

**Chapter 7****Clean Water Act Compliance and Enforcement:  
EPA Targets the Coal Industry****Kirsten L. Nathanson<sup>1</sup>****David P. Ross***Crowell & Moring LLP*

Washington, DC

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<sup>1</sup> Kirsten Nathanson is a Partner and David Ross is a Counsel with the Washington, D.C. office of *Crowell & Moring LLP*. Both are specialized practitioners in the firm’s Environment and Natural Resources practice group.

**§ 7.01. Introduction.**

The United States Environmental Protection Agency (EPA) typically engages in focused enforcement activity under the Clean Water Act (CWA), 33 U.S.C. §§ 1251, *et seq.*, on an industry sector basis, starting with the largest companies in a particular sector. For example, the United States Department of Justice (DOJ) and EPA recently filed consent decrees in the Eastern District of Virginia resolving alleged violations of EPA's storm water management program against four of the largest homebuilders in the United States.<sup>2</sup> Those enforcement actions were a direct outgrowth of a nationwide enforcement initiative against big box retailers and high production homebuilders designed to coax the construction industry into enhanced compliance with EPA's storm water program.<sup>3</sup> Like other major CWA enforcement initiatives, it appears that EPA may now have its sights set on the coal industry and that industry's compliance with the National Pollutant Discharge Elimination System (NPDES) permit program.

In May 2007, EPA filed a complaint in federal district court against Massey Coal Company, alleging widespread noncompliance with Massey's numerous NPDES permits governing wastewater discharges from its coal mining operations.<sup>4</sup> The alleged violations totaled nearly \$2 billion in potential civil penalties. The parties negotiated a settlement, which was filed in January 2008, for a \$20 million civil penalty payment and additional injunctive relief and supplemental environmental projects.<sup>5</sup> The court approved the agreement in early April 2008.<sup>6</sup>

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<sup>2</sup> See 73 Fed. Reg. 35,711-712 (June 24, 2008).

<sup>3</sup> See U.S. EPA, *2003 Storm Water Compliance and Enforcement Strategy* (Aug. 14, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/cwa/stwenfstrategy2003.pdf>.

<sup>4</sup> *United States v. A.T. Massey Coal Co.*, Civ. No. 07-0299 (S.D. W.Va. May 10, 2007).

<sup>5</sup> In addition to paying the civil penalty, Massey must implement various environmental auditing programs, such as an electronic tracking system for its numerous discharge monitoring reports (DMRs), and undertake supplemental environmental projects, including 20 stream remediation projects and conservation easements for 200 acres of land. *United States v. A.T. Massey Coal Co.*, 2008 WL 1744630 (S.D. W.Va. April 9, 2008).

<sup>6</sup> *Id.*

It is expected that EPA will target additional coal companies for further NPDES investigations and enforcement actions, and indeed, there are indications that it already has done so. The purpose of this chapter, therefore, is to provide the coal industry with an overview of what to expect should EPA come knocking on the door.

This chapter will provide an outline of federal CWA enforcement actions, starting with EPA information requests under CWA section 308. It will discuss EPA's internal administrative enforcement options (administrative penalties and administrative compliance orders), as well as the expected chain of events should an enforcement case be referred to DOJ. The limited protection offered by state settlements will also be reviewed. Finally, for those companies who want to proactively manage potential CWA liabilities, this chapter will summarize environmental auditing practices and the benefits and risks of EPA's voluntary disclosure policy.

In short, the goal of this chapter is to better arm companies potentially subject to CWA enforcement actions and help them grasp the exposure they face by explaining the phases and factors that guide EPA and DOJ decision-making, which in turn may help companies craft strategies to minimize that exposure and the potential financial and public relations impacts associated with CWA enforcement actions.

## **§ 7.02. Initiation of Enforcement Inquiry – CWA Section 308 Requests.**

Most CWA enforcement actions begin with an innocuous letter from EPA requesting compliance information from a company. Such requests need to be analyzed carefully and taken seriously, as they are the first indication that a company has fallen within EPA's enforcement sights. Those requests should also be analyzed for compliance with CWA section 308. As explained below, while EPA's authority under section 308 is broad, it is by no means unlimited.

### **[1] — CWA Section 308 – Statutory Language.**

Section 308 provides in relevant part:

Whenever required to carry out the objective of this chapter, including but not limited to . . . determining whether any person is in violation