New Federal Initiatives Project

Mountaintop Coal Mining: A Permitting Process In Flux

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MOUNTAINTOP COAL MINING: A PERMITTING PROCESS IN FLUX

Mountaintop coal mining is a subspecies of surface coal mining. It "involves the blasting of soil and rock atop a mountain to expose coal deposits below." *Ohio Valley Envtl Coalition v. Aramoca Coal Co.*, 556 F.3d 177, 186 (4th Cir. 2009). According to the National Mining Association, Mountaintop coal mining is a highly efficient method of coal mining, accounts for a significant percentage of the nation's coal production, and represents a significant (if not vital) portion of the economic activity in many parts of rural Appalachia (including sections of West Virginia, Kentucky, Virginia, and Tennessee.). *See, e.g.*, Mountaintop Mining Fact Book (National Mining Assn, March 2009) at *1-2; http://mtmcoalition.com/media.aspx.

This type of mining also presents certain environmental concerns. During the mining process, the blasted material (known as "excavated overburden" or "spoil") is placed in valleys close to the mountain, often burying streams ("valley fill"). *See Aramoca Coal*, 556 F.3d at 186. *See id.*[1] To ensure the fill's stability, water that collects there is channeled (by use of large boulders) into a "treatment pond" (or "sediment pond"), where sediment settles out of the water. (Sometimes the treatment pond is immediately adjacent to the fill; when it cannot be, a small stream segment is used to bring the water that collects from the fill down to the treatment pond.). Subsequently, the water is channeled from the treatment pond back into the stream. *See id.*

Mountaintop coal mining is heavily regulated, at both the state and federal level, through a complex web of statutes and regulations, including The Surface Mining and Control Reclamation Act (SMCRA),[2] the Clean Water Act,[3] and NEPA.[4] At present, the application of these statutes, and thus the ability to legally perform mountaintop coal mining, is in a state of flux. Competing judicial decisions, as well as new administrative regulations, have created a constantly shifting and confusing regulatory landscape.

This type of mining cannot be done unless the Army Corps of Engineers issues a CWA Section 404 permit allowing "the discharge of dredged or fill material[.]" 33 U.S.C. 1344. The Army Corps of Engineers can issue two types of permits: individual permits for discharges at specified disposal sites, and general permits, which "authorize categories of activities rather than individual projects" where the activities "are similar" and "will cause only minimal environment effects" (individually and cumulatively). *Ohio Valley Envtl Colation v. Bulen*, 429 F.3d 493, 497 (4th cir. 2005). In 2002 the Corps issued (and reissued) a general nationwide permit (NWP 21) authorizing "discharges of dredged or fill material associated with surface coal mining" so long as the specific project met certain requirements, including obtaining authorization under SMCRA (*see* note 2), and obtaining individual determination by the Corp that the activity complies with NWP 21 and will have minimal adverse environmental effects (individually and cumulatively). *See* id. at 497.[5]

In 2004, the United States District Court for the Southern District of West Virginia suspended these general permits and enjoined the Corps from issuing further permits, concluding that the Corps lacked the statutory authority to issue a general permit for mountaintop coal mining, particularly where the NWP later required individualized analysis for a permit to be issued. *See Bulen*, 429 F.3d at 497. In 2005, the Fourth Circuit vacated the injunction, concluding that, especially in light of the *Chevron* deference owed to the Corps' construction of Section 404, the Corps acted within its authority in issuing a general nationwide permit. *Id.* at 498-505. In 2009, the United States District Court for the Southern District of West Virginia again enjoined NWP 21 (and the permits issued there under), this time concluding that (1) the Corps's decision to issue the general permit without performing an Environmental Impact Statement (EIS) under NEPA was arbitrary and capricious, and that (2) the Corps' CWA determination that cumulative environmental impacts of all activities authorized under the generalized

permit would be minimal was arbitrary and capricious. *See generally Ohio Valley Envtl Coalition v. Hurst*, 2009 WL 819230 (March 31, 2009). It is unclear whether the Corps will appeal the District Court's ruling.

Many entities simply apply for individualized permits under section 404(a) instead of attempting to navigate the general nationwide permit process. In 2007, the United States District Court for the Southern District of West Virginia rescinded four individualized permits (only four had been challenged), concluding that the Corps should have performed an EIS before issuing each individualized permit (since the adverse environmental impact was significant and the mitigiation measures proposed did not abate it), and that the cumulative impacts precluded a 404(a) permit. *See Aracoma Coal*, 556 F.3d at 188-89. The District Court also declared that the Corps lacked the authority to permit discharges into the stream segment that brought the water from the valley fill to the sediment pond. *See id.* at 186. The Fourth Circuit reversed the District Court. *See generally id.*[6] (There is significant tension between this Fourth Circuit decision and the recent District Court decision mentioned above.) Nonetheless, there are still considerable hurdles to obtaining an individualized permit.

Specifically, the Corps' authority to permit is circumscribed by Permitting Guidelines promulgated by EPA, *see* 33 U.S.C. § 1344(b)(1), and EPA has the authority to effectively countermand a Corps-issued permit where EPA concludes that "the discharge of . . . materials into [a particular] area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *See* 33 U.S.C. § 1344(c). Recently, the EPA has used that authority to hold up an enormous backlog of permits, and has hinted that it may use the authority to deny several of the requested permits, or to require more significant mitigation activities. *See* 2009 EPA News Release, EPA Acts to Reduce Harmful Impacts from Coal Mining, March 24, 3009; Greenwire, EPA Puts Breaks on Three More Mountaintop Mining Permits, April 9, 2009.

Where this process will end is not entirely clear. Given the statutory regime, and the appellate caselaw's deference to the regulatory agencies, it would be difficult (though not impossible) for industry to challenge a permit denial by either the Corps or the EPA as either arbitrary and capricious or as unlawful. One could imagine a constitutional regulatory takings challenge. *See, e.g., Stearns Co., Ltd. v United States*, 396 F.3d 1354, 1358. The takings claim could be predicated either on the reduction in economic use of the land, *see generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)., *Penn Central Transp. Co. v. City New York*, 438 U.S. 104 (1978), or the exaction of disproportionate mitigating efforts, *see generally Dolan v. City of Tigard*, 512 U.S. 374 (1994). The success of such a claim would depend on the specifics of the underlying Corps/EPA action.

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1 Although some of the "spoil" is used to re-contour the mountain once mining is complete, "large quantities" of the spoil remain in the valleys. *See Aramoca*, 556 F.3d at 186.

2 Enacted in 1977, SMCRA's purpose was to "establish a nationwide program to protect . . . the environment from the adverse effects of surface coal mining," while "strik[ing] a balance between protection of the environment . . . and the Nation's need for coal as an essential source of energy." *See id.*, quoting 30 U.S.C. § 1202(a), (f). Employing the "cooperative federalism" model often seen in environmental statutes, SMCRA allocates "exclusive jurisdiction over the regulation of surface coal mining" to the State in which the mining is performed, provided that the State's "regulatory

program has been approved by the Secretary of the Interior as satisfying" certain minimum requirements." *See id.* at 189, quoting 30 U.S.C. § 1256.

3 Under the Clean Water Act, persons are not allowed to discharge any pollutant into any waters of the United States without a permit. *See* 33 U.S.C. § 1311. This prohibition includes the spoil, and sediment ponds, etc. associated with mountaintop mining. Section 404 of the Clean Water Act provides that the Army Corps of Engineers may (under Guidelines established by EPA) permit "the discharge of dredged or fill material . . . at specified disposal sites," subject to the EPA's authority to prohibit the permit under certain circumstances. *See* 33 U.S.C. § 1344(a)-(c). In addition to a Section 404 permit, mountaintop mining operations almost always require a Section 402 (NPDES) permit because they involve point source discharges into the waters of the United States. *See* 33 U.S. § 1342. And for any federal permit to issue, mountaintop mining operations must conform to the requirements set forth in Section 401 of the Act.

4 For example, under NEPA, the Army Corps of Engineers must consider whether granting a permit will cause significant adverse environmental effects. This requirement is enforced through the Administrative Procedure Act.

5 Pursuant to NWP 21, the Corps issued many mountaintop coal mining permits.

6 The Fourth Circuit made clear that the Corps need only consider the adverse environmental effects of the creating the system to drain the water from the valley fill (not the entire valley fill project or the entire coal mining enterprise), that the Corps reasonably concluded that the adverse impact (individual and cumulative) of this activity (after mitigation) was minimal (not significant), and thus that and that the Corps' decision not to perform an EIS and to permit the activity was not arbitrary and capricious. *See Bulen*, 429 F.3d at 194-209. The Fourth Circuit also made clear that mitigation measures (e.g. creating new streams to mitigate for destroying old ones) will abate environmental impacts even where the new stream created is functionally different from the old stream (e.g. headwater streams versus other streams). *See id.* at 203-04. Finally, the Fourth Circuit declared that the Corps does have the authority to permit the use of stream segment to bring water from the valley fill to the sediment pond, because those waters are part of the "waste treatment system" at the site. *See* id. *at* 212-14.

Related Links:

Surface Coal Mining Activities Enhanced Coordination Procedures, EPA: http://www.epa.gov/owow/wetlands/guidance/mining-screening.html

EPA Releases Preliminary Results for Surface Coal Mining Permit Reviews, Released September 11, 2009: http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/b746876025d4d9a38525762e0056be1b!OpenDocument

Department of the Army, Corps of Engineers, Proposed Suspension and Modification of Nationwide Permit 21, Federal Register Notice: http://edocket.access.gpo.gov/2009/pdf/E9-21792.pdf

"Point-Counterpoint: Repairing the Clean Water Act" by Brent Fewell, *Engage*, July 2009: http://www.fed-soc.org/publications/pubid.1526/pub_detail.asp

"NEPA Scope of Analysis in the Federal Permitting Context: The Federal Tail that Risks Wagging the Non-Federal Dog" by Deidre G. Duncan and Brent A. Fewell, *Engage*, June 3, 2007: http://www.fed-soc.org/publications/pubID.750/pub_detail.asp