The Federal Water Pollution Control Act Amendments of 1972 as Applied to the Surface Mine in West Virginia–Pollutant Discharge Permit Requirements

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THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 AS APPLIED TO THE SURFACE MINE IN WEST VIRGINIA—POLLUTANT DISCHARGE PERMIT REQUIREMENTS

Congress passed the Federal Water Pollution Control Act Amendments of 1972\(^1\) with the expressed desire to create an ordered and uniform nationwide program "to restore and maintain the chemical, physical and biological integrity of the Nation's waters"\(^2\) by eliminating pollutant discharge into navigable waters by 1985,\(^3\) establishing and enforcing interim levels of water quality designed to protect aquatic wildlife and recreation,\(^4\) providing federal aid in planning and building waste treatment facilities commensurate with areawide waste treatment management and planning,\(^5\) and encouraging and funding research designed to advance water pollution control technology.\(^6\) The program, though federal in origin and management, is designed to protect the rights and powers of the states to exercise control over pollution within their boundaries.\(^7\)

Vital to the achievement of Congress' intent is the National Pollutant Discharge Elimination System\(^8\) (NPDES) and its requirement that operators of point sources of pollution discharged into navigable waters must first obtain a permit for such discharges from the Federal Environmental Protection Agency (E.P.A.) before the discharge is legal. Implicit in the permit program are requirements for maintenance of allowable effluent levels in the discharge and for reports of monitoring results to the E.P.A.

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7 33 U.S.C.A. § 1251(b) (Supp. 1976):
   It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter . . . .

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What follows is an attempt to explain the sections of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter, "the Act") which are pertinent to surface mines, provide an explanation of their application to West Virginia surface mines, as viewed by the E.P.A., and to provide a guide to the process by which the surface mine operator may obtain a discharge permit. Without reciting specific technical requirements, which may vary from mine to mine and point source to point source, the types of conditions and procedures which are required of the operator by the permit will be considered. Finally, the legal ramifications of noncompliance with the requirements of the Act will be examined in terms of government action, both criminal and civil, and of citizens' actions for civil remedies.

The "heart" of the Act, insofar as it attempts to control and eventually eliminate the discharge of pollutants into the nation's waters, is the NPDES permit program, which is administered by the Administrator of the E.P.A.\(^9\) The program requires the owner or operator of a point source of pollution to obtain a federal permit before he may legally discharge pollutants into navigable waters.\(^10\) As the congressional definition indicates, a point source is any identifiable conveyance which produces a collected flow of effluent or pollutant-bearing water,\(^11\) as distinguished from water which naturally and diffusely runs off the land.\(^12\) The term "point source" has been liberally construed by the courts. In *Natural Resources*
Defense Council, Inc. v. Train, 13 the United States District Court for the District of Columbia denied the authority of the Administrator of the E.P.A. to exempt certain categories of point sources from the permit requirement.14 The court found that even storm sewers from which the discharge is entirely storm runoff are point sources requiring permits.15 Taking note of this judicial indication of the liberal construction to be given the term, as well as the broad congressional definition, the E.P.A. now takes the general view that any concentrated, pollutant-bearing flow which is caused by man is a point source, regardless of whether the conveyance is man-made or the result of natural water flow from the point at which the operator's activities have caused the water to collect and become contaminated with pollutants.16

The use of the term "navigable waters" to describe those bodies of water to which the program, as well as the Act itself, applies would seem to limit the scope of the permit requirements to those larger bodies of water on which there is, or might be, waterborne commerce. However, the definition given the term for the purposes of the Act17 is very broad and indicates a congressional intent to

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14 Id. at 1396.
15 National Resources Defense Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975). The Administrator promulgated regulations (40 C.F.R. § 125.4(f) (1975)) which exempted the discharge from storm sewers from permit requirements. The court in this case found that such storm sewers are point sources for the purposes of the Act and must have NPDES permits.
17 33 U.S.C.A. § 1362(7) (Supp. 1976). "The term 'navigable waters' means the waters of the United States, including the territorial seas." The definition in the regulations governing the NPDES provides further insight into the broad meaning given the term "navigable waters" for the purposes of the Act. 40 C.F.R. § 125.1(p) (1975):

The term "navigable waters" includes:
(1) All navigable waters of the United States;
(2) Tributaries of navigable waters of the United States;
(3) Interstate waters;
(4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
(5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.
regulate pollutant discharges into even the smallest streams.\textsuperscript{18} The question whether Congress has the power under the Constitution to regulate pollutant discharges into small, intrastate streams has not yet been brought before the United States Supreme Court. The lower courts, however, have held, based on Supreme Court rulings on similar questions regarding congressional actions regulating activities such as flood control and navigational safety on purely intrastate streams and rivers, that Congress has merely exercised its constitutional powers in regulating the intrastate tributaries of interstate, navigable waters.\textsuperscript{19}

The E.P.A., in applying the permit requirements, generally presumes that any active surface mine will have at least one point source of pollution and, therefore, requires the mine operator to obtain an NPDES permit.\textsuperscript{20} The permit must be maintained throughout the time during which the actual mining is in progress and during the recovery and reggrading period which follows.\textsuperscript{21} In

\begin{itemize}
  \item \textsuperscript{18} 1972 U.S. Code Cong. & Ad. News 3668, 3742-43:
  
  The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

  P. Gove, Webster’s Third New International Dictionary 1109 (1961), defines “hydrologic cycle” as “a complex sequence of conditions through which water naturally passes from water vapor in the atmosphere through precipitation upon land or water surfaces and ultimately back into the atmosphere as a result of evaporation and transpiration.”

  \item \textsuperscript{19} United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974), provides a comprehensive and well-reasoned discussion of the constitutionality of the congressional prohibitions and restrictions on the discharge of pollutants into intrastate, nonnavigable tributaries of navigable streams.

  \item \textsuperscript{20} Interview with Ray George, supra note 16.

  \item \textsuperscript{21} Interview with Ray George, supra note 16. The E.P.A. considers the recovery and reggrading, or reclamation, period, and thus the NPDES permit requirement, as ended when the performance bond which the surface mine operator is required to post with the State Department of Natural Resources, W. Va. Code Ann. § 20-6-16 (1973), has been returned to the operator. This bond is posted prior to the beginning of operations to assure the reclamation of the land, after mining operations cease, in compliance with a plan approved by the Director of the Department of Natural Resources. The bond is returned only when reclamation is completed to the state’s satisfaction, thus marking a readily identifiable time at which the E.P.A. can terminate the NPDES requirement.
\end{itemize}
West Virginia, the E.P.A.'s presumption that a surface mine produces point sources is confirmed by the requirement in the West Virginia Surface Mining and Reclamation Act that, in order to legally operate a surface mine, the owner must provide an approved drainage system. Acceptable drainage systems are set forth in the Drainage Handbook for Surface Mining, published and distributed by the West Virginia Department of Natural Resources (D.N.R.).

The drainage handbook calls for extensive "pre-planning", prior to the beginning of mining operations, to achieve a program of site drainage which will reduce the levels of sediment and acid water discharged into area streams while effectively carrying water away from the mine site without allowing it to flow uncontrolled over the land and causing erosion damage. To control sediment, the drainage handbook requires the installation of sediment dams or ponds to hold water from drainageways motionless so that sediment may settle out of the water. Treatment of acid water includes creation of water treatment impoundments to trap acid water and thus facilitate chemical treatment. The E.P.A. assumes that both the ponds and impoundments will have spillways or overflow channels which will qualify as point sources. Surface mines in West Virginia are, therefore, required to have an NPDES permit in order to operate legally.

The process of obtaining a permit begins with the filing of an application with the E.P.A. Since all authority in the management of the NPDES program, with the exception of the power to hear appeals and national security responsibility, has been delegated to the various E.P.A. Regional Administrators for each of the ten

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22 W. VA. CODE ANN. § 20-6-1 to -32 (1973).
23 W. VA. CODE ANN. § 20-6-9a (1973): "Prior to the beginning of surface-mining operations, the operator shall thereafter maintain a drainage system including any necessary settling ponds in accordance with the rules and regulations as established by the commission."
25 Id. at 1, 6.
26 Id. at 7.
27 Id. at 4.
28 Interview with Ray George, supra note 16. In fact, the DRAINAGE HANDBOOK FOR SURFACE MINING, supra note 24, requires, in its specifications for various types of approved sediment dams and ponds, that there be either a spillway or exit channel. Id. at 11-14, 25-26, 31-32, 39-40.
E.P.A. regions, the application is filed with the Regional Administrator for the region in which the mine is located.

Generally, the application will be filed at least 180 days prior to the commencement of mining operations on Short Form C (for manufacturing and mining establishments), which may be obtained from the Regional Administrator. If the owner is a corporation, the form must be signed by a person having at least the status of a vice-president, or by a representative who is responsible for overall operations of the facility at which the point source is located. The form must be signed by a general partner in the case of a partnership, or by a sole proprietor. A fee of $10 must accompany the form when it is filed.

If the information contained on the short form indicates that discharges from the mine will total at least 50,000 gallons on any day of the year, or will contain toxic pollutants, or if the Regional Administrator or the Director of the D.N.R. while making the decision whether the State will certify the permit for issuance, should determine that additional information is required to allow proper consideration of the application, the owner will be required to fill out a Standard Form C, which elicits more comprehensive information about the proposed operation and discharge. This form must be accompanied by a $100 base fee (less the $10 short form filing fee) plus $50 for each additional point source to be covered by the permit.

It is important to note that the owner of a mine may choose to obtain a single permit for the entire surface mine, despite the fact that there will probably be several point sources, or he may apply for a separate permit for each point source. The acquisition

29 40 C.F.R. § 125.5 (1975). West Virginia is located in Region III, so applications for NPDES permits should be addressed to:
Regional Administrator
Region III
Environmental Protection Agency
Curtis Building
Sixth and Walnut Streets
Philadelphia, Pennsylvania 19106
Attention, Permits Branch
30 40 C.F.R. § 125.12(a) (1975).
31 40 C.F.R. § 125.12(e) (1975).
32 40 C.F.R. §§ 125.12(g),(h)(2) (1975).
33 40 C.F.R. § 125.12(a) (1975).
34 40 C.F.R. § 125.12(f) (1975).
37 40 C.F.R. § 125.12(i)(2) (1975).
38 Interview with Ray George, supra note 16.

https://researchrepository.wvu.edu/wvlr/vol78/iss2/5
of a separate permit for each point source is desirable when the industry is one in which the requirements of the permit are tailored to the point source with a resulting higher degree of flexibility, but the E.P.A. applies the same set of requirements to all point sources resulting from surface mines in West Virginia. For that reason, a mine owner realizes no benefit from the acquisition of a separate permit for each point source, and the E.P.A. discourages the practice.

The Regional Administrator and his staff will examine the application to determine whether additional information about the operation and expected point source discharges is required before the permit can be properly formulated. If more information is needed, the owner will be notified, and he will be required to make arrangements for the transmission of the needed information or for a site inspection by an E.P.A. representative. The owner of the mine has, at this point, completed his part of the application process and must await notification of whether the permit will be issued and, if so, what requirements will be imposed as conditions of the permit. The decision whether or not the permit will issue and what conditions will be imposed on the permittee is based on the requirement that the point source discharge meet the effluent limitations, water quality standards, standards of performance.

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24 Id.


26 40 C.F.R. § 125.1(j) (1975): "The term 'effluent limitations' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . ."

33 U.S.C.A. § 1311(b) (Supp. 1976):

(b) In order to carry out the objective of this chapter there shall be achieved

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator . . . .

(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class . . . .


(a) (1) The Administrator shall . . . publish . . . a list which
and monitoring requirements of the Act, as well as any state standards.\footnote{33 U.S.C.A. § 1312 (Supp. 1976):}

Upon receipt of the application and any additional information which the Regional Administrator may require, copies are sent to the West Virginia Department of Natural Resources, the District Engineer of the United States Army Corps of Engineers for the district in which the mine is located, the Federal Department of the Interior, and the Federal Department of Commerce.\footnote{33 U.S.C.A. § 1316 (Supp. 1976):} Feedback from each of these agencies will be incorporated into the conditions of the permit.

\footnote{33 U.S.C.A. § 1318 (Supp. 1978), provides the authority by which the Administrator may require the operator of a point source to monitor the discharge of pollutants and record and report the results of such monitoring.}

\footnote{40 C.F.R. § 125.11 (1975).}

\footnote{40 C.F.R. § 125.14 (1975).}
The D.N.R. is asked to certify in writing to the Regional Administrator that the point source will meet the requirements of the Act with respect to effluent standards, water quality standards, and standards of performance under the Act or that none of those standards are applicable to the point source; the state agency may deny certification if it finds that the point source cannot be brought within the applicable standards, or it may waive certification. If there are applicable standards, the D.N.R. must spell out those standards and the treatment and monitoring requirements necessary to bring the discharge from the point source within them. Under the provisions of the Act, the NPDES permit may not be issued without the state's certification or a waiver of certification, and any requirements set forth by the state become part of the requirements of the NPDES permit. The E.P.A. has no authority to ease or otherwise modify such state-imposed restrictions, and, as a result, will not hear challenges to those requirements. Such challenges must be made to the D.N.R.

The District Engineer of the Army Corps of Engineers is given a specific time period in which to determine the effects of the point source discharge on anchorage and navigation in waters into which the discharged pollutants will flow. He may determine that the discharge will substantially impair anchorage or navigation, in which case the Regional Administrator must deny issuance of the permit. If possible, however, the District Engineer may specify restrictions on the discharge which will lessen the effects on navigation and anchorage to an acceptable level. Alternatively, he may determine that the discharge will have no adverse effects and approve issuance of the permit.

The Federal Departments of Commerce and the Interior receive the permit application for purposes of commenting on the

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18 40 C.F.R. § 125.14(c) (1975).
19 33 U.S.C.A. § 1341(d) (Supp. 1976). Although this section implies that the State will tailor the requirements to the point source, the D.N.R. simply applies the same requirements to all surface mine point sources. Telephone conversation with Ray George, Environmental Protection Agency West Virginia State NPDES Co-Ordinator, Jan. 1976.
22 Interview with Ray George, supra note 16.
23 Id.
effects of the point source discharge on fish, shellfish, and wildlife resources. They may make recommendations regarding the conditions which should be placed on the permit, although inclusion of the suggested conditions in the permit is purely discretionary on the part of the Regional Administrator.56

Upon receipt of the feedback from these various agencies regarding a particular permit application, the Regional Administrator must determine whether the permit will issue; if he finds that no set of requirements and restrictions upon the point source will cause the pollutant discharge to fall within the applicable limits of the Act, or if either the D.N.R. or the District Engineer refuses to certify the permit for issuance, the permit will not be issued.57 If the permit is to be issued, the Regional Administrator will formulate the conditions of the permit so that the point source discharge will fall within the limitations as to effluent levels, effects on area water quality, and standards of performance under the Act which he determines to be applicable to the point source in question.58 Additional requirements pursuant to certification by the D.N.R. and approval by the District Engineer are written into the permit.59

The permit will set out average and maximum daily quantitative limitations on the level of each of the various polluting elements in the discharge in terms of weight or, when the pollutant is of a nature not conducive to measurement by weight, by any more practical measure.60 At the discretion of the Regional Administrator, additional daily quantitative limitations may be spelled out in terms of average or maximum pollutant concentration.61 He may also include a schedule by which the permittee is to achieve compliance with the terms of the permit if the permittee has not done so at the time of application.62 The owner of the point source

57 40 C.F.R. §§ 125.21(a),(b),(c) (1975).
58 40 C.F.R. § 125.22(a) (1975). As a practical matter, the Regional Administrator applies the same basic permit conditions to all surface mine point sources in West Virginia. Telephone conversation with Ray George, Environmental Protection Agency West Virginia State NPDES Co-Ordinator, Jan. 1976.
59 40 C.F.R. § 125.22(b) (1975). When requirements set by the D.N.R. conflict with those of the E.P.A., the more stringent of the two requirements is applied as a permit condition. Telephone conversation with Ray George, Environmental Protection Agency West Virginia State NPDES Co-Ordinator, Jan. 1976.
60 40 C.F.R. § 125.24(a) (1975).
61 Id.
62 40 C.F.R. § 125.23 (1975).
will be required to take those steps necessary to maintain the quality of the discharge within the limitations of the permit as set out by the Regional Administrator. The permit will also spell out the requirements for monitoring the point source discharge in terms of the installation, use, and maintenance of monitoring equipment, frequency of monitoring, and scope of records maintenance and reports to the E.P.A. Minimum monitoring requirements will include measurement of the following parameters: flow in terms of gallons per day, pollutants which are subject to reduction or elimination under the terms of the permit, pollutants which have a significant impact on the water quality of the locality, and any other pollutants which are specified by the Administrator to be subject to monitoring. The Regional Administrator will specify the frequency with which monitoring will be performed, subject to the requirement that it must be done with sufficient frequency to properly characterize the nature of the discharge. The Regional Administrator will also spell out the requirements for maintaining records of the results of the monitoring, the minimum requirements being that the records be kept for at least three years, with reports to the E.P.A. being made at least once a year.

Once the permit is issued, it is always subject to modification, suspension, or revocation, following proper notice and opportunity for a hearing, if it is determined that there has been a violation of the terms of the permit, a fraudulent misrepresentation or failure to disclose information pertinent to the acquisition of the permit during the time in which the application is being processed, or a change, either in the nature of the discharge or in the environment surrounding the point source which requires a temporary or permanent reduction or elimination of the discharge to maintain the desired water quality.

As shown above, the requirements for obtaining an NPDES permit and the conditions which are imposed on the owner of the mine by the permit have increased the difficulty of opening and operating a surface mine in West Virginia. In a parallel vein, the Act has provided additional stages during the creation of the sur-

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63 40 C.F.R. § 125.22 (1975).
64 40 C.F.R. § 125.27 (1975).
65 40 C.F.R. § 125.27(b) (1975).
66 40 C.F.R. § 125.27(c) (1975).
67 40 C.F.R. §§ 125.27(d),(e) (1975).
face mine at which the public may question the wisdom of opening a surface mine in terms of its effects on the environment and may possibly restrict or halt the operation altogether, either at its inception or at any time that its pollution discharges fall outside the limits set by the NPDES permit. At the time that an application for an NPDES permit is received by the Regional Administrator, the E.P.A. must give public notice of the application by posting notices in the post office and other public places in the municipality nearest the point source, by posting notice on the land on which the point source is located, by publishing notice in the local newspapers and in any existing periodicals or newspapers which have a general circulation in the region, and by mailing notices to the applicant, to those persons who have requested that they be included on a mailing list for all such permit applications in the state, and to all others requesting notice of this particular application. Any party may file a written comment on the application with the Regional Administrator within thirty days of the publishing of the notice. If the Regional Administrator decides that the public has exhibited significant interest in a particular application, he may conduct a public hearing at which any person may submit oral or written statements and data concerning the proposed permit and the discharge which it will regulate. Notice of

49 40 C.F.R. § 125.32(a) (1975).
70 40 C.F.R. § 125.32(b)(1) (1975).
71 Telephone conversation with Ray George, Environmental Protection Agency West Virginia State NPDES Co-Ordinator, Nov. 11, 1975: Although very few public hearings on permit applications have been held in West Virginia to date, the E.P.A. will hold such a hearing if requests are received. No indication as to any specific minimum number of requests necessary to gain a hearing was given; the determination is made on a case by case basis with consideration given to the locality of the point source in question, the number of requests for a hearing, and the identities of the requesting parties.

The E.P.A. viewpoint, as indicated by Mr. George, is that very little is gained by holding such public hearings and that the views and suggestions of interested parties with respect to a permit application will gain as much, if not more consideration when submitted to the E.P.A. in written form. No letter expressing interest or suggestions concerning a permit application will go unanswered, and in the case of a request for a public hearing, the requesting party will generally be contacted by phone to allow the E.P.A. to determine the basis for the request and perhaps clear up misunderstandings as to the ramifications of permit issuance which might have led to the desire for a public hearing. A large number of the requests for public hearing which are received by the E.P.A. are subsequently determined to be based on such misapprehensions; a telephone call to the requesting party often results in the withdrawal of the request.

72 40 C.F.R. §§ 125.34(b)(1), (3) (1975).
the hearing must be given in the same manner as for the application itself,71 and thirty days of preparation time must be allowed before the hearing.74

Both the requirements for public notice of the application with subsequent acceptance of comment and for public hearings give interested parties a chance to submit data and opinions to the Regional Administrator to attempt to influence the disposition of the permit application, but there is no requirement that the actual effects of submitted information on the disposition of the permit be revealed.75 The Act, however, does supply a quasi-judicial forum in which an interested person may express his views in a more thorough manner and be informed of the results of his efforts with respect to the issuance and conditions of the permit. He may appeal if he feels that his interests were not adequately protected. Within thirty days of the publication of notice of an application and within twenty days of any public hearing on the application, any person may request an adjudicatory hearing to consider the proposed permit and its ramifications.76 The hearing will be presided over by an officer or employee of the E.P.A. appointed to act as a judicial officer by the Regional Administrator,77 and any party to the hearing may be represented by counsel.78 All relevant evidence will be received and considered regardless of the rules of evidence which might preclude its admission in a formal court of law.79 Provision is also made for the introduction of witnesses and cross-examination by adverse parties.80 The hearing will be stenographically recorded,81 and the record, together with proposed findings and conclusions submitted by the parties will be certified to the Regional Administrator within twenty days of the conclusion of the hearing.82 The Regional Administrator then has fifteen days

72 40 C.F.R. § 125.32(b)(2) (1975).
73 40 C.F.R. § 125.34(i) (1975).
74 40 C.F.R. § 125.34(c) (1975). The Administrator may refuse to hold a requested adjudicatory hearing, but logic would indicate that the hearing will be granted if the requesting party has shown a valid interest in the permit application, since the party may seek judicial review of the Administrator's actions in denying the hearing. 33 U.S.C.A. § 1369(b)(1) (Supp. 1976).
75 40 C.F.R. § 125.34(j) (1975).
76 40 C.F.R. § 125.34(i) (1975).
77 40 C.F.R. § 125.34(m) (1975).
78 Id.
79 40 C.F.R. § 125.34(n) (1975).
in which to issue a tentative decision on the application,\textsuperscript{83} followed by an additional ten days during which any party may submit exceptions to the tentative decision along with written evidence which is probative of the propriety of the decision.\textsuperscript{84} Finally, the Regional Administrator has thirty days in which to issue his final decision, which must include a statement of findings and conclusions and the final decision on the issuance of the permit, along with the bases upon which such findings and the decision were made.\textsuperscript{85} Any party to the adjudicatory hearing may then appeal to the Administrator from the Regional Administrator's final decision. The Administrator, after reviewing the record of the hearing and the Regional Administrator's decision, may adopt, modify, or set aside that decision.\textsuperscript{86} Finally, any action by the Administrator in issuing or denying a permit may be reviewed by the circuit court of appeals of the federal judicial district in which the party seeking review resides or conducts an affected activity.\textsuperscript{87} The entire procedure of hearing, decision, appeal, and review thus allows the surface miner to seek to ease the burden placed on his operation by the permit. At the same time, the procedure gives the anti-surface mining groups a forum in which to seek restriction or elimination of such mining.

Having discussed the procedure for obtaining a permit and the requirements placed on the operator of a point source by the permit, it is necessary to consider the consequences of failing to secure a permit, or, having obtained a permit, of failing to meet the requirements of the permit.

The Regional Administrator has several courses of action open to him in dealing with mine operations in violation of the Act. Upon finding that the operator of a point source has allowed the pollutant discharge to violate the limitations set forth in the permit and that the discharge exceeds applicable effluent limitations, water quality standards, or standards of performance, he may issue a compliance order to that person or may bring a civil action for appropriate relief, including permanent or temporary injunctive relief.\textsuperscript{88}

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} 40 C.F.R. § 125.34(o)(2) (1975).
\textsuperscript{86} 40 C.F.R. § 125.34(p) (1975).
Although the provision for these actions by the Regional Administrator does not expressly provide for legal action based on an operator's failure to obtain a permit, the enforcement provision must be read with the thought in mind that the permit program was designed to facilitate the achievement of the various water quality standards, limited effluent levels, and standards of performance which have been set forth by the E.P.A. pursuant to Congress' directions. It may reasonably be inferred then that failure to obtain a permit is a "violation of any permit condition or limitation implementing" these standards. Weight is given to this argument by the fact that there are no provisions for legal action by the Administrator for failure to obtain a permit. The conclusion that the Administrator has no course of legal action against an operator who fails to obtain a permit is not in keeping with Congress' expressions of intent to make federal water pollution control effective.90 Moreover, section 1342 of the Act, which creates the permit program specifies that compliance with a permit issued under that program is deemed to be compliance with the various effluent and water quality standards for the purposes of the enforcement section of the Act, section 1319.91 Again, there is the inference that the enforcement section penalties apply to noncompliance with the permit requirements, including the requirement of acquisition. Finally, the legislative history of the Act indicates that Congress intended the enforcement section to apply to all violations of the Act.92

If the Regional Administrator elects to bring a civil action, it is to be filed in the United States District Court for the district in

91 This intent is evident from the congressional declaration of goals and policy for the Act, 33 U.S.C.A. § 1251 (Supp. 1976), the breadth of the definitions of such key words in the Act as "point source", cited notes 11-12 supra, and "navigable waters", cited notes 17-18 infra, and in the legislative history, cited note 90 infra.
93 1972 U.S. CODE CONG. & AD. NEWS 3668, 3730-31:

The Committee further recognizes that sanctions under existing law have not been sufficient to encourage compliance with the provisions of the Federal Water Pollution Control Act. Therefore, the Committee proposes to increase significantly the penalties for knowing violations . . . .

. . . .

The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct . . . .
which the defendant resides or conducts his business,83 the district court being given express jurisdiction to restrain the violation and require compliance.84 Civil penalties for violations or for failure to abide by an order to comply are expressly provided to a maximum of $10,000 per day of violation.85 The Act also provides for criminal penalties for willful or negligent violation of the same provisions for which civil penalties were provided.86 The provision is for "a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both."97 Nothing in the penalty provisions indicates that the imposition of one type of penalty, civil or criminal, excludes the imposition of the other. Additionally, the provision of criminal penalties for negligent violations, as well as for willful violations, seems to insure that in every case in which an operator has failed to secure a permit, or has violated the provisions of his permit, the possibility of criminal prosecution exists.

Section 1365 of the Act provides another source of litigation against violators of the requirements of obtaining a permit and operating within its restrictions: a civil action may be initiated by "any citizen"98 on his own behalf against any party allegedly violating an effluent standard or limitation under the Act or an order by the Regional Administrator or the Administrator regarding those standards or limitations.99 Such citizens' actions are also authorized against the Administrator or Regional Administrator where there is alleged failure to perform a nondiscretionary action or duty.100 Jurisdiction is specifically granted to the federal district court to enforce effluent standards and administrative orders and to order the Administrator or Regional Administrator to per-

84 Id.
88 33 U.S.C.A. § 1365(g) (Supp. 1976): "For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected."
89 Note that in cases involving suits by parties relying on the grant of standing to sue as persons "adversely affected", under the Federal Administrative Procedure Act, 5 U.S.C.A. § 702 (1966), the United States Supreme Court has required that the party bringing suit allege an injury to himself to gain standing. Sierra Club v. Morton, 405 U.S. 727 (1972).
form his nondiscretionary duties. The citizen may not bring suit until sixty days after notice of the alleged violation has been given to the Administrator, the state in which the violation allegedly occurs, and to the alleged violator. Additionally, the citizen may not institute a suit if the Regional Administrator has already instituted an action for that particular violation, though the citizen may intervene in the government action. Venue for a citizen's action is in the federal judicial district in which the point source is located.

The Federal Water Pollution Control Act Amendments of 1972 are a congressional attempt to reverse the effects of over a century of indiscriminate industrial activity on the waters of the Nation before those waters become so polluted as to make revitalization impossible and become hazardous to the health of the public. The NPDES permit program provides a viable vehicle for the achievement of that goal, if it is enforced with the vigor which Congress intended. As applied to surface mining in West Virginia, the permit program represents a step toward the prevention of the destruction of one of the state's greatest natural resources, its clean mountain streams, in the process of utilizing another great resource, coal.

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102 33 U.S.C.A. § 1365(b)(1)(A) (Supp. 1976). This provision seems to be aimed at reducing litigation by allowing the alleged violator sufficient time to correct the violation, if there is one, before subjecting him to litigation; similarly, by allowing the Regional Administrator sufficient time to investigate the alleged violation and bring a government action against the violator, the provision seems to be aimed at saving the costs of private litigation.