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[Back to Article](#)

## Government Dancing With Itself

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On Nov. 9, the U.S. 4th Circuit Court of Appeals decided *West Virginia Highlands Conservancy Inc. v. Huffman* ("WVHC"), a case that, at first blush, appears to be a relatively straightforward decision under the federal Clean Water Act. It also appears to be a routine implementation of West Virginia regulations to the effect that a discharge of acid mine drainage, even from a reclamation project operated by the West Virginia Department of Environmental Protection, requires a wastewater discharge permit under the National Pollutant Discharge Elimination System, or NPDES.

But on reflection, the case raises important issues of advocacy and policy.

Coal mining exposes rain water and groundwater to minerals that will make the water acidic. The acidic water will dissolve metals and other minerals, making that water not only acidic, but toxic. When that water flows from a mined area into a stream, it can degrade water quality in that stream very seriously. One can typically control that discharge, but if a coal operator abandons its mine, someone else has to come forward and take active measures to address the mine drainage. Otherwise, water pollution occurs. The problem is long standing in the coal regions of Pennsylvania and West Virginia.

One approach to this problem is to make private persons in any way associated with the mine drainage responsible for cleaning it up. This, of course, is the approach more commonly associated with the Superfund and other site contamination programs. Lawyers sometimes forget that this approach, at least in Pennsylvania, originated in response to abandoned mine drainage.

Sections 316 and 401 of the Clean Streams Law make a person who owns or occupies land on which exists a condition that threatens to pollute groundwater or surface water strictly liable to abate that condition. In the 1977 case *Commonwealth v. Barnes & Tucker Co.*, the Pennsylvania Supreme Court held that those statutory provisions made the new owner of mine works responsible for drainage from a portion of the mine that the new owner was not operating and that had been mined and abandoned by someone else.

That liability or enforcement-first approach does not work well to address abandoned mine drainage because one often cannot find a defendant with the financial resources to address the problem. Accordingly, abandoned mine reclamation often becomes a public works project.

In West Virginia, mine operators post bonds. When they abandon a mine, the bond becomes forfeit and the state can step in to reclaim the mine using the bond. The bond often fails to cover the reclamation cost, so the state must use other funds to do the work, and a backlog exists. A similar backlog exists in Pennsylvania, where addressing all of the abandoned mine drainage would cost billions of dollars.

In *West Virginia Highlands Conservancy Inc.*, or *WVHC*, the West Virginia DEP took some steps to address drainage from certain abandoned mines, but did not reduce the pollution load to the levels called for by either federal technology-based standards or West Virginia water quality standards. The mines polluted less, but they still polluted in excess of what would be permissible under the water pollution permitting regulations.

Discharges of pollutants to surface waters from "point sources" require NPDES permits under the Clean Water Act. In Pennsylvania and most other states, including West Virginia, the state issues that permit under its own rules; the United States Environmental Protection Agency reviews and approves the state permit program and has an opportunity to veto any individual permit, but most of the time the state is the regulating sovereign.

So, if the mines in *WVHC* had been under private control, the discharges from those mines would require permits. Those permits would have included effluent limitations determined by the more stringent of federal technology-based standards — that is, standards that everyone in the industry would have to meet — and water-quality based effluent limitations — that is, the limitations necessary to achieve water quality standards in the receiving stream.

But that was not what was happening in *WVHC* .

Instead, the state was stepping in to improve the situation. For financial resource reasons, the state could not achieve what would otherwise be permit standards. But the state was making things better.

The West Virginia DEP did not issue a permit to itself. To paraphrase Billy Idol, there was nothing to lose, there was nothing to prove and the state was dancing with itself, so there was no reason to issue a permit.

It seemed absurd, said the state (and the Commonwealth of Pennsylvania as amicus), for DEP to issue a permit so that DEP could regulate itself.

But the court disagreed. The statute is clear. The federal and state regulations are clear. A discharge, even by West Virginia DEP, requires a permit, according to the court.

This is not just a paperwork exercise.

Under the Clean Water Act, third persons — such as the plaintiff environmental groups in *WVHC* — may sue to enforce the effluent limitations contained in a permit. Because the permit requires the permittee to monitor the discharge and to report compliance, enforcement of the strict conditions becomes relatively easy for third parties. Thus, on the facts of *WVHC* , a third person may sue to accelerate or to intensify the clean up of abandoned mine drainage, even when the clean up is being done by the state and would require public money to do more.

Contrast that position with the rules under other clean up programs.

Under section 113(h)(4) of the federal Comprehensive Environmental Response, Compensation and Liability Act (the "Superfund" act), 42 U.S.C. § 9613(h)(4), no one may bring a citizen's suit to challenge the selection of a remedy until the remedy has been completed. A different rule applies in an enforcement action.

Indeed, in the 1993 8th U.S. Circuit Court of Appeals case *Arkansas Peace Center v. Arkansas Dept. of Pollution Control & Ecology* , the court dismissed a suit by an environmental group claiming that air pollution from implementation of the remedy at a contaminated site would release dioxin into the surrounding the neighborhood. The court held that the environmental group could not raise that issue until after the government completed the clean up — that is, after the air pollution had occurred, if it did. Moreover, under section 121(e) of CERCLA, 42 U.S.C. § 9621(e), while a Superfund clean up must comply with the substantive standards imposed by environmental regulatory programs, no one, not even a private party conducting the clean up under threat of enforcement, need obtain any permits to complete an on-site action provided that the remedy was properly selected by the EPA.

Section 504 of the Pennsylvania Hazardous Sites Cleanup Act provides a permit bar for HSCA remedies, and Section 508 precludes pre-enforcement review of the remedy selection. By number of sites, however, more cleanup takes place under the Land Recycling and Environmental Remediation Standards Act, or Act 2.

Act 2 — the voluntary response statute — permits private parties to conduct cleanups without state intervention in the selection or implementation of the remedy, for the most part. The state merely reviews a report of the results of the cleanup. Nevertheless, Act 2 exempts all on-site clean up activities from the requirement to obtain permits.

Most environmental programs, like the NPDES program under the Clean Water Act at issue in *WVHC* , proceed from the assumption that all change in polluting activity is for the worse — or at least quite likely to be so. On that assumption, the ability of interested private parties to challenge permit terms and to enforce issued permits makes perfect sense. Scrupulous enforcement by third-parties, even if it inhibits new regulated activity, will protect the environment.

That assumption does not hold true in the contamination programs. Cleanup, even if it is not perfect or complete, can be said to be an improvement. Moreover, prompt cleanup has marked advantages over cleanup delayed by litigation, even if the later cleanup would be "better" in some way.

Thus, under the contamination programs, the assumption is reversed. Change in the condition of contaminated sites is

assumed to be for the better, or likely to be so, and so the governing statutes provide permit and pre-enforcement review bars.

In any given case, lawyers can productively ask the question whether the "all change is for the worse" assumption holds.

A lot of new activity right now works on environmental improvement. For example, new public infrastructure would make the economy more energy efficient, reduce carbon emissions and even better manage stormwater runoff to avoid flooding and water pollution; replacing old facilities with new ones will improve their environmental efficiency; and, on Nov. 10, EPA offered extensive guidance on the technology-based standards to be applied to large emitters of greenhouse gases under the Clean Air Act, and the amount of new work for which they call remains to be seen.

In each case, advocates may productively argue that permit processes and standards should be streamlined because the work more resembles a clean up than a new, polluting project. Indeed, in Pennsylvania, one can consider whether the work arguably falls within Act 2, and therefore within the permit bar. That actually might be true for some abandoned mine drainage matters.

Regulators and courts will have to consider whether that argument works. In *WVHC* it did not, but the court quite explicitly directed the parties to seek a change in the West Virginia regulations or the Clean Water Act. •

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