ENERGY AND NATURAL RESOURCES LITIGATION 2012 HIGHLIGHTS

Presented by:

David M. Flannery
Jackson Kelly PLLC

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Remarkable Times

- Broad based attack by USEPA on all fossil fuels
- Particular attention being directed by EPA at coal mining and coal burning power plants
- Significant EPA actions are also being directed at oil and gas activities
- Much litigation is being initiated by well-funded and well-organized environmental organizations

Significant EPA Regulatory Actions

1. Clean Air Act
   a. Transport rule (electric power)
   b. NAAQS revisions (ozone and PM)
   c. Mercury / HAPs (electric power)
   d. CO_2
2. Clean Water Act
   a. Intake structures (316(b)) (electric power)
   b. Effluent guidelines (electric power and shale gas)
   c. Conductivity as a water quality standard (coal mining)
3. Resource Conservation and Recovery Act (RCRA)
   a. Coal combustion residuals (CCR) (electric power)
4. Surface Mining Control and Reclamation Act
   a. Stream protection rule (coal mining)

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This presentation will review …

- Selected court decisions involving energy development

1. Reylas valley fill permit
2. Blair Mountain designation
3. Oil and gas permit appeals
4. Oil and gas source aggregation
5. Spruce Mine permit
6. Cross State Air Pollution Rule (CSAPR)
7. Appalachian mining guidance
8. Minor source permitting

Reylas Valley Fill Permit

- <u>OVEC et. al. v. Corps et. al.</u>, Civil Action No. 3:11-0149, S.D.W.V., August 10, 2012.
- Decision:
  - Rejected challenge to valley fill permit issued by Corps of Engineers for a surface mining operation in Logan County, WV
  - Found that EPA had not contested the State's certification that selenium water quality standard would not be violated
  - Found that deference should be extended to the Corps' determination that conductivity would not significantly affect water quality

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Blair Mountain

- Sierra Club et. al v. Salazar et. al., Civil Action No. 10-1513, D.C. District, October 2, 2012
- Decision:
  - Denied standing of environmental groups to challenge decision of Park Service to remove West Virginia's Blair Mountain from the National Registry of Historic Places
  - Found that Sierra Club's concerns about harm were hypothetical since economic condition could prevent mining
  - Found that any harm to Sierra Club would relate to the mining permit and not to the decision to remove Blair Mountain from NRHP

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Oil and Gas Permit Appeals

- Martin et. al. v. Hamblet, Case No. 11-1157, WV. Sup. Court, November 21, 2012
- Decision on Certified Question:
  - Surface owners have no right to seek judicial review of well work permit
    - No mention of surface owners in statute setting forth right to appeal
    - No constitutional right involved since the right of the mineral owner to drill well is a private party right involving a contract – and not an action by the State

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Oil and Gas Source Aggregation

- Summit Petroleum et. al. v. EPA et. al., Case Nos. 09-4348; 10-4572, 6th Cir., August 7, 2012
- Decision:
  - Vacated EPA determination that emissions from a natural gas sweetening plant could be added to emissions from various flares and sour gas production wells to trigger Clean Air Act permitting for new source review
  - Found that to be aggregated, emission sources must be located on physically contiguous property, and not be "functionally related"
  - Found that it was unreasonable for EPA to have found that interrelated facilities included 100 wells within 43 square miles of gas sweetening plant and flares 0.5 to 1.0 miles from that plant

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Spruce Mine

- Mingo-Logan Coal Company v. EPA, Civil Action No. 10-0541, D.C. District, March 23, 2012
- Decision:
  - Overturned EPA retroactive veto of Spruce Mine permit issued previously by Corps of Engineers
  - Found that CWA was unambiguous in not granting EPA authority to reverse another agency's permit
  - Also found that even if statute was ambiguous (allowing some deference to be extended to EPA's interpretation of the statute), EPA's interpretation was unreasonable

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Spruce Mine Quotes

- "This attempt to withdraw the specification of discharge sites after a permit has been issued is unprecedented in the history of the Clean Water Act."

- "EPA's position is that section 404(c) grants plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps – the only permitting agency identified in the statute – and to do so at any time. This is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute."

Spruce Mine Quotes

- "To explain how this would be accomplished in the absence of any statutory provision or even regulation that details the effect that EPA's belated action would have on an existing permit, EPA resorts to magical thinking. It posits a scenario involving automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof! Not only is this non-revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory authority touchstone for measuring their Clean Water Act compliance: the permit."

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CSAPR Litigation

- EME Homer City v. EPA, Case No. 11-1315, D.C. Circuit, August 21, 2012
- Decision
  - Vacates and remands Cross State Air Pollution Rule (CSAPR) which imposed additional NO_x and SO_2 controls on power plants in West Virginia and elsewhere at a cost of $800 million per year
  - Directs EPA to continue administering the prior rule, Clean Air Interstate Rule (CAIR), pending completion of a remand rulemaking to replace CSAPR
  - Found that CSAPR "exceeds [EPA's] statutory authority in two independent respects" by
    a. Requiring upwind states "to reduce emissions by more than their own significant contributions to a downwind State's nonattainment," and
    b. Failing to allow States the "initial opportunity" to implement, through SIPs, the emission reductions required by EPA in CSAPR

CSAPR Quotes

- "EPA has transgressed statutory boundaries."
- "EPA pursues its reading of the statutory test down the rabbit hole to a wonderland where EPA defines its target after the States' chance to comply with the target has already passed."

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Appalachian Mining Guidance

- NMA et. al. v. EPA et. al., Civil Action No. 10-1220, D.C. District, July 31, 2012
- Decision:
  - Set aside as unlawful EPA's Guidance Document that had been used to stop surface coal mining permits due to concerns about conductivity
  - Found that SMCRA does not grant EPA authority to dictate what practices are followed
  - Found that EPA's conductivity benchmark standard was more than guidance and was, in fact, being treated as a water quality standard
  - Found that EPA's Guidance improperly infringed on State authority to determine when to conduct "reasonable potential" analysis

Mining Guidance Quotes

- "Accordingly, the EPA cannot justify its incursion into the SMCRA permitting scheme by relying on its authority under the CWA – it has no such permitting authority. The EPA has therefore impermissibly interjected itself into the SMCRA permitting process with the issuance of the Final Guidance."

- "Accordingly, in light of its earlier determination that the Final Guidance's conductivity benchmarks were being treated as binding by the EPA's regional offices, see supra at 14, 17, the Court must again conclude that the Final Guidance impermissibly sets a conductivity criterion for water quality. The EPA has, therefore, overstepped the authority afforded it by Section 303 of the CWA.

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Mining Guidance Quotes

- "In other words, by presuming anything with regard to the reasonable potential analysis, the EPA has effectively removed that determination from the state authority. And there can be no question that a plain reading of the regulation leaves that determination, and the decision as to when it must be made, solely to state permitting authorities."

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Minor Source Permitting

- Texas et. al. v. EPA, Case No. 10-60614, 5th Cir., August 13, 2012.
- Decision:
  - Vacated EPA's disapproval of the Clean Air Act implementation plan for Texas which allowed for facilities to make modifications without review as long as aggregate emissions do not exceed an emission cap.
  - Found that EPA could not disapprove the plan because it disagreed with Texas grammar (Texas language called for compliance with permitting requirements rather than prohibit actions that didn't)
  - Found that EPA could not insist that Texas apply a one-size-fits-all program to its sources (versus the Texas approach of allowing flexible permitting based upon the size, needs and type of facility)

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Minor Source Permitting Quotes

- "Because the administrative record reflects that the EPA's rejection is based, in essence, on the Agency's preference for a different drafting style, instead of the standards Congress provided in the CAA, the EPA's decision disturbs the cooperative federalism that the CAA envisions. A state's "broad responsibility regarding the means" to achieve better air quality" would be hollow indeed if the state were not even responsible for its own sentence structure

- "[The EPA] cannot expand [its] congressional delegated power based on ad-hoc and general assertions of a state program's complexity."

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Minor Source Permitting Quotes

- “It is clear that Congress had a specific vision when enacting the Clean Air Act: The Federal and State government were to work together, with assigned statutory duties and responsibilities, to achieve better air quality. The EPA’s final rule disapproving Texas’ Flexible Permit Program transgresses the CAA’s delineated boundaries of this cooperative relationship

Conclusion

- Significant regulatory challenges will continue to confront energy and natural resource development
- Unlikely the Congress will be able to act to provide leadership to resolve some of the more difficult public policy issues
- Recent Court decisions have shown a willingness to weigh in on some of the most significant of EPA's regulatory initiatives
- EPA's upcoming regulatory agenda will provide much opportunity for additional litigation

JACKSONKELLY ATTORNEYS AT LAW PLLC

CONTACT INFORMATION

David M. Flannery

Jackson Kelly PLLC

1600 Laidley Tower

P.O. Box 553

Charleston, WV 25322

Telephone: (304) 340-1017

Email: dmflannery@jacksonkelly.com

JACKSONKELLY
ATTORNEYS AT LAW PLLC