

**THE SWITCH THAT CAUSED A STORM:
CONSOLIDATING WEST VIRGINIA’S SURFACE MINING AND WATER
PROTECTION PROGRAMS**

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I. INTRODUCTION

Two main statutes in the United States govern the processes for treating and discharging water that has been affected by coal mining: the Clean Water Act (CWA)¹ and the Surface Mine Control and Reclamation Act (SMCRA).² The CWA governs the discharge of that water from a point source into waters of the United States,³ and the SMCRA governs the process of surface mining and treating the water that comes into contact with the disturbed area.⁴

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¹ Clean Water Act, 33 U.S.C. §§ 1311–1387 (2013) [hereinafter CWA].

² Surface Mine Control and Reclamation Act, 30 U.S.C. §§ 1201–1238 (2013) [hereinafter SMCRA].

³ See *infra* Part II.A.

⁴ See *infra* Part II.B.

In 1984, the West Virginia Department of Natural Resources consolidated the surface mine and water protection programs into one scheme for coal mining facilities.⁵ This paper argues that the consolidation of these two regulatory programs brought forth a storm of negative effects the state is still facing today. Specifically, this paper argues that the switch caused an inconsistency in application of the regulations across industries and an inconsistency in interpretation between federal and state governments.

Part II of this paper provides the regulatory background of these programs on both federal and state levels. Part III discusses the regulatory switch in detail. Part IV discusses the storm that followed the switch, detailing each of the areas that have been negatively impacted. Part V concludes the paper with a discussion of the uncertain future resulting from the storm.

II. BACKGROUND: REGULATING COAL AND WATER

The following parts discuss the federal laws and their state counterparts that govern surface coal mining and clean water. Part II.A examines the Surface Mining Control and Reclamation Act. Part II.B looks at the Federal Water Pollution Control Act, commonly known as the Clean Water Act. Part II.B will also discuss the history of the act and how the act works to protect the waters of the United States. Part II.C will discuss the state counterparts of those acts. Part II.D will explain the federal Administrative Procedure Act and its state counterpart, the West Virginia Administrative Procedures Act.

A. *The Clean Water Act*

The Clean Water Act was first enacted by Congress in 1948.⁶ Congress originally set up the Act to focus on ambient water quality standards of an entire body of water,⁷ but amendments to the Act that were passed in 1972 changed the focus to the individual polluters of the water themselves.⁸ In order to institute this focus on the individual polluters, the amendments implemented a scheme of maximum effluent limitations.⁹ Under this scheme, an “effluent limitation” was established as a restriction on the concentration of chemicals that are discharged from a point source.¹⁰ With this scheme in place, regulating bodies could better focus on the quality of the body of water

⁵ See *infra* Part III.

⁶ Federal Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat. 1155.

⁷ *Id.*

⁸ Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816.

⁹ *Id.*

¹⁰ *Id.*

in its entirety by regulating the discharges from the point sources of each discharging entity separately.¹¹

1. Creation of the NPDES System

The crux of the change ushered in by the amendments was the implementation of the National Pollutant Discharge Elimination System (NPDES).¹² This new system requires a discharger to apply for an NPDES permit if it has the potential to discharge any pollutants from a point source.¹³ Once awarded the permit, the discharger may then discharge limited amounts of effluents, as detailed in the permit, into the nation's waters.¹⁴ Once the application and data is received by the permitting agency, the agency determines what pollutants the applying entity has a reasonable potential to discharge.¹⁵ Using that information, the agency applies effluent limitations to the permit that determine the level at which the permit holder can discharge those effluents.¹⁶ The discharging entity, with the permit approved, can now legally discharge certain amounts of pollutants into the nation's waters, so long as it maintains those effluent limitations.¹⁷

2. The Permit Shield Provision

The "permit as a shield" clause is another important part of the Act that came with the 1972 amendments.¹⁸ The permit shield clause says that "compliance with a permit . . . shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, and with sections 1311, 1312, 1316, 1317, and 1343 of this title . . ." ¹⁹ In other words, this section means that compliance with a discharger's NPDES permit amounts to compliance with the whole Act, and therefore shields the permit holder from liability.²⁰

The EPA itself has proclaimed that so long as the permit applicant fully discloses the relevant information regarding possible pollutants, the permit applicant has done its due diligence and should be shielded from liability for pollutants for which the agency did not see a need to establish effluent limitations.²¹ The Supreme Court has also applied this interpretation to the permit as a shield clause: "[t]he purpose of [the permit shield

¹¹ *Id.*

¹² *Id.* at 880.

¹³ CWA, 33 U.S.C. § 1342(a) (2014).

¹⁴ *Id.*

¹⁵ *Id.* § 1342(a)(2).

¹⁶ *Id.* § 1342(a).

¹⁷ *Id.*

¹⁸ *Id.* § 1342(k).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 EPA App. LEXIS 85 (Env'tl. Appeals Board 1998).

provision] seems to be to insulate permit holders . . . and to relieve them of having to litigate in an enforcement action the question of whether their permits are sufficiently strict.”²²

3. West Virginia Counterpart

In order to administer its own Clean Water Act and NPDES program, a state must seek authorization from the EPA.²³ Even with this authorization, the EPA maintains authority to withdraw its approval of a state’s program if the state is not administering its program in accordance with section 1342(c)(3) of the federal act.²⁴ West Virginia received approval to administer its own NPDES program in 1982, and does so through the West Virginia Department of Environmental Protection (WVDEP).²⁵ State regulations provide the conditions that are applicable to all NPDES permits granted by the WVDEP. The regulations also provide that these conditions must be incorporated into the permit by reference or expressly.²⁶ Specifically, the rules state that the permit holder must comply with all effluent standards established under the Clean Water Act²⁷ and that the permit holder’s discharges must not violate the applicable water quality standards adopted by the WVDEP.²⁸

B. *The Surface Mine Control and Reclamation Act*

The other important piece of federal legislation passed involving coal mining was the Surface Mine Control and Reclamation Act (SMCRA).²⁹ SMCRA was passed to ensure that, after surface mining was completed, the land would be reclaimed to a useable state.³⁰ According to the Act, any potential surface coal-mining operator must apply for and obtain a permit before mining may commence.³¹

²² E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977).

²³ *Id.* at 119.

²⁴ *Id.* at 139 n.7.

²⁵ Ohio Valley Env’tl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 190 (4th Cir. 2009).

²⁶ W. VA. CODE R. § 47-30-5 (2013).

²⁷ *Id.* § 47-30-5.1.b.

²⁸ *Id.* § 47-30-5.1.f.

²⁹ SMCRA, 33 U.S.C. §§ 1201–1238 (2013).

³⁰ Bragg v. W. Va. Coal Ass’n, 248 F.3d 275, 288 (4th Cir. 2001) (“The Surface Mining Control and Reclamation Act (‘SMCRA’) was enacted to strike a balance between the nation’s interests in protecting the environment from the adverse effects of surface coal mining and in assuring the coal supply essential to the nation’s energy requirements.”).

³¹ SMCRA, 30 U.S.C. § 1256 (2013); *see also* Ohio Valley Env’tl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 190 (4th Cir. 2009) (“[A]nyone wishing to engage in surface coal mining operations within the state must first obtain a permit from the state’s regulatory authority.”).

SMCRA employs cooperative federalism so that the regulation of surface mining can be shared between the state and federal governments.³² For a state's program to be approved by the Secretary of the Interior, the state must first pass a law that sets forth the same minimum national standards that the federal act requires, and then must demonstrate that it has the ability to enforce those minimum standards within its borders.³³ West Virginia gained approval of its surface mine program in 1981³⁴ and passed the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA).³⁵

C. *The West Virginia Administrative Procedure Act*

One final statute to consider is the West Virginia Administrative Procedure Act (WVAPA).³⁶ Similar to the federal Administrative Procedure Act, the WVAPA establishes the procedures state agencies must follow when they promulgate rules and regulations.³⁷ Specifically, the WVAPA requires an agency to file a notice of proposed rulemaking when it intends to promulgate a rule.³⁸ Included in that notice of proposed rulemaking must be a copy of the full text of the proposed rule.³⁹ The WVAPA also requires that the notice provide details on the opportunity for public comment, and then the agency must actually provide that opportunity.⁴⁰

The WVAPA does differ from the federal statute in some ways, however. For example, according to the WVAPA, when a state agency approves a rule after the public comment period is complete, that rule must be sent to the Legislative Rulemaking Committee for review.⁴¹ Once the committee reviews the rule, it may send the rule to the legislature and recommend its adoption.⁴² If the legislature accepts the recommendation of the rulemaking committee, the legislature will enact a bill authorizing the promulgated rule, making it official.⁴³

³² *Bragg*, 248 F.3d at 288.

³³ *Id.*

³⁴ *Id.* at 289.

³⁵ *Id.*

³⁶ W. VA. CODE §§ 29A-1-1 to 7-4 (2013).

³⁷ *Id.* § 29A-1-1.

³⁸ *Id.* § 29A-3-5.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* § 29A-3-11.

⁴² *Id.* § 29A-3-11(d).

⁴³ *Id.* § 29A-3-12(a).

III. THE SWITCH

With the regulatory framework described above in mind, the following Part looks at the switch that was made concerning these regulations in West Virginia that consolidated the state's surface mine and water protection programs for coal facilities.

West Virginia gained primacy of its NPDES program in 1982⁴⁴ and primacy of its surface mine control program in 1981.⁴⁵ The West Virginia Department of Natural Resources (WVDNR, the predecessor to the WVDEP) was in charge of issuing both types of permits discussed above and thereby regulating water pollution and surface coal mining.⁴⁶ In May 1984, the WVDNR filed with the secretary of state a Notice of Proposed Rulemaking (NPRM) providing a proposed rule that sought to consolidate West Virginia's surface mining program and water pollution control program.⁴⁷ The two programs were consolidated to streamline the administrative procedures of obtaining WVSCMRA and NPDES permits for coal mining facilities only.⁴⁸ Per the WVAPA, the WVDNR also issued a notice of public comment on the proposed rule, so as to get public comment as per the requirements of the WVAPA.⁴⁹ The text of the entire proposed rule, also required by the WVAPA,⁵⁰ made no mention of any additional changes to the programs outside of consolidation.⁵¹

The public comment period ran its course, and in October 1984, the WVDNR filed its final rule concerning the consolidation of these two permits with the secretary of state.⁵² Importantly, this final rule to be sent to the Legislative Rulemaking Committee included a change in wording not included in the original rule that equated water quality standards with effluent limitations.⁵³ This final version was recommended for adoption by the West Virginia Legislature and was adopted as law on December 14, 1984.⁵⁴ The

⁴⁴ See *supra* note 25 and accompanying text.

⁴⁵ See *supra* note 34 and accompanying text.

⁴⁶ See Memorandum in Support of Motion for Summary Judgment by Defendants at 24, *Ohio Valley Env'tl. Coal. Inc. v. Alex Energy, Inc.*, No. 2:12-3412, 2013 WL 6162954 (S.D.W. Va. Nov. 18, 2013).

⁴⁷ Letter from William H. Hertig, Jr., Chairman of W. Va. Dept. of Natural Res. Reclamation Comm'n, to A. James Manchin, Sec'y of State (May 8, 1984), available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15238&Format=PDF>.

⁴⁸ See Memorandum in Support of Motion for Summary Judgment by Defendants, *supra* note 46, at 24.

⁴⁹ Press Release, W. Va. Dep't of Natural Res., Transfer and Consolidation of Water Pollution Control Program—Notice of Pub. Hearing (For Release May 25, 1984), available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15239&Format=PDF>.

⁵⁰ W. VA. CODE § 29A-3-5 (2013).

⁵¹ See Memorandum in Support of Motion for Summary Judgment, *supra* note 46.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ *Rules of Governmental Agencies*, 80 W. VA. REG. 1439 (Dec. 14, 1984), available at <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1375>.

result of this adoption was that NPDES regulations were consolidated with the state's SCMRA regulations for the purposes of coal mining facilities only, and therefore were separated from the regulations for NPDES permits governing non-coal facilities. So, as of December 1984, West Virginia's surface mining control program and water protection program were combined into one regime for coal mining entities only.

IV. THE STORM

The following Part discusses the storm of negative impacts that came after the switch in regulations discussed above. Part IV.A discusses inconsistencies in application that have arisen because of two consolidated regulatory regimes being enforced by one state agency. Part IV.B looks at inconsistencies in interpretation of this rule, focusing on a part of the Clean Water Act known as the permit as a shield clause.

A. *Inconsistencies in Application*

While the issues regulated under WVSCMRA are similar to West Virginia's NPDES program,⁵⁵ the two regulatory programs are also very different. Both programs regulate environmental impacts on land and water and therefore overlap to a certain extent. However, WVSCMRA jurisdiction ends when a pollutant is discharged from a point source and Clean Water Act NPDES jurisdiction takes over after that. This distinction is important for a consistent application of the statute to coal facilities.

WVSCMRA regulations require each entity with a surface mining permit to include a plan for sediment control.⁵⁶ This WVSCMRA permit is issued to the entity by the WVDEP, the state agency in charge of implementing the WVSCMRA.⁵⁷ The surface mining entity must use these sediment control structures to ensure that all water coming into contact with disturbed areas is rid of sediment before it is discharged.⁵⁸ When the water from those sediment control structures is discharged, however, it is considered a discharge from a point source, and thus becomes governed by the entity's WVNPDES permit rather than its WVSCMRA permit.⁵⁹ That NPDES permit is also issued and enforced by the WVDEP, which again has primacy.⁶⁰ In other words, a surface mine's sediment control structures and its discharges from point sources are governed and enforced by the same agency under two different and distinct regulatory schemes.

Practically speaking, when the WVDEP inspector arrives at a surface mine site to do an inspection, he or she might determine that, based on the quality of the water

⁵⁵ See *supra* Part II.A, II.B.

⁵⁶ W. VA. CODE R. § 38-2-5 (2013).

⁵⁷ *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001).

⁵⁸ W. VA. CODE R. § 38-2-5.4.a.

⁵⁹ *Id.* § 38-2-5.b.3; CWA, 33 U.S.C. § 1342 (2013).

⁶⁰ *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.* 556 F.3d 177, 190 (4th Cir. 2009).

downstream from the sediment control structures, the entity is out of compliance with its WVSCMRA permit. Such noncompliance likely would lead the inspector to issue a violation under the WVSCMRA. That issue, however, is an NPDES issue, not a WVSCMRA issue. If the entity is violating water quality standards or effluent limits, even those listed as parameters of concern under SMCRA,⁶¹ it is doing so in violation of its WVNPDES permit, which regulates what can be discharged from point sources, including those point sources that discharge from sediment control structures.⁶² Therefore, if a WVDEP inspector issues a WVSCMRA violation because of discharges from a sediment control structure, the inspector is incorrect. For this mistake to be caught, though, an employee of the surface mining entity has to know the regulations and push back against the state agency.

Similarly, a WVDEP inspector may show up to a surface mine site and do the opposite: issue a violation to a mining company under its WVNPDES permit for failure to maintain the hydrologic balance. However, hydrologic balance issues are regulated by the WVSCMRA permit rather than the WVNPDES permit.⁶³ A company that does not have a strong understanding of the regulations governing WVNPDES permits may not know to challenge such a violation.

These two situations illustrate the possible inconsistencies in application of the two regulatory schemes that arise because of the switch that consolidated them. If an inspector issues a WVSCMRA permit violation that should be governed under the WVNPDES program, and the company fights it, that company may win and the problem would be curtailed. However, if an inspector does the same thing to a company that does not have the knowledge to fight the violation, then the violation may go forward, causing the company to suffer penalties for a violation that should not have been issued under the regulatory scheme the inspector applied. This kind of action amounts to a piecemeal application of these programs from site to site. Such inconsistent application causes more harm than good, and does not further the goals of the West Virginia Surface Coal Mining and Reclamation Act or the West Virginia Water Pollution Control Act.

Because the switch combined the two regulatory programs for coal facilities only, thereby isolating coal facilities, the focus tends to be on SMCRA only. This means that, when an inspector shows up to do an inspection, the inspectors is likely to issue a violation of the WVSCMRA permit, even if the violation is one that belongs under the

⁶¹ SMCRA, 30 U.S.C. §§ 1201–1238 (2013). The purpose of the parameters of concern is to create a red flag to catch the eye of the permitting agency which writes the WVNPDES permits (in this case that agency would still be the WVDEP) to key that agency in on potential discharges to look out for when writing a WVNPDES permit.

⁶² See Memorandum in Support of Motion for Summary Judgment, *supra* note 46 (“Water is released from these [sediment control] structures through ‘outlets,’ which are considered point sources subject to the NPDES permitting program.”).

⁶³ See SMCRA, 30 U.S.C. § 1260(b)(3).

WVNPDES permit.⁶⁴ Rather than be streamlined, the application of the two distinct statutory regimes becomes a mishmash; the NPDES program for these isolated coal facilities gets ignored.

It could be argued that such inconsistency is not really an issue. Even if the violation is issued under the wrong regulatory scheme, does it *really* matter if some environmental problem exists that needs addressing? Is it not easy for the agency to just write another violation if it finds that the first one was issued under the incorrect law? However, this issue does indeed matter. While murder and manslaughter are both crimes of homicide, and are both regulated by the police, the two are very different. The same applies here. The differences between the West Virginia Water Pollution Control Act and WVSCMRA are important, and it is unfair to nonchalantly accuse an entity of violating one statute when in fact that entity violates the other or commits no violation at all.

B. *Inconsistencies in Interpretation*

Another negative effect that came in the storm following the consolidation of these two regulatory programs was an inconsistency in interpretation of the regulations governing the NPDES program. This section discusses that inconsistency using a specific example: the permit as a shield defense⁶⁵ of the Clean Water Act.

The permit as a shield clause of the Clean Water Act protects a discharging entity from suit so long as the entity complies with its permit in its entirety.⁶⁶ In other words, if a discharging entity follows all the rules in applying for an NPDES permit, and then complies with that permit when it discharges pollutants, the entity cannot face a lawsuit for a discharge that turns out to violate effluent limits.⁶⁷ When the WVDNR made the switch discussed above and consolidated West Virginia's SMCRA and NPDES schemes,⁶⁸ the promulgated rule included this permit shield language in the same way it is written in the federal Clean Water Act.⁶⁹ However, the final rule that was sent to the legislature and ultimately approved included a requirement that all discharges not violate state ambient water quality standards.⁷⁰ Because this language was not in the originally

⁶⁴ Citations supporting this proposition are difficult to locate, but the author contends that this difficulty further supports the point. The permitting agency has focused so heavily on issuing citations for WVSCMRA permits only, that a search for case law from the West Virginia Environmental Quality Board turns up no cases where mining entities have challenged violations. Almost all challenges go to the Surface Mine Board, because all violations are issued under WVSCMRA permits, even when they do not belong there.

⁶⁵ CWA, 33 U.S.C. § 1342(k) (2013).

⁶⁶ *Id.*

⁶⁷ *See supra* Part II.A.2.

⁶⁸ *See* Memorandum in Support of Motion for Summary Judgment, *supra* note 46.

⁶⁹ *See id.*

⁷⁰ W. VA. CODE R. § 47-30-5(1)(f) (2013).

promulgated rule, it did not receive public comment, and therefore was not technically passed according to the WVAPA.⁷¹

This language that was never given public comment has allowed environmental plaintiffs to sue surface mining entities for violations of NPDES permits because their discharges do not comply with water quality standards, despite the following: Neither the EPA⁷² nor the West Virginia Legislature⁷³ interprets this language to mean that water quality standards are the same as effluent limitations. Similarly, the WVDEP followed the lead of the West Virginia State Legislature and promulgated a rule confirming that it also did not interpret this language to mean that compliance with water quality standards was required to use the permit shield defense.⁷⁴ Even still, environmental plaintiffs have successfully sued surface mining entities using this same language in federal court because some federal courts have interpreted the language differently.

An example of this different interpretation is found in a decision issued when the Ohio Valley Environmental Coalition sued Marfork Coal Company.⁷⁵ The environmental plaintiff sued Marfork Coal Company for discharging pollutants that violated state-promulgated water quality standards,⁷⁶ even though the chemicals in the discharges were not subjected to effluent limitations in Marfork's WVNPDES permit.⁷⁷ Because Marfork's permit did not include effluent limitations for these chemicals, it moved for summary judgment, arguing that it was not in violation of its permit and therefore could not be sued due to the permit as a shield defense of the Clean Water Act.⁷⁸

The federal district court, however, disagreed with Marfork and found that Marfork was not in compliance with its permit because it violated water quality standards.⁷⁹ The court reasoned that permit holders are shielded from liability only if they are in compliance with all parts of the permit, including compliance with water quality standards not specifically embodied in effluent limitations.⁸⁰ Because of the language that arose from the switch described above, the *Marfork* court was able to find for the

⁷¹ See W. VA. CODE § 29A-3-6(a) (2013); *supra* Part II.C (discussing Administrative Procedures Act).

⁷² *In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (EAB 1998).

⁷³ See S.B. 615, 2012 Leg., Reg. Sess. (W. Va. 2012) (“AN ACT . . . 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.”).

⁷⁴ See W. VA. CODE R. § 47-30-5(1)(f) (2013) (“However, . . . except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.”).

⁷⁵ *Ohio Valley Env'tl. Coal., Inc. v. Marfork Coal Co.*, 966 F. Supp. 2d 667 (S.D.W. Va. 2013).

⁷⁶ *Id.* at 671.

⁷⁷ *Id.*

⁷⁸ *Id.* at 676.

⁷⁹ *Id.* at 685.

⁸⁰ *Id.*

plaintiffs. Even though both the WVDEP and the EPA had interpreted the permit shield clause to protect a discharger from liability as long as it complied with the conditions of its permit, and did not interpret water quality standards to be specific effluent limitations, the switch allowed the federal district court to interpret the water quality standard language in an inconsistent manner.

This inconsistent interpretation—stemming from the switch—turns the entire NPDES system on its head. Even if the discharging entity does what the agency tells it to do and follows the state’s interpretation of the language, a federal court will likely interpret the language differently and hold the company responsible for discharges that should be covered under the company’s license to pollute. Inconsistent interpretations such as this diminish the power of the NPDES permit; if a discharger knows it will likely not be covered even while in compliance with the effluent limitations in its permit, that discharger is more likely to throw caution to the wind and take whatever shortcuts will save it money, knowing litigation will come irrespective of compliance.

V. CONCLUSION

When the West Virginia Department of Natural Resources, predecessor of the West Virginia Department of Environmental Protection, switched the regulations so as to consolidate the state’s surface mine and water protection programs for coal mining facilities only, it caused a storm. That storm had two particular and important effects. First, the switch caused an inconsistency in the way the state applied its WVSCMRA and NPDES regulations. Inspectors now have the opportunity to issue a WVSCMRA violation when the violation on the coal facility should concern the facility’s WVNPDES permit, and vice versa. Unless a company has the wherewithal to push back against the agency when it gets these violations incorrect, the violation will apply. If the company does push back, the agency has the potential to move on and issue the same incorrect violations to a company that does not push back, resulting in an inconsistent and piecemeal application of the regulations and thereby not attaining the goal the regulatory systems were created to reach. The consolidation of these programs allows mistakes to go unnoticed more often than they would otherwise.

Second, the switch caused an inconsistency in the way courts interpret the language of the regulations enforcing the state’s NPDES program. This is especially so when the language pertains to the permit shield clause of the Clean Water Act. Although the EPA, the West Virginia Legislature, and the WVDEP all have clarified that ambient water quality standards are not the same as effluent limits,⁸¹ the *Marfork* decision nonetheless interpreted the WVSCMRA and WVNPDES consolidating language to require compliance with water quality standards in addition to compliance with the specificities of an NPDES permit. Such inconsistency has led to a strong rise in litigation

⁸¹ See *In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (EAB 1998); S.B. 615, 2012 Leg., Reg. Sess. (W. Va. 2012); W. VA. CODE R. § 47-30-5(1)(f) (2013); *supra* text accompanying notes 72–74.

and an unsettled determination of what it really means to be in compliance with an NPDES permit.

It is unclear what the future holds in the wake of this storm. Should federal courts continue to interpret the language of the regulations the way the Southern District of West Virginia did, some effects of the storm discussed above likely will be here to stay, especially the inconsistencies in interpretation between the state and federal agencies and the federal courts. Although there have been legislative attempts to fix some of these ramifications,⁸² those attempts have been abated by the ruling of the federal court for the time being. The switch that caused the storm has been in force for a long time now. It seems that, for the foreseeable future at least, industries and permitted entities affected have no choice but to ride it out.

⁸² See S.B. 615, 2012 Leg., Reg. Sess. (W. Va. 2012); W. VA. CODE R. § 47-30-5(1)(f) (2013); *supra* text accompanying notes 73–74.