

EPA'S New "Guidance" on Coal Mine Permitting Reveals a Different Kind of Transparency

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As seen in the April 30th issue of *The State Journal*.

About a year ago, I wrote in these pages that efforts by the federal Environmental Protection Agency (EPA) to restrict coal mining in West Virginia have very little to do with trying to enforce compliance with existing laws. (*Opposition to Coal Mining in W.Va.: It's Not About the Law, The State Journal*, June 12, 2009.) EPA's latest move -- issuance on April 1, 2010 of a 31-page "Guidance" document on "Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act and the Environmental Justice Executive Order" -- should be enough to remove any doubt about that. This and other EPA actions over the last several months have continued to evince a disdain on the part of that agency for the 'niceties' of sound regulatory law.

The April 1 EPA memorandum imposes fundamentally new, far more stringent standards for approving mining-related permit applications under the Clean Water Act and other statutes (effective *immediately*, but graciously open for "comments" until December 1). It almost goes without saying that this unprecedented step is premised on the determination that the end (abolition of coal mining in the region) justifies the means. That does not need to be said, because EPA Administrator Lisa Jackson has already said it. Indeed, at the time the memorandum was released, Administrator Jackson proudly declared during a press conference that the effect of the April 1 "Guidance" is to create a regulatory program in which "no or very few" valley fill permits -- which are essential for all types of coal mining operations in West Virginia -- will be granted. (*EPA Salinity Standard Could Significantly Reduce Mining, The State Journal*, April 9, 2010.)

In much the same way that EPA and its allies have repeatedly persuaded lower federal courts in West Virginia to bypass Congress by reading into the Clean Water Act and the federal Surface Mining Control and Reclamation Act things that were not there, EPA's latest weapon in its war against the Appalachian coal industry seeks to bypass the rulemaking process established by Congress in the federal Administrative Procedure Act (APA). Normally, when an agency wishes to propose a new regulatory standard, the APA requires that public notice of the proposed new rule be provided, along with an adequate opportunity for those who have an interest to review it and submit comments on it. In this instance, EPA has decided that its April 1 "Guidance" is just that; since EPA was only issuing a memorandum to itself, it declared that the memorandum is not "a regulation," because it "does not impose legally binding requirements..." and therefore does not need to be issued in accordance with APA rulemaking procedures. Tell that to the coal companies who will receive "no or very few" valley fill permits.

Even ordinary citizens who know little about the intricacies of "robustly conduct[ed] analyses" of water quality or the "emerging science" cited in EPA's memorandum can recognize this for what it is. After all, if EPA had legitimate reasons for seeking to eliminate nearly all coal mining in Appalachia, one would expect that the agency would wish to make those reasons known and allow a full, public evaluation of the costs and benefits of such a move. Apparently, that was not deemed to be an important step to take in this context.

The Obama Administration came into office promising a new era of transparency in government. This is the kind of "transparency" we can all live without.