



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

MAY 27 2010

Mr. Scott Mandirola, Director  
Division of Water and Waste Management  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street  
Charleston, WV 25304

Mr. Thomas Clarke, Director  
Division of Mining and Reclamation  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street  
Charleston, WV 25304

Re: NPDES Permit No. WV1020013  
Argus Energy LLC  
Copley Trace No. 2 Surface Mine

Dear Mr. Mandirola and Mr. Clarke:

Pursuant to Section 402 of the Clean Water Act, 40 C.F.R. Section 123.44, and the Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency (EPA) and the West Virginia Department of Environmental Protection (WVDEP), we received the above-referenced permit modification for review on March 2, 2010. On March 31, 2010, we sent a general objection letter, which served as a time extension request for the full 90-day period to review the draft modification. Because, for the reasons described below, this permit does not satisfy the Clean Water Act, 40 C.F.R. Parts 122, and the applicable West Virginia Water Quality Standards, this letter serves as the U.S. Environmental Protection Agency Region III's (EPA) specific objection to the permit as modified and supplements the position provided in the general objection letter.

The permit modification requested by the permittee would extend the compliance schedules included in the permit for the effluent limitations for selenium. Under the current applicable compliance schedule, final effluent limits for selenium were to become effective on April 6, 2010. The new proposed compliance schedule, which covers three outfalls, would last 28 more months. The compliance schedule for selenium limits is the only revision proposed to this permit.

A National Pollutant Discharge Elimination System (NPDES) permit must include, in addition to any technology-based effluent limits, effluent limitations necessary to meet water quality standards. *See* Section 301(b)(1)(C) of the CWA; 40 C.F.R. §§ 122.44(d) & 122.4(d). These limitations "must be established to assure compliance, regardless of the availability or effectiveness of treatment technologies." *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1384 (4<sup>th</sup>

Cir. 1990) Where a Total Maximum Daily Load (TMDL) has been established, the permit also must include effluent limitations that are consistent with the assumptions and requirements of any applicable TMDL. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B).

A permit may include a compliance schedule, if appropriate, for limits set to achieve water quality standards which were adopted after 1977. Relevant factors to consider in evaluating whether a compliance schedule is appropriate include the total amount of time that a discharger has already have to meet the effluent limit, the extent to which the discharger has made efforts to comply with the effluent limits in prior permits, and the amount of time necessary to implement the measures that will result in compliance with the limits. The schedule must lead to compliance as soon as possible. A compliance schedule in a permit must lead to compliance with the effluent limitations for water quality standards by the end of the compliance period. A finding that the discharger will achieve compliance at the end of the period must be adequately supported by the administrative record for the permit. Once an NPDES permit has a compliance schedule in place, such schedule can only be modified for “good cause... such as an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy.” *See* West Virginia C.S.R. § 47-30-8.2.c.2.D and 40 C.F.R. 122.62(a)(4).

The documents submitted by WVDEP for our review in support of the permit modification do not support a finding of good cause to modify a compliance schedule. There is no evidence of any unexpected intervening event that has occurred during the compliance period to justify the modification. Although EPA acknowledges the challenges of building treatment for selenium and the research which the permittee has conducted, the permittee has already had since 2004 to come into compliance with their selenium limitations.

The schedule proposed in the modification continues to provide additional time to evaluate the treatment technology, to decide whether such system is successful in controlling the discharges and to develop alternate plans, if necessary. The proposed schedule provides for continuation of experimental AMD sludge/slurry treatment. The permittee provided data that showed noncompliance for nearly half of the samples collected for outfalls Nos. 6 and 9 during 2009, despite early positive results, and was unable to conclude whether the treatment method had been successful up to this point. The schedule allows continued experimentation, with a final compliance date 28 months from the effective date of the permit. The method proposed by the permittee does not appear to guarantee compliance nor is an alternative technology identified which would do so. Additional research information provided stated that the solubility and mobility of selenium were highly variable and did not support a simple model for “special materials handling” to control selenium. Failure to ensure compliance with these permit requirements is a valid reason for EPA to object to a compliance schedule in a permit under 40 C.F.R. 123.44(c).

If you have any questions, please feel free to contact Evelyn MacKnight at (215) 814-5717 or Francisco Cruz at 215-814-5734.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon M. Capacasa". The signature is fluid and cursive, with a large initial "J" and "M".

Jon M. Capacasa, Director  
Water Protection Division

cc: Argus Energy WV LLC  
Jeffrey Parsons, WVDEP