

MAJOR DEVELOPMENTS IN SECTION 404 PERMITTING

BY MATTHEW AHRENS, SARA ORR, & ANDREA HOGAN

Mountaintop coal mining in the Central Appalachians faces increased challenge under the Clean Water Act (CWA). These challenges have included the U.S. Environmental Protection Agency's (EPA) increased involvement in permitting under Section 404 of the CWA; active opposition by environmental groups to Section 404 permits; and proposed federal legislation to reduce the availability of these permits.

These recent challenges culminated in a June 11, 2009, Memorandum of Understanding (MoU) between the EPA, the Department of Interior (DoI), and the Army Corps of Engineers (Corps) that will limit the use of general permits for mountaintop coal mining and increase the scrutiny applied to individual permits, while also providing a coordinated approach for reviewing the backlog of pending permit applications. By entering into the MoU, the federal agencies aim to reduce the environmental impacts of mountaintop coal mining, while increasing certainty and transparency for permit applicants. The initial response from environmental groups, such as Earthjustice and the Ohio Valley Environmental Coalition (OVEC), include statements that the actions contemplated by the MoU are not sufficient to address the environmental issues caused by mountaintop coal mining and are just "essentially rearranging bureaucratic deck chairs," whereas the National Mining Association (NMA) has announced that, due to the federal agencies contemplated actions, the permitting process "has become much more complicated, more uncertain, and it is clearly going to take longer." As a result, neither environmental groups nor miners appear satisfied with the MoU, which may suggest a likelihood for future legal challenges to the MoU and the actions contemplated thereunder.

Challenges to Section 404 permitting for mountaintop coal mining are dynamic and new developments occur almost daily. This article provides a snapshot of the current climate.

Process for Section 404 Permits Prior to the New MoU

Surface coal mines can be required to obtain Section 404 permits when overburden from mining and reclamation operations is placed in a valley with streams. The Corps has issued two types of permits for discharges of "fill material," which includes mining overburden, into "waters of the United States," which includes streams, rivers, tributaries, and adjacent wetlands: (1) individual permits and (2) authorizations under general permits. Authorization under general permits typically required a shorter, less costly review process. In 2007, the Corps reported that average processing time was 27 days for authorization under a general permit and 144 days for an individual permit. However, as described below, pursuant to actions proposed in the MoU, the Corps may discontinue use of the general permit that has been used for discharge of fill material associated with mountaintop mining operations into streams (Nationwide Permit 21 or NWP 21) for certain mining activities. In addition, the increased agency review will likely lead to longer application periods.

Individual permits are required for discharges that will cause more than a minimum adverse effect on the aquatic environment.

The review process involves a public notice and comment period, a "public interest review," compliance with the EPA's Section 404(b)(1) guidelines including a determination that the environmental impacts are reasonable when compared to other reasonable alternatives, and review pursuant to the National Environmental Policy Act (NEPA). NEPA requires a "hard look" at the environmental consequences of a proposed project. In most cases, the Corps does not identify any significant adverse environmental impact, and, after issuance of a "Finding of No Significant Impact," proceeds with the application. Projects with significant adverse impacts can require an extremely detailed review and preparation of an environmental impact statement, which can take several years.

General permits can authorize categories of activities that are similar in nature and cause only minimal adverse individual or cumulative effects. A review similar to that for individual permits is required prior to issuance of the general permit. However, projects seeking authorization under the general permit will not require a detailed review on a case-by-case basis.

NWP 21, which was issued on July 22, 1982, and reissued on March 12, 2007, is a general permit for the discharge of fill material from surface coal mining and reclamation operations that have minimal adverse effects. Before receiving authorization from the Corps to rely on NWP 21, an applicant must submit a pre-construction notification. If the adverse effects of a particular project, or the cumulative effects of NWP 21, are more than minimal, an individual permit is required. However, under the MoU, the Corps, EPA and DoI are proposing to modify NWP 21 to preclude its use for the discharge of fill material from mountaintop coal mines into streams. This permitting option may therefore not be available in the near future.

Increased EPA Involvement

Although the Corps is the issuing authority for Section 404 permits, the EPA can participate in the permitting process by reviewing and commenting on permit applications. The EPA may also: (1) veto permits, before or after issuance, where the discharge would have an "unacceptable adverse effect," (2) request suspension of issued permits on an emergency basis if there is an "imminent danger of irreparable harm," and (3) recommend that the Corps revoke authorization under NWP 21 due to "concerns for the aquatic environment" or for factors in the public interest. On March 31, 2009, the District Court for the District of Columbia narrowed the EPA's discretion in determining whether to veto a Section 404 permit stating that if the EPA finds that a permit would have an "unacceptable adverse effect," it is obligated to veto the permit.

In the time leading up to the June 11, 2009, MoU, the EPA was actively involved in the review of Section 404 permit applications for mountaintop coal mining. In general, the EPA's involvement in permit review under the Obama administration differs markedly from the EPA under the Bush administration, which did not veto any Section 404 permits for mountaintop mines. In a March 24, 2009, statement, the EPA indicated that it would closely review pending applications, and expressed concern over the environmental

impacts from certain proposed projects. On March 25, 2009, the EPA clarified that it was “not halting, holding, or placing a moratorium on any of the mining permit applications,” and that it “fully anticipate[s] that the bulk of these pending permit applications will not raise environmental concerns.” Instead, the EPA stated that its comments to the Corps were a “well-established procedure.”

The EPA commented on six of the 48 permit applications announced by the Corps in March 2009 as ready for review, including: (1) a veto notice for a Kentucky project’s individual permit application unless the applicant provides more information (Big Branch surface mine); (2) recommending denial of permits for two West Virginia projects (Reylas surface mine and Spring Fork No. 2 surface mine), one with a “high potential as a [veto] candidate” and the other that the EPA believed would contribute to violations of the state’s water quality standards; (3) recommending revocation of authorization under NWP 21 for a Virginia project and requiring an individual permit instead (Ison Rock Ridge surface mine); (4) requesting delayed permit issuance for a West Virginia project until the full range of alternatives can be analyzed (Republic No. 1 surface mine) and (5) recommending denial of an individual permit for a Kentucky project and noting that the project would require an EIS (Buffalo Mountain Surface Mine). Before the MoU, it was unclear how and to what extent the Corps and the EPA would collaborate to address these comments and the EPA’s concerns regarding the environmental impacts of certain mountaintop coal mining projects.

Several federal and state lawmakers have either lauded or questioned the EPA’s increased participation in Section 404 permitting, with some seeking clarification on the nature and extent of the EPA’s review. For example, shortly after EPA’s March 24, 2009, statement, West Virginia Governor Joe Manchin stated: “I told [the EPA and the White House Council on Environmental Quality that] we are looking for a balance between the environment and the economy, and they assured me that they will work with us to find that balance.” Similarly, on March 25, 2009, Senator Rockefeller of West Virginia stated that he “strongly encourage[s] state and business officials to meet at one table with EPA and [Corps] officials to discuss the best solutions.” In addition, Senator Inhofe of Oklahoma expressed “serious concerns” in an April 20, 2009, letter to EPA Administrator Jackson regarding the review of pending permit applications, and noted the economic importance of mountaintop mining.

On May 6, 2009, the EPA replied to Senator Inhofe and affirmed that it “is not raising concern with the majority of pending permits,” that the “Corps is expected to continue to issue permits for surface coal mining operations that do not raise environmental problems,” and that the EPA “expects that mining companies will continue to submit new permit applications.” In a May 14 letter to Representative Rahall of West Virginia, the EPA confirmed that, although it had raised environmental concerns for six permit applications, it would not provide comments on 42 other pending applications. As a result, the EPA did not comment on nearly ninety percent of the applications under review. On May 15, 2009, the EPA indicated that its “understanding is that none of the [forty-two] projects would permanently impact high value streams that flow year-round,” whereas, in contrast, the “EPA has opposed six permits because they would all result in significant adverse impacts to high value streams, involve large numbers of valley fills, and impact watersheds with extensive previous mining impacts.” The EPA also stated that it would continue “a detailed and rigorous review” of pending Section 404 applications.

EPA, DoI and Corps Action

A major development in the mountaintop coal mining permitting regime occurred on June 11, 2009, when the EPA, the DoI and the Corps entered into a MoU to, according to the EPA, “reduce the environmental impacts of mountaintop coal mining” in Appalachian states. Under the MoU, the agencies agreed to implement an Interagency Action Plan to “reduce the harmful environmental consequences,” “tighten the regulation of mountaintop coal mining,” and “ensur[e] that future mining remains consistent with federal law.” Several short-term and long-term actions are contemplated by the agencies, most notably, a future prohibition on the use of NWP 21 issuance to surface coal mines. In the short term, within 30 days of the MoU, the Corps will issue a public notice proposing to modify NWP 21 to preclude its use for the disposal of fill material from Appalachian mountaintop coal mines into streams. In the long term, the agencies will consider eliminating the use of NWP 21 for surface coal mines in 2012, when the Nationwide Permits are scheduled for reauthorization.

In sum, the MoU does not seek to eliminate mountaintop coal mining or to prevent the permitting required under Section 404. Instead, as stated by Jackson, it seeks stronger review and protections and to ensure that “[m]ountaintop coal mining cannot be predicated on the assumption of minimal oversight of its environmental impacts.” In turn, Terrence “Rock” Salt, acting assistant secretary of the Army for Civil Works, said that the Corps “support[s] interagency efforts to increase environmental protection requirements and factual considerations for mountaintop coal mining activities in Appalachia.” Permits will thus likely be issued, but will be subject to further review. Even if NWP 21 could no longer be used, individual permits (or a modified general permit) may be available. Although there can be no guarantee, if the EPA’s actions since its March 24, 2009, letter can provide an indication of the level of its review, then the EPA will not express opposition concerns for nearly ninety percent of applications.

Other actions the agencies have committed to under the MoU include:

- The EPA and Corps, in coordination with the Fish & Wildlife Service (FWS), will jointly develop guidance to strengthen environmental review of the surface coal mining projects.
- The EPA will improve and strengthen oversight of permits for fill materials under authorities other than Section 404, including Sections 402 and 401 of the CWA.
- The EPA and Corps, in coordination with the FWS, will develop guidance regarding the evaluation of impacts to streams and mitigation measures.
- On a longer-term basis, the agencies will consider revisions as to how surface coal mines are evaluated, authorized and regulated under the CWA.

Another key element of the MoU is its “Enhanced Coordination Process” for surface coal mining permits, which applies to 108 permit applications that were pending as of March 31, 2009. These procedures seek to expedite review and final decisions for the pending permit applications and resolve in a timely manner the issues for the permit applications that generate a substantial environmental concern. Specifically, the “Enhanced Coordination Process” requires that:

- Corps district offices provide additional information at the EPA’s request, including information from the permit applicants.

- Within 45 days of receipt of that information, the EPA will publish an initial list of permit applications which have identified problems which do not require further EPA review. For the applications with identified problems, the EPA will describe its environmental concerns and recommended actions. The list can become final within 14 days after posting on the EPA's regional Web sites.
- For permit applications of substantial concern, the Corps and the EPA will begin discussions immediately to facilitate a timely resolution. Before such discussions begin, the Corps will provide written notice to the applicable EPA Region, triggering a 60-day permit coordination process. During the 60 day period, Corps and the EPA must resolve the permit application in question through meetings with the mining companies, their consultants, and state and federal agencies and field visits. A 15-day extension is available if necessary.
- If the Corps decides to issue the permit after the 60-day period despite unresolved issues, within 10 days after the 60-day permit coordination process, the Corps may submit to the EPA a written decision to issue the permit with a description of how the Corps plans to address the EPA's concerns. Within 10 days of receipt of this notice, EPA will either advise the Corps that it is free to issue the permit, or initiate a Section 404(c) veto.

Simultaneous with entry of the MoU, the EPA sent a letter to the Secretary of Army describing the issues and guidelines that will inform the EPA's review of the pending permit applications, including the adequacy of the analysis of project alternatives and requirements that no discharge cause an exceedance of water quality standards, violate toxic effluent standards, or jeopardize threatened

or endangered species, that no discharge shall contribute to the significant degradation of the waters of the United States, and that potential adverse impacts of the discharge on the aquatic ecosystem be minimized. The EPA also provided the Corps with specific factual considerations for each of the above requirements.

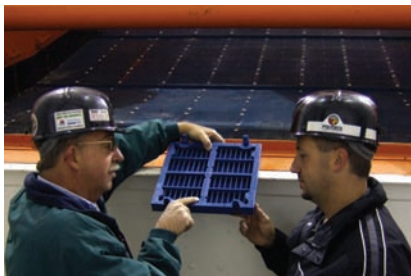
While threatening to limit the use of NWP 21 for the discharge of fill material from mountaintop coal mines, the MoU and the "Enhanced Coordination Process" provide some guidance to mining companies after a period of great uncertainty, and seek to "facilitate effective and timely coordination" between the agencies during the permitting review process. Nonetheless, until issuance of the joint guidance anticipated by the MoU, great detail is not available as to what permit applications may be allowed and which may require significant changes or not be permitted.

Environmental Group Challenges

Environmental groups have been actively involved in challenging Section 404 permits for mountaintop coal mines since the late 1990s. Since the first lawsuit was brought by coal field residents in 1999, lawsuits challenging individual permits and NWP 21 authorizations for mountaintop mining (typically related to larger mining companies and mining operations in West Virginia and Kentucky) have been ongoing. In these cases, environmental groups have argued that mountaintop mining causes irreparable damage to mountains and streams, impacting aquatic life and water quality. Claims have included allegations that the Corps has no legal authority to issue permits for valley fill material and that the Corps' permit process violates the CWA and other laws. The plaintiffs are often legally repre-

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sented by Joseph Lovett, of the Appalachian Center for the Economy and the Environment, and James Hecker, of Trial Lawyers for Public Justice, and have included groups such as OVEC, Kentuckians for the Commonwealth (KTFC), Kentucky Riverkeeper, Kentucky Waterways Alliance (KWA) and Sierra Club. The defendant is usually the Corps or government officials, but mining industry associations and companies holding the challenged permits or authorizations have intervened in order to participate in the litigation.

The federal district courts often rule in favor of the environmental groups, but the Fourth Circuit Court of Appeals has consistently ruled in favor of the Corps and overturned the district court. Although each permit challenge usually names a specific permit, the plaintiffs also challenge the authority of the Corps generally to issue Section 404 permits for discharge valley fills. The impact of the litigation can be felt industry wide because the district court's decisions can prevent or dramatically slow issuance of new Section 404 permits until the Fourth Circuit's ruling.

For example, in *OVEC v. Bulen*, in July 2004, the district court in the Southern District of West Virginia (SDWV) ruled that the Corps' issuance of NWP 21 did not comply with the CWA, NEPA or the Administrative Procedure Act (APA), and suspended all existing NWP 21 authorizations in the SDWV. In November 2005, more than one year later, the Fourth Circuit overturned the district court and lifted the suspension on the use of NWP 21. Following the Fourth Circuit decision, OVEC renewed its case in the SDWV on claims that the Fourth Circuit had not yet decided. Recently, on March 31, 2009, the SDWV again sided with the OVEC, blocking the Corps from authorizing new projects pursuant to NWP 21. On May 28, 2009, the

NMA and several mining companies filed an appeal. On June 10, 2009, the Corps also appealed the Fourth Circuit Decision, although the Justice Department indicated that this appeal was a procedural step to preserve the right to appeal and noted that no decision has been made on whether it will actually fight to overturn the ruling. While the case is under appeal, NWP 21 cannot be used to authorize mining projects in the SDWV. The outcome of this case may ultimately be superseded by agency action under the MoU, if the Corps does in fact modify NWP 21 to preclude its use to authorize discharge of fill material from mountaintop coal mining operations into streams.

In *OVEC v. Corps*, in March 2007, the SDWV ruled in favor of OVEC and revoked several individual permits. Since its initial complaint, OVEC has supplemented its claim and sought to limit operations under several other Section 404 permits. The SDWV sided with OVEC on these other permits also, impairing the ability of the permittees to continue certain operations. In February 2009, after nearly two years, the Fourth Circuit reversed the decision, instead deferring to the Corps' interpretation of its responsibilities under the CWA and NEPA. On May 29, 2009, the Fourth Circuit denied a petition for rehearing by OVEC, although there were three dissenting judges. Although the Corps was successful in this case, the actions pursuant to the MoU may lead to increased scrutiny for individual Section 404 permits as well.

As these cases illustrate, often more than a year can lapse between the district court and Fourth Circuit decisions, during which time the Corps is frequently blocked from issuing new Section 404 permits. As a result, during this period, mining opera-

Continued on page 60...



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Continued from page 47...

tions may be limited to activities that are already permitted or that would not require authorization under Section 404. On June 1, 2009, nine members of Congress sent a letter to the Corps questioning its delayed review and stated that the Corps “needs to get moving on this backlog” to avoid “hurt[ing] this vital industry.”

Environmental groups have also brought actions directly against mining companies alleging that operations are unlawful without a needed Section 404 permit. Two such claims recently settled, and each mining company agreed to pay up to \$300,000 in exchange for the environmental groups dropping the lawsuits.

Environmental groups have taken other actions to challenge mountaintop mining, including submitting comments before permits are issued, soliciting shareholder proxies to influence mining company policy, lobbying financial institutions to phase out financing mountaintop mining, and challenging participation with certain mining companies (for example, the Ohio State University President recently resigned from the board of Massey Energy due to pressure from environmental groups).

The environmental groups’ actions have created uncertainty for all mountaintop mining operations, including mines awaiting Section 404 permit issuance, operating under existing permits, or without permits.

Stream Buffer Zone Rule

Another recent action has added to regulatory uncertainty. On April 27, 2009, the DoI announced that it would reverse the Bush administration’s “stream buffer zone” rule governing surface mining activities near streams under the Surface Mining Control and Reclamation Act (SMCRA), and requested that the D.C. District Court vacate the current rule. Although the CWA and SMCRA have different permitting regimes, there may be some overlap regarding the disposal of overburden near streams. Under the MoU, DoI has committed to issuing guidance in 2009 clarifying the application of an earlier version of the rule issued in 1983, if the current stream buffer rule is vacated by the D.C. District Court.

Proposed Legislation

In March 2009, two bills were introduced in the U.S. House and Senate that seek to impose limitations on Section 404 permits for mountaintop mining. A bipartisan group of 149 Members co-sponsored the Clean Water Protection Act (H.R. 1310) in the House, and Senators Alexander, Cardin, Gillibrand, Menendez, Sanders and Whitehouse co-sponsored the Appalachia Restoration Act (S. 696) in the Senate. Both bills would exclude overburden from mountaintop mining operations from being “fill material” under the CWA. This could preempt issuance of Section 404 permits for valley fills, which could in turn limit the operation of mountaintop mines that require such permits. The disposal of overburden could potentially be regulated instead by the EPA as non-fill material under the CWA, such as under National Pollutant Discharge Elimination System (NPDES) permitting, which can be more stringent than Section 404. Although similar bills proposed over the last seven years were not enacted, support has increased.

On the same day the MoU was issued, Maryland Senator Cardin, a S. 696 sponsor and chairman of the Senate Environment and Public Works Water and Wildlife Subcommittee, announced that the subcommittee would hold a hearing to address mountaintop mining practices. The substance and outcome of this hearing could also impact developing policy related to mountaintop mining.

State legislation has also been proposed. For example, a Kentucky bill sought to limit mountaintop mining, but died at least twice in the House Natural Resources and Environment Committee. Other states, such as North Carolina, have proposed bills that would restrict the use of coal from mountaintop mining by public utilities.

Conclusions

Scrutiny on the issuance and review of Section 404 permits to Appalachian surface coal mines has increased on all fronts, most recently culminating in the MoU. Because of these challenges, surface coal mining operations that require Section 404 permits will face obstacles in the permitting process. Despite these difficulties, there are numerous opportunities for surface coal mining companies to monitor and participate in the litigation, regulatory and legislative processes, and help influence agencies, decisionmakers and lawmakers.

As Section 404 litigation progresses, companies can work with legal counsel and mining associations to devise strategies to participate, as appropriate. Some companies can become involved directly in the litigation as an intervenor or interested party. For other companies, it may be appropriate to submit amicus briefs—briefs from a non-party who believes that the court’s decision may affect its interest—on issues relevant to specific mining projects. More generally, companies should monitor the status of ongoing litigation and stay up to date on the plaintiffs’ arguments in order to anticipate any potential challenges to their own Section 404 permits or permit applications.

It is also important to follow the pending state and federal legislation and rulemaking and other agency activities. In particular, the MoU expressly contemplates “robust public involvement” in the proposed actions and regulated reforms set forth in the agreement, and states that the agencies will hold public meetings in Appalachia in 2009 to gather “on-the-ground input and encourage ongoing local engagement.” Additionally, there will be a public comment period for the proposal to modify NWP 21 to exclude its use for the discharge of fill material from mountaintop coal mines and in considering its reissuance in 2012. Companies can work with government relations experts or meet with federal and state representatives and federal agency officials as part of a trade association and/or individually to address concerns with proposed legislation, rulemakings, or other agency actions.

Companies with pending or anticipated Section 404 applications can request meetings with the EPA and other interested parties early in the application process. The “Enhanced Coordination Process” specifically provides that the process of resolving permit applications should include meetings with affected mining companies. The EPA has also stated that “meetings directly with the individual mining companies are valuable and [the EPA] welcomes the opportunity to meet with our state partners and coal mine applicants at any time.”

Correspondence with the EPA and DoI is another avenue companies can use to be involved. In a May 4, 2009, letter to the EPA and DoI, several environmental groups asked the EPA to take control of the permitting process in West Virginia. Impacted companies can also express their concerns to the EPA and DoI about the EPA’s involvement, proposed legislation and the challenging regulatory climate.

Ahrens, Orr, and Hogan work with the Environment, Land & Resources Department of Latham & Watkins LLP (www.lw.com).