

# Mine Permitting & Regulatory Update



Governor's Energy Summit  
*December 6, 2011*

Jason Bostic  
Vice-President

West Virginia Coal Association

# Introduction

## ■ EPA Interference

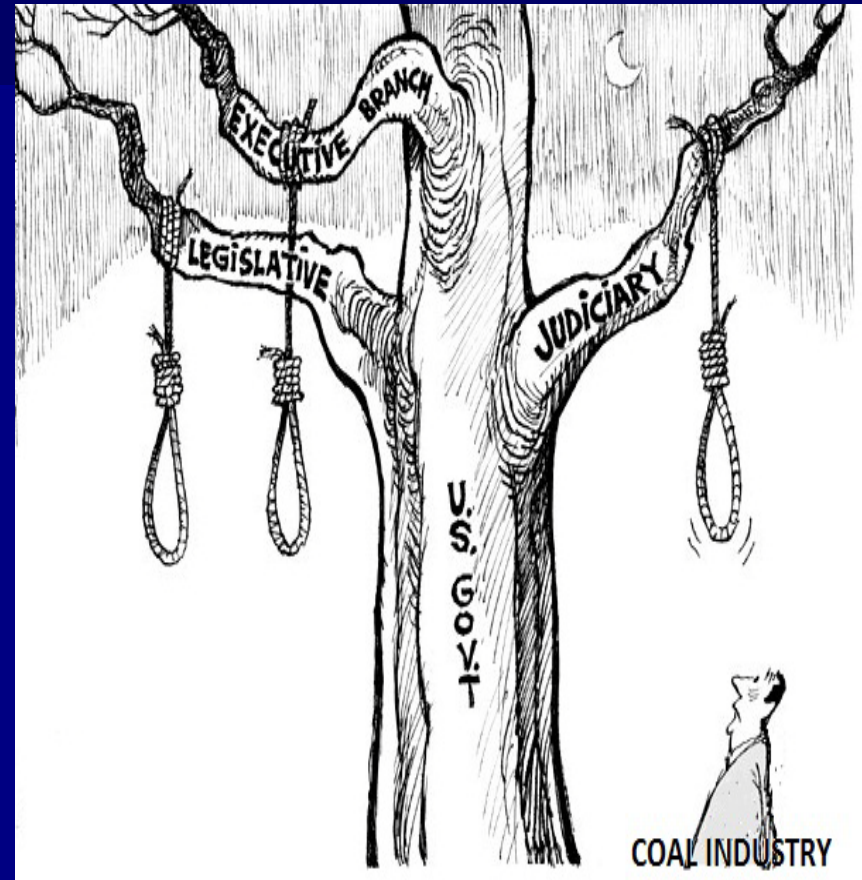
- Cause

- 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

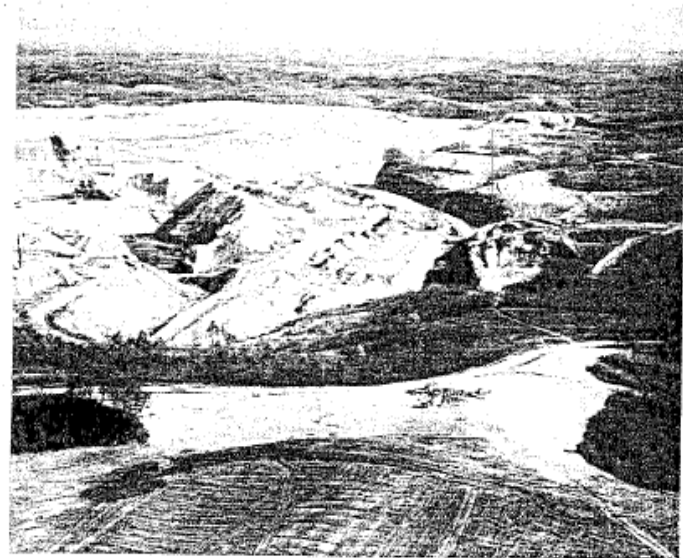
-Programmatic EIS

-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

# Background



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

APR 19 2010

Mr. Jeffrey Parsons  
West Virginia Department of Environmental Protection  
Division of Mining & Reclamation  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

Re: WV NPDES No. WV1014803  
Elk Run Coal Company, Inc. - Laurel Eagle Mine  
Deep Mine - SMCRA No. U300894, U300996  
EPA Receipt Date - March 19, 2010

Dear Mr. Parsons:

Pursuant to Section 402 of the Clean Water Act, 40 CFR Parts 123.74 and 123.75, the *Memorandum of Agreement Regarding the Administration and Enforcement of the National Pollutant Discharge Elimination System (NPDES) in West Virginia (1982)* (MOA), the U.S. Environmental Protection Agency (EPA) Region III received the draft permit modification cited above concerning the revision of the total aluminum effluent limits based on the translator study. Based on our review, we offer the following comments for your consideration and action.

The EPA's Metals Translator Guidance, EPA 823-B-96-007, indicates that a metals translator must be conducted under critical conditions to determine the fraction of total recoverable metal in the downstream water that is dissolved. This will allow the regulatory agency to convert the dissolved instream metal criteria to total recoverable effluent limits based on site specific data. The documentation that you submitted to our office does not indicate how the permittee addressed the critical conditions requirement in the development of the aluminum translator analysis. Please provide the documentation that the permittee used to determine the critical conditions of this study.

The translator report data reviewed included samples demonstrating levels of conductivity consistent with levels potentially associated with biological impairment, greater than 500 umhos. Supporting water quality analyses exhibited specific conductivity levels of 409 to 738 umhos, with an average level of 587 umhos. The state should conduct a reasonable potential analysis for conductivity to assess compliance with the state narrative water quality criteria as indicated in the EPA's "Guidance Summary: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order".

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.



**EPA:**

**Shift in the Benthic / INSECT Population means  
IMPAIRMENT, and an operation can meet State  
Water Quality Standards and , in EPA's opinion, still  
have "Unacceptable Adverse Impact"**

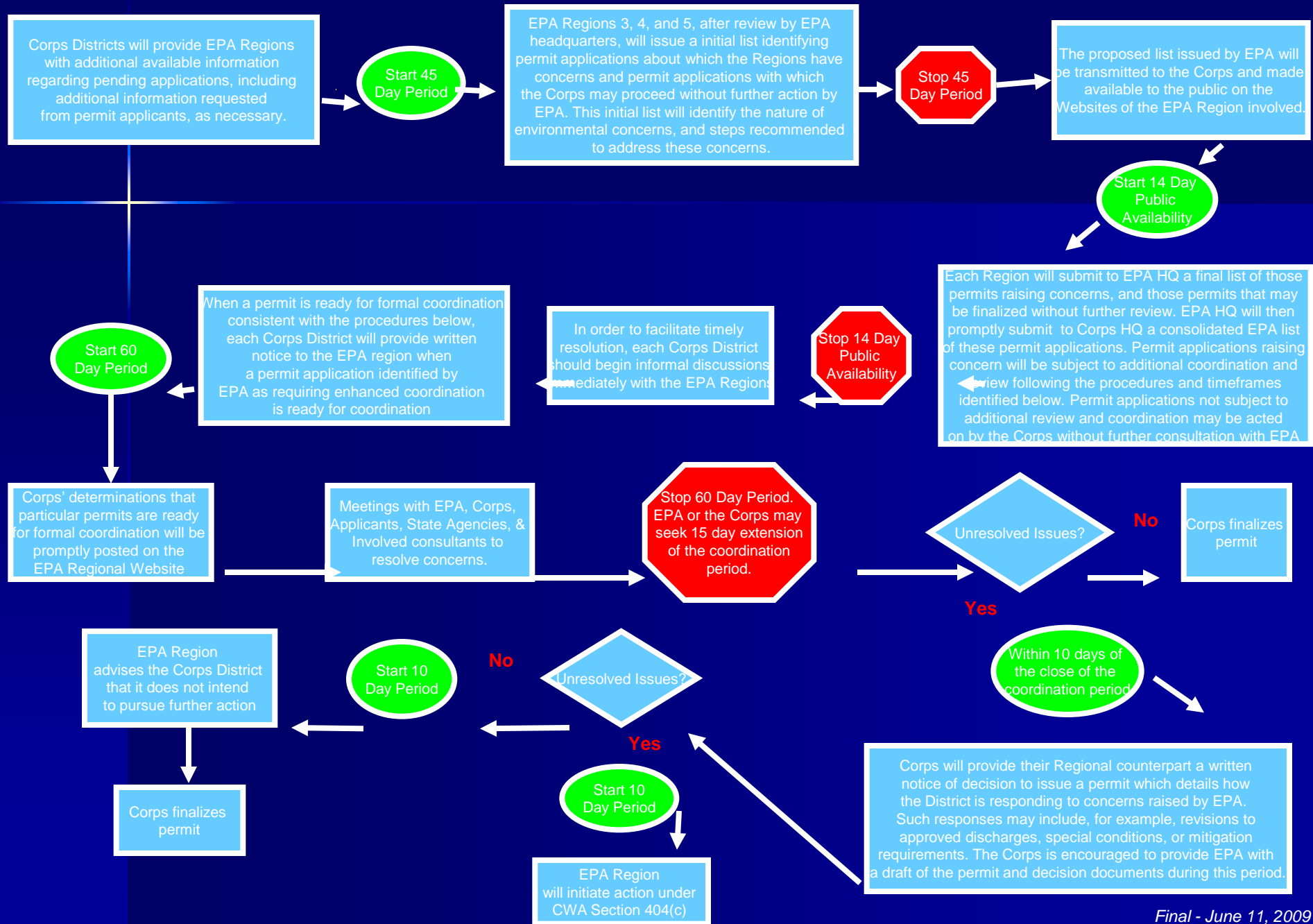


Fred Snyder - Ohio Sea Grant

## 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

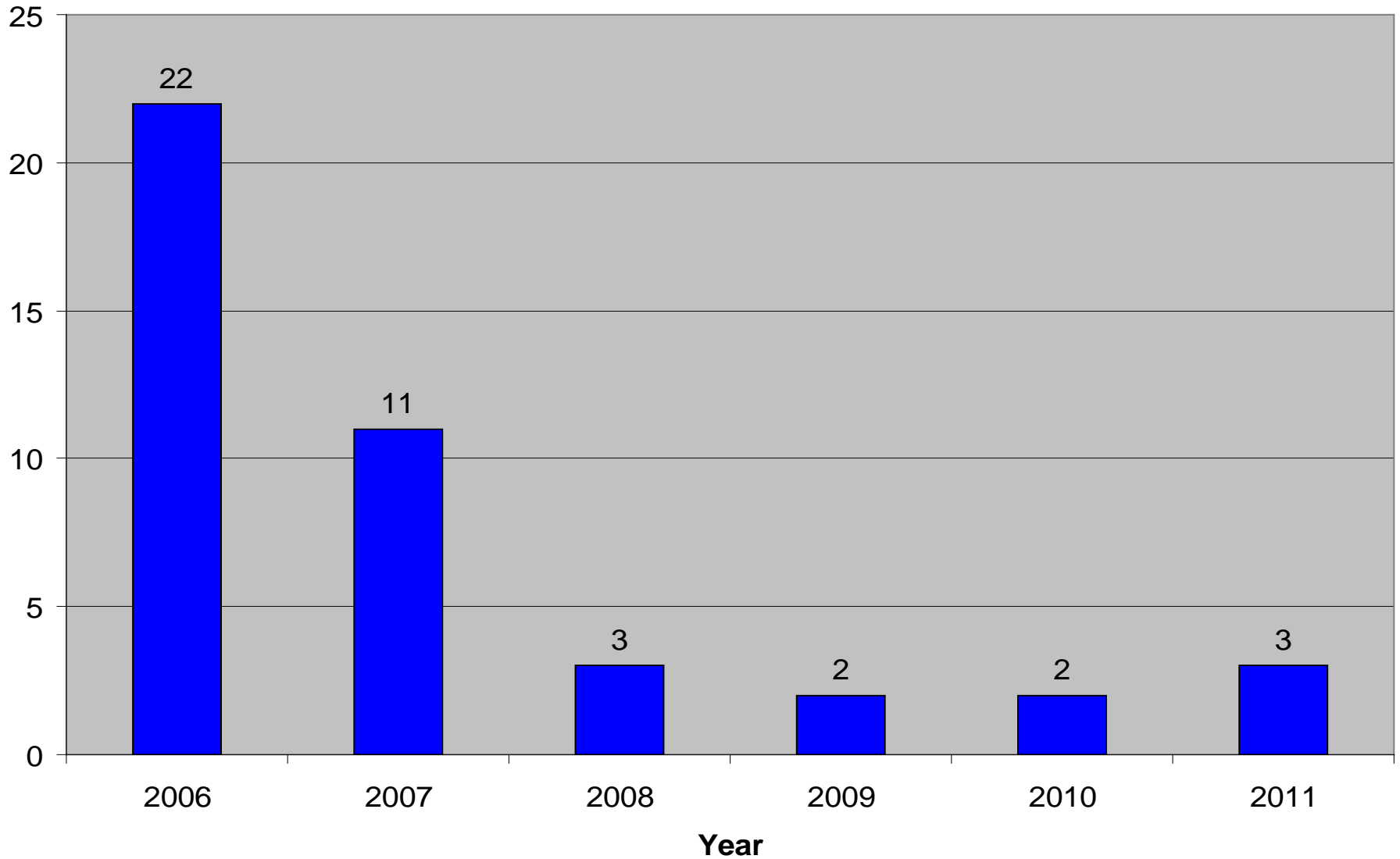
# MOU Enhanced Coordinated Permit Process



**Issued Section 404 Permits in West Virginia by Permit Type:  
July 2010 to November 2011**

	<b>IP</b>	<b>NWP 49</b>	<b>NWP 50</b>	<b>Total</b>
<b>Huntington</b>	1	0	3	<b>6</b>
<b>Pittsburgh</b>	1	0	0	<b>1</b>

### CWA Section 404 Individual Permits Issued in Huntington District





## Section 404(c) “Veto” Process

### Intent to Issue Notice of Proposed Determination

The EPA Regional Administrator notifies the Corps and the project proponent of his or her intention to issue a public notice of a Proposed Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for discharge of dredged or fill material.



### Notice of Proposed Determination

If the Regional Administrator is not satisfied that no unacceptable adverse effects will occur, a notice of the Proposed Determination is published in the *Federal Register*. The Proposed Determination begins the process of exploring whether unacceptable adverse effects will occur.



### Public Comment Period *(generally between 30 and 60 days)*

A public hearing is usually held during the comment period.



### Recommended Determination or Withdrawal *(within 30 days of the public hearing or, if no public hearing is held, within 15 days of the end of the comment period)*

The Regional Administrator prepares a Recommended Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for disposing of dredged or fill material and forwards it along with the administrative record to the EPA Assistant Administrator for Water. Alternatively, he or she withdraws the Proposed Determination.



### Corrective Action

*(within 30 days of receipt of the Recommended Determination)*

The EPA Assistant Administrator contacts the Corps and project proponent and provides them 15 days to take corrective action to prevent unacceptable adverse effects.



### Final Determination

*(within 60 days of receipt of the Recommended Determination)*

The EPA Assistant Administrator affirms, modifies, or rescinds the Recommended Determination and publishes notice of the Final Determination in the *Federal Register*.

## 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

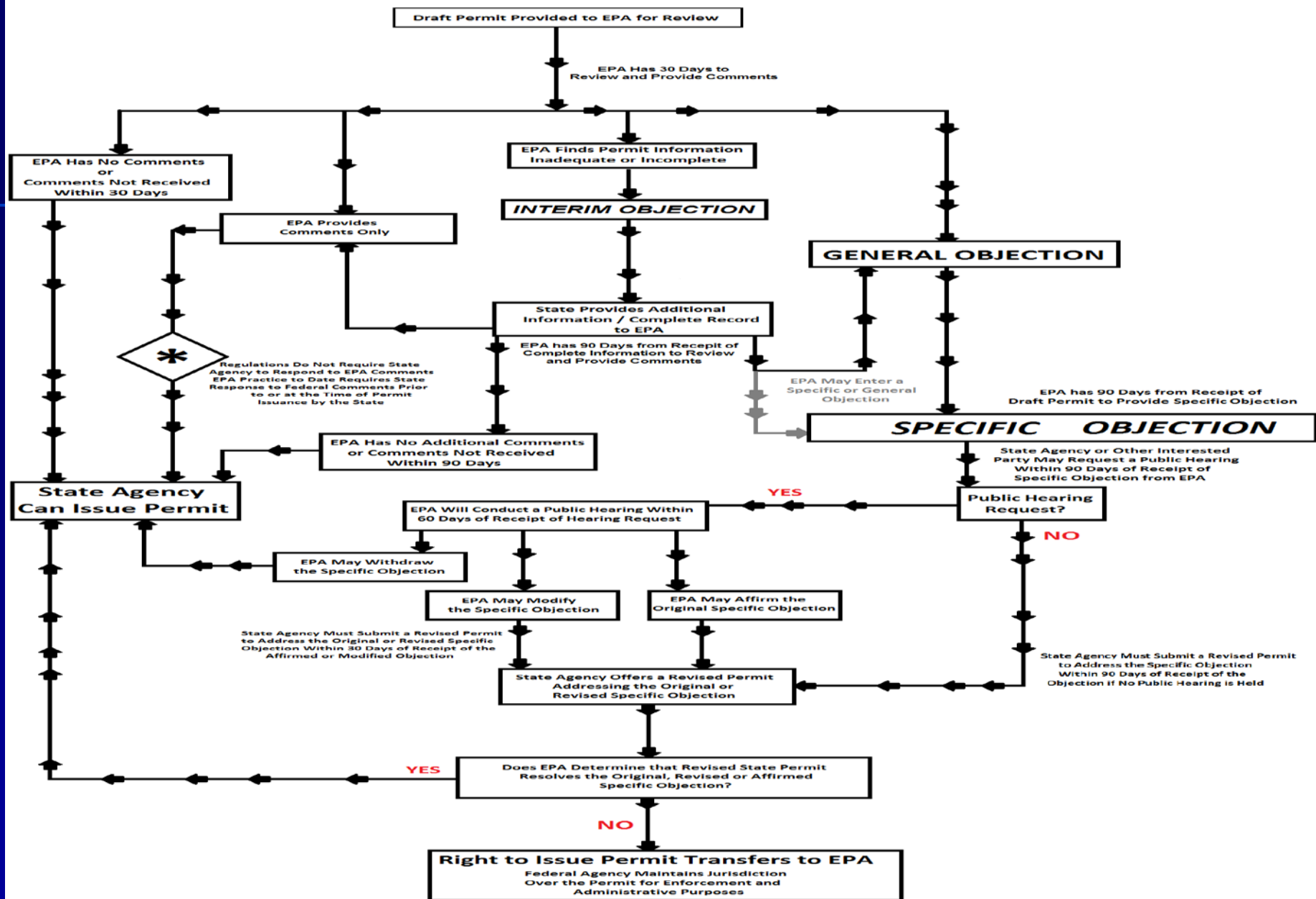
-Comments

-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



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

NOV 30 2011

Mr. Thomas Clarke, Director  
West Virginia Department of Environmental Protection  
Division of Mining and Reclamation  
601-57<sup>th</sup> 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:

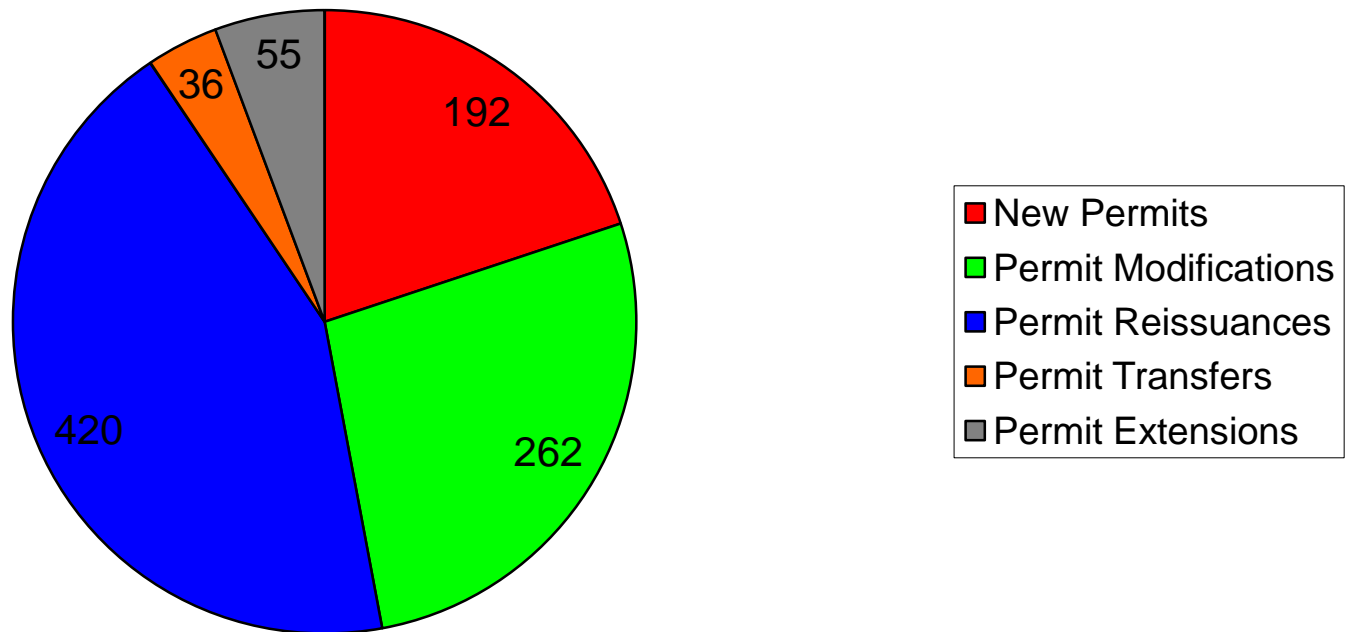
On September 1 and 6, 2011, the U.S. Environmental Protection Agency (EPA) sent a general objection to the West Virginia Department of Environmental Protection (WVDEP) concerning the above-referenced draft permits pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1342, 40 C.F.R. § 123.44 and the *Memorandum of Agreement Regarding the Administration and Enforcement of the National Pollution 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 WVDEP 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 (a)(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(a)(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).

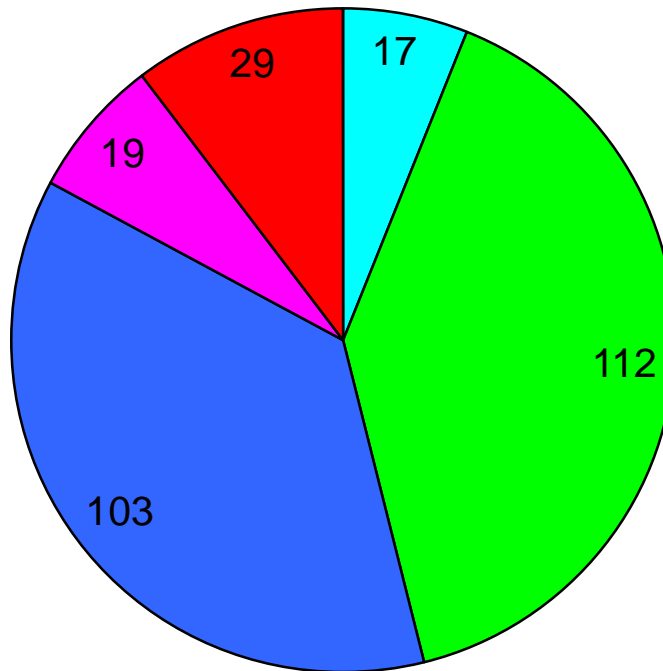
# Symptoms: CWA Section 402

## Pending NPDES Permit Actions (965 Total)



# Symptoms: CWA Section 402

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



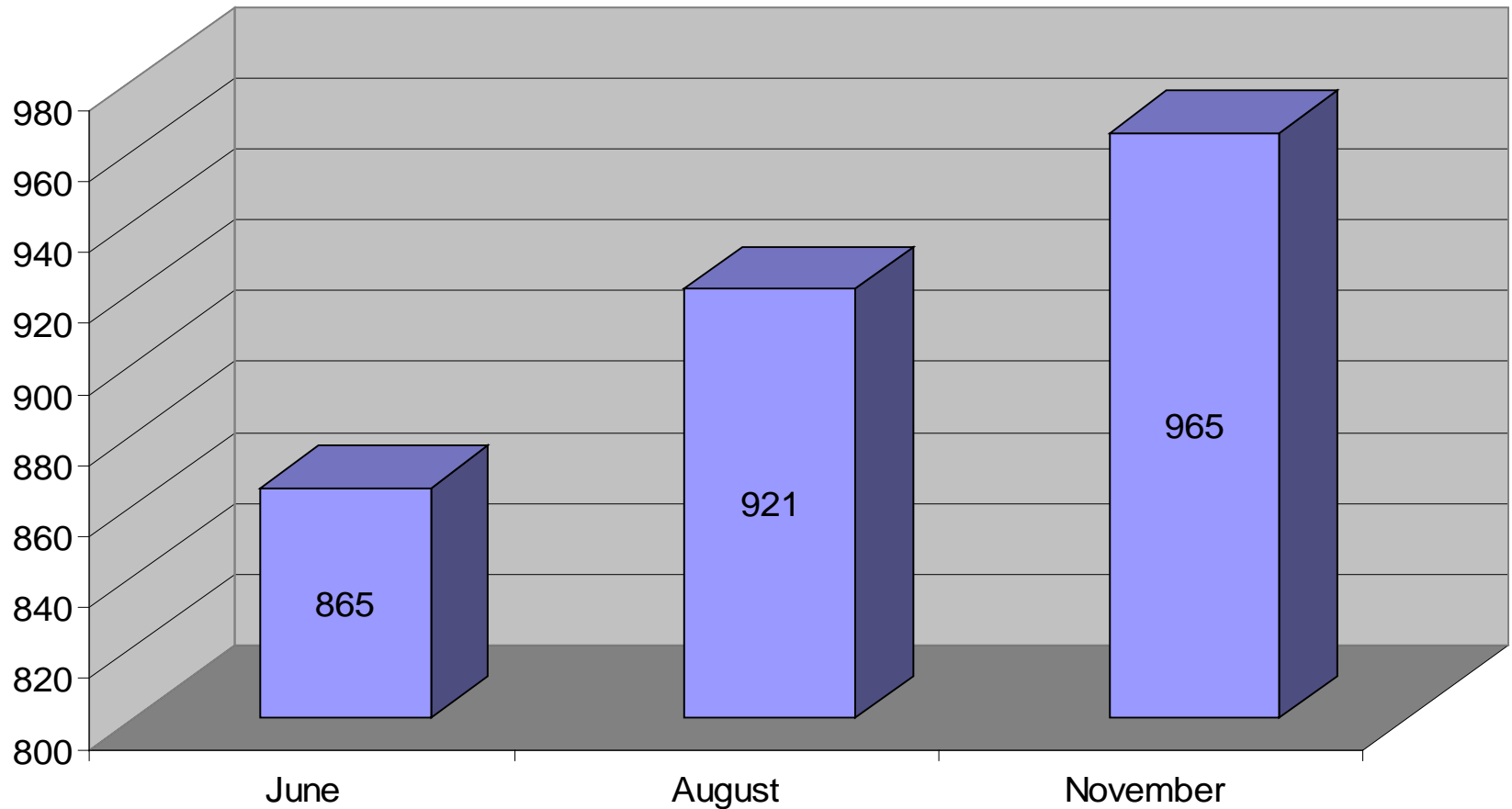
- Specific Objections
- No Comments or Objections
- Comment Letters
- General Objections  
(not followed by Specific  
Objection)
- Interim Objections



# NPDES Permitting

## Pending Mining-Related NPDES Permits in W.Va.

June-November 2011



# Real Crisis Yet to Come

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



# Solutions (CWA)

## HOUSE CONCURRENT RESOLUTION NO. 111

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

[Introduced March 10, 2010.]

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



west virginia department of environmental protection

## 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.<sup>1</sup>

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."<sup>2</sup>

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

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

<sup>2</sup> W. Va. Code § 22-11-2(a).



west virginia department of environmental protection

## 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."<sup>1</sup> These new procedures shall take effect immediately.<sup>2</sup>

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.<sup>3</sup>

### 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

<sup>1</sup> 47 C.S.R. 2 § 3.2.i

<sup>2</sup> 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.

<sup>3</sup> 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)

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

RANDY C. HUFFMAN, in his official  
capacity as CABINET SECRETARY OF  
THE WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,  
and acting on behalf of the STATE OF  
WEST VIRGINIA,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; LISA P.  
JACKSON, in her official capacity as  
ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY; UNITED STATES ARMY  
CORPS OF ENGINEERS; JOHN M.  
MCHUGH, in his official capacity as  
SECRETARY OF THE ARMY;  
LIEUTENANT GENERAL ROBERT L.  
VAN ANTWERP, in his official capacity  
as UNITED STATES ARMY CHIEF OF  
ENGINEERS AND COMMANDING  
GENERAL OF THE UNITED STATES  
ARMY CORPS OF ENGINEERS,

Civil Case No. \_\_\_\_\_

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**I. Introduction**

1. Plaintiff Randy C. Huffman, in his official capacity as Cabinet Secretary of the West Virginia Department of Environmental Protection ("WVDEP"), and acting on behalf of the State of West Virginia (sometimes referred to as "West Virginia" or the "State," and together with WVDEP, the "Plaintiffs"), brings this complaint for declaratory and injunctive relief against defendants United States Environmental

## • 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

Calendar No. 103  
112TH CONGRESS  
1ST SESSION  
**H. R. 2018**

IN THE SENATE OF THE UNITED STATES

JULY 14, 2011

Received; 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,*



# SMCRA...

## What 4<sup>th</sup> 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?



U.S. Army Corps of Engineers  
Huntington District

## Public Notice

In reply refer to Public Notice No.:  
LRH-2011-191-NEW

Issuance date: **DEC 02 2011**

Stream:  
UT Piney Creek

Closing Date: **JAN 03 2012**

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Huntington District

ATTN: CELRH-OR-F Public Notice No. (*reference above*)

502 Eighth Street

Huntington, West Virginia 25701-2070

Phone: (304) 399-5710

APPLICANT: Raleigh County Memorial Airport  
177 Airport Circle  
Beaver, WV 25813-9760

**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,<sup>o</sup> longitude -81.02175<sup>o</sup>) 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

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

**H. R. 2018**

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