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Appalachian Coal Industry Faces Challenges in 2010

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As a new decade begins, coal companies with operations in Appalachian states face the prospect of continued efforts by opposition groups and their federal agency allies to severely limit their production activities, including in particular the development of new surface mines. Lengthening reviews under the federal Clean Water Act ("CWA") Section 404 "dredge and fill" permit program (and judicial challenges to any 404 permits that are actually issued) will remain a primary tool in accomplishing this goal. In addition, industry can expect to face a renewed push from within and outside EPA to implement more stringent water quality standards that would apply to stormwater runoff and other discharges under CWA Section 402 ("National Pollutant Discharge Elimination System" or "NPDES") permit programs. In Appalachian states, these efforts will be framed as an attempt to minimize levels of total dissolved solids (TDS) and other parameters that are deemed critical to preserving the pre-mining composition of biological communities in streams near mining sites. Moreover, as suggested by the federal Office of Surface Mining Reclamation and Enforcement (OSM) in its recent advanced notice of proposed revisions its "buffer zone" rule (74 Fed. Reg. 62664 (Nov. 30, 2009)), similar considerations may eventually be applied in the context of mine permitting.

These approaches will very likely be supplemented by new policy, rule-making and case-specific initiatives that are intended to expand the role of the federal oversight agencies under CWA programs (EPA) and under the Surface Mining Control and Reclamation Act of 1977 (OSM). In all cases, the evident goal is to effectively displace or at least greatly diminish the role of state environmental agencies in administering federally-delegated programs, without following the time-consuming procedures that are established by statute for formally substituting federal agency administration or revoking approved state programs. This, of course, is analogous to what has been seen in the attempted use of federal court challenges as a means of changing the scope and interpretation of established 404 permitting rules, thereby avoiding the more deliberative rule-making amendment process established by the Administrative Procedures Act. As illustrated by OSM's pending proposal to seek revisions to its buffer zone regulation, when the agencies do decide (or, in that instance, are forced by court rulings) to follow the normal rulemaking procedures, they are not hesitant to identify as an option the complete re-writing of long-established regulatory interpretations, where the effect will be to reduce the universe of permittable mines.

On the 404 permitting front, EPA and five other federal agencies will presumably continue to implement the provisions of a June 11, 2009 Memorandum of Understanding (MOU) that identified several steps that are aimed at "significantly reduc[ing] the harmful environmental consequences of Appalachian surface coal mining operations...." Though EPA assured the regulated community that the MOU procedures were not intended to slow down the 404 permitting process, it has proven to have just that effect. Of the 108 Section 404 permit applications that were pending when the MOU was issued, only a handful have been the subject of discussions that are the first step in the "Enhanced Coordinated Review Process" described in the MOU. In addition, the federal agencies have yet to issue the more detailed guidance documents described in the MOU, that are to address a more detailed consideration of environmental effects of proposed 404-authorized mining activities, mitigation of adverse stream impacts, and a proposed re-interpretation of the long-

standing waste-treatment exclusion policy (that allows construction of in-stream sediment ponds without the need for a NPDES permit for water flowing *into* the ponds).

With regard to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), as noted, should OSM propose certain radical changes to the language and interpretation of its buffer zone regulation that are described in its Advanced Notice of Proposed Rulemaking, this could *substantially* limit the number of new surface and underground mines in mountainous Appalachian states. Beyond that, however, the administration of virtually *every* aspect of approved state SMCRA programs may change dramatically beginning this year, depending upon the outcome of another pending initiative that was also first described (if not justified) in the June 11, 2009 MOU.

Specifically, on November 18, 2009, OSM published its proposed "Oversight Improvement Actions," outlining several immediate and longer-term steps that OSM proposes to improve its oversight of approved state mine regulatory programs. Among other items of concern is OSM's suggestion that it may revise its policy describing the circumstances in which it will inject itself in state mine permitting procedures -- an area that has been the subject of significant litigation and carefully developed regulations. In explaining why OSM believes revisions to its oversight policy are required now, OSM stated as follows:

While our oversight policy fosters a cooperative effort with the states to achieve SMCRA's goals, coal field citizens and environmental organizations, particularly in central Appalachia, have voiced concern that the policy is not sufficiently comprehensive, that it is too deferential to the states, and that it fails to strike the proper balance between coal production and environmental protection.

"Making Oversight More Effective - Overview," OSM, Nov. 18, 2009 (emphasis added).

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As the agencies themselves have suggested in various memoranda and other documents released in 2009, one fundamental result of these "enhanced" review procedures and other proposed changes to these federal environmental programs is a far greater need for advanced planning and a coordinated approach to mine permitting across all programs and all agency levels. In some cases, there may ultimately be a need for an appropriate legal challenge to agency over-reaching. However, a permitting strategy that anticipates areas of possible dispute, and proactively seeks to resolve issues in a way that satisfies all reasonable interpretations of existing legal requirements, will put Appalachian coal companies in the best position to deal with this new era of regulatory uncertainty.