

# 28th Annual Kentucky Professional Engineers in Mining

## 2015 Federal Regulatory Update

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# Overview

- Clean Water Act
  - Section 404 Permit Decisions
  - Section 402 Permit Shield Decisions
- Surface Coal Mining and Reclamation Act
  - Stream Protection Rule
  - NO<sub>x</sub> Rule
  - Cost Recovery Rule
- Other Issues

# Clean Water Act (CWA)

## ■ EPA's § 404 "Veto" Decisions

### 1. Retroactive Vetos

■ *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013)

■ January 2007, Obtained Corps 404 Permits

■ January 2011, EPA Published a Final Determination to Invalidate Permits



- U.S. District Court Ruled in Favor of Mingo Logan
- U.S. Court of Appeals Reversed
- March 24, 2014, U.S. Supreme Court Denied Review

- Remanded to District Court
  - September 2014, District Court Held in Favor of EPA
  - EPA's Decision was Reasonable, Supported by the Record, and Based on Considerations Within the Agency's Purview
- December 9, 2014, Appeal Filed

## 2. Pre-Emptive Vetos

- Pebble Mine, Alaska
  - Pebble Limited Partnership Proposed to Mine Massive Mineral Deposits
  - Mine is Upstream of Pristine Salmon Habitat in Bristol Bay

- EPA Initiated a § 404(c) “Pre-Emptive Veto” Process Before a Permit Application for a § 404 Permit was Submitted
- Pebble Filed Suit but Case was Dismissed

- Pebble Sought to Enjoin the 404(c) Process as Violative of the Federal Advisory Committee Act
- Court Granted Pebble's Motion for Preliminary Injunction
- Court Battle is Ongoing





- Implications:
  - Retroactive Veto
  - Pre-emptive Veto
  - Regulatory Uncertainty
  - Elevates EPA as Final Water Regulator

## ■ CWA Permit Shield

### ■ What is the Clean Water Act Permit Shield?

#### ■ Section 402(k) Provides:

...[c]ompliance with a permit issued pursuant to this section shall be deemed compliance”, for purposes of enforcement and citizen suits involving certain effluent limits, performance standards, and ocean discharges, but not toxic pollutants.

33 U.S.C. § 1342(k)

- Applies to:
  - Sections 301 and 302 – Effluent Limitations
  - Section 306 – National Standards of Performance
  - Section 307 – Pretreatment Effluent Standards
  - Section 309 – Governmental Enforcement Actions
  - Section 403 – Ocean Discharges
  - Section 505 – Citizen Suits

- Under the Permit Shield:
  - May Not Argue That the Permit Failed to Cover all Parameters or was Drafted Improperly
  - May Only Argue That the Permittee is Not Compliant With its Permit
  - Confines Challenges to the Four Corners of a Permit

- What is the CWA Permit Shield Controversy?
  - Not: Whether a Permit Condition Has Been Violated
  - But Rather: Whether the Permit Shields a Permittee for Pollutants Actually Discharged, Which are Known by Agencies to be Present in the Discharge, but Not Specifically Incorporated into a Permit Limit or Condition

## ■ Seminal Permit Shield Litigation

### ■ *Piney Run Preservation Ass'n v. County Commr's*, 268 F.3d 255 (4th Cir. 2001)

- Permit Holder May Continue to Discharge an Unlisted Pollutant Under its Permit and Will be “Shielded” From Enforcement Action, if:
  1. The Permit Holder Complies With the Express Terms of the Permit and With the CWA’s Disclosure Requirements
  2. The Pollutant was Within the “Reasonable Contemplation” of the Permitting Authority at the Time the Permit was Granted

## ■ Recent Permit Shield Decisions

### 1. *Southern App. Mtn. Stewards v. A&G Coal Corp.*, 758 F.3d 560 (4<sup>th</sup> Cir. 2014)

- Plaintiffs Claimed Unpermitted and Non-Disclosed Discharges of Selenium
- A & G Argued:
  - Selenium was Naturally Occurring
  - Individual NPDES Application Disclosed Coal and Coal Processing
  - Agency Knew Selenium was Present in Discharge

- Court Found A&G Failed Both Prongs of the *Piney Run* Test:
  - Under The Permit Application Instructions, A&G was Required to Test for Selenium but Failed to do so
  - A&G Failed to Report Whether it Believed Selenium to be Present or Absent
- No Selenium Disclosure Meant No Permit Shield Defense
- “Silence as to the Existence of a Referenced Pollutant is Not Adequate”



## 2. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6<sup>th</sup> Cir. 2015)

- Sierra Club Filed a Citizen Suit Alleging:
  - Selenium Discharges From a Coal Mine Were in Excess of the State Water Quality Standards
  - Selenium was Not Covered by ICG's KPDES Coal General Permit

- Sixth Circuit Held in Favor of ICG Finding:
  - Full Disclosure
    - ICG Complied With Reporting Requirements and Disclosed the Selenium Discharge
  - Reasonable Contemplation
    - Deposed Agency Permit Writer was “Well Aware” of Selenium
    - Provision of Permit Recognized Possibility That the Mines May Discharge Selenium: Agency Included a One-Time Selenium Monitoring Requirement
    - Selenium Discharges Were Within Agency’s “Reasonable Contemplation”

- Permit Shield Implications
  - CWA Permit Shield Defense is Viable
  - Permit Shield Applies to Individual and General Permits
  - Full Disclosure to the Permitting Agency is a Fundamental Pre-Requisite to Asserting the Shield
  - Better to Provide More Information With an Application, Even at Risk of Facing More Limits and Conditions, than to Risk Claims That Certain Discharges are Not Shielded

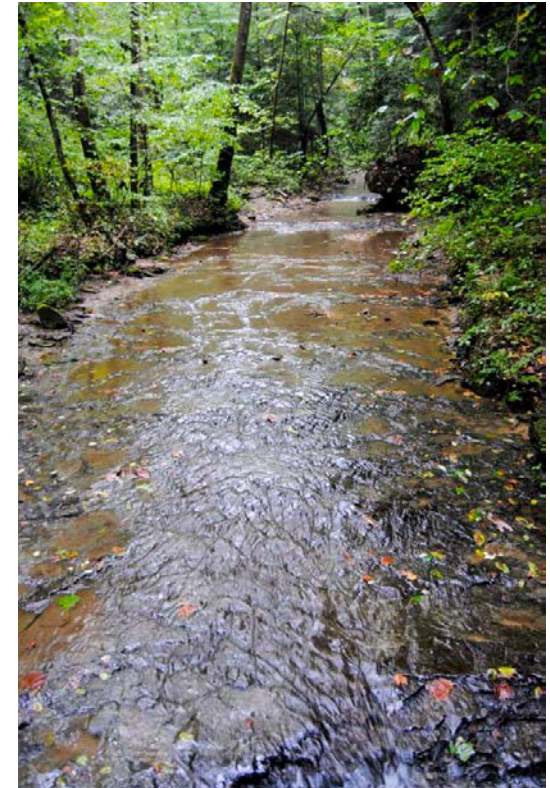
# Surface Mining Control and Reclamation Act (SMCRA)

## ■ Stream Protection Rule

■ July 27, 2015 Published [80 Fed. Reg. 44435]

■ Purpose of the Rule is to:

...reinforce the need to minimize the adverse impacts of surface coal mining operations on surface water, groundwater, fish, wildlife, and related environmental values, with particular emphasis on protecting or restoring streams and aquatic ecosystems.



1. “Material Damage to the Hydrologic Balance Outside the Permit Area”
  - 30 CFR 701.5
  - Under SMCRA, a Permit Application May Not be Approved Unless it is Found that the Proposed Operation is Designed to Prevent “Material Damage to the Hydrologic Balance Outside the Permit Area”
  - Neither SMCRA nor Regulations Define the Term

- Proposed Rule Defines the Term as: Any Adverse Impact from Mining on the Quality or Quantity of Surface or Groundwater, or on the Biological Condition of a Perennial or Intermittent Stream, that Would:
  - Preclude Attainment of a Designated Use of Surface Water;
  - Cause Surface or Groundwater to be Incapable of Supporting Existing or Reasonably Foreseeable Uses of that Water; or
  - Adversely Impact T&E Species, or Have an Adverse Effect on Designated Critical Habitat, Outside the Permit Area in Violation of the ESA

- Proposed Definition Applies to all Surface Coal Mining Operations
  
- Requires the Establishment of Permit-Specific Numerical Material Damage Criteria for Parameters of Concern to Identify:
  - the Level or Concentration at Which the Parameter Would Adversely Impact Surface or Groundwater to the Extent of Causing Material Damage to the Hydrologic Balance Outside the Permit Area [30 CFR 780.21(b)(6); 784.21(b)(6)]

## 2. Baseline Data Collection

- 30 CFR 780.19; 784.19
- Requires Collection of Pre-Mining Data About the Site of the Proposed Operation and Adjacent Areas to Establish a Baseline to Evaluate the Effects of Mining
- Requires Baseline Information for Seven Water Quality Parameters for Both Surface and Groundwater



- Requires Collection of Baseline Information for Determinants of Conductivity and Acidity and Alkalinity
- Sampling Location and Frequency Requirements
- Precipitation Measurement Requirements
- Assessments of Hydrological Characteristics and Riparian Vegetation for all Streams within and Adjacent to the Proposed Permit
- Measurement of the Biological Condition of Streams

### 3) Water Monitoring

- 30 CFR 780.23; 784.23, 800.42; 816.35-37; 817.35-37
- Outlines Surface and Groundwater Monitoring Requirements During and After Mining and Reclamation to Determine Changes in Water Quality and Quantity
- Revised Monitoring Requirements Largely Parallel Baseline Data Requirements
- Quarterly Sampling Frequency Remains

4. Provides Additional Requirements for Probable Hydrologic Consequences (PAH) Determinations and Cumulative Hydrologic Impact Assessments (CHIA)
  - 30 CFR 780.20; 780.21; 784.20; 784.21
  - PAH Evaluations Must Include: Analysis of Aquifers, Impacts on Water Quality Parameters, Precipitation, and the Biological Condition of Streams
  - CHIA-New Detailed and Specific Finding Requirements

## 5. Mining in or Near Streams

- 30 CFR 780.28; 784.28; 816.57; 817.57
- The Rule Prohibits Mining Activities Through a Perennial or Intermittent Stream or the Conduct of Mining Activities on the Surface of Land within 100 Feet of Such a Stream, with Exceptions
  - Exceptions Differ From Current Rules
  - Exceptions are Tailored to the Types of Activities to be Conducted in, Through, or Within 100 Feet of a Stream

- Activity Types Include:
  - Conducting Activities on the Surface of Land Within the Buffer Zone of a Perennial or Intermittent Stream
  - Mining Through or Diverting a Perennial or Intermittent Stream
  - Constructing an Excess Spoil Fill or Coal Mine Waste Facility that Would Cover or Encroach Upon Any Part of a Perennial or Intermittent Stream

- Other Requirements for Mining in or Near Streams:
  - Establishment of 100-foot Riparian Corridors Along Perennial, Intermittent, and Ephemeral Stream Channels if Mining Activities Disturb Those Streams or, for Perennial and Intermittent Streams, Their Buffer Zones
  - Restoration of Pre-mining Drainage Patterns of Perennial, Intermittent and Ephemeral Stream Channels Unless Otherwise Approved.

## ■ Other Areas:

### ■ Definitions

### ■ AOC and Exceptions to Restoration to AOC

### ■ Handling of Toxic Forming Materials

### ■ Surface Water Runoff Control Plans

### ■ Coal Mine Waste Disposal

- Soil Handling and Testing
- Revegetation/Land Use
- Fish and Wildlife
- Bonding and Releases
- Reassertion of Jurisdiction



## ■ SPR Summary

- Direct and Significant Adverse Impacts on Mining
- Will Impact New Permits, Revisions and Renewals
- Sterilize Coal Reserves
- October 26, 2015, Public Comment Period Closes

## ■ **NO<sub>x</sub> Emissions at Surface Coal Mines**

- 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



- February 20, 2015, OSM Granted the Petition for Rulemaking
  - Rule is Expected to Include:
    - Definition for “Blasting Area”
    - New Training and Testing Requirements
    - Potential to Impose a Substantial Compliance Burden
    - Rule Will Have National Application

- **Cost Recovery Rule for Permit Processing, Administration and Enforcement**
  - March 26, 2013, Proposed Rule [78 FR 18430]
  - Overhauls OSM Fees for Permitting Activities
    - Eliminates Fixed Fee Schedule, and Replaces it with (1) a Processing Fee Determined on a Case by Case Basis; and (2) an Annual Fixed Fee
- November 2015, Final Rule Expected

# Other Issues

## 1. Clean Water Rule

- May 27, 2015, Final Rule
- Impacts all CWA Permitting

## 2. EPA Draft Recommended Criterion for Selenium

- July 27, 2015, Proposed Rule
- September 25, 2015, Comments Due

### 3. CCR Rule

- April 17, 2015, Final Rule Published
- October 14, 2015, Effective Date
- EPA will Regulate CCRs as Non-Hazardous Under RCRA Subtitle D

## 4. Proposed Ozone Standard

- November 25, 2014, Proposed
- EPA to Revise Primary Ozone Standard  
From 75 ppb Level (8-hr average) to Within a  
Range of 65-70 ppb
- Proposed Changes to Monitoring  
Requirements
- October 2015, Finalized
- October 2017, Final Designations

## 5. Mercury and Air Toxics Standards (MATS)

- March 29, 2013, EPA Finalized MATS Rule for New and Existing Coal and Oil Fired Power Plants
  - Set Emissions Limits for Hg, PM, SO<sub>x</sub>, Acid Gases, and Certain Metals
  - Supreme Court Struck the Rule
  - MATS Remanded to D.C. Circuit
  - EPA Argues the Rule Should be Stayed Until it Completes a Cost Study



## 6. The Clean Power Plan (CPP)

- August 3, 2015, Final Rule Released
- Goal: Cut Carbon Pollution From Power Plants by 32 Percent from 2005 Levels by 2030
- Regulates Existing Power Plants Under CAA 111(d) and New Plants Under 111(b)
- Kentucky's Emissions Reduction Target Increased from Proposed Rule

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