

The Continuing Evolution in Mine Permitting -EPA's War Against Coal Reaches New Heights

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Elections, we have been told, have consequences. In the area of coal mine permitting, this apparently includes the dismantling of settled administrative law as a part of an effort to severely reduce the size of the Appalachian coal industry. An outright legislative abolition being unattainable, the Obama Administration has used one of its most powerful federal bureaucracies, the Environmental Protection Agency (EPA), to accomplish what it sees as the next best thing: a chokehold on the agencies that issue permits allowing for the opening of new mines and expansion of existing ones.

It began, symbolically enough, on January 20, 2009 -- the very day that President Obama was sworn into office. In a letter bearing that date, EPA's Region III first notified the U.S. Army Corps of Engineers (Corps) that it would begin objecting to issuance of mining-related "dredge and fill" permits under Section 404 of the federal Clean Water Act (CWA) based on concerns about a shift in benthics (insect) population below valley fills. That first letter, and many after it, was based principally upon an unpublished study by EPA's "Freshwater Biology Team" that concluded that valley fills created in the course of surface mining are "strongly related to" such "downstream biological impairment." It did not matter that the Corps had already addressed the potential effects of the proposed operations on the biologic and aquatic communities, requiring the applicant to minimize those effects and mitigate for those that could not be avoided. It also did not matter that the 404 permit could not take effect until the State of West Virginia (through its Department of Environmental Protection) had certified that the proposed mine would not violate State water quality standards. EPA's opinion as to what was the best science among the differing opinions was declared to be controlling.

More 404 permit objection letters followed, focusing on the same types of objections and in many cases using the same language to express them. EPA claimed that the Corps had not adequately evaluated the effects of proposed stream filling on biological diversity, and had not properly assessed the various functions performed by stream headwaters. It also questioned the Corps' reliance on mitigation measures to offset the loss of particular stream segments, concluding that the functions served by headwater streams in nearly every case could never be restored or replaced.

This all seemed to come to a head when the U.S. Court of Appeals for the Fourth Circuit issued its February 13, 2009 decision in *OVEC v. Aracoma Coal Company*. In *Aracoma*, the district court had

granted judgment to the plaintiff groups against the Corps, rescinding several 404 permits based on the same grounds that EPA had been citing in objecting to such permits. The Fourth Circuit reversed. Observing that federal courts are not authorized to simply adopt the opinions of plaintiffs' expert witnesses over those of the agency's experts, the Court found (among other things) that the Corps had used its "best professional judgment for assessing the structure and function of the affected aquatic ecosystem," and that its decisions "addressed the required considerations under the Guidelines.

Although one might have expected that the *Aracoma* decision would prompt the Corps to act on its large backlog of 404 permit applications that had been deferred awaiting the outcome of that appeal, such was not the case. Instead, EPA imposed an unannounced moratorium on review of those permits. Then, on June 11, 2009, EPA (joined by five other federal agencies) released its "Enhanced Coordination Process for Pending Clean Water Act Permits Involving Appalachian Surface Coal Mining" (ECP) and a Memorandum of Understanding (MOU) implementing an "Interagency Action Plan on Appalachian Surface Coal Mining." Emphasizing the need for "coordinated environmental reviews" of proposed mines, and a commitment to engage in "robust public participation," the MOU included a series of regulatory actions aimed at "better managing" Appalachian coal mining. These included plans to (1) revise and substantially expand the "Stream Buffer Zone" regulation issued by the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement under the federal Surface Mining Control and Reclamation Act of 1977, to include new provisions specifically directed towards limiting valley fill activities; and (2) for mining projects in Appalachian States only, eliminate use of Nationwide Permit No. 21, which is a general 404 permit (with a relatively streamlined registration process) specifically designed for use in connection with coal mining operations.

As for the "enhanced" process set forth in the ECP, it turned out to be nothing more than a procedurally convoluted method of delaying the issuance of permits. Indeed, of the 235 permit applications that had been placed on hold by EPA on May 11, 2009, in a report issued a year later the Minority Staff of the U.S. Senate Committee on Environment and Public Works found that only 45 had been issued – all after that Committee's investigation was started. This occurred despite the fact that the Corps, not EPA, is supposed to be the lead agency in 404 permitting, and the Corps is generally required to process 404 permit applications within 90 to 105 days.

While 404 permits are required for the vast majority of mining operations in Appalachia (including most underground mines, and all types of surface mines), there is another CWA permit that must be issued for every coal mine and associated facility: a National Pollutant Discharge Elimination System (NPDES) permit issued under CWA Section 402 (or an approved State program). EPA's next move in the permitting war was an effort to firmly establish its dominance in the realm of NPDES permitting and water quality standard setting – both areas that the CWA expressly reserves to the states once their programs have been approved by EPA (as have all of the Appalachian state programs).

Specifically, on April 1, 2010, EPA issued its 31-page "Guidance" document on "Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act and the Environmental Justice Executive Order." In it, EPA imposed fundamentally new, far more stringent "conductivity" standards for approving mining-related permit applications under NPDES programs. Such a policy not only runs roughshod over the states' exclusive authority to administer the NPDES program within their borders, but also ignores the mandatory procedures that are required to be followed in amending existing water quality standards. Though EPA claimed that the Guidance was not binding on the states, at the time of its release EPA Administrator Jackson candidly stated that EPA's intent was to create a regulatory program in which

"no or very few" valley fill permits will be granted. (*EPA Salinity Standard Could Significantly Reduce Mining*, (W. Va.) State Journal, April 9, 2010.) The issuance of the Guidance has been challenged in at least four different federal court cases, including one filed by the State of West Virginia. There has been no formal indication from EPA that it intends to refrain from applying these new standards unless and until a higher authority instructs it to do so.

EPA's most recent move occurred on January 13, 2011, when it took action against Arch Coal, Inc.'s proposed Spruce No. 1 Mine (to be located in Logan County, West Virginia), by issuing a "Final Determination" under CWA Section 404(c) finding that the valley fills proposed as a part of that mine would cause significant adverse environmental effects on streams and wildlife. While all of EPA's actions since 2009 in effectively re-writing the coal mine permitting programs have ignored or bypassed long-established legal requirements and procedures, this action displays a particularly cavalier disregard for settled expectations. By this proposed "veto," EPA is effectively reversing the issuance of a permit that occurred in 2007, after a thorough, 10-year review that included preparation of a comprehensive Environmental Impact Statement in which EPA itself participated.

In short, every permitting program affecting the coal industry in Appalachia has been effectively amended by the Obama Administration's EPA, without any effort to legally change the underlying statutory or regulatory bases for those programs. Although other federal and state agencies are supposed to have primary administrative responsibility under these programs, EPA now asserts controlling authority under each. In the absence of judicial or other relief, the coal industry in this region will be suffering under the effects of this usurpation of power for years to come.

As seen in the March issue of *COAL USA* magazine.

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National Law Review, Volume I, Number 54

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