Mine Permitting & Regulatory Update

Governor’s Energy Summit
December 6, 2011

Jason Bostic
Vice-President
West Virginia Coal Association
Introduction

EPA Interference

-Cause
-Symptoms
-Solutions
Observations...

-NOT about Central Appalachian surface mining
-NOT about the size or type (MTM) of mining operation
-NOT about valley fills
-NOT about a treatment solution
-Cannot “reduce, restrict or mitigate” your way out of this

IT IS ABOUT the proper interpretation and implementation of federal and state water laws and standards
Observations...

NOT A QUESTION OF SCIENCE!

PUBLIC POLICY
Background

- EPA Region III publishes “report” on biological conditions in streams below coal mines.
- In February 2009 COE received a favorable Appeals Court decision resolving a five-year controversy regarding mine permitting.
- Unleashed a regulatory assault by EPA on coal mining in West Virginia (migrated to Appalachia).
- First objection letter on COE permit was received on January 20, 2009.
Background

Region III report is “new” information

They’re fibbing

- Studies from OSM in ’90s

- Programmatic EIS

- SBZ Rulemaking

- Federal Litigation

A Report on the Cumulative Off-Site Impacts from a Large Area Mine in Southeast Ohio

September 15, 2000

Mining and Reclamation Activities in the “Big Muskie” Pit Area

Prepared by:
Office of Surface Mining
Oversight and Inspection Office
4480 Refugee Road
Columbus, Ohio 43232
EPA Attention is Reserved for Large MTR and Surface Mines...

They’re fibbing

Comments / Objections on everything Surface, Underground, Prep Plant, Roads, etc.
Causes:
Narrative Standards

No sewage, industrial wastes or other wastes present in any waters of the state shall cause or materially contribute to any of the following conditions thereof:

* * * *

3.2.e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life.

* * * *

3.2.i. Any other condition ... which adversely alters the integrity of waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

47 CSR 2-3.2.e and 3.2.i.
EPA:

Shift in the Benthic / **INSECT** Population means **IMPACT**, and an operation can meet State Water Quality Standards and, in EPA’s opinion, still have “Unacceptable Adverse Impact”
Symptoms:
CWA Section 404

- EPA forcing the Corps to act as water quality regulator--- counter to 30 years of history and federal court decisions
- One federal agency (EPA) telling another federal agency (the Corps) what STATE water quality standards mean (without asking the state)
- EPA revocation (veto) of an issued and operating mining permit based on the same warped logic
MOU Enhanced Coordinated Permit Process

Corps Districts will provide EPA Regions with additional available information regarding pending applications, including additional information requested from permit applicants, as necessary.

EPA Regions 3, 4, and 5, after review by EPA headquarters, will issue an initial list identifying permit applications about which the Regions have concerns and permit applications with which the Corps may proceed without further action by EPA. This initial list will identify the nature of environmental concerns, and steps recommended to address these concerns.

Each Region will submit to EPA HQ a final list of those permits raising concerns, and those permits that may be finalized without further review. EPA HQ will then promptly submit to Corps HQ a consolidated EPA list of these permit applications. Permit applications raising concern will be subject to additional coordination and review following the procedures and timeframes identified below. Permit applications not subject to additional review and coordination may be acted on by the Corps without further consultation with EPA.

Start 45 Day Period

Start 60 Day Period

Start 10 Day Period

When a permit is ready for formal coordination consistent with the procedures below, each Corps District will provide written notice to the EPA region when a permit application identified by EPA as requiring enhanced coordination is ready for coordination.

Meetings with EPA, Corps, Applicants, State Agencies, & Involved consultants to resolve concerns.

Stop 60 Day Period. EPA or the Corps may seek 15 day extension of the coordination period.

EPA Region advises the Corps District that it does not intend to pursue further action.

Corps finalizes permit.

Corps finalizes permit.

EPA Region will initiate action under CWA Section 404(c).

Unresolved Issues?

Start 14 Day Public Availability

Within 10 days of the close of the coordination period.

Yes

Corps will provide their Regional counterpart a written notice of decision to issue a permit which details how the District is responding to concerns raised by EPA. Such responses may include, for example, revisions to approved discharges, special conditions, or mitigation requirements. The Corps is encouraged to provide EPA with a draft of the permit and decision documents during this period.

Unresolved Issues?

No

Corps finalizes permit.

Stop 14 Day Public Availability

Each Region will submit to EPA HQ a final list of those permits raising concerns, and those permits that may be finalized without further review. EPA HQ will then promptly submit to Corps HQ a consolidated EPA list of these permit applications. Permit applications raising concern will be subject to additional coordination and review following the procedures and timeframes identified below. Permit applications not subject to additional review and coordination may be acted on by the Corps without further consultation with EPA.

Stop 45 Day Period

The proposed list issued by EPA will be transmitted to the Corps and made available to the public on the Websites of the EPA Region involved.

Stop 60 Day Period.

EPA or the Corps may seek 15 day extension of the coordination period.

Yes

No

Final - June 11, 2009
Issued Section 404 Permits in West Virginia by Permit Type:
July 2010 to November 2011

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CWA Section 404 Individual Permits Issued in Huntington District

Year

- 2006: 22
- 2007: 11
- 2008: 3
- 2009: 2
- 2010: 2
- 2011: 3
Spruce Veto Action...

- Only 12 404(c) actions since 1972
- Never used against an already issued and operating permit
- EPA’s issues relate to STATE WQStds and 404(b)1 Guidelines
Symptoms:

CWA Section 402

- EPA has hijacked state water quality programs by way of April 1, 2010 Guidance
  - advocates for parameter-specific limits in certain area (Appalachia) for specific activity (coal mining)
  - Bypasses the NORMAL process for promulgating water quality standards
  - Tramples the responsibilities of state legislatures and agencies to control their own programs
  - Nullifies the existence of a state program... if EPA can implement standards through guidance why have state programs at all
Symptoms:
CWA Section 402

EPA’s NPDES Weapons of Choice:
- 40 CFR 123.44 & State MOAs
  - Comments
  - Interim Objections (???)
  - General Objections
- **Specific Objections**
  - If not resolved, right to issue permit passes to EPA
Section 402

• Perversion of the CWA:

CWA is a national statute—how can it be used to target a specific activity in a specific region?

Are other mayflies not important?

Impacts (if that’s what you want to call them) are no different than any other development, so why rob Appalachia of economic opportunity?

EPA no longer bothering to follow their rules about comments / objections

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Mr. Thomas Clarke, Director
West Virginia Department of Environmental Protection
Division of Mining and Reclamation
601-57th Street
Charleston, West Virginia 25304

Re: West Virginia Department of Environmental Protection (WVDEP)
Office of Special Reclamation
NPDES Permit Nos. WV1024795 Triple A Coals, WV1024779 Harvey Energy Corp., and WV1024787 Royal Scot Minerals Inc.

Dear Mr. Clarke:

On September 1 and 6, 2011, the U.S. Environmental Protection Agency (EPA) sent a general objection to the West Virginia Department of Environmental Protection (WVDEP) concerning the above-referenced draft permits pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1342, 40 C.F.R. § 125.44 and the Memorandum of Agreement Regarding the Administration and Enforcement of the National Pollutant Discharges Elimination System in West Virginia (1982) (MOA). The general objection letter served as a time extension request for the full 90-day period to review the draft permit. We have been discussing these permits with WV DEP and identified several concerns. EPA is requesting additional information and analyses and expects to continue to review the draft permits and underlying information it has received. EPA’s comments are identified below. We request that these permits not be issued until these comments are resolved.

(1) Permits must include an evaluation of technology-based effluent limits

Section 301(b) of the CWA represents the minimum level of control that must be imposed in a permit issued under Section 402 of the CWA. The statutory deadline under the CWA for Best Available Technology was March 31, 1989. Therefore, these permits must address technology-based limits. This must be done at the time of permit issuance. Compliance schedules are not allowed for statutory deadlines which have passed. For industrial discharges, the permit should include technology-based effluent limits as specified in 40 CFR § 122.44(e)(1) as applicable to these discharges. EPA regulations at 40 C.F.R. § 125.3(a) further define minimum technology-based requirements that must be applied. 40 C.F.R. § 125.3(e)(2) requires that permits for all dischargers (except publicly-owned treatment works), include effluent limits consistent with (i) the best practicable control technology-currently available (BPT), (ii) for conventional pollutants (including total suspended solids), the best conventional pollutant control technology (BCT), and (iii) and (v) for all toxic and nonconventional pollutants, the best available technology economically achievable (BAT).
Symptoms:
CWA Section 402

Pending NPDES Permit Actions
(965 Total)
Symptoms: CWA Section 402

NPDES Permits Subject to Federal Involvement: EPA Actions (280 Total)

- 112 Specific Objections
- 103 Comment Letters
- 19 No Comments or Objections
- 17 General Objections (not followed by Specific Objection)
- 29 Interim Objections
Pending Mining-Related NPDES Permits in W.Va.
June-November 2011

- June: 865
- August: 921
- November: 965
Real Crisis Yet to Come

2012-2013 Over 700 Mining NPDES Permits will EXPIRE in W.Va. and must be renewed
therefore, be it

Resolved by the Legislature of West Virginia:
That any interpretation and implementation of West Virginia's narrative water quality standards is the responsibility of the West Virginia Department of Environmental Protection; and, be it

Further Resolved, That the requirements of the narrative criteria are met, when a stream (a) supports a balanced aquatic community that is diverse in species composition; and (b) contains appropriate trophic levels of fish (in streams with sufficient flows to support fish populations); and (c) the aquatic community is not composed only of pollution tolerant species, or the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach (or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present); and, be it
Justification and Background for Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards, 47 C.S.R. 2 §§ 3.2.e and 3.2.i

PURPOSE

The West Virginia Department of Environmental Protection ("DEP") adopts this Justification and Background for its "Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards" (the "Guidance"). The Guidance is intended to facilitate compliance with applicable statutory and regulatory requirements and to provide reasonable means of effectuating the intent of the narrative criteria, as well as to enforce the mandate of the Clean Water Act ("CWA") that every permit contain effluent limitations that reflect the practicable pollution reduction a state can achieve.¹

The Guidance was developed in accordance with the West Virginia Water Pollution Control Act ("WVWPCA"), which states that "the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development."²

As it must, the Guidance also recognizes the intent of the West Virginia Legislature, which has formally resolved as follows:

- That any interpretation and implementation of West Virginia's narrative water quality standards is the responsibility of the West Virginia Department of Environmental Protection;
- That the requirements of the narrative criteria are met when a stream (a) supports a balanced aquatic community that is diverse in species composition; and (b) contains appropriate trophic levels of fish (in streams with sufficient flows to support fish populations); and (c) the aquatic community is not composed only of pollution tolerant species or

¹ American Paper Institute, Inc. v. United States Environmental Protection Agency, 996 F.2d 346, 349 (D.C. Cir., 1993)

Promoting a healthy environment.

Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards, 47 C.S.R. 2 §§ 3.2.e and 3.2.i

INTRODUCTION

The purpose of this Permitting Guidance ("Guidance") is to assist West Virginia Department of Environmental Protection ("DEP") permit writers in developing site-specific National Pollutant Discharge Elimination System ("NPDES") permit conditions for surface coal mining operations using a holistic watershed management approach through the use of biological and chemical monitoring, whole effluent toxicity ("WET") testing, and the development of Aquatic Ecosystem Protection Plans ("AEPP") and, where necessary, Adaptive Management Plans ("AMP") to protect the State's narrative water quality standards. These standards are found in West Virginia's Code of State Rules, which states, in pertinent part, "No significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed."³ These new procedures shall take effect immediately.³

This Guidance does not apply to outlets that are primarily precipitation induced, or for which the activities associated with those outlets have been substantially completed.³

REASONABLE POTENTIAL ANALYSIS

In deciding which permit conditions to include in a permit, the first thing a permit writer must do is perform a reasonable potential analysis and document the same in the Statement of Basis for the permit. If the applicant cannot demonstrate, by means of its chemical and biological monitoring and the control measures outlined in its AEPP, that it does not have reasonable potential ("RP") to cause or contribute to an excursion above the narrative criteria, the permit writer should treat new or expanded discharges as if they have RP and include WET limits in the permit, in accordance with 40 C.F.R. § 122.44(d)(1)(v).

At permit reissuance, DEP will use all valid and representative data to determine, on a case-by-case basis, whether an existing discharge causes, has the reasonable potential to cause, or contributes to an excursion from the narrative water quality criteria. Where DEP concludes that an existing outlet has RP, the permit will include WET limits. In cases where insufficient data is available to make a determination of RP upon permit reissuance, the permit writer will place WET monitoring requirements and triggers in the permit in order to determine RP (or lack of

³ 47 C.S.R. 2 § 3.2.i
³ In light of the changing nature of the policy concerns addressed herein, this document is intended to be dynamic and will likely be modified in the future as technology and best management practices develop and improve.
³ The term "substantially complete" shall mean that the operation is past the point when measures that could be undertaken under either an AEPP or an AMP could be effective in reducing the operation's impact on the aquatic ecosystem.
Solutions (CWA)

- Litigation
- State of West Virginia Sues EPA & Corps
- Combined with NMA Litigation and Transferred to DC Circuit
- Challenged ECP / 404 Process and Conductivity Guidance

October 6, 2011 Judge Walton Finds ECP Process “Blatant Illegal Rulemaking”
Real Solution: **H.R. 2018**

- EPA cannot object to permits based on federal interpretation of an approved state water quality standard.

- EPA cannot issue a new/revised WQStd for a state where an approved standard exists unless EPA undertakes federal rulemaking.

- Prevents EPA from interfering with program funding based on guidance issued by EPA.

- Provides mandatory timeframes for EPA to comment on pending Corps applications (30 to 60 days).

- Requires EPA to analyze the economic impacts of decisions and requires reporting/hearings/notifications where more than 100 jobs will be lost.
SMCRA...

What 4th Circuit Decisions?
Who Cares About Congressional Intent?

“Stream Protection Rule”
- Plays on Emotion of SBZ Rule, but...
- Massive Re-write of Fed Regulations
- Material Damage

Underground Mining Subject to Most Risk:
- Subsidence (Material Damage)
- Coal Refuse Placement
Status

- Permitting (attempts) Continue- So does EPA Interference
- State Discussions About Permitting (NPDES) Train Wreck Stalled (EPA Wants Conductivity)
- Litigation Advancing (June 2012)
- **Congressional Oversight and Inquiry**
- Sharpening Our Skills (Narrative Policy)
WHERE WILL IT END?

LOCATION: The proposed project would be located at the Raleigh County Memorial Airport in the Town of Beaver, Raleigh County, West Virginia (latitude 37.78508°, longitude -81.02175°) as depicted on the attached location map (Drawing 1 of 5).

DESCRIPTION OF PROPOSED WORK: The applicant proposes to discharge fill material in potential waters of the U.S. in conjunction with the expansion of the existing main apron (aircraft parking area). The proposed work would also include the construction of an on-site haul road to connect the construction site with the on-site borrow area. To construct the proposed apron expansion and haul road, a total of 61,825 cubic yards of fill material would be permanently discharged into a total of 1,683 linear feet of intermittent stream and 1.65 acres of wetlands (0.63 acre scrub-shrub and 1.02 acres emergent). Plans of the proposal are attached to this notice.
We Can Beat This…

Calendar No. 103

H.R. 2018

IN THE SENATE OF THE UNITED STATES
July 14, 2011
Reserved; read the first time
July 18, 2011
Read the second time and placed on the calendar

AN ACT

To amend the Federal Water Pollution Control Act to preserve the authority of each State to make determinations relating to the State’s water quality standards, and for other purposes.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,