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

OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, and THE SIERRA CLUB,

Plaintiffs,

v. **Civil Action No.** 3:21-cv-00301

GLENDA OWENS, ACTING DIRECTOR, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,

Defendant.

COMPLAINT

INTRODUCTION

1. This is a citizen suit for declaratory and injunctive relief against Defendant, Glenda Owens in her official capacity as Acting Director of the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), pursuant to § 520(a)(1) and (a)(2) of the Surface Mining Control and Reclamation Act ("SMCRA") for failure to comply with the nondiscretionary duty set forth in 30 C.F.R. § 732.17(c).

2. As detailed below, Plaintiffs allege that OSMRE has failed to make the required determination of whether an amendment to West Virginia's SMCRA Program is necessary within the 30-day period following receipt of notice from the West Virginia Department of Environmental Protection ("WVDEP").

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3. Plaintiffs seek a declaration that Defendant has violated her non-discretionary duty, an injunction requiring her to conform her future conduct to the federal law, and costs and expenses including attorneys' and expert witness fees.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 30 U.S.C. § 1270(a).

5. On March 12, 2021, Plaintiffs mailed a notice of the violation and their intent to file suit in letters addressed to the Defendant, the Acting Secretary of the United State Department of the Interior, the Regional Director for OSMRE, and WVDEP as required by § 520(b)(1)(A) of SMCRA. 30 U.S.C. § 1270(b)(1)(A).

6. More than sixty days have transpired since the notice letters were sent and Defendant has failed to make a determination pursuant to 30 C.F.R. § 732.17(c) and redress the violation described in the notice letter.

7. Venue is appropriate pursuant to 30 U.S.C. § 1270(c) because the surface coal mining operations complained of are in this judicial district.

PARTIES

8. Defendant is a "person" within the meaning of § 701(19) of SMCRA. 30 U.S.C. § 1291(19).

9. Ms. Owens is the Acting Director of OSMRE. She is responsible for ensuring that OSMRE meets its obligations under SMCRA and its implementing regulations as the Director of the agency.

10. Plaintiff Ohio Valley Environmental Coalition is a nonprofit organization incorporated in Ohio. Its principal place of business is Huntington, West Virginia. It has approximately 550 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to

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the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

11. Plaintiff West Virginia Highlands Conservancy is a nonprofit organization incorporated in West Virginia. It has approximately 1,000 members. It works for the conservation and wise management of West Virginia's natural resources, and is one of West Virginia's oldest environmental activist organizations. The West Virginia Highlands Conservancy is dedicated to protecting our clean air, clean water, forests, streams, mountains, and the health and welfare of the people that live in West Virginia and those who visit to recreate.

12. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 780,000 members and supporters nationwide, including approximately 2,700 members who reside in West Virginia and belong to its West Virginia Chapter. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of Earth; to practicing and promoting responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club's concerns encompass the exploration, enjoyment, and protection of surface waters in West Virginia.

13. Plaintiffs' members, including Cindy Rank, Ronda Harper, and others use and enjoy the areas affected by WVDEP's failure to fully reclaim all underground and surface mine sites in West Virginia that have been abandoned since the enactment of SMCRA on August 3, 1977—and OSMRE's failure to require the state agency to do so. Specifically, Plaintiffs' members visit, live near, drive by and/or fly over areas of the State and observe the adverse impacts which have resulted from the failure of WVDEP to fully reclaim all mine sites which SMCRA permittees have

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abandoned before completion of reclamation. The observable adverse impacts of the failure to properly reclaim these surface mines and the pollution of streams resulting from inadequate bonding adversely affect these members' property, recreational, aesthetic and environmental interests. For example, unreclaimed mines owned by ERP Environmental Fund discharge excessive amounts of selenium and other pollutant discharges that degrade water quality and harm aquatic life in downstream waters, including Rum Creek, the Mud River and its tributaries. Because of this pollution, Plaintiffs' members refrain from using or restrict their usage of waters receiving these discharges.

14. At all relevant times, Plaintiffs were and are "persons" as the term is defined by § 701(19) of SMCRA, 30 U.S.C. § 1291(19).

STATUTORY AND REGULATORY FRAMEWORK

15. Section 732.17 of OSMRE's implementing regulations for SMCRA require a State regulatory authority to notify OSMRE "of any significant event or proposed changes which affect the implementation, administration or enforcement of the approved State [SMCRA] program." 30 C.F.R. § 732.17(b).

16. Within 30 days of OSMRE's receipt of that notification, the Director of OSMRE "shall determine whether a State program amendment is required and notify the State regulatory authority of the decision." *Id.* § 732.17(c).

17. To guide OSMRE in making its determination, the regulations further provide a list of three examples of when State program amendments may be required:

> (1) As a result of changes in [SMCRA] or regulations of this chapter, the approved State program no longer meets the requirements of [SMCRA] or this chapter; or (2) Conditions or events change the implementation, administration or enforcement of the State program; or (3) Conditions or events indicate that the approved State

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> program no longer meets the requirements of [SMCRA] or this chapter.

Id. § 732.17(e)(1)-(3).

18. Thus, when the State program no longer meets the requirements of SMCRA, a program amendment is necessary. *Id.* § 732.17(e)(2).

19. SMCRA requires permittees to post bonds in an amount that is sufficient to assure completion of reclamation by the State regulatory authority in the event of forfeiture—that is, if the operator refuses or is unable to complete reclamation. 30 U.S.C. § 1259(a), (b). West Virginia's SMCRA program imposes the same requirement. W. Va. Code § 22-3-11. The State regulatory authority must ensure that adequate bond coverage is in effect "at all times." 30 C.F.R. § 800.4(g).

20. To ensure adequate bond coverage, states may adopt an alternative bonding system ("ABS") that "will achieve the objectives and purposes of the bonding program pursuant to [SMCRA]." 30 U.S.C. § 1259(c).

21. To achieve this, the state ABS "must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for *any areas* which may be in default *at any time*." 30 C.F.R. § 800.11(e)(1) (emphasis added). The words "at any time" include both present and potential future insolvencies.

22. West Virginia has adopted an ABS, which is funded by a tax levied on each ton of coal mined to support the Special Reclamation Fund ("SRF") that is to be used to complete reclamation at forfeited sites. Whenever the amount of forfeited and posted bonds for a mine is less than the actual cost of reclamation, WVDEP must withdraw funds from the SRF to pay for reclamation. W. Va. Code §§ 22-3-11(g), (i).

23. In approving West Virginia's program, OSMRE stated that 30 C.F.R. § 800.11(e) "requires that West Virginia modify its ABS to (A) eliminate the deficit and (B) ensure that sufficient money

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