

27th Annual Kentucky Professional Engineers in Mining: 2014 Federal Regulatory Update

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Overview

- Clean Water Act
 - Significant Case Decisions
 - Regulatory Activity
- Resource Conservation and Recovery Act
- Surface Mining Control and Reclamation Act

Clean Water Act (CWA)

■ Significant Case Decisions

1) NMA Litigation (*Nat'l Mining Assoc., et al. v. McCarthy, et al.*, 2014 WL 3377245)

- Began in 2009, with EPA's New Approach to Review of CWA § 402 and § 404 Permits
- Challenged:
 - Enhanced Coordination Screening Process
 - Detailed Guidance

CWA-NMA/KCA

- 2011/2012, U.S. District Court Ruled in Favor of NMA
- July 2014, U.S. Court of Appeals Reversed in Favor of EPA, Finding:
 - EC Process is a Mere Procedural Rule Which EPA had CWA Authority to Enact
 - Final Guidance Is Not a Final Agency Action Subject to Review
 - No Legal Consequences/Not Binding
 - States Can Ignore

CWA-Spruce

2) EPA Spruce Mine Permit Revocation (*Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013))

- Spruce No. 1 Mine
 - One of the Largest Authorized Surface Mines in Appalachia
 - January 2007, Obtained Corps 404 Permits
 - January 2011, EPA Published a Final Determination to Invalidate Permits (“Veto”)



CWA-Spruce

- U.S. District Court Ruled in Favor of Mingo Logan
 - Post-Permit Veto Unlawful
 - EPA Exceeded its Authority Under § 404 of the CWA

CWA-Spruce

- U.S. Court of Appeals Reversed
 - EPA has CWA Authority to Withdraw a Disposal Site Specification Post-Permit
 - May Withdraw a Site “Whenever” EPA Determines There is an “Unacceptable Adverse Effect”
 - Broad Veto Powers
- March 24, 2014, U.S. Supreme Court Denied Review

CWA-Spruce

- Currently on Remand to District Court to Determine:
 - What Impacts May EPA Lawfully Consider When Revoking a Permit?
 - What Impacts did EPA Consider When it Revoked Mingo Logan's Permit?
- Implications:
 - Pre-emptive Vetoes
 - Regulatory Uncertainty
 - Jobs and Economic Growth at Risk
 - Are Other Industries Next?

CWA-Waters of the U.S.

■ CWA Regulatory Actions

1) Proposed Rule/Waters of the U.S.

- CWA Applies to any Discharge of a Pollutant into Navigable Waters
- CWA Defines “Navigable Waters” as “Waters of the U.S.”

CWA-Waters of the U.S.

- Problem: Since 1972, the Term “Waters of the U.S.” Has Been Unclear
 - Several Proposed Guidance Documents
 - Subject to Several U.S. Supreme Court Decisions
- Question Raised:
 - If CWA Governs “Navigable Waters” Which are “Waters of the U.S.”, What are “Waters of the U.S.”?

CWA-Waters of the U.S.

- March 25, 2014, EPA and Corps Released Proposed Rule for “Waters of the U.S.”
 - 79 Fed Reg. 22187 (April 21, 2014)
 - Comment Period Extended to October 20, 2014
 - Exceedingly Controversial

CWA-Waters of the U.S.

- Under the Proposal, There are Two Categories of “Waters of the U.S.”
 - Jurisdictional Waters by Rule
 - Traditional Navigable Waters (“NW”)
 - Interstate Waters (“IW”)
 - Territorial Seas (“TS”)
 - “Tributaries” of NW or IW or TS or Impoundments

CWA-Waters of the U.S.

- Impoundments of Traditional NW or IW or TS or Tributaries
- Waters, Including Wetlands, “Adjacent” to NW, IW or TS or Tributaries or Impoundments
- Discretionary Waters
 - Other Waters, Including Wetlands, that Have a “Significant Nexus” with NW or IW or TS

CWA-Waters of the U.S.

- “Tributary” - Anything with a Bed and a Bank that Provides Downstream Flow
 - Duration and Volume of Water do not Matter
 - Can be Natural or Man-Made, i.e., Ditches
- “Adjacent” - Bordering, Contiguous or Neighboring, Does Not Have to Touch

CWA-Waters of the U.S.

- “Neighboring” - In the Riparian Area or Floodplain of NW, IW or Tributary
- “Significant Nexus”
 - Is Determined on a Case-By-Case Basis
 - Can be Based on “Similarly Situated” Waters
 - Broadens the Area and Scope of Waters Considered

CWA-Waters of the U.S.

- Waters Excluded from the Proposed Rule:
 - Waste Treatment Systems
 - Prior Converted Cropland
 - Certain Man-Made Ditches
 - Small Ornamental Waters Created by Excavating Dry Land for Primarily Aesthetic Reasons
 - Swimming Pools



CWA-Waters of the U.S.

- Ground Water
- Certain Upland Man-Made Ponds
- Farming, Silviculture, Ranching
- Puddles Created During Construction Activities, Gullies and Upland Swales



CWA-Waters of the U.S.

- Impacts:
 - Smaller and Remote Upstream Bodies of Water Will Fall Within CWA Jurisdiction
 - Increased Permitting and Mitigation Requirements
 - Project Timing and Scope
 - Land Use Restrictions

CWA – Effluent Limits

2) Steam Electric Power Generation Effluent Limitation Guidelines and Regulations

- April 19, 2013, EPA Signed Notice of Proposed Rulemaking for the Steam Electric Power Generating Point Source Category



CWA-Effluent Limits

- June 7, 2013, Proposed Rule Published
 - Strengthens Controls on Discharges from Certain Steam Electric Power Plants
 - Revises Technology-Based Effluent Limitation Guidelines and Standards for Wastewater Discharges to Surface Waters and POTWs

CWA-Effluent Limits

- Four Proposed Options Under Consideration
- Major Impacts on Coal-Fired Power Plants
- September 2015, Final Rule Expected

3) Cooling Water Intake Structures Rulemaking

- May 19, 2014, Final Rule Published
- Establishes Standards for Cooling Water Intake Structures at Existing EGUs, Manufacturing, and Industrial Facilities
- Impacts Facilities Using Large Volumes of Water From Lakes and Streams to Cool Plants



CWA-Intake Structures

- Intended to Prevent Aquatic Life Entrapment in Intake Structures
- Applies to:
 - Facilities Withdrawing More Than 2 Million Gallons Per Day of Cooling Water; and
 - Which Use at Least 25% of Water Exclusively for Cooling
- Facilities Must Choose one of Seven Options to Reduce Fish Impingement
- Implemented Through NPDES Permits

Resource Conservation and Recovery Act

- Coal Combustion Residuals
 - What are They?
 - By-Products of Coal Combustion
 - Include Fly Ash, Bottom Ash, Slag, etc.
 - Most are Produced at Power Plants
 - Disposed of
 - In Liquid Form at Large Surface Coal Impoundments
 - In Solid Form in Landfills



RCRA-CCRs

- EPA Rulemaking Continues with Two Proposed Alternatives:
 - Regulate as Hazardous Waste Under RCRA Subtitle C
 - Continue to Treat as Non-Hazardous Under RCRA Subtitle D

RCRA-CCRs

- February 7, 2014, EPA Formally Found that Reusing Encapsulated Coal Fly Ash in Certain Construction Materials is Safe
- EPA Also Found that the Beneficial Use of CCRs Has Significant Environmental and Economic Benefits
- December 19, 2014, Rule Must Be Finalized per EPA Consent Decree

Surface Mining Control and Reclamation Act (SMCRA)

1) Stream Protection Rule (SPR)

- Replace 2008 Stream Buffer Zone Rule
- First Major Rewrite of SMCRA
- Expected to Be Broad in Scope, May Include:
 - Increased Baseline Data Requirements
 - Definitions

SMCRA-SPR

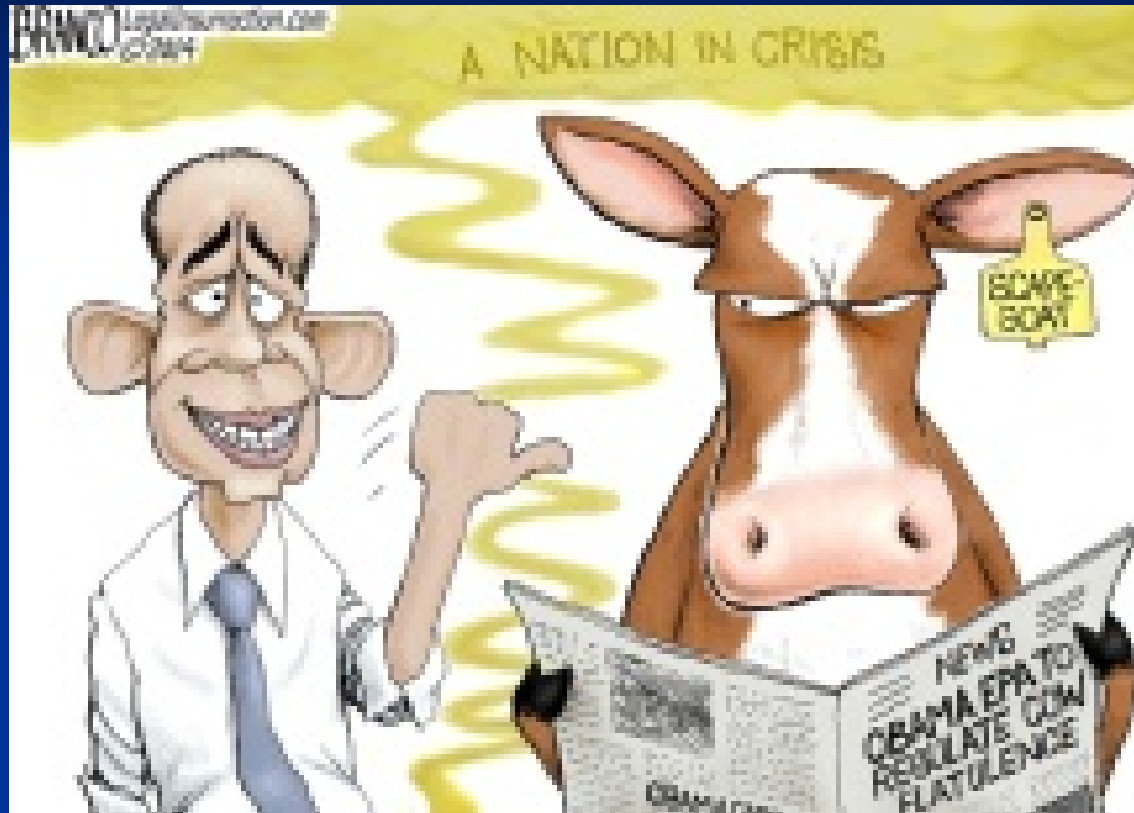
- Mining in or Near Stream Limitations
 - Monitoring Requirements
 - Corrective Action Thresholds
 - Limiting AOC Variances
 - Reforestation Requirements
 - Sterilized Coal Reserves
- Delayed Repeatedly, Expected Late 2014

2) NO_x Emissions at Surface Coal Mines ("Red Dust Rule")

- July 25, 2014, Petition to Initiate Rulemaking Published
- Requests that OSM Amend Its Regulations Governing the Use of Explosives to:
 - Prohibit Visible Nitrogen Oxide Clouds
 - Monitor all Blasting Activities
 - Report Instances of Visible Emissions



- OSM Currently Requesting Comments
- September 25, 2014, Comment Period Closes



Source: <http://legalinsurrection.com>

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