

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**OHIO VALLEY ENVIRONMENTAL
COALITION, WEST VIRGINIA RIVERS
COALITION, INC., WEST VIRGINIA HIGHLANDS
CONSERVANCY, INC., GREENBRIER RIVER
WATERSHED ASSOCIATION, INC., COAL
RIVER MOUNTAIN WATCH, WEST VIRGINIA
CITIZEN ACTION GROUP, FRIENDS OF THE
CHEAT, INC., FRIENDS OF THE CACAPON, INC.,
AMERICAN WHITEWATER AFFILIATION, BLUE
HERON ENVIRONMENTAL NETWORK, INC.,
STANLEY HEIRS FOUNDATION, INC.,
CONCERNED CITIZENS COALITION OF ROANE,
CALHOUN AND GILMER COUNTIES, WHEELING
ENVIRONMENTALISTS, FRIENDS OF THE LITTLE
KANAWHA, PLATEAU ACTION NETWORK, INC.,
WINNIE FOX, ELINORE TAYLOR, FRANCIS D.
SLIDER, DENISE GIARDINA, JULIAN MARTIN,
REGINA M. HENDRIX, KATHRYN A. STONE,
DOYLE COAKLEY, ABBY CHAPPLE, and
FRANCES LATTERELL,**

Plaintiffs,

v.

CIVIL ACTION NO.

**CHRISTIE WHITMAN, Administrator,
United States Environmental Protection Agency,**

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks review of a November 26, 2001 decision by the U.S. Environmental Protection Agency (“EPA”) to approve West Virginia’s antidegradation

implementation procedures--60 Code of State Regulation, Series 5--as consistent with the requirements of Section 303(c)(2)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(c)(2)(A), and its implementing regulations, 40 C.F.R. Part 131. This decision was made in violation of EPA's duties under the CWA and those regulations. Plaintiffs seek (1) a declaration that EPA has violated its statutory and regulatory responsibilities, (2) an order setting aside EPA's decision and remanding the case to the agency for further proceedings consistent with the CWA, and (3) an award of costs and expenses, including reasonable attorneys' and expert witness fees.

JURISDICTION AND VENUE

2. This action arises under the CWA, 33 U.S.C. §§ 1251, et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553, 706(2)(A), and the All Writs Act, 28 U.S.C. § 1651(a). The Court has subject matter jurisdiction by virtue of 28 U.S.C. §§ 1331, 1361, 1551, 2201 and 2202.

3. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(e) because several plaintiffs reside in this District and a substantial part of the events or omissions giving rise to the claim occurred in this District.

PARTIES

4. Defendant Christie Whitman is the Administrator of the EPA, and is sued in her official capacity. She is charged with the supervision and management of all EPA decisions and actions, including the approval or disapproval of state water quality standards, which are the subject of this lawsuit.

5. Plaintiff Ohio Valley Environmental Coalition is a nonprofit organization

incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1000 members. Its mission to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, communication, and leadership development.

6. Plaintiff West Virginia Rivers Coalition, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 2,800 members. Its mission is to seek the conservation and restoration of West Virginia's exceptional rivers and streams.

7. Plaintiff West Virginia Highlands Conservancy, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 2000 members. It works for the conservation and wise management of West Virginia's natural resources.

8. Plaintiff Greenbrier River Watershed Association, Inc. is a nonprofit organization incorporated in West Virginia. It works to protect the health of the Greenbrier River. It has approximately 200 members.

9. Plaintiff Coal River Mountain Watch is a nonprofit organization incorporated in West Virginia. It has approximately 250 members. It works for social, economic, and environmental justice for the people of the southern West Virginia coalfields.

10. Plaintiff West Virginia Citizen Action Group is a nonprofit organization incorporated in West Virginia. It has approximately 4200 members. It advocates for better public policy, rights of individuals, a clean environment and a stronger democratic process.

11. Plaintiff Friends of the Cheat, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 600 members. Its mission is to restore, preserve and promote the natural qualities of the Cheat River watershed.

12. Plaintiff Friends of the Cacapon, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 85 members. Its mission is to preserve, protect and promote the Cacapon River watershed.

13. Plaintiff American Whitewater Affiliation is a nonprofit organization incorporated in Missouri. It has approximately 8,400 members, and 160 club affiliates representing approximately 80,000 paddlers. Its mission is to restore and conserve America's whitewater resources and to enhance opportunities to enjoy those resources safely.

14. Plaintiff Blue Heron Environmental Network, Inc., is a nonprofit environmental organization incorporated in West Virginia. It has 52 members.

15. Plaintiff Stanley Heirs Foundation, Inc., is a nonprofit organization incorporated in West Virginia. It seeks to conserve and preserve an heirship on Kayford Mountain in Kanawha County, West Virginia, and to prevent destruction by surrounding mountaintop removal/valley fill coal mining operations.

16. Plaintiff Concerned Citizens Coalition of Roane, Calhoun and Gilmer Counties is an unincorporated organization of approximately 100 members. It seeks to educate citizens on issues pertaining to ecological recovery, economic sustainability, reestablishment of democratic principles, and corporate/government responsibility.

17. Plaintiff Wheeling Environmentalists, an unincorporated grassroots organization, focuses on the improvement and preservation of the environment of Ohio County, West Virginia, through education, grassroots organizing and leadership development, while staying informed and involved with environmental issues in the Ohio River Valley, across the state of West Virginia, and the nation.

18. Plaintiff Friends of the Little Kanawha is a nonprofit organization incorporated in West Virginia. It has approximately 75 members. It seeks to safeguard the integrity of the communities in the area of the headwaters of the Little Kanawha River, maintain the quality of the fragile waters of the Little Kanawha River, and safeguard the wildlife habitat and the recreational value of the area.

19. Plaintiff Plateau Action Network, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 100 members. It works within the Fayetteville, West Virginia community to promote responsible economic development and sustainable environmental management.

20. The organizational plaintiffs listed above have members who live in this District and recreate in, on, and/or near the streams and rivers of West Virginia. Those members are adversely affected by the decisions of West Virginia and EPA challenged herein, because those decisions increase the likelihood that those rivers and streams will suffer degradation from pollution. As a result, the environmental, aesthetic, and recreational interests of these members will be adversely affected.

21. Plaintiffs Winnie Fox and Elinore Taylor are residents of Cabell County, West Virginia. Plaintiff Francis D. Slider is a resident of Tyler County, West Virginia. Plaintiffs Denise Giardina, Julian Martin, Regina M. Hendrix, and Kathryn A. Stone are residents of Kanawha County, West Virginia. Plaintiff Doyle Coakley is a resident of Webster County, West Virginia. Plaintiff Abby Chapple is a resident of Morgan County, West Virginia. Plaintiff Frances Latterell is a resident of Jefferson County, West Virginia. They recreate in, on and/or near the streams and rivers of West Virginia. They are adversely affected by the decisions of

West Virginia and EPA challenged herein, because those decisions increase the likelihood that those rivers and streams will suffer degradation from pollution. As a result, their environmental, aesthetic, and recreational interests will be adversely affected.

STATUTORY AND REGULATORY BACKGROUND

22. The CWA was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to achieve “water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water.” 33 U.S.C. §§ 1251(a), (a)(2).

23. To accomplish these goals, the CWA requires states to establish water quality standards for intrastate waters. *Id.*, § 1313. As one of those standards, states must adopt an antidegradation review policy that allows the state to assess activities that may lower the water quality of the water body. *Id.*, § 1313(d)(4)(B); 40 C.F.R. § 131.12.

24. Whenever a state revises or adopts a water quality standard, the state must submit the standard to the EPA’s Regional Administrator for a determination as to whether the new standard is consistent with the CWA. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.21(a). EPA must either approve the standard within sixty days of submission or—if EPA determines that the standard is inconsistent with the CWA—disapprove the standard and notify the state of any changes necessary to gain the EPA’s approval. 33 U.S.C. § 1313(c)(3). If the state fails to make the changes required by EPA, the agency must promptly promulgate and impose replacement standards upon the state. *Id.*, § 1313(c)(3)-(4)(A).

25. The antidegradation review policies adopted by the states as a part of their water quality standards must be consistent with the federal antidegradation policy. 40 C.F.R. § 131.12.

26. The federal antidegradation policy establishes three levels of water quality protection: Tier 1, Tier 2, and Tier 3. Tier 1 protection establishes the minimum water quality standard for all waters and requires that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1). Tier 2 protection provides that, where the water quality of a water body exceeds that necessary to support aquatic life and recreation, that level of water quality shall be maintained unless the state determines that “allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” 40 C.F.R. § 131.12(a)(2). In addition, “the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.” Id. Tier 3 protection provides that, where a water body “constitute[s] an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.” 40 C.F.R. § 131.12(a)(3).

FACTS

27. On July 5, 2001, the West Virginia Department of Environmental Protection submitted the West Virginia antidegradation implementation procedures—60 C.S.R. 5—to EPA in accordance with Section 303(c)(2)(A) of the CWA, 33 U.S.C. § 1313(c)(2)(A).

28. Among other provisions that are inconsistent with 40 C.F.R. § 131.12, West Virginia’s antidegradation implementation procedures contain provisions that:

A. Exempt the main stems of two of the three largest rivers in the state, the lower

Kanawha from milepoint 72 to the confluence of the Ohio River and the Monongahela, from Tier 2 review and permanently fix them in Tier 1. § 60-5-4.3.

B. Exempt from Tier 2 review activities that qualify for coverage under nationwide permits under § 404 of the CWA, 33 U.S.C. § 1344, and that are certified by the state pursuant to § 401 of the CWA, 33 U.S.C. § 1341. § 60-5-3.8. As a result, stream segments buried by valley fills associated with surface coal mining activities are likely to be exempt from Tier 2 review.

C. Exempt from Tier 2 review “a proposed new or expanded discharge from a publicly owned or publicly owned and privately operated sanitary wastewater treatment plant constructed or operated to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage.” § 60-5-5.6.c. This exemption includes “combined sewer overflow elimination or reduction projects” and “applies only where there will be a net decrease in the overall pollutant loading discharged.” *Id.*

D. Exempt existing sources, and only cover new or expanded discharges. §§ 60-5-4.8; 60-5-5.6.a.1; 60-5-6.3.h; 60-5-7.2.

E. Exempt from Tier 2 review regulated activities that are granted coverage by a WV/NPDES general permit under § 402 of the CWA, 33 U.S.C. § 1342. § 60-5-3.7.

F. Give WVDEP the discretion to exempt “types or classes of activities” from Tier 2 review “after balancing the relative impact of the activities on water quality against the overall benefit of the activities to public health and welfare or the environment.” § 60-5-5.6.c. Examples given for activities that would fall under this exemption include “expansions or improvements to publicly owned wastewater treatment facilities or activities, public benefit activities by governmental entities, or discharges related to environmental remediation

activities.” Id.

G. Do not require nonpoint sources to be in compliance with Best Management Practices (BMPs) before degradation caused by point sources is allowed, and do not require BMPs to be sufficient to prevent degradation. § 60-5-1.5.b.

H. Do not require Tier 2 protection for every water segment that supports the minimum fishable/swimmable uses and has assimilative capacity remaining for some parameters, and instead provides that such segment “shall generally” have such protection. § 60-5-5.2.

I. Do not require Tier 2 or Tier 2.5 review unless the proposed activity would result in a 10% reduction of the water segment’s assimilative capacity or if the cumulative impacts of all activities on Tier 2 water segments would result in a 20% reduction to assimilative capacity. §§ 60-5-5.6.d; 60-5-6.3.a.

J. Provide only Tier 1 protection to waters that have one or more of their parameters impaired but whose other parameters exceed the water quality standard. § 60-5-4.4.

K. Provide only Tier I protection to some waters that are fishable and/or swimmable. § 60-5-4.6.

L. Do not provide intergovernmental and public participation procedures sufficient to satisfy 40 C.F.R. § 131.12(a)(2).

M. Exempt trades in Tier 2, 2.5 and 3 waters from anti-degradation review. §§ 60-5-5.6.f.; 60-5-6.3.h.; 60-5-7.5.

N. Allow trades in Tier 1 waters that do not guarantee the protection of existing uses. § 60-5-4.8.

O. Allow exemptions from Tier 2 and 2.5 review on a case-by-case basis based on best professional judgment. §§ 60-5-5.3; 60-5-6.3.b.

P. Limit reasonable and cost-effective less degrading alternatives to 110% of the costs of the pollution control measures. § 60-5-5.7.c.

Q. Allow exemptions for wastewater treatment plants from Tier 2.5 review. § 60-5-6.1.

R. Provide exemptions from Tier 2.5 review for dissolved oxygen, pH, thermal discharges and fecal coliform. § 60-5-6.3.a.

S. Allow short-term exemptions from Tier 2.5 review. § 60-5-6.3.k.

29. On November 26, 2001, EPA approved West Virginia antidegradation implementation procedures—60 C.S.R. 5—in their entirety, pursuant to Section 303(c)(2)(A) of the CWA, 33 U.S.C. § 1313(c)(2)(A).

CLAIM

30. Plaintiffs incorporate by reference the allegations of the above paragraphs.

31. West Virginia's antidegradation implementation procedures—60 C.S.R. 5—are inconsistent with the CWA and its implementing regulations.

32. By approving those procedures, Defendant has violated the CWA and has acted in a manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706(2).

RELIEF

Wherefore, Plaintiffs respectfully request this Court to grant the following relief:

1. Declare that Defendant's November 26, 2001 decision is contrary to the CWA

and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A);

2. Issue an order setting aside EPA's decision and remanding the case to the agency for further proceedings consistent with the CWA and its implementing regulations;

3. Award Plaintiffs their costs and expenses, including reasonable attorneys' and expert witness' fees, as authorized by 28 U.S.C. § 2412(d)(2)(A); and

4. Grant Plaintiffs such other and further relief as this Court deems appropriate.

Respectfully submitted,

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