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Piling On; How the Effort to Stop Surface Coal Mining Subverts the Rule of Law

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By all appearances, organized efforts to put an end to surface coal mining, especially in West Virginia, have been moving at warp speed since the new Administration took office. Indeed, it seems hardly coincidental that the first in a series of threatening communications from EPA's Region III to the Corps of Engineers' Huntington District office, regarding new scrutiny to be given to the permitting of coal-related projects, was dated January 20, 2009, the day that President Obama was sworn in. That letter for the first time raised a concern about a shift in benthics (insect) population below valley fills as possibly constituting a violation of State water quality standards. It has been followed by what seems to be a methodical, steady release of letters, memos, complaints and petitions from or to EPA, other agencies, and outside groups that oppose surface mining, all aimed at tightening the noose on the surface coal mine industry in our State.

For example, after issuing a press release assuring concerned citizens that a series of letters that EPA had sent to the Corps earlier in the year was *not* intended to effect a "moratorium" on issuance of Clean Water Act Section 404 permits for coal mining operations, on June 11, 2009, EPA released a series of detailed memoranda and yet another letter to the Corps, at least in part addressing that very topic. One of those documents was a guidance memo setting forth an "Enhanced Coordination Process for Pending Clean Water Act Permits Involving Appalachian Surface Coal Mining." As EPA acknowledged in the memo, most of the 108 permits that are to be reviewed under this "enhanced" process have already been considered by the Corps, but were put on hold for over a year as a result of the appeal of adverse court decisions that were eventually resolved in favor of the Corps (and industry permittees).

Moreover, this "enhanced coordination process" is only to be applied to permits involving "Appalachian surface coal mining," defined by the agency as any proposed mine in the Appalachian region that would use techniques requiring permits under both the federal Surface Mining Act and Section 404 of the Clean Water Act (which by necessary implication encompasses *all* types of surface mining in West Virginia). Among other "short-term actions" that the federal agencies will take in order to "reduce the harmful environmental consequences of Appalachian surface coal mining" was a commitment by EPA to "improve and strengthen oversight and review of water pollution permits for discharges from valley fills under Clean Water Act Section 402" (i.e. NPDES permits).

What a surprise that less than a week later, the Sierra Club and other groups filed with the EPA a formal petition to withdraw approval of the West Virginia Department of Environmental Protection (WVDEP)'s NPDES permitting program, asking that EPA take over the issuance and enforcement of NPDES permits in our State. Although much of that petition references other administrative and federal court litigation, it too identifies issuance of NPDES permits allowing discharges to "biologically impaired" streams as one of the ways that the WVDEP has violated the federal statute.

On July 7, 2009, less than a month after the Sierra Club petition was filed, EPA Region III sent a letter to the WVDEP announcing that henceforth, EPA plans to individually review all NPDES permits issued for surface coal mining operations in West Virginia. Among the items to be considered in evaluating such permits is whether they assure compliance with all "narrative" water quality standards (i.e., prohibitions against biological impairment).

What is perhaps most disturbing about these efforts is that instead of simply acknowledging a desire to end all coal mining in Appalachia -- and pursuing that goal through the representational branch of government -- the executive agencies and outside groups are seeking to achieve that result through either an unprecedented expansion of administrative discretion or an unwarranted exercise of judicial intrusion. It can be most charitably viewed as nothing more than 'regulation at the margins,' not geared towards addressing truly significant environmental harms, but rather in making it so difficult to engage in surface coal mining operations that no one can afford to do so.

In this regard, although some have criticized the pre-packaged nature of the hearing they convened on June 25 (ostensibly to address water quality impacts of mountaintop mining operations), U.S. Senators Benjamin L. Cardin (D-MD) and Lamar Alexander (R-TN) of the Water and Wildlife Subcommittee of the Senate's Committee on Environment and Public Works, are refreshingly open about their intent to end all surface coal mining in Appalachian states. More importantly, as shown by their co-sponsorship of the "Appalachia Restoration Act" (S. 696), they intend to try to do so through appropriate *legislative* channels.

Though the deck was obviously stacked against any fair hearing of the merits of surface coal mining operations (witness the slate of speakers), one must also give credit to one of the Senators who, in informal remarks offered after the close of the hearing, acknowledged that he has probably driven by a surface coal mine without knowing it. Of course, he further conceded that he has never actually made the effort to visit a mountaintop mine, nor taken the time to visit the site of a reclaimed mine. With sponsors such as that, one might think that such legislation faces an uphill battle to consideration by the entire Senate.

Unfortunately, some people are not waiting.