

**PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE  
COMMONWEALTH OF VIRGINIA**

Sierra Club, Southern Appalachian Mountain Stewards, Appalachian Voices and Appalachian Mountain Advocates (hereinafter “Sierra Club”) hereby petition the United States Environmental Protection Agency (“EPA”) to initiate formal proceedings under 40 C.F.R. §123.64(b) to withdraw approval of the Commonwealth of Virginia’s National Pollutant Discharge Elimination System (“NPDES”) program. The Commonwealth of Virginia, specifically the Department of Mines, Minerals, and Energy, has systematically failed to comply with the requirements of the Clean Water Act since 2011. Sierra Club requests that EPA formally respond to this petition in writing, as required by 40 C.F.R. §123.64(b)(1); that EPA notify the Commonwealth of Virginia that the Department of Mines, Minerals, and Energy (“DMME”) is not administering the permit program for point-source discharges into the waters of Virginia in accordance with the Clean Water Act; and that EPA schedule a public hearing to consider these violations. See 33 U.S.C. §1342(c)(3); 40 C.F.R. §123.64(b)(1). Because Virginia fails to demonstrate sufficient ability to administer the NPDES program and has failed to take corrective action, EPA must withdraw its approval of the Virginia NPDES delegation and assume administration and enforcement of the program. Id. In the alternative, Sierra Club asks that EPA assure the Commonwealth immediately comply with the permitting requirements of the NPDES program and the Clean Water Act (“CWA”).

**I. THE CLEAN WATER ACT PRESCRIBES SPECIFIC CIRCUMSTANCES UNDER WHICH WITHDRAWAL OF A STATE PROGRAM IS NECESSARY.**

The EPA is authorized to exercise its withdrawal authority for inadequacies in a State program. The legislative history of the Clean Water Act outlines specific instances where Congress intended EPA to exercise that authority. EPA has promulgated regulations that set out the criteria that will guide its exercise of its authority to withdraw approval of State programs. 40 C.F.R. §123.63. First, a State’s repeated issuance of permits that fail to comply with the requirements of the Clean Water Act is grounds for withdrawal. 40 C.F.R. §123.63(a)(2)(ii). Second, a State’s failure to act on violations of permits or other program requirements justifies withdrawal. Id. at §123.63(a)(3)(i). Third, withdrawal is appropriate when a State “fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.” Id. at §123.63(a)(5). Fourth, when a State fails to inspect and monitor activities subject to regulation, withdrawal is appropriate. Id. at 123.63(3)(iii).

In the Commonwealth of Virginia, DMME’s administration of the NPDES program for coal mining permits is an abject failure, satisfying all four of these criteria for withdrawal. More specifically:

- Virginia has failed administer an adequate regulatory program to develop water quality-based effluent limits in NPDES permits because:
  - DMME routinely approves permits on the basis of incomplete permit applications.
  - DMME never considers existing water quality when approving permits because it allows permittees to submit effluent characterization six months *after* permit reissuance.
- Virginia has repeatedly issued permits that fail to comply with the Clean Water Act because:
  - DMME repeatedly issues permits that are not protective of the narrative water quality standard and therefore do not conform to the requirements of federal regulations.
  - the agency has a policy of applying BMPs as the chief pollution control for point sources in TMDL watersheds.
  - DMME’s guidance does not require any pollution reduction actions for permits in TMDL watersheds beyond those already required of all mining operations.

- under the NPDES Program, BMPs are not permitted except in very narrow circumstances that do not apply to DMME’s mining permits.
- DMME fails to conduct reasonable potential analyses for heavy metals.
- In 2012, DMME, DEQ, and the State Water Control Board entered a settlement agreement with a mining industry group that explicitly consents to restriction of the agencies’ authority to enforce the Clean Water Act.
- Virginia is failing to meet the State’s duties to implement TMDLs through the NPDES program because:
  - DMME has no effective system for monitoring compliance with aggregate wasteloads
  - DMME refuses to enforce EPA-approved individual WLAs
- Virginia has failed to comply with the requirements of 40 C.F.R. § 123 by failing to issue NPDES permits for point source discharges at abandoned and bond released mining sites.

This petition sets forth the evidence establishing that the NPDES program, specifically as administered by the Department of Mines, Minerals, and Energy, should be withdrawn from the Commonwealth of Virginia.

## **II. BACKGROUND**

In 1975, EPA gave approval to the Commonwealth of Virginia to administer the NPDES permit program for regulating the discharge of pollutants to water bodies within its borders, referred to as the Virginia Pollutant Discharge Elimination program.<sup>1</sup> EPA approved a modification to the Virginia NPDES program in 1983, allowing a transfer of authority from the State Water Control Board to the Division of Mined Lands Reclamation (“DMLR”) to combine the administration of the VPDES program and the Surface Mining Control and Reclamation Act (“SMCRA”) program into a single permitting process for coal mining facilities in Virginia. In 2011, the Virginia legislature updated state law to formally transfer the authority to issue, revoke, and modify NPDES permits for coal mining facilities from Department of

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<sup>1</sup> Available at [http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityAssessments/IntegratedReport/2012/ir12\\_Ch7.1\\_Pollution\\_Control\\_and\\_TMDLs.pdf](http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityAssessments/IntegratedReport/2012/ir12_Ch7.1_Pollution_Control_and_TMDLs.pdf).

Environmental Quality (“DEQ”) to DMME. 9 Va. Admin. Code § 25-31-940; see also <http://register.dls.virginia.gov/details.aspx?id=1217>.

The legislature’s delegation of authority to DMME was conditioned upon the requirement that every permit issued by DMME comply with the Clean Water Act. See Letter from Virginia Office of Attorney General to DEQ and DMME, dated Sept. 30, 2011, attached as Exhibit 1. In addition, the final regulation requires that, before it issues permits, DMME must ensure that the permits conform to the Clean Water Act and state regulations. See 9 Va. Admin. Code § 25-31-940(B)(1). In spite of these requirements, DMME’s administration of the NPDES program in Virginia has led to a systematic failure by violating the regulatory, public participation, and enforcement provisions of the Clean Water Act.

As the following discussion explains, DMME does not evaluate effluent characterization until six months *after* it approves permit renewals; DMME agreed to an industry demand to forfeit its enforcement authority over permit violations; DMME uses compliance schedules when they are impermissible; DMME circumvents the TMDL process by repeatedly using BMPs for point sources; and DMME issues permits that frustrate EPA-approved TMDLs. All of those examples demonstrate a systematic failure to develop and implement a regulatory program that complies with the Clean Water Act. The State Water Control Board, which has objection authority over DMME’s permits, and the Department of Environmental Quality, which has oversight authority over DMME’s permits, are complicit in that systematic failure because they fail to exercise their authorities to correct program and permit inadequacies. See 9 Va. Admin. Code § 25-31-940(B)(2)-(3). For the following reasons, Sierra Club petitions EPA to withdraw Virginia’s authority to administer the NPDES program.

### **III. DMME HAS FAILED TO ADMINISTER AN ADEQUATE REGULATORY PROGRAM TO DEVELOP WQBELS IN NPDES PERMITS BECAUSE IT**

**MAINTAINS A POLICY OF ISSUING PERMITS ON THE BASIS OF INCOMPLETE PERMIT APPLICATIONS.**

DMME's regulatory program for developing NPDES permit effluent limits applicable to coal mining operations is deeply flawed and ineffective. The flaws begin with the application process and extend to the guidance that DMME issues and follows. The implementing regulations of the Clean Water Act provide that withdrawal of a State program is appropriate when the State "fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits." 40 C.F.R. §123.63(a)(5). DMME develops as few water quality-based effluent limits as possible, allowing surface mines to discharge virtually unlimited levels of solids and heavy metals to Appalachian streams. There is no better evidence that the program is flawed than the predominance of impaired streams in the watersheds DMME is charged with protecting.

**A. DMME Routinely Approves Incomplete Permits, Which Precludes the Development of Appropriate Water Quality-Based Effluent Limitations.**

DMME unlawfully accepts incomplete permit applications, and issues permits based on those flawed applications, meaning that every permit it approves is administratively incomplete. Specifically lacking from those permit applications is the requisite effluent characterization. An administratively complete permit is one that contains "information addressing each application requirement of the regulatory program and [contains] all information necessary to initiate processing and public review." 4 Va. Admin. Code §25-130-700.5. The Virginia NPDES application template only provides space for operators of coal mining facilities to submit effluent characterization for temperature, total iron, total manganese, TSS, and TDS. See, e.g. Attachment 5.15 Application- NPDES Permit for Red River Fox Gap Mine, attached as Exhibit 2. Operators are required under the Clean Water Act to submit effluent characterization for least

118 additional pollutants regardless of the format of the State permit application. See 40 C.F.R. §122.21, App. D Tables III, IV, and V. Virginia has incorporated these disclosure provisions of the Clean Water Act into its own permit regulations. See 9 Va. Admin. Code §25-31-100(H)(7)(e)(2) (requiring applicants in primary industry categories that discharge process wastewater to report quantitative data for those pollutants listed in table III of 40 C.F.R. part 122, appendix D). It has also been incorporated into the permit application instructions. See DMME, NPDES Permit Instructions at 3, attached as Exhibit 4. In spite of the already clear requirements that operators must disclose this information, DMME’s scant application form would be significantly improved if the NPDES permit testing requirements for coal mining operations were listed in the permit application table that now only includes five pollutants.

For DMME to effectively evaluate these pollutants for purposes of limiting their discharge, permit applicants must, at a minimum, disclose whether each listed pollutant is believed present or absent. See EPA, Application Form 2C – Wastewater Discharge Information (1990) (“Application Form 2C”); see also 9 Va. Admin. Code §25-31-100(H)(7)(g) (requiring each applicant not discharging process wastewater to indicate whether it knows or has reason to believe that any pollutants listed in tables II or III of appendix D are being discharged).

DMME’s administration of the application process fails to meet the basic testing requirements for NPDES permits as required under the Clean Water Act, Virginia regulations and even DMME’s own permit application instructions. Without knowledge *at the time of application* of the full suite of pollutants in the effluent discharged by coal mines in Virginia, DMME cannot conduct reasonable potential analyses or establish limits for discharges that have the potential to lead to violations of water quality standards. As a result, new NPDES permits issued to coal mining operations by DMME rarely contain limits to protect the selenium or

narrative water quality standards. DMME’s NPDES permitting process is fundamentally flawed by the agency’s willful disregard of regulatory requirements.

**B. DMME Never Considers Existing Water Quality When Approving Permits Because It Allows Permittees to Submit Effluent Characterization Six Months *After* Reissuance.**

DMME maintains an unwritten but consistent policy of allowing permittees to submit effluent characterization of certain pollutants up to six months *after* DMME approves the permit reissuance. According to Joey O’Quinn, DMLR Technical Supervisor,

Effluent characterizations are a requirement of permit re-issuance; effluent information and data are part of every renewal application that we process here at DMLR. We have allowed applicants for renewal of their joint mining and discharge permits to satisfy parts of that requirement within six months of the permit’s renewal. In particular, information on whole effluent toxicity and information on our Table 1 metals has been allowed to be submitted within that six month window.

Email from J. O’Quinn to E. Russell dated August 6, 2014 (making clear that the six month window begins *after* permit renewal), attached as Exhibit 3. Table 1 includes TDS, conductivity, TSS, sulfates, and heavy metals—the most common pollutants in coal mining discharges.

In other words, without taking any steps to understand the type and quantity of pollutants being discharged by coal mines, DMME allows permittees to continue those discharges. Without that data, DMME has no basis to perform an informed Reasonable Potential Analysis (“RPA”) or develop water quality-based effluent limitations at the time of permit reissuance. Once the permit is reissued, the time to do a RPA or impose effluent limits has passed. Under this “six month window” policy, DMME is rubber-stamping the approval of permit reissuances without meaningful consideration of the actual pollutants being discharged by these mines. There is little point to agency review and public participation in the permit process when critical information is collected and submitted only after permit reissuance.

The “six month window” policy directly contradicts the NPDES application instructions DMME itself developed. To implement the requirements of the CWA and Virginia regulations, the instructions page for a DMME permit application lists a host of pollutants and requires that applicants submit water quality analysis for those pollutants. See Exhibit 4. Indeed, the application is not complete without providing the effluent characterization. Id. (section is called “Instructions/Information To Complete Application”). In theory, by disclosing the pollutants it expects to discharge, permit applicants assist DMME in developing the water quality-based effluent limits for the permit. In practice, however, DMME does not enforce this disclosure requirement and approves permit applications in the absence of the water quality data.

By issuing permits on the basis of incomplete permit applications, DMME is exposing all permit applicants to potential litigation because the permittees cannot assert a permit shield when they fail to disclose the presence of these pollutants. See Southern Appalachian Mountain Stewards v. A&G Coal Corp., No. 13-2050 (4th Cir. July 11, 2014). Further, it exposes the waters of the United States to pollutants that DMME failed to consider during the permit process.

Unabated and unregulated water pollution is the second consequence of DMME’s regulatory failure at the permit application stage. Water pollution should never be a *result* of a regulatory program under the National Pollution Discharge *Elimination* System. Effluent characterization is the foundation of establishing water quality-based effluent limits, but under its current regulatory scheme, DMME issues permits without considering the presence of at least 118 pollutants. In defiance of their own instructions for submitting water quality analysis in application permits, DMME has a policy of issuing permits without reviewing water quality data first. On this basis, the State program must be withdrawn. DMME cannot administer a legally sufficient program when it turns a blind eye to the chemicals being discharged by coal operators.



**IV. DMME HAS REPEATEDLY ISSUED PERMITS THAT FAIL TO COMPLY WITH THE CLEAN WATER ACT BECAUSE OF ITS POLICY OF APPLYING BMPS AS A POLLUTION CONTROL FOR POINT SOURCES IN TMDL WATERSHEDS.**

EPA has grounds for withdrawing a State program when the State consistently issues permits that fail to comply with the Clean Water Act. 40 C.F.R. §123.63(a)(2)(ii). For three reasons, DMME violates the Clean Water Act every time it issues a permit for discharges from an active mine to a TMDL watershed. DMME maintains a policy of applying BMPs as a pollution control for point source discharges of TDS and TSS to watersheds impaired by these stressors. First, the effect of DMME's BMP policy is to violate the clear intent of the Clean Water Act that BMPs be used for exclusively for nonpoint sources in TMDL watersheds. Second, this policy violates the unambiguous language of the NPDES program that provides very few, limited circumstances for when BMPs may be substituted for WQBELs in point source permits. Third, even if BMPs were a permissible pollution control for discharges to TMDL watersheds, the BMPs required by DMME for this subcategory of permits are exactly the same as the BMPs required for *all* permits. In other words, the permittees discharging to the watersheds that are most impaired are not subject to any additional requirements to limit their discharge. This problem is not isolated to a few permits in the coalfields. The number of permits in TMDL watersheds is so extensive that DMME estimated it would take a year's time and cost nearly \$28,000 to provide copies of permits and water quality data for six TMDL watersheds in the coalfields of Virginia. FOIA Response from DMME to Ben Lockett dated May 9, 2014, attached as Exhibit 5. For the following reasons, EPA must withdraw DMME's program.

**A. DMME's Policy of Applying BMPs to Permits in Benthically Impaired TMDL Watersheds Is Misleading, Ineffective, and A Misapplication of The Clean Water Act.**

Since 2005, DMME has maintained an explicit policy of using Best Management Practices (“BMPs”) in lieu of numeric effluent limits, to address point source pollution from active mining operations in TMDL watersheds. Guidance developed by DMME in 2005 requires *no* additional BMPs that are specific to discharges into benthically impaired TMDL watersheds. BMPs are an ineffective substitute for numeric effluent limits. See DMLR Guidance Memorandum 14-05, Nov. 23, 2005, available at <https://www.dmme.virginia.gov/DMLR/Adobe/14-05TMDLPermittingRequirements.pdf>. Even if BMPs did work, DMME is misapplying them as pollution controls to *point* sources. BMPs are applicable to NPDES permits for point sources in four very limited circumstances that do not apply to active mining permits in Virginia’s TMDL watersheds.

i. The BMP Approach Treats Point Sources and Nonpoint Sources As If They are Identical For Purposes of Controlling Water Pollution.

Even if BMPs were successful in reducing loading of total dissolved solids (“TDS”) and total suspended solids (“TSS”) in Virginia’s coalfields TMDL watersheds (and they are not), DMME’s BMP policy ignores the distinction between point sources and nonpoint sources. BMPs were never intended as a pollution control for point sources. More specifically, the Clean Water Act does not intend that BMPs be used to implement wasteload allocations developed for point sources in TMDLs. The implementing regulations for the TMDL program clearly limit the use of Best Management Practices to nonpoint source control, defining BMP to mean: “[m]ethods, measures or practices selected by an agency *to meet its nonpoint source control needs...*” 40 C.F.R. §130.2(m). The definition of TMDL in the same regulations reiterates the understanding that BMPs are intended for nonpoint source pollution only. *Id.* at 130.2(i) (stating “[i]f Best Management Practices (BMPs) *or other nonpoint source pollution controls* make more stringent load allocations practicable...”). Through its BMP policy, DMME

repeatedly issues permits that violate the intent and clear language of Clean Water Act and its program should be withdrawn.

- ii. Under the NPDES Program, BMPs are Not Permitted Except in Very Narrow Circumstances That Do Not Apply to DMME's Mining Permits.

Furthermore, the CWA regulations governing NPDES programs limit the use of BMPs in lieu of water quality-based effluent limits to four specific circumstances. See 40 C.F.R. §122.44(k); see also Waterkeeper Alliance v. United States Env'tl. Protection Agency, 399 F.3d 486, (2d Cir. 2005) (interpreting 40 C.F.R. §122.44(k) as “describing the circumstances in which the EPA may promulgate ‘best management practices in place of numerical [effluent limitations].” In the case of DMME's BMP Approach, applying BMPs in place of numerical effluent limitations is a violation of the CWA.

First, BMPs are applicable to control the release of toxics from ancillary industrial activities. 40 C.F.R. §122.44(k)(1). TDS and TSS are not regulated as toxics under the CWA. Therefore, BMPs are not applicable under this condition.

Second, BMPs are applicable to control stormwater discharge. 40 C.F.R. §122.44(k)(2). The outfalls to which wasteload allocations apply are point source discharges of pollutants, including TDS and TSS. That is, the outfalls at issue that have wasteload allocations do not simply discharge stormwater. Therefore, wasteload allocations from TMDL watersheds do not apply to stormwater discharge, a nonpoint source, and BMPs are not appropriate to control the release of TDS and TSS.

Third, only when numeric effluent limits are infeasible are BMPs applicable to NPDES permits. 40 C.F.R. §122.44(k)(3). In the case of TMDLs, numeric effluent limits are entirely feasible. DMME has never established otherwise. Approved TMDLs specify what the water

quality-based endpoint for impaired watersheds should be. DMME's task is simply to apply what has already been done to create a numeric water quality-based effluent limitation to limit the point source discharges of TDS and TSS from a NPDES permit.

Fourth, BMPs must be reasonably necessary before they may be applied to point source discharges covered by a NPDES permit. 40 C.F.R. §122.44(k)(4). DMME and permittees have made no showing that BMPs are reasonably necessary in this instance such that they should displace numerical effluent limitations. In fact, it is quite clear that BMPs are not reasonably necessary because DMME has applied numeric effluent limitations to TSS. Therefore, it is not necessary to use BMPs when numeric effluent limitations are feasible and effective.

- iii. DMME's guidance does not require any pollution reduction actions for permits in TMDL watersheds beyond those already required of all mining operations.

DMME's BMP guidance simply restates the BMPs already applicable to all surface mining operations and follows that list with the empty promise that "[r]eduction in the sedimentation and mineralization of runoff attendant to mined land erosion and strata exposure can be achieved with sediment control measures and BMPs." DMLR Guidance at 4. If the BMPs were applicable to all surface mining operations, and the watershed were impaired, then the logical conclusion is that the BMPs failed and a more stringent limitation on pollution is required. DMME, rather than properly implementing additional pollutions controls to protect and improve impaired waters, simply requires the same practices already applicable to all operations, regardless of impairment.

There is a *single* statement in the BMP section of the guidance document that is specific to discharges to TMDL watersheds. It reads: "In a watershed where pollution load reductions for solids are necessary for active mining operations to meet an approved TMDL, haulroad design,

construction, and maintenance shall be performed in consideration of the TMDL.” DMLR Guidance at 3. With the exception of maintenance, each of these BMPs refers to the construction phase of a mining operation, and ignores the pollution that is discharged during and after active mining operations. The guidance fails to address the reality of a TMDL: that TMDL watersheds are not the same as non-TMDL watersheds. Accordingly, more stringent pollution controls are required in TMDL watersheds to meet the wasteload allocation that was designed to regain attainment of the water quality standard. See 33 U.S.C. § 1313(d)(1)(C) (Every TMDL “shall be established at a level necessary to implement the applicable water quality standards ....”) These controls must address current pollutant discharges -- not simply mine construction and road maintenance alone. DMME’s BMP approach completely ignores this basic premise of pollution control and uses weak and largely inapplicable measures to apply the same standards to TMDL and non-TMDL watersheds alike.

TMDLs are not self-implementing. NPDES permits are an important facet of any TMDL and must be consistent with TMDLs. DMME’s ineffective reliance on BMPs is unnecessary and unlawful. It constitutes a “fail[ure] to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.” 40 C.F.R. §123.63(a)(5).

**B. The Effect of DMME’s Inadequate Regulatory Program is Demonstrated by the Poor Water Quality of the Streams the NPDES Program is Meant to Protect.**

DMME is responsible for issuing permits in seven Virginia coalfields counties. Since 2004, EPA has approved at least nineteen TMDLs to address impairment of the streams in those counties. As the TMDLs detail, the aquatic communities in Virginia’s coalfields counties are stressed by sediment, total suspended solids, and total dissolved solids, which are attributed largely to discharges from mining operations.

The ineffectiveness of DMME's BMP approach is made clear by the continued benthic impairment of coalfields watersheds. Sustained and gross exceedances of TMDL wasteload allocations further prove the inadequacy of the BMP approach as a means of regulating discharges of TDS and TSS from active coal mines.

The science speaks for itself. According to Virginia's DEQ 2012 Water Quality Assessment Guidance Manual, Virginia Stream Condition Index ("VSCI") Scores below 60 demonstrate stream impairment. This number is also Virginia's threshold for determining compliance with the general narrative standard. The Guest River and Callahan Creek, two coalfields watersheds that are chronically impaired for the aquatic life use, highlight the failure of DMME's BMP approach and permitting system to meet water quality standards.

The Guest River remains impaired more than *ten years* after EPA approved a sediment TMDL meant to attain the narrative water quality standard. DEQ conducted biological monitoring of the Guest River in October and May of 2011, with depressing results. The Guest River scored a 38.04 in the fall and a 40.69 in the spring of that year. In the headwaters of the Guest, the river is even more impaired. In Fall 2012, an active mining permittee reported VSCI scores ranging from 26.32 to 44.8 at its biological monitoring stations. See *ATS, Semi-Annual Aquatic Monitoring of Critical Fork and the Guest River Near Lipps in Wise County, Virginia for Red River Coal Company, Appendix B Table 2, September 2012, attached as Exhibit 6.*

As another example, a comparison of benthic surveys from 1995 to 2011 shows that that Callahan Creek has only become *more* impaired after the implementation of the Callahan Creek TMDL in 2006. In 1995, the VSCI scores for Callahan Creek were 47.01 and 54.32. See *Callahan Creek TMDL, Table 6.5 at 134.* In 2011, biological monitoring data from DEQ Monitoring Stations in Callahan Creek provided VSCI score ranging from 33.57 downstream of

mining discharges below Stonega to 45.92 below a waterfall on Callahan Creek. See DEQ, “Appendix H1 Freshwater Biological Stations SFY12,” attached as Exhibit 7. In 2011, not only were the VSCI scores for all monitoring points in Callahan Creek below the impairment threshold of 60, they were actually *lower* than the original VSCI scores that were the impetus for developing the Callahan Creek TMDL. In sixteen years years of biological monitoring, Callahan Creek’s impairment has worsened, in spite of a TMDL meant to restore water water quality. This decrease in water quality following the implementation of a TMDL is the perfect example of why BMPs are a failure in attaining and maintaining water quality standards in Virginia’s coalfields.

Permittees regularly exceed the wasteload allocations designated to active mining operations in these chronically unhealthy TMDL watersheds. From calculations and data from Discharge Monitoring Reports submitted by coal companies, it is clear how pervasive these permit violations are. The fact that permits routinely violate their wasteload allocations years after the application of BMPs demonstrates that BMPs are ineffective in ensuring the attainment of water quality standards.

For example, in the Dumps Creek watershed, which is benthically impaired by TDS and TSS, two mines are each discharging in excess of the wasteload allocation intended for the sum of discharges from thirteen mines. In other words, the TDS loading from two mines in the Dumps Creek watershed is more than twice as high as the annual limit for the entire watershed. In Straight Creek, also impaired for TDS and TSS, a single mine is exceeding the wasteload allocation intended for twenty-two mines. In the South Fork Pound River, five mines, all of which were assigned individual wasteload allocations, are each exceeding their limits.

The common thread in these instances of permit violations and failures to improve water quality is DMME's improper and ineffectual reliance on BMPs. By insisting that "a BMP approach will be used in Virginia to meet WLAs in lieu of altered effluent limitations for permitted coal mine point source discharges," DMME ensures that pollution from coal mines will continue unchecked into already-impaired watersheds. DMME simply lacks the will to improve water quality, and its regulatory program shows it. The 2005 BMP guidance states that "applications that involve NPDES discharge points within TMDL watersheds with total dissolved solids (TDS) WLAs shall include a plan to monitor TDS and conductivity at designated outfalls." DMLR Guidance Memorandum at 3. At the time the guidance was issued, only one TMDL with TDS WLAs had been approved: the Dumps Creek TMDL. However, DMME waited three years to actually require permittees to monitor TDS. In the meantime, five more TDS TMDLs were approved. A NPDES program cannot implement a TMDL when it fails to require basic monitoring of the pollutant causing the impairment.

**V. Withdrawal of the State Program is Warranted Because DMME, DEQ, and the State Water Control Board Entered a Settlement Agreement That Explicitly Consents to Restriction of the Agencies' Authority to Enforce the Clean Water Act.**

In a 2012 settlement agreement with the Virginia Mining Issues Group (VMIG), Virginia's regulatory agencies responsible for the NPDES program changed the template for CSMO/NPDES permits to eviscerate their enforcement authority. See Settlement Agreement, April 16, 2012, attached as Exhibit 8. Withdrawal of a State program is warranted when the State fails to act on violations of permits. 40 C.F.R. §123.63(a)(3)(1). By signing the Settlement Agreement, the State promised the mining industry that it would take no action when permittees violate their permits by exceeding their TMDL wasteload allocations.



VMIG, which represents coal industry interests, recognized that permittees would likely violate WLAs for active coal mining operations in benthically impaired watersheds. Seeking to avoid liability for those violations, VMIG utilized a lawsuit and the resulting settlement to obtain an agreement from DMME that it would overlook the permit violations. Specifically, DMLR agreed to “amend its NPDES permit template to replace the TMDL Special Condition (b)(2) with the following: “If [DMME] determines that waste loads from permitted point sources *have resulted* or will results in a waste load in excess of the TMDL WLAs, the Department will require the permittee to conduct additional monitoring...” Settlement Agreement at 3 (emphasis added). The new permit condition goes on to say that if the monitoring fails, DMME may require *more monitoring*. Id. In other words, the permit condition requires that DMME have actual knowledge of a permit violation and then requires DMME to ignore this violation by taking no enforcement action at all. This change in the NPDES permit template memorializes Virginia’s intent to voluntarily surrender its enforcement authority.

**A. The Settlement Agreement Neuters DMME’s Enforcement Authority So That It Must Choose Monitoring Over Enforcement Action, Which Is A Failure To Act On Permit Violations.**

Part and parcel of receiving a NPDES permit from DMME is the permittee’s duty to comply with the conditions of that permit. 40 C.F.R. § 122.41(a) (listing the duty to comply as the first condition applicable to all NPDES permits). Because joint CSMO/NPDE permits issued by DMME require compliance with TMDLs as an express permit condition, exceeding a WLA is a violation of the permit. When permittees do not comply, agencies have the authority to compel compliance by initiating enforcement actions, revoking the permit, or denying a permit renewal. Id. Any abrogation of that authority weakens Virginia’s NPDES program.

Under the conditions of the Settlement Agreement, DMME has agreed to basically ignore violations of the conditions implementing the TMDLs. To signify its intent that it will not act, DMME has begun to develop draft permits that incorporate the new language into the NPDES permit template. See, e.g. Draft NPDES Permit for 1301411, April 30, 2014, available at <http://www.dmme.virginia.gov/dmlrinquiry/frmDownloadPdf.aspx?Type=NPDES&Key=135>. The Clean Water Act becomes a sham when industry can avoid liability by relying on a privately reached agreement with regulatory agencies to secure a promise that agencies will merely implement “additional monitoring” when the agency has actual knowledge that a violation of the permit has occurred.

**B. By Instituting a New Monitor-Only Permit Condition As The Sole Remedy For Permit Violations, The Private Agreement Between the Agencies and VMIG Is An Illegal Attempt To Override State Law and A Failure to Enforce Known Violations of the Clean Water Act.**

DMME’s settlement agreement effectively attempts to change a permit condition that is fundamental to every joint CSMO/NPDES permit DMME issues. In Virginia, permittees are required to minimize the impact to the environment resulting from noncompliance with their permit. 4 Va. Admin. Code § 25-130-773.17(e). Under the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR), monitoring may only be used *in addition to* taking immediate measures to comply with a joint CSMO/NPDES permit when permittees are not in compliance with the conditions of their permits. Id. The private agreement between the agencies and VMIG attempts to override state law by instituting a new monitor-only permit condition to remedy known permit violations.

This change to the NPDES permit was not advertised, and it was not subject to public review and comment. Furthermore, EPA was evidently excluded from this decision-making process. On its face, the settlement agreement represents DMME’s abrogation of authority when

it comes to enforcing violations that it *knows* are occurring. Because of this clear decision by the agencies to refuse to comply with the obligation to enforce violations of the CWA and state law, the criteria is satisfied and EPA must withdraw the program.

**VI. Virginia Repeatedly Issues Permits That Are Not Protective of the Narrative Water Quality Standard and Therefore Do Not Conform to the Requirements of Federal Regulations, Which is Grounds for Withdrawal of the State Program.**

DMME consistently and blatantly disregards the permitting regulations when issuing permits for mining operations with a reasonable potential to cause or contribute to narrative water quality standards violations. For pollutants or pollutant parameters for which Virginia has not promulgated a numeric standard, DMME must conduct a reasonable potential analysis to determine whether that pollutant or pollutant parameter will cause, have the reasonable potential to cause, or contribute to an excursion above a narrative standard. 40 C.F.R. § 122.44(d)(1)(i). If a reasonable potential exists for an excursion above a narrative standard, DMME must establish effluent limits for that pollutant. 40 C.F.R. § 122.44(d)(1)(vi). DMME refuses to perform the required analysis or impose the necessary limits to protect the narrative water quality standard from discharges from surface coal mines.

In theory, once an RPA is complete, it will show whether effluent limits for that particular pollutant are required. However, DMME's approach, based on WET testing, is to ignore the RPA when it shows there is a reasonable potential of WQS violations. The DMME's permit template contradicts itself: "WET assays are a useful screening tool to determine if a reasonable potential for effluent toxicity exists." But in a permit where the RPA shows that TDS will contribute to impairment in a TMDL watershed that is already impaired for TDS, DMME's only action was to require WET testing, i.e. more monitoring. See Draft Permit and Factsheet for Permit 1101760 at 61-62 ("The resulting instream concentration of TDS at critical stream

flow for both outfall 010 and outfall 012 exceed the 422 mg/L watershed limit and therefore will require WET testing.”), attached as Exhibit 9. If WET testing is a screening tool, then it necessarily cannot be a pollution control to achieve effective control of TDS pollution. This example highlights DMME’s habit of finding water quality violations and trying to remedy those violations with monitoring. Monitoring and WET tests are not meaningful solutions for improving water quality when the agency is aware that quality is degraded. Yet DMME insists on the do-nothing approach of monitoring as often as possible.

Surface mining, as practiced in Virginia, creates large amounts of spoil, and importantly, it is this spoil that is sometimes but not necessarily disposed of in valley fills, which leads to significant water pollution and water quality degradation. This occurs because when water runoff percolates through this spoil, it leaches out metals and compounds that then act as pollutants. A robust body of science demonstrates that these pollutants have a significant and adverse effect on aquatic ecosystem health and species diversity. These solutes are measured in varying forms, including as total dissolved solids (TDS), conductivity, and as its specific ions including  $\text{SO}_4^{2-}$ ,  $\text{Mg}^{2+}$ ,  $\text{Ca}^{2+}$ ,  $\text{HCO}_3^-$ .

The 2002 EPA water chemistry study in the programmatic EIS on Mountaintop Mining/Valley Fills in Appalachia found that conductivity was “clearly impacted by MTR/VF [mountaintop/valley fill] mining.” PEIS, App. D, EPA 2002b, p. 2. “Conductivity at Filled sites can be 100 times greater than that at Unmined sites.” *Id.* at 45. “Unmined sites have a consistently low conductivity no matter what the flow. Filled sites have a broad range of conductivity much higher than Unmined sites indicating that MTM/VF mining increases specific conductance in streams.” *Id.* at 46.

EPA's Science Advisory Board has stated that elevated levels of conductivity from mountaintop removal mining are having an "extreme ecological effect" on Appalachian waters and streams because they cause the complete loss of a genus. In 2011, EPA published two peer-reviewed scientific reports documenting the harm caused by conductivity and mountaintop removal mining valley fills. This research showed that a significant percent of aquatic life is extirpated when conductivity reaches 300 microsiemens per centimeter ( $\mu\text{S}/\text{cm}$ ). Scientists from EPA also recently published a set of peer-reviewed studies that further support that guidance. These studies explain the methodology and results of a scientific investigation of the relationship among surface coal mining, increased conductivity, and downstream biological impairment. In an editorial accompanying the publication of these studies, the journal stated that "[t]he U.S. EPA's initial application [of field data to generate water quality criteria], a benchmark value for dissolved ions measured as specific conductance, has withstood a series of intense reviews and has guided environmental decisions." On the causation issue, "the authors found that a mixture containing the ions  $\text{Ca}^+$ ,  $\text{Mg}^+$ ,  $\text{HCO}_4^-$ , and  $\text{SO}_4^-$ , as measured by conductivity, is a common cause of extirpation of aquatic macroinvertebrates in Appalachia where surface coal mining is prevalent. The mixture of ions is implicated as the cause rather than any individual constituent of the mixture." On the benchmark issue, the abstract states:

Because increased ionic strength has caused deleterious ecological changes in freshwater streams, thresholds for effects are needed to inform resource-management decisions. In particular, effluents from surface coal mining raise the ionic strength of receiving streams. The authors developed an aquatic life benchmark for specific conductance as a measure of ionic strength that is expected to prevent the local extirpation of 95% of species from neutral to alkaline waters containing a mixture of dissolved ions in which the mass of  $\text{SO}_4^{2-} + \text{HCO}_3^- > \text{Cl}^-$ . Extirpation concentrations of specific conductance were estimated from the presence and absence of benthic invertebrate genera from 2,210 stream

samples in West Virginia. The extirpation concentration is the 95th percentile of the distribution of the probability of occurrence of a genus with respect to specific conductance. In a region with a background of 116  $\mu\text{S}/\text{cm}$ , the 5th percentile of the species sensitivity distribution of extirpation concentrations for 163 genera is 300  $\mu\text{S}/\text{cm}$ . Because the benchmark is not protective of all genera and protects against extirpation rather than reduction in abundance, this level may not fully protect sensitive species or higher-quality, exceptional waters.

Other independent, peer-reviewed scientific research has also confirmed EPA's research. In July 2012, a group of prominent scientists published a peer-reviewed paper analyzing 30 years of stream data in a 390-square-mile region in southwestern West Virginia. This study concluded that the extent of surface coal mining in that region is highly correlated with elevated conductivity and harm to the ecosystem. Using the same water quality data used by EPA, but a different statistical method for analyzing that data, they independently derived a threshold of 308  $\mu\text{S}/\text{cm}$  for biological impairment related to increased conductivity. That value is essentially the same as the 300  $\mu\text{S}/\text{cm}$  value used in EPA's 2011 guidance and derived in 2012 by Cormier et al. They also found that significant biological impairment and biodiversity loss is occurring in 1,740-2,670 miles of the regional stream network, and that devastation of aquatic life can occur when as little as 2.2% of an ecosystem is mined. In recent years, the cumulative impacts to waters from conductivity have grown exponentially. These data show that some areas have reached or are close to a level of harm that is extremely dangerous for native macroinvertebrates that drive the health of the local ecosystems.

Other studies concur with EPA's threshold conductivity numbers and strengthen evidence that conductivity from mining operations causes biological impairment downstream. A final review document from EPA's Science Advisory Board detailing the Board's assessment of EPA's guidance documents found that the relationship between conductivity and species

extirpation was “robust,” validation using Kentucky data was “important,” the use of extirpation as an end point was “extreme” and a more sensitive depletion concentration end point may be more appropriate, and EPA provided a “convincing case” for causality between conductivity and species loss. Ex. g, Ex. Sum. Scientists from leading universities also made an independent assessment of the data using different methods of analysis and arrived at similar results confirming EPA’s findings. The researchers “detected a significant community threshold response to altered ionic strength, with many sensitive taxa declining precipitously and synchronously in abundance at conductivity of 277  $\mu\text{S cm}^{-1}$  (95% CI of 176 to 344  $\mu\text{S cm}^{-1}$ ).”

DMME has declined to acknowledge the validity of this abundance of research and fails to limit TDS, sulfates, conductivity, or its constituent ions. No coal mining VA/NPDES permits have numeric limits for TDS, sulfates, or conductivity. Of the more than one hundred pollutants that DMME must analyze before issuing a permit, it has a plan for how to do an RPA on only one. Its single guidance document is specific to performing RPAs for TDS. When DMME does perform an RPA for TDS, it takes no meaningful action to limit the discharge of TDS to ensure compliance with Virginia’s narrative standard. As this petition has discussed above, DMME routinely ignores the “water quality-based” part of “water quality-based effluent limits.” The failure to conduct scientifically defensible RPAs to establish effluent limits on TDS, sulfates, and conductivity is yet another example where nothing in DMME’s permit is based on water quality and everything is based on ensuring that the duty of coal companies to comply with the Clean Water Act is as limited as possible.

**VII. DMME REPEATEDLY ISSUES PERMITS THAT DO NOT COMPLY WITH THE CLEAN WATER ACT BECAUSE IT FAILS TO CONDUCT REASONABLE POTENTIAL ANALYSES FOR METALS AND APPROVES IMPROPER COMPLIANCE SCHEDULES.**

NPDES permits issued by DMME do not comply with the Clean Water Act because: (1) DMME repeatedly fails to conduct Reasonable Potential Analyses (RPA), and (2) DMME grants compliance schedules to permittees in situations where such schedules are disallowed. Also, as discussed above, DMME has tainted the entire NPDES permitting process at the application stage by issuing permits with no consideration of the majority of pollutants being discharged by the mine operators. Repeated issuance of permits by the State that fail to comply with the requirements of the Clean Water Act is grounds for withdrawal. 40 C.F.R. §123.63(a)(2)(ii).

**A. DMME Fails to Perform Reasonable Potential Analyses For Heavy Metals Even in the Face of Compelling Water Quality Data.**

DMME's system of allowing permittees to submit heavy metals and other effluent characterization six months after permit reissuance prevents any meaningful RPA during the application process. Without data, there is no way to calculate a mine's reasonable potential for violating water quality standards. Even when a permittee actually submits effluent characterization data in accordance with the NPDES permit application instructions, DMME fails to perform an RPA. More significantly, when a permittee submits effluent characterization data that demonstrates the permit applicant is *already* violating water quality standards, DMME fails to do an RPA. The State Water Control Board and DEQ are complicit in this failure because they too receive a permittee's application for reissuance and are charged with issuing more stringent permit requirements that will avoid violations of water quality standards when DMME fails to do so. See 9 Va. Admin. Code § 25-31-940(B)(2), (3).

For example, when Red River Coal Company submitted a permit renewal application for its Hall Branch and Big Branch mine, it included effluent data showing that the stream below the mine's discharge contained 19 ug/L of selenium. See EMI Lab Results dated Dec. 12, 2010, attached as Exhibit 10. In Virginia, 5 ug/L is the chronic standard for selenium, and 20 ug/L is



the acute. DMME failed to conduct an RPA, an analysis of whether effluent has the *potential* to violate water quality standards, when it was given information that the effluent was *already* violating the selenium standard. As has become standard, DMME flagrantly disregarded the requirements of the NPDES permitting process in favor of issuing permits that favor coal industry interests over protection of water quality.

**B. DMME Assigns Compliance Schedules When They Are Not Allowed and Violates Virginia Law By Issuing Permits to Mine Operators that Are Currently In Violation of Environmental Laws.**

A compliance schedule cannot be allowed for permit reissuance when a NPDES permit contains a requirement that the current permit comply with a TMDL. EPA Region III Letter to Virginia Division of Mined Land Reclamation dated July 26, 2014, attached as Exhibit

11. Every joint CSMO/NPDES permit issued by DMME has the requirement that: “The discharge of any pollutant(s) from this facility that enters into a water body with an existing and approved Total Maximum Daily Load (TMDL) must be made in compliance with the TMDL and any applicable TMDL implementation plan.” Therefore, when there is an existing permit in a watershed with an approved TMDL, DMME has no authority to reissue a permit with compliance schedule for the pollutants addressed by the TMDL.

In at least two draft permits released for public comment and review this year, Lone Mountain Processing, Inc. Permit 1301411 and Dickenson-Russell Coal Company Permit 1301839, DMME has provided compliance schedules to coal companies who are violating the wasteload allocation assigned by TMDLs approved by EPA. These compliance schedules allow the companies to continue discharging TDS to watersheds stressed by TDS when they are already in violation of their permit condition requiring compliance with the TMDL. However, as EPA stated, issuing compliance schedules is simply not allowed when permits are already in

violation of their permits by exceeding the WLAs from applicable TMDLs. Those draft permits further demonstrates DMME efforts to avoid enforcement of the Clean Water Act.

## **VII. DMME ADMINISTRATION OF THE NPDES PROGRAM IN TMDL WATERSHEDS IS DEFICIENT AND UNLAWFUL.**

Many of the watersheds in Virginia’s coal mining areas are subject to approved TMDLs. DMME has failed in several respects to administer the NPDES program in these watersheds in a manner consistent with the Clean Water Act. First, DMME fails to effectively implement the “aggregate approach” TMDLs by issuing permits sufficient to monitor aggregate WLAs. Second, even where there a TMDL without an aggregate approach, DMME refuses to enforce the WLAs in those watersheds. Third, although NPDES permits do make WLAs enforceable permit conditions, permit enforcement and water quality would be improved through the imposition of clear numeric effluent limits. DMME refuses to impose such limits. TMDLs must include both Load Allocations (“LAs”) and Waste Load Allocations (“WLAs”). 40 C.F.R § 130.2(i). A LA is the portion of a receiving water’s Loading Capacity that is attributed to existing or future nonpoint sources of pollution or to natural background sources. 40 C.F.R § 130.2(g). A WLA is the portion of the waterbody’s loading capacity that is allocated to an existing or future point source discharge. WLAs are a type of water quality-based effluent limitation. 40 C.F.R § 130.2(h).

The Clean Water Act requires that all NPDES permits be “consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. 130.7” 40 C.F.R. § 122.44(d)(1)(vii)(B). Thus, NPDES permits covering discharges subject to a WLA must include conditions that will ensure compliance with the WLAs.

DMME makes WLAs directly enforceable permit conditions of its joint CSMO/NPDES

permits for dischargers subject to a TMDL. Specifically, the permit includes Special Condition BB(3) which mandates that “[t]he discharge of any pollutant(s) from this facility that enters into a water body with an existing and approved Total Maximum Daily Load (TMDL) must be made in compliance with the TMDL and any applicable TMDL implementation plan.” The permit also requires, in section D, that “[p]ermittee will ensure that waste loads discharges from permit do not exceed mining waste load allocations set forth in the applicable TMDL for the watershed”. Any exceedance of a WLA is not in compliance with the TMDL and thus constitutes a violation of Condition BB(3) and the condition in Section D.

**a. DMME has no effective system for monitoring compliance with aggregate wasteloads.**

Many of the TMDLs in watersheds under DMME’s jurisdiction use an “aggregate/transient” approach to WLAs for coal mining discharges. Under that “aggregate/transient” approach, coal mining discharges are limited to a single aggregate waste load for a stressor pollutant, rather than applying a WLA that is outfall and/or permit specific. Thus, the aggregate WLA is being exceeded if the sum of all coal mining discharges in that watershed exceeds the allocated aggregate WLA. In those watersheds, DMME fails to apply any NPDES permit measure or condition that would allow the agency, the public or even the permittee know when the permittee’s discharges exceed its share of the aggregate WLA. That has the effect of further harming streams that are already impaired, and it constitutes a failure to inspect and monitor activities subject to regulation. Withdrawal is therefore appropriate. 40 C.F.R. § 123.63(3)(iii).

The Callahan Creek TMDL explains the transient approach as follows:

The NPDES permits associated with surface mining in this watershed was modeled as NPS loads since a runoff event is required to deliver pollutants to the stream from these sources. These sources are considered to be transient as they

are temporary best management practices (e.g., ponds) installed to control NPS pollution resulting from active surface mining operations. Upon completion of current mining operations, these ponds will likely be removed and additional ponds installed as new operations begin. As such, the wasteload allocation for Callahan Creek includes a “transient” load, which represents the acceptable load from these sources.

Fecal Bacteria and General Standard Total Maximum Daily Load Development for Callahan

Creek, at 10.2.1.1. Thus, as EPA concluded in approving this TMDL, “This lumped WLA cannot be exceeded by the aggregate of all sources.” June 22, 2006 EPA decisional rationale for Callahan Creek at 10.

The aggregate approach is an inappropriate and insufficient method of creating a TMDL, because it avoids the Clean Water Act requirement of individual WLAs for point source discharges. It explicitly treats mining outfalls as nonpoint sources, even though such outfalls are clearly point sources under the Clean Water Act. However, TMDL deficiencies are beyond the scope of this petition. Upon approval of a TMDL, DMME has a duty to issue NPDES permits that are consistent with the assumptions of the TMDL. In these TMDL watersheds, therefore, DMME has a duty to issue NPDES permits that are consistent with the assumption that the sum of coal mining discharges in a TMDL/aggregate approach watershed will not violate the aggregate WLA. DMME fails to execute that duty.

DMME does not implement any measure in these watersheds to allocate or track the exceedance of the WLA, much less enforce compliance with the WLA. DMME does not apportion the WLA among the mining discharges. Therefore, there is no benchmark for determining whether the WLA is being approached or exceeded other than adding the discharges of each operator to arrive at a sum. That sum is either not regularly calculated by DMME or it is not readily publicly available. Therefore, it is difficult or impossible for a permittee or member

of the public to determine whether the aggregate WLA is being violated, unless a single permittee is violating the WLA on its own, at which point the WLA is being grossly violated.

The NPDES system is broken and patently inconsistent with the TMDL because there is no permit measure that requires permittees to limit discharge to something less than the entire aggregate WLA. Under this system, each permittee can discharge 99% of the aggregate WLA, resulting in aggregate discharges that exceed the WLA many times over. There is no NPDES permit provision to prevent, track or even discourage such discharges.

The Dumps Creek watershed is an example of the problem. The Dumps Creek TMDL assigns a “transient” load for TDS to a group of outfalls, including 11 outfalls from permit 1301839/0081839. This “transient” load is a cumulative load shared among outfalls with sediment control structures that will eventually be removed upon reclamation of the facility. Dickenson-Russell Coal Company exceeded this limit *by itself* as a result of discharges from outfalls on permit 1301839/0081839 in both 2012 and 2013.

Dickenson-Russell’s NPDES permit contains no measure that would create any obligation for the operator until the operator actually exceeds the entire transient WLA on its own. See Permit 1301839. Once Dickenson-Russell exceeds the WLA on its own, there is no allocation remaining for any discharge of TDS by any other operator. Dickenson-Russell is currently violating the entire Dumps Creek WLA. That system is inadequate, harmful to the environment, and is inconsistent with assumptions and requirements of the TMDLs in the respective watersheds.

**b. DMME refuses to enforce approved individual WLAs.**

This is a serious problem for Virginia waters, but it is not limited to TMDLs that explicitly employ the weak, nebulous “aggregate/transient” approach. For example, two more

recent TMDLs, for Bull Creek and the North and South Forks of the Pound, contain no mention of the aggregate approach. Instead, each of those TMDLs, each approved by EPA in 2011, contains permit-specific WLAs. *See, e.g.*, April 2011 Amendment to Bull Creek TMDL, Table 4 at page 5 of 5. That table lists NPDES permits by number and the corresponding WLAs for each permit – not a single load corresponding to the entire set of mining discharges. The TMDL, therefore, does not apply an aggregate approach and instead applies the lawful and much clearer approach of individual WLAs.

Incredibly, DMME has asserted in the 2012 court settlement discussed above that it will nonetheless treat each of those TMDLs as though it were based upon the aggregate approach. On April 16, 2012, parties to a lawsuit in the Circuit Court of the City of Richmond filed a purported settlement. According to the document the case arose from the Virginia Mining Issues Group's appeal of the amendments to the Bull Creek and Pound River TMDLs. The document, executed by DMME, purports to apply the aggregate approach to those TMDLs despite the fact that those TMDLs are irreconcilable with a aggregate approach. The settlement states that:

All the mining wasteload allocations included in the Bull Creek and South Fork of the Pound River TMDLs, and calculated by the Division's contractor, were developed with the assumption that they would be applied under the agency's existing transient/aggregated permitting approach. To apply them to permit limitations as individual wasteload allocations would be inconsistent with the assumptions made during TMDL development.

Thus, the agency purports to refuse to enforce the TMDL, and its individual WLAs, through the NPDES program, despite its legal obligation to do so. The settlement agreement itself states that the parties' focus in reaching settlement was "the manner in which the Contested [Bull Creek and North and South Fork Pound River] TMDLs will be interpreted and implemented through the National Pollutant Discharge Elimination System ("NPDES") permit process." Again, it is true that the permits contain a standard condition that obligates each permittee to comply with

any applicable approved TMDL and WLA. DMME, however, purports to treat each NPDES permit in these watersheds as though they were subject only to a “transient/aggregate” WLA. That reading cannot be reconciled with the TMDLs themselves, which include individual WLAs.

**VII. Virginia has failed to comply with the requirements of 40 C.F.R. part 123 by failing to issue NPDES permits for point source discharges at abandoned and bond released mining sites.**

Virginia has failed to issue/obtain NPDES permits for point source dischargers at bond released mining sites and at abandoned mine land sites. DMME has failed to issue or require the continuance of NPDES permits for point source discharges at sites that were abandoned or that were previously permitted under SCMRA and have had their SCMRA permits and bonds released.

A recent study consistently found elevated levels of selenium and conductivity below reclaimed valley fills.<sup>2</sup> Nearly 90% of the streams below reclaimed valley fills sampled in the study exhibited biological impairment.

To our knowledge and belief, no abandoned or bond-released mine sites have VA/NPDES permits for their continued discharges. As a result, there are unpermitted discharges from valley fills across Virginia’s coal producing counties.

EPA issued regulations in 1985 establishing that post-mining discharges are covered by the NPDES scheme. See 50 Fed. Reg. 41296 (Oct. 9, 1985). In those regulations, the EPA “reemphasize[d] that post-bond release discharges are subject to regulation under the Clean Water Act,” observing that “[i]f a point source discharge occurs after bond release, then it must be regulated through an NPDES permit.” Id. at 41298. The comments to the rule sharpen this point, flatly stating that “[a]ny point source discharge after bond release does require a permit. To the extent parties do not comply, the regulations state that they will be “subject

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<sup>2</sup> Pond, G. J., Passmore, M. E., Pointon, N. D., Felbinger, J. K., Walker, C. A., Krock, K. J., Fulton, J.B. & Nash, W. L. (2014). Long-Term Impacts on Macroinvertebrates Downstream of Reclaimed Mountaintop Mining Valley Fills in Central Appalachia. *Environmental Management*, 1-15.

to enforcement action by EPA under section 309 of the Act and by citizens under section 505(a)(1) of the Act.” at 41298.

West Virginia Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 166 (4th Cir. 2010).

Harm continues to occur from uncontrolled discharges from bond-released mines. For example, a 2014 study found that conductivity’s negative impact on downstream biological communities is long-term. The study’s findings were summarized as:

In addressing our three central questions, we determined that (1) temporal ecological impacts persist downstream of VFs, given 11–33 years post-reclamation; (2) many expected taxa were missing from VF streams (suggesting local extinctions) and the scraper feeding group was significantly reduced; and (3) water quality is most likely the primary barrier to recovery but proximity to clean sources (intervening tributaries) may contribute some sensitive taxa that increase the biological indices used to measure condition.<sup>3</sup>

By failing to issue NPDES permits for point source discharges from abandoned and bond released mine sites DMME is abdicating its duties under the approved NPDES program. The failure to appropriately implement the NPDES program provides grounds for EPA to withdraw approval of Virginia’s NPDES program under 40 C.F.R. § 123.63(a)(2)(i).

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<sup>3</sup> Pond, G. J., et. al. (2014). Long-Term Impacts on Macroinvertebrates Downstream of Reclaimed Mountaintop Mining Valley Fills in Central Appalachia. *Environmental Management*, 1-15.