



# Division of Mining & Reclamation

Thomas Clarke  
Director

# CWA Regulation of Mining

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- Section 402 (NPDES) Permits - State Issued Direct Regulation of Water Quality
- Section 404 (Fill) Permits – Corps Issued Water Quality is an Issue
- Section 401 – State Water Quality Certification

# New Regulatory Direction

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- January, 2009 – EPA sends first of several comment/objection letters to the Corps
- June 11, 2009 MOU
  - EPA
  - Army Corps of Engineers
  - Interior Department

# New Regulatory Direction

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- June 11, 2009 MOU

- Short Term Actions

- Longer Term Actions

- **Coordinated Permit Reviews - SMCRA & CWA – Enhanced Coordination Process (ECP)**

- Public Participation

- Move Toward Clean Energy Economy

- Green Jobs in Appalachia

# June 11 MOU - EPA/Corps Short Term Actions

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- **Develop Guidance to Strengthen 404 Permit Review**
- **Strengthen oversight and review of NPDES (402) permits and state water quality certifications (CWA section 401)**

# Actions Under the June 11 MOU

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- July, 2009 – EPA rescinds waiver of review of minor NPDES permits for coal
- September, 2009 – EPA Permit Quality Review

# EPA's April 1, 2010 Guidance

- Motivating Factors
  - 303(d) Listings – Biologic Impairment
  - PQR (Permit Quality Review) Findings
  - “Emerging Science”
- Direction to Regions for 402 Permits
  - Documentation
  - Water Quality
- Direction to Regions for 404 Permits
  - Water Quality
  - NEPA

# EPA's Issues – Water Quality

- Narrative State Water Quality Standard
  - “Significant adverse impact on the biologic component of the aquatic ecosystem”
- 2008 Pond/Passmore Study – mayflies
- Previous Research/EIS
- Conductivity/Total Dissolved Solids
  - Practical application to mining and construction
  - Underground mines

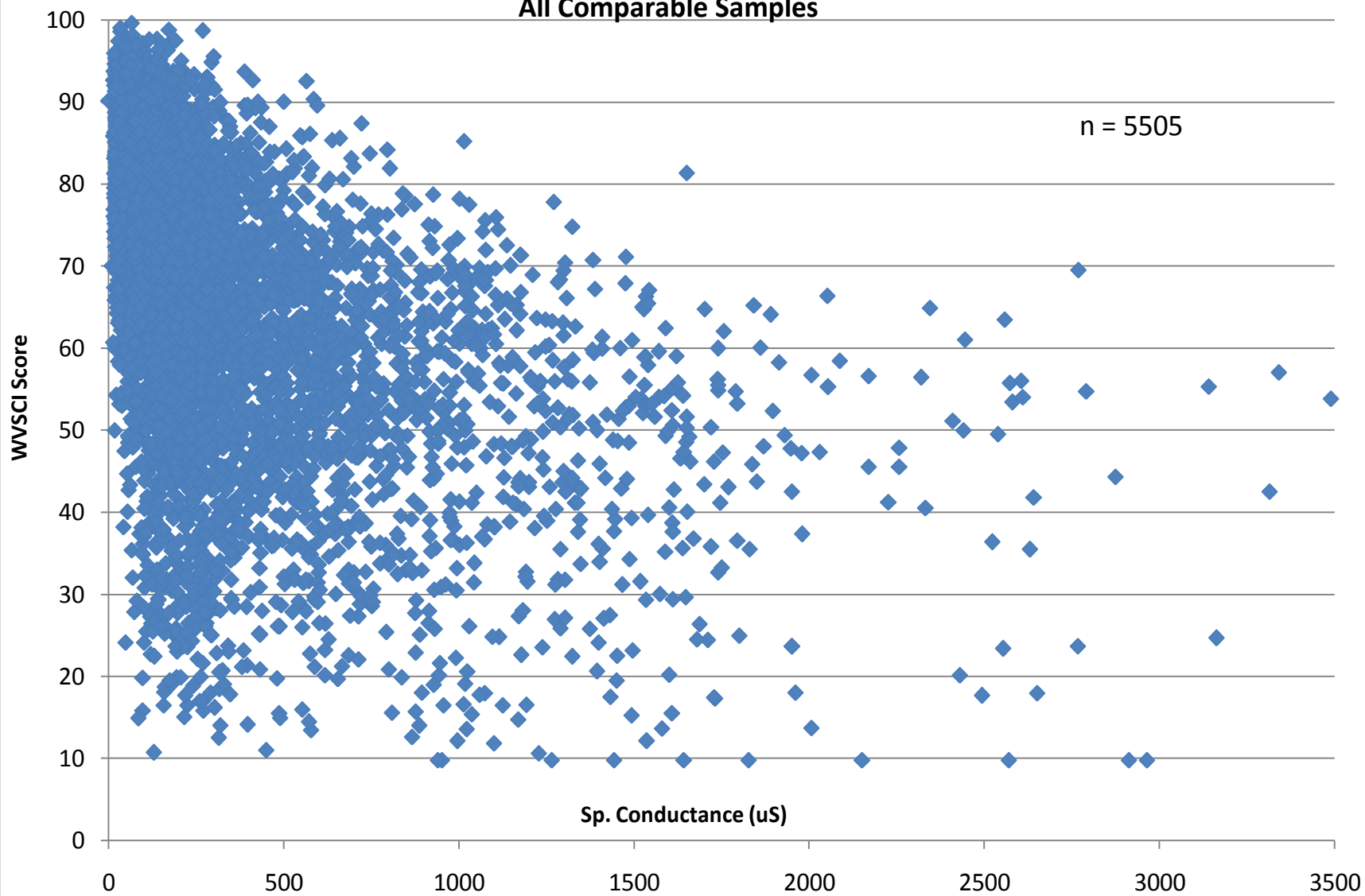


# EPA's April 1, 2010 Guidance

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- Converts Narrative Standard to Numeric
- Acceptable Impacts Are Now Impairments
- Conductivity < 300 – No Impact
- Conductivity > 500 – Impairment Likely
- Applied in EPA Review of 402 and 404 Permits
- EPA Disregards State Interpretation of State Standards
- Direction as to Acceptable Mining Practices

**Scatterplot of WVSCI Scores vs Conductivity -  
All Comparable Samples**



# West Virginia's Lawsuit

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- Filed by WVDEP
  - As an Agency and
  - On Behalf of the State
- ECP Violates the Federal Administrative Procedure Act (APA)
- 4/1/10 Guidance Violates the Federal APA
- ECP Violates the Clean Water Act (CWA)
- 4/1/10 Guidance Violates the CWA

# West Virginia's Lawsuit

- Under the APA, EPA's Water Quality Standard for Conductivity is Arbitrary and Capricious
- 4/1/10 Guidance Exceeds EPA Authority Under the National Environmental Policy Act
  - Establishes Presumptive Criteria for EIS's
  - EPA lacks Authority to Direct the Corps' NEPA Analysis
- 4/1/10 Guidance Violates SMCRA

# West Virginia's Lawsuit

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- Filed 10/6/10
- US District Court, Southern District of WV (Judge Copenhaver)
- EPA Seeks to Move the Case to DC
- Environmental Groups Seek to Intervene
- EPA's Answer is Due -

# Other Litigation

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- National Mining Association (NMA) – DC
- Gorman Company, et al. – Eastern District of Kentucky
- Kentucky Coal Association/Commonwealth of Kentucky - Eastern District of Ky
- Sierra Club, et al. v. Fola Coal – Southern District of WV
- Sierra Club v. WVDEP – WV Environmental Quality Board
- Mingo Logan Coal v. EPA - DC

# West Virginia's Guidance

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- Issued 8/12/10
- Whole Effluent Toxicity (WET) Testing and Limits
- Aquatic Ecosystem Protection Plans (AEPP)
- Biologic Monitoring Downstream – Holistic Approach
- Adaptive Management Plans
- Issued With a Justification Document