EPA and the Spruce Mine Permit

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December 7, 2010

Introduction

- EPA actions and the 404(c) veto process
- Brief history of the permit
- What's at stake:
  - -The permit and operation
  - -The underlying regulatory programs

Why is Spruce Important?

- Ultimate manifestation of EPA's efforts to frustrate the mine permitting process in Appalachia
- Shatters the "sanctity" of state and federal environmental regulatory programs and authorities
- Its West Virginia, Appalachia and coal mining today, but EPA could be coming to a project near you
- ***When is a permit really a permit?***

Permitting Programs

- Surface Mining Control & Reclamation Act
  - -state primacy with federal oversight

- Clean Water Act
  - -Section 401
    - -state primacy
  - -Section 402 (NPDES)
    - -concurrent state and federal jurisdiction
  - -Section 404 (Dredge and Fill)
    - -Corps of Engineers with EPA review
      - -EPA comments- can veto any permit issued by the Corps

Spruce Mine Permit History

- SMCRA permit issued by WV DEP in 1998
- EPA comments (objects) to the issuance of the NPDES permit in 1998
- EPA objections resolved in 1999
- First Corps permit issued (w/o EPA objection) in 1999
- EPA objects again to NPDES permit (modification) in 2002; Issues again resolved through addressing specific EPA concerns

Corps Permit History

- Initially authorized by the Corps as a Nationwide Permit 21 in 1999
- Caught in litigation (Haden Case)
- Company agreed to preparation of Individual Permit and a permit-specific Environmental Impact Statement
- Dal-Tex operation shuts down (no Corps permit)
- EPA involved consistently in the EIS
- Corps completes EIS and issues permit in January 2007
- Company mobilizes investment and begins operations

The Regulatory Nightmare

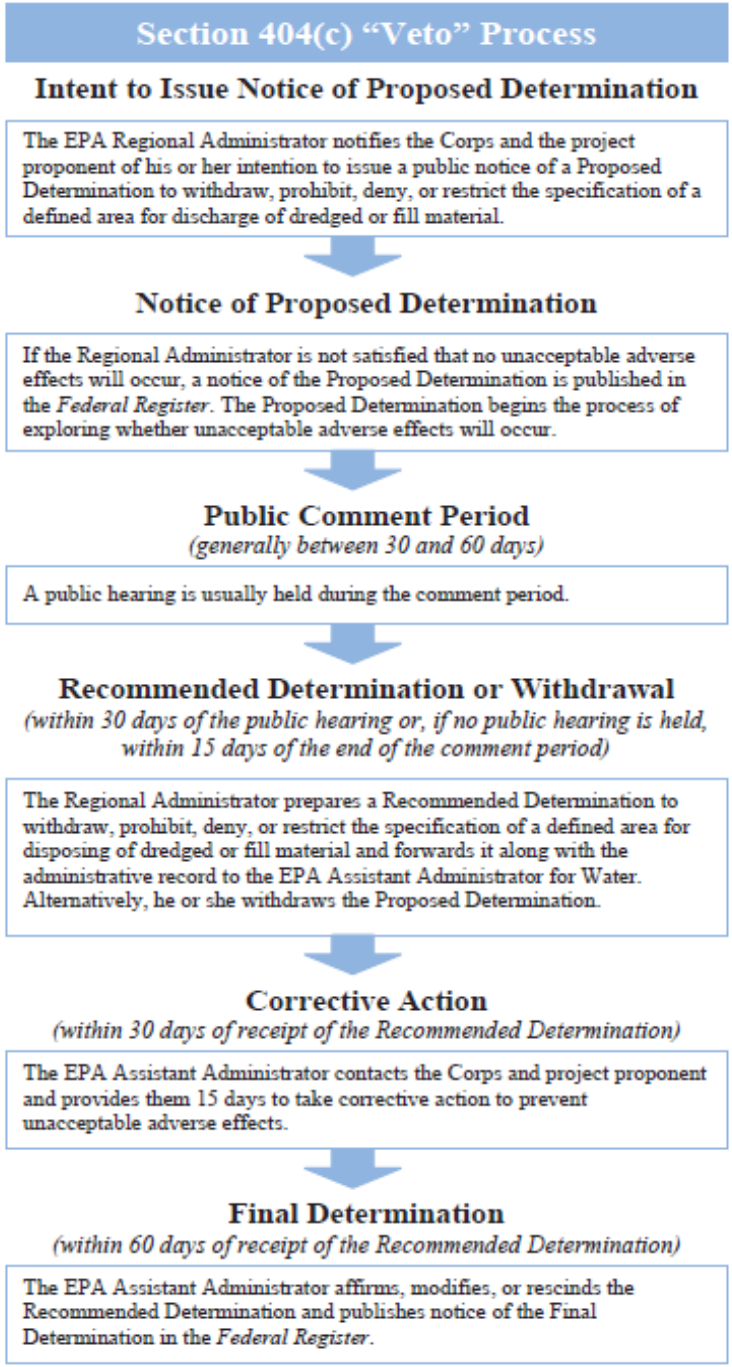
- "New Information" motivates EPA to initiate the 404(c) process:

  -2009 EPA asks the Corps to voluntarily suspend the Spruce permit

  -Corps, after consultation with WV DEP, declines

  -EPA publishes a proposed determination in April 2010, comment period and public hearing May and June 2010

  -EPA forwards "recommended determination" to EPA headquarters in Sept. 2010



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 interpretations

EPA:

Shift in the Benthic / Bug Population means IMPAIRMENT

Water Quality Standards

SENATE CONCURRENT RESOLUTION NO. 61

Whereas, Interpretations and implementation of West Virginia's water quality standards is the responsibility of the West Virginia Legislature and the West Virginia Department of Environmental Protection, who has previously determined that the Spruce Mine complies with the water quality standards, including the narrative standards approved by the Legislature and implemented by the West Virginia Department of Environmental Protection; and

Water Quality Standards

HOUSE CONCURRENT RESOLUTION NO. 111

(By Delegates Butcher, Cann, Givens, Manchin and Shott)

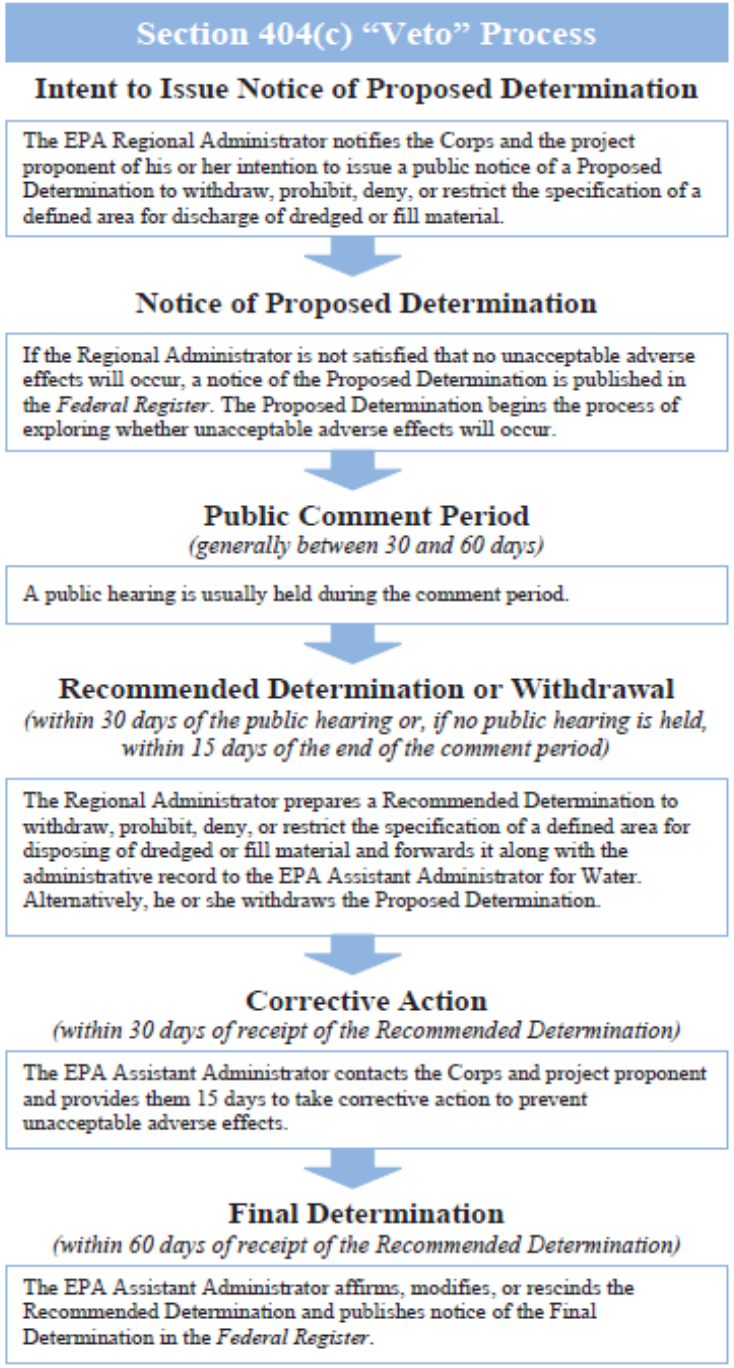
[Introduced March 10, 2010.]

Whereas, West Virginia's narrative standards must be implemented and interpreted in a manner that is protective of aquatic communities consistent with the Legislature's statement of public policy and applicable laws; and

Whereas, The State of West Virginia has not adopted subcategories of special use to protect a certain species of mayfly but protects the aquatic community consistent with the Legislature's statement of public policy; and

Where are we?

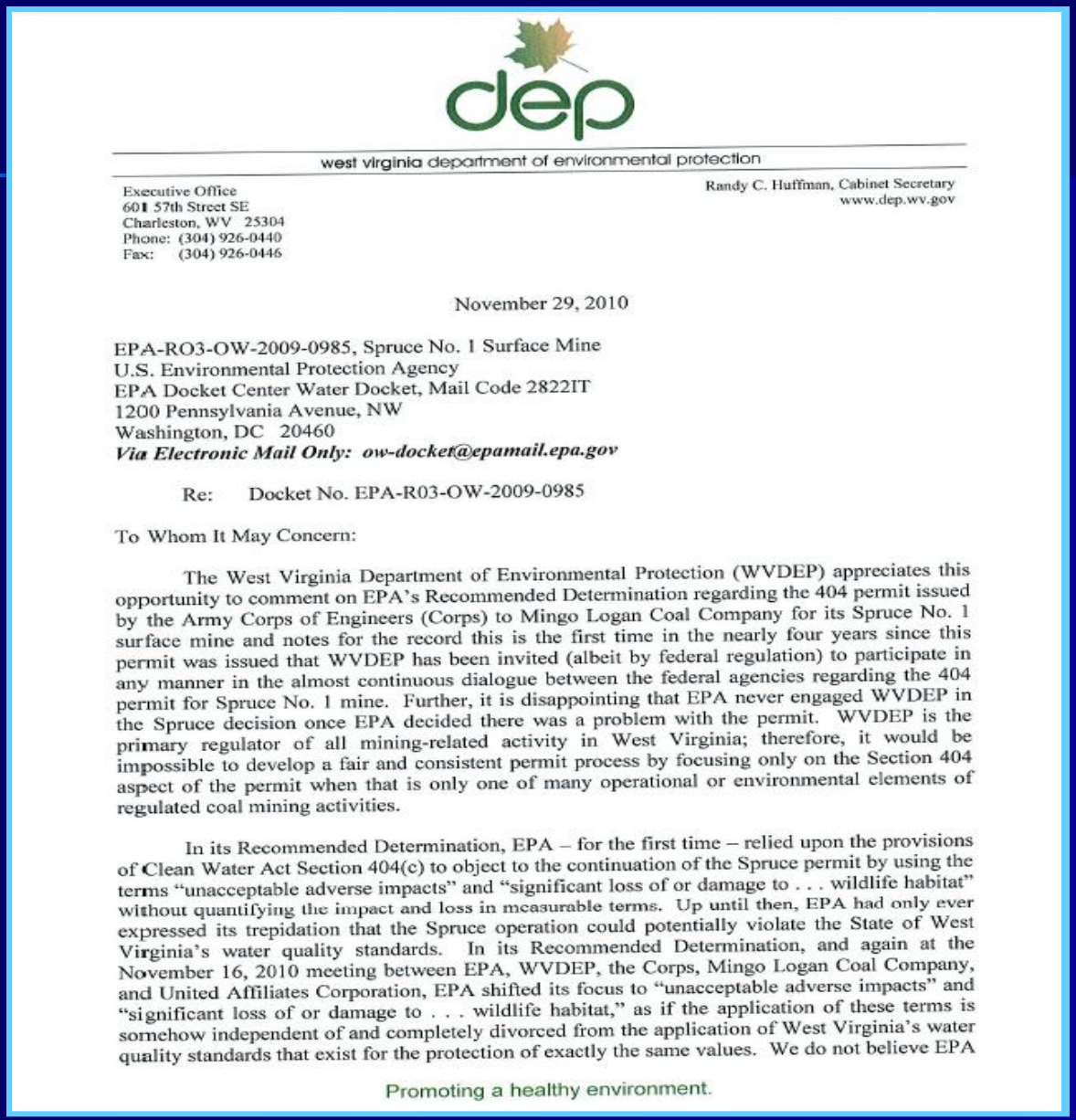
- Recommended determination to HQs
- Corrective Action period has ended- responses from Company, Corps and WV DEP
- Wait on a decision from EPA
- Lawsuit should and will begin flying



Why Everyone Should be Concerned

- Federal agencies in dialogue about what state programs mean
- Neutralizes the state executive, legislatures and public comment processes
- No faith in permit
- Further chills the permitting environment
- Sanctity of the process– EPA's objections were previously addressed and resolved- politics changes, everything starts over again.

Questions ???



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Randy C. Huffman, Cabinet Secretary
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November 29, 2010

EPA-RO3-OW-2009-0985, Spruce No. 1 Surface Mine
U.S. Environmental Protection Agency
EPA Docket Center Water Docket, Mail Code 2822IT
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Via Electronic Mail Only: ow-docket@epamail.epa.gov

Re: Docket No. EPA-R03-OW-2009-0985

To Whom It May Concern:

The West Virginia Department of Environmental Protection (WVDEP) appreciates this opportunity to comment on EPA's Recommended Determination regarding the 404 permit issued by the Army Corps of Engineers (Corps) to Mingo Logan Coal Company for its Spruce No. 1 surface mine and notes for the record this is the first time in the nearly four years since this permit was issued that WVDEP has been invited (albeit by federal regulation) to participate in any manner in the almost continuous dialogue between the federal agencies regarding the 404 permit for Spruce No. 1 mine. Further, it is disappointing that EPA never engaged WVDEP in the Spruce decision once EPA decided there was a problem with the permit. WVDEP is the primary regulator of all mining-related activity in West Virginia; therefore, it would be impossible to develop a fair and consistent permit process by focusing only on the Section 404 aspect of the permit when that is only one of many operational or environmental elements of regulated coal mining activities.

In its Recommended Determination, EPA – for the first time – relied upon the provisions of Clean Water Act Section 404(c) to object to the continuation of the Spruce permit by using the terms "unacceptable adverse impacts" and "significant loss of or damage to . . . wildlife habitat" without quantifying the impact and loss in measurable terms. Up until then, EPA had only ever expressed its trepidation that the Spruce operation could potentially violate the State of West Virginia's water quality standards. In its Recommended Determination, and again at the November 16, 2010 meeting between EPA, WVDEP, the Corps, Mingo Logan Coal Company, and United Affiliates Corporation, EPA shifted its focus to "unacceptable adverse impacts" and "significant loss of or damage to . . . wildlife habitat," as if the application of these terms is somehow independent of and completely divorced from the application of West Virginia's water quality standards that exist for the protection of exactly the same values. We do not believe EPA

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