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Regulating the Regulators: WVDEP Forced to Issue Permits to Itself

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On November 8, 2010, the U.S. Court of Appeals for the Fourth Circuit issued its decision in *West Virginia Highlands Conservancy, et al. v. Huffman* (Appeal No. 09-1474). It's an opinion that should be of great interest to government agencies and others who find themselves in a position of seeking to remediate water quality problems left by third parties. The appeals court decision in *Huffman* affirmed a district court ruling requiring that the West Virginia Department of Environmental Protection (WVDEP) issue National Pollutant Discharge Elimination System (NPDES) permits *to itself,* to address water discharges emanating from abandoned coal mining sites.

Though the case dealt with so-called bond forfeiture sites (areas that were permitted after passage of the federal Surface Mining Control and Reclamation Act of 1977), the legal principles that lie behind the decision are equally applicable to work done at mining sites that were abandoned before 1977 ("abandoned mine lands" or "AML" sites), for which no site-specific bond monies are available. In essence, the Fourth Circuit held that the federal Clean Water Act establishes a structure whereby states that are delegated NPDES permitting authority are also required, by virtue of that delegation, to regulate themselves.

The case arose in the context of an effort by the WVDEP to use monies available in its "Special Reclamation Fund" to address acid mine drainage problems at various bond forfeiture sites in northern West Virginia. Under state law, the WVDEP is required to "take the most effective actions possible to remediate acid mine drainage" at such sites. In most cases, this takes the form of in-stream treatment works such as waterwheels, which mechanically release neutralizing agents, bringing the stream back to a more healthy condition. Here, the plaintiff groups took the position that this kind of effort devoted to actual stream conditions "was not enough." Instead, plaintiffs pressed the district court to require that the WVDEP issue NPDES permits to itself for each site, regulating the types and concentrations of pollutants in discharges from those sites, requiring monthly reporting (to itself), and exposing the Mining and Reclamation Division of the WVDEP to potential enforcement actions brought by the WVDEP for violations of effluent limits and other NPDES permit conditions.

Though there can be little doubt that imposing these obligations will increase the costs of such reclamation projects—and thereby reduce the number of areas that may be remediated—the Fourth Circuit agreed with the district court's decision requiring that NPDES permits be obtained.

In so ruling, the appeals court emphasized several principles that would apply to any person who seeks to treat water discharging from property that he or she owns or controls. Of primary importance is the observation that "there is simply no causation requirement in the [Clean Water Act]." In other words, that statute "takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur." Equating the WVDEP to a subsequent "operator" of a mine, the court held that whenever an owner abandons a mine, any other person who steps in to address polluted runoff at that mine site becomes "the party responsible for obtaining a permit."

The Clean Water Act, the court pointed out, is a "broadly worded statute." Thus, when that statute prohibits the discharge of "any pollutant by any person," it means just that. In the words of the court: " 'Any' is a powerful statutory term. The Clean Water Act uses it frequently." In short, the court's opinion is fair warning to anyone who would try to tiptoe around the implications of these statutory prohibitions—regardless of how good one's intentions may be.

Recognizing that the Special Reclamation Fund represents a limited pool of recourses available to address a large number of bond forfeiture and AML sites, is easy to foresee that the immediate result of this decision will be to restrict the number of such sites that the WVDEP is able to address. This would presumably be contrary to the goals of the conservancy groups that brought the lawsuit. However, looking beyond the short-term implications, it is also reasonable to expect that this decision will lead to a renewed push for both an increase in the $5,000-per-acre cap on bonds for coal mine permits and more frequent denials of permit applications where it can be shown that long-term water treatment may be required after mining. Under either or both of those scenarios, the ultimate result will likely be less coal mined in West Virginia, which *would* be consistent with the plaintiff groups' goals.

Though the potentially severe consequences of this decision are evident based upon existing law and regulations, the federal Environmental Protection Agency (EPA) recently initiated an effort in this region that may make the situation even worse. Specifically, on April 1, 2010, the EPA published "Guidance" that imposes a pseudo water quality standard for conductivity—limited in its application to coal mining sites in the Appalachian states (including West Virginia). The WVDEP, which has its own narrative water quality policy that is intended to address the aquatic ecology concerns cited in the EPA's guidance, has challenged that policy in federal court. According to the WVDEP's complaint, the EPA is improperly usurping the role of the state in setting water quality standards under the Clean Water Act, and the proposed conductivity "threshold" represents "an overbroad, generic criterion" that is "unattainable" at many sites.

The application of the April 1, 2010, EPA guidance will not only greatly restrict permitting of new coal mines; if applied to bond forfeiture and AML sites, it will also further reduce the number of those areas that may be remediated by the WVDEP. Nevertheless, on November 16, 2010—eight days after the Fourth Circuit's decision in *Huffman*—a number of groups petitioned the court to intervene on behalf of the EPA, to help it defend its action. Included among that group: the West Virginia Highlands Conservancy, lead plaintiff in *Huffman*.

These legal skirmishes may be all about coal. But other industries—and those who regulate them—should keep a close watch on how far mining opponents are allowed to go in hampering all efforts to maintain an effective permitting program.