

West Virginia Legislature Voices Opposition to EPA Intrusion into State Water Quality Rulemaking

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As has been described in previous Alerts (See "[Opposition to Coal Mining in West Virginia: It's Not About the Law](#)"), EPA has used a number of different approaches in seeking to thwart the issuance of so-called "dredge and fill" permits under Section 404 of the federal Clean Water Act (CWA) for coal mining projects in Appalachia. Perhaps the most well developed to date is the claim that new or expanded mining operations will cause violations of State "narrative" water quality standards, meant to protect general biological, aquatic and other physical systems. In West Virginia, that effort has reached a new level, and State lawmakers have expressed their desire to return some balance to EPA's oversight activities in this regard.

Two resolutions (one in each chamber) were enacted in the 2010 West Virginia Legislative Session expressing the Legislature's intent that State water protection laws should be primarily administered, applied and interpreted by the State Department of Environmental Protection (DEP), rather than EPA. Further, those resolutions reflect a specific understanding that the State's narrative water quality standards should *not* be interpreted in such a manner as to find a violation whenever a certain subcategory of "special use," such as a "certain species of mayfly," is threatened. In addition, on March 9, 2010, the Select Committee on Coal Mining Permits for the West Virginia House of Delegates sent a letter to EPA Administrator Lisa Jackson, expressing much the same views, and objecting to EPA's continued efforts to reverse Section 404 permitting decisions that were made years ago. In the words of the Committee, "[T]o say we are disappointed is an understatement." Suggesting that EPA work with the DEP to resolve these concerns, "post haste," the Special Committee also invited EPA to discuss these issues with the Committee directly. Whether such expressions of legislative intent by the State will be considered relevant to EPA's oversight initiatives is an open question.