

EPA Proposes 'Veto' of Section 404 Permit for Mountaintop Removal Coal Mining Project in West Virginia

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The U.S. Environmental Protection Agency ("EPA") has proposed to rescind the Clean Water Act ("CWA") section 404 permit for a controversial mountaintop removal coal mining project in West Virginia, more than three years after the U.S. Army Corps of Engineers ("Corps") issued the permit. It would be a rare application of the EPA's "veto" authority to a previously issued permit. When viewed in combination with other pending actions by the EPA, the proposed action appears to signal a decision by the agency to take a more assertive stance toward regulation of mountaintop removal mining operations generally.

CWA section 404(c) allows the EPA to prohibit or restrict discharges of dredged or fill material to waters of the United States if it finds that the discharge would have unacceptable adverse impacts on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. 33 U.S.C. § 1344(c). The EPA issued a Proposed Determination ("PD") on April 2, 2010, finding that the Spruce No. 1 Surface Mine in Logan County, West Virginia could have unacceptable adverse impacts to wildlife and fisheries as currently permitted. 75 Fed. Reg. 16788 (April 2, 2010). The PD requests public comments by June 1, 2010. After the close of the comment period, the EPA must decide whether to prohibit any further discharges to waters of the United States from the project; allow the project to go forward under a modified permit with more environmentally protective conditions; or allow the current permit to stand. If it decides to prohibit or restrict discharges from the

project, the EPA will issue a Recommended Determination and a Final Determination that detail its findings.

In total, the EPA has exercised its section 404(c) veto authority only twelve times since 1972, and it has rescinded or modified a previously issued permit only once. The agency's Spruce Mine action has triggered a storm of protest from elected officials in West Virginia and from the state's members in the U.S. Congress, as well as a federal lawsuit by the mine's current owner, the Mingo Logan Coal Company.

Background

The Corps issued a section 404 permit for the Spruce No. 1 Surface Mine on January 22, 2007, after preparing an Environmental Impact Statement ("EIS") for the project. The Corps and the EPA, in partnership with other federal and state agencies, also prepared a [programmatically EIS](#) in 2005 for mountaintop mining in Appalachia. The Spruce Mine permit authorizes direct impacts to more than 39,000 linear feet of streams, mostly ephemeral or intermittent "headwaters" streams. The impacts are associated with the fill of six valleys with spoils, or "overburden," from the destruction of adjacent mountaintops during the mining process. The permitted discharges represent a reduction from the 57,755 linear feet of stream fill originally proposed in 1998. The Corps actually approved that proposal under a nationwide permit, but a federal court enjoined the authorization and the project proponent then applied for an individual permit.

The project has been involved in litigation brought by the Ohio Valley Environmental Coalition since January 2007, but the mine operator and the plaintiffs reached an agreement in early 2007 that allows operation of a limited portion of the project and fill of one valley, consistent with the permit terms. In explaining its unusual decision to revisit the permit, the EPA cited the fact that most of the permitted discharges have not occurred due to the pending litigation (which has now been stayed pending the outcome of the EPA's process). The EPA also stated that new information has become available since issuance of the permit that suggests project impacts may be greater than previously anticipated.

The EPA's Proposed Determination

According to the PD, the previous analysis of impacts from the Spruce Mine project did not adequately consider the potential for downstream impacts to water quality and aquatic life uses. New information, including recent research by the EPA, suggests that the project is likely to cause increased conductivity and elevated levels of pollutants in downstream waters. In addition, the project would destroy headwater streams that contain a "high richness and abundance of macroinvertebrate wildlife" (e.g., mayflies, stoneflies) and perform important ecosystem functions that are important to downstream waters and the fish and wildlife that live in those waters. The EPA also does not believe the analysis of the project accurately described and quantified the stream resources that would be impacted or that it adequately considered the cumulative impacts of 11 other mining projects that are either proposed or already authorized but not yet built. Finally, the EPA is concerned that the mitigation proposed for the project may not fully replace lost functions and does not provide for sufficient monitoring and adaptive management.

The PD suggests that the project could incorporate additional avoidance and minimization measures, including "side hill fills," "back to back fills," and other techniques to reduce valley fills. It also proposes constructing the project in phases and allowing monitoring data from each phase to inform decisions regarding the remainder of the project. Those decisions could include adaptive management for mitigation efforts, as well as decisions regarding whether and how to proceed with subsequent phases of construction.

Veto Action Just Part of Controversy Over Mountaintop Removal Mining

The proposed veto comes at the same time as other EPA actions concerning surface coal mining in Appalachia. On April 1, the EPA issued draft guidance regarding federal review of surface coal mining operations under the CWA and other federal statutes. The EPA also has [released a draft study](#) analyzing the effects of mountaintop removal coal mining operations on stream systems in the Appalachian coalfields. According to an EPA press release, [the report](#) finds a growing body of evidence that mountaintop removal coal mining is destroying Appalachian forests and dangerously polluting vital headwater streams.

Meanwhile, Mingo Logan has challenged the EPA's proposed veto action in court. Mingo Logan filed a complaint in the federal district court for the District of Columbia on April 2, alleging that the EPA is engaging in an "unlawful effort to revoke Mingo Logan's Clean Water Act permit." According to the complaint, CWA section 404(c) only authorizes the EPA to veto a permit before it is issued. Notwithstanding the allegations in the complaint, it is questionable whether the EPA's issuance of the PD constitutes "final agency action" for purposes of review under the Administrative Procedure Act, or whether the controversy is ripe for judicial review.

In addition to the Spruce Mine action, the EPA also has initiated a 404(c) action regarding the proposed Big Branch Surface Mine in Pike County, Kentucky. It has not yet issued a PD for that project.

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