non-Discretionary Duty to Approve or Deny West Virginia's 303(d) List Within the Requisite 30-day Period.



500 LEE STREET EAST • SUITE 1600 • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-348-1200 • TELECOPIER: 304-348-1130

www.jacksonkelly.com

crisjackson@jacksonkelly.com

304-348-1281

March 4, 2013

VIA CERTIFIED MAIL

91 7108 2133 3935 9063 6722

Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

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

Dear Mr. Perciasepe:

You are hereby notified pursuant to § 505(b)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(b)(2), that the West Virginia Coal Association ("WVCA") and/or some of its members intend to institute a civil action against you, as Administrator of the U.S. Environmental Protection Agency ("EPA"), pursuant to § 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), for failure to perform a non-discretionary duty under § 303 of the CWA.

High-Stakes Game of Brinkmanship Regarding the Role of Federal Government under CWA will Continue: Test the Walton, Jackson Decisions

Outlook / Assessment 2013

May Have Similar Path to
Follow Under SMCRA

-Stream Protection Rule
-Ten Day Notices from
OSM to correct
“permitting defects”

Recent TDNs from OSM:

1. NPDES Permitting
(Senate Bill 615)

2. SRF Sites

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of Surface Mining
Reclamation and Enforcement
TEN-DAY NOTICE

Originating Office: Charleston Field Office
US SO, Office of Surface Mining
1817 Virginia Street, East
Charleston, WV 25301

number: 2013-115-00-000 TV 2 Telephone Number: (304) 343-7100

Ten-Day Notice to the State of West Virginia

You are notified that, as a result of Citizen information (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.


Permitter: KEENAR TRUCKING CO INC County: Surface
or Operator (if not permittee) Underground
Mailing Address: PO BOX L, CEDAR GROVE, WV 26009 Other
Permit Number: UD-000 Mine Name:

01 NATURE OF VIOLATION AND LOCATION
Failure to protect the hydrologic balance, as further clarified under WV Code 20-2-7(d)(2), 20-2-7(e), 20-2-12.6 and 20-2-14.6.a.1
Section of State Law, Regulation or Permit: 20-2-7(e)
Condition believed to have been violated:

02 NATURE OF VIOLATION AND LOCATION
Failure to prevent material storage to the hydrologic balance, as further clarified under WV Code 20-2-7(d)(2), 20-2-12.6, 20-2-12.6.a and 20-2-14.6.a.1
Section of State Law, Regulation or Permit: 20-2-7(e)
Condition believed to have been violated:

03 NATURE OF VIOLATION AND LOCATION
Discharge from areas disturbed by surface mining shall not cause a violation of applicable effluent limitations and State and Federal water quality standards
Section of State Law, Regulation or Permit: 20-2-7(e)
Condition believed to have been violated:

Remarks or Recommendations:

Date of Notice: 03/13/2013 Signature of Authorized Rep: 
Print Name and Title: Gregory Mitchell ID# 423

RECEIVED
Office of Mining & Reclamation
MAY 1 3 2013

Page 1 of 1
Revised 1/08



Thank You!