United States Senate Report

THE MINGO LOGAN SPRUCE NO. 1 MINE

EPA IGNORES TRANSPARENCY, CONCERNS OF WEST VIRGINIA OFFICIALS

EPA Permit Veto Stops 253 New Jobs, Threatens Energy Security

U.S. Senate Environment and Public Works Committee

Minority Staff Report

www.epw.senate.gov/inhofe

Released: January 14, 2010

Contact: Matt Dempsey 202-224-9797 matt_dempsey@epw.senate.gov
David Lungren 202-224-5642 david_lungren@epw.senate.gov

Background: Permitting process for the Mingo Logan Spruce No. 1 mine in Logan County, West Virginia

Since President Obama took office, the Obama Administration, working through the Environmental Protection Agency (EPA), has taken several actions to obstruct, delay, and shutter surface coal mining operations in Appalachia. The case of the Mingo Logan Spruce No. 1 mine, the largest such mine in the state, exemplifies the Administration's handling of, and opposition to, coal mining operations as well as coal more generally.

On October 16, 2009, Sen. James M. Inhofe (R-Okla.), Ranking Member of the Senate Committee on Environment and Public Works, asked West Virginia Governor Joe Manchin (D) for his perspective on EPA's decision to "veto" the Clean Water Act (Section 404) permit for the Spruce No. 1 mine. Specifically, Sen. Inhofe inquired as to whether EPA followed an open and transparent process before issuing its decision. He was also interested in the steps taken by EPA to collaborate with West Virginia officials before its decision was made. Link to PDF of Sen. Inhofe's Letter

According to a detailed response provided by Randy Huffman, Director of West Virginia's Department of Environmental Protection, EPA's recent actions on surface mining permits "represent a stark change in regulatory direction," which "has been undertaken in the absence of any change in statute, regulation or formal policy which would necessarily require transparency in the process." With respect to EPA's action on the Spruce No. 1 mine, Huffman found that EPA:

- Failed to make its decision in a transparent manner;
- Moved forward without input or consultation from state officials; and
- Presented no new information or analysis to justify its change in position.

This approach is both odd and troubling, considering that the Spruce permit was issued in 2007 after a ten-year process, which culminated in a detailed environmental impact statement. The permit ultimately reduced the overall mine acreage by 835 acres and reduced permanent impacts to stream channels by over 15,000 feet. Moreover, EPA either ignored or dismissed the fact that the project would bring jobs and economic growth to the Appalachian region.

According to estimates, the Spruce Mine project would provide **253 mining jobs and 298 indirect jobs for West Virginia** and the **coal at the mine would generate electricity for 74,500 homes for each year the mine is working**.

As for the current status of the permitting process, U.S. District Judge Robert Chambers recently issued a 60 day stay, in which EPA has proposed to negotiate with Arch Coal, the company that owns the mine. Sen. Inhofe encourages EPA to work with West Virginia on the state's suggestions to improve the regulatory process. They are as follows:

- "Return all water quality standard development and interpretation back to the State of West Virginia"
- "Stop using the CWA Section 404 permitting process, alone, to regulate water quality. Work with the State to interpret established water quality standards that are protective of human health and aquatic life using the already established legal framework for such development"
- "Use the Surface Mining Act as enforced by the Office of Surface Mining to address the avoidance and minimization issue and the effects of any cumulative impacts."
- "Respect the sovereignty of the State and primacy of its regulatory programs."

West Virginia's coal resources must continue to play an important role in the nation's energy security. Sen. Inhofe shares the view—expressed by Huffman—that the "impediments to production of these resources by EPA could cause the undesirable effect of making our country even more dependent on foreign sources on energy."

The following is the complete response to Sen. Inhofe's letter:

Link to PDF of Secretary Huffman's Response

Executive Office
601 57th Street SE
Charleston, WV 25304
304-926-0440

Jon Manchin III, Governor
Randy C. Huffman, Cabinet Secretary
www.wvdep.org

December 2, 2009

The Honorable James M. Inhofe, Senator
United States Senate
Committee on Environment and Public Works
Washington, DC 20510

Dear Senator Inhofe:

I am responding to your November 2, 2009 letter to Joe Manchin III, Governor of the State of West Virginia concerning the Clean Water Act section 404 permit for the Spruce mine in West Virginia. Thank you for the opportunity to be of assistance.

In addition to providing answers to your questions, I thought it would be helpful to include a brief history of the Section 404 permitting for the Mingo Logan Coal Company Spruce mine. From the attached summary, you can see that attempts to permit this mine under section 404 have been underway since 1998. I am also enclosing an attachment on which I have responded to each of your specific questions about this permit.

If you have any further questions or would like to discuss these matters, please contact me.

Sincerely,

Randy C. Huffman

Enclosures

Summary of Section 404 Permitting History

Mingo Logan Coal Company - Spruce Mine

The Spruce permit application to the Corps started as a request for an authorization to use the section 404 Nationwide Permit ("NWP") 21 in 1998. The permit was needed to allow an existing mine to expand into adjacent areas. The original application covered a mine of over 3,000 acres.

In the fall of 1998, in the face of threatened litigation, EPA and the Corps agreed to issue a NWP authorization for a downsized version of the original application. Consistent with that agreement, by letter of January 21, 1999, the Corps issued a letter stating, "it has been determined that the revised mining plan . . . meets the requirements of Nationwide Permit 21. . . ." By another letter of January 21, 1999, EPA Region 3 acknowledged to the Corps that the downsized mine plan has minimized "the potential individual and cumulative adverse environmental impacts to waters of the United States . . . to the extent possible while maintaining a viable project." That letter also stated that "[w]e concur that this project is consistent with Section 404(e) of the Clean Water Act and with Nationwide Permit 21."

The actions of the mine operator, the Corps, and EPA did not prevent litigation. On March 3, 1999, a federal district court in West Virginia preliminarily enjoined issuance of NWP 21 authorization for the Spruce mine. *Bragg v . West Virginia Coal Ass'n*, 54 F. Supp. 2d 635 (S.D. W.Va. 1999). On June 24, 1999, the Corps withdrew its "proffered authorization under NWP 21" to end the pending litigation. The mine operator closed the existing mine and laid off over 440 miners. The mine operator then agreed to resubmit an application for an "individual permit" and to participate in an Environmental Impact Statement (EIS)—the only one ever prepared for an individual surface mine in central Appalachia.

The mine operator worked with EPA and the Corps on an EIS for over 6 years before the Corps issued an individual permit under section 404 on January 22, 2007. Compared to the original 1998 application, the 2007 permit reduced the overall mine acreage by 835 acres and reduced permanent impacts to stream channels by over 15,000 feet. At full production, the permit, as issued, will employ over 250 miners. Operations commenced in one watershed almost immediately after the Corps permit was issued in January 2007.

In late January, 2007, some of the same plaintiffs who previously challenged the Nationwide 21 permit for the Spruce mine added a challenge to the individual section 404 permit for the Spruce mine to a lawsuit they had filed opposing several other individual section 404 permits for surface coal mines in West Virginia. At that time, a bench trial had been conducted on issues similar to those raised on the Spruce permit on four individual 404 permits for surface coal mining operations, but no decision had been rendered. To avoid an attempt by these plaintiffs to obtain a preliminary injunction of the permit for the Spruce mine, its operator agreed to operate on a very restricted basis on a small portion of the permit area while issues were being litigated in court. The court rendered decisions on the 404 permits that had been the subject of the trial in March and June, 2007.

The trial court's decisions were appealed to the U.S. Court of Appeals for the Fourth Circuit. In February, 2009, the Fourth Circuit reversed the trial court's decisions. While, strictly speaking, this ruling was limited to the four permits that were the subject of the trial, the issues the appeals court addressed on the four permits were essentially the same as those raised in opposition to the Spruce permit. Based on this and the fact that many of the issues the plaintiffs had raised under the National Environmental Policy Act did not apply to the Spruce permit because an EIS had been conducted in connection with it, the operator of the Spruce mine sought judgment from the trial court in July, 2009. Since then, the federal government has sought delays of its deadline to respond.

On September 3, 2009, EPA Region 3 sent a letter to the Corps asking it to suspend, revoke or modify the 404 permit for the Spruce mine. According to EPA, "new information and circumstances" since permit issuance justified reconsideration of the permit. However, the issues EPA has newly raised in opposition to the Spruce

permit are not new ones. In a September 15, 2009 court order, the trial court before whom the legal challenge of the Spruce permit is pending observed "…the EPA letter [of September 3, 2009] does not provide substantial new information regarding the Spruce No. 1 permit." On September 30, 2009, the Corps sent a letter to EPA responding and declining to take any of these actions. The EPA responded with a letter on October 16, 2009, informing the Corps that it was initiating the process for an EPA veto of the Spruce permit under section 404(c) of the Clean Water Act. The trial court concluded in an October 21, 2009 order that "many of the flaws EPA identifies [in its October 16, 2009 letter] relate to issues raised by Plaintiffs in this litigation; addressed by the Fourth Circuit in [OVEC] v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009) and argued by Mingo Logan in support of its motion for summary judgment." While EPA claims to be pursuing a veto of the Spruce permit "in light of new data and information since permit issuance," all of the issues it identifies in its September 3 and October 16 letters to the Corps have been addressed in the eleven plus years since the permitting for this operation began.

EPA has indicated that changes in the mining operation might make it acceptable. Since EPA sent its October 16 letter, coal company representatives have met with EPA twice to try to find out what changes need to be made in order to accomplish this. Despite having scrutinized plans for this operation for these many years, EPA has been unable to give the coal company any clear answers.

Responses to Senator Inhofe's Questions

1. **When did EPA notify the state of West Virginia about its decision to revoke the Spruce No. 1 mine permit that was issued in 2007?**

The WVDEP received a copy of a September 3, 2009 letter the EPA sent to the Army Corps of Engineers, requesting that the Corps suspend, revoke or modify this permit, on September 8, 2009. Although, at that time, the EPA had not yet threatened to veto the permit, the fact that it was requesting that the Corps revoke a two year old permit could be viewed as an indication that EPA was willing to act against the permit if the Corps failed to do so. In a meeting between EPA Region 3 and WVDEP personnel on October 15, 2009, Acting Regional Administrator William Early indicated that the EPA would soon begin the process of vetoing this permit. The EPA's October 16, 2009 letter to the Corps initiated this process.

2. **Has EPA supplied you with criteria or a rationale to support its action?**

The EPA supplied the WVDEP with a copy of its October 16, 2009 letter in which it stated its rationale for this action. As related in the summary of the permitting history for the Spruce mine, this letter does not raise any issue which has not been thoroughly considered in the eleven plus years this permit has been under consideration. Although EPA has suggested to the WVDEP and the coal company that changes in the operation might make it acceptable, EPA is unable to articulate what changes are required or to identify any clear criteria it will use in judging what is acceptable.

3. **Did EPA express any of its concerns during either the two years after the permit was issued or at any time prior to EPA's indication of its intention to veto the permit?**

The EPA had not expressed its concerns about this permit to the WVDEP before supplying the WVDEP with a copy of its October 16 letter to the Corps. The WVDEP received the EPA's September 3, 2009 letter from the Corps.

4. **Did EPA work with the West Virginia DEP to address any of its concerns prior to its indication to veto the permit?**

No.

5. **How many direct jobs will be lost because of EPA's action? How many indirect jobs will be lost because of EPA's action?**

According to information supplied by the coal company, there are 253 direct mining jobs and an additional 298 indirect or induced jobs that are at risk due to EPA's actions. These are long term employment opportunities projected to have a duration of 13 to 15 years.

6. **How many tons of coal will be affected by EPA's action? Please quantify the amount of electricity that could have been generated by this coal and the number of West Virginia households that could have been served by this electricity.**

According to information supplied by the coal company, EPA's action affects the recovery of 41,000,000 tons of high quality bituminous coal. The U. S. Energy Information Agency estimates the average electricity usage for a 2 story, 3 bedroom house is 8,900 Kilowatt-hours per month. The electricity generated by the coal produced by the Spruce operation would provide electricity for 74,500 homes for each year the mine is working.

7. **Since 2007, how many West Virginia 404 permits have been applied for and how many of those have been issued? And since 2007, how many West Virginia 404 permits are pending at either the EPA or the Corps?**

In the Huntington District of the Army Corps of Engineers, which encompasses the coal producing regions of southern West Virginia, there were twenty (20) 404 permits for coal mining operations pending at the beginning of 2007. Since then, fifty eight (58) permits have been applied for and forty (40) permits have been issued. Thirty eight (38) permit applications are currently pending. According to the Corps, each of the thirty eight (38) applications which has reached the stage in the process for EPA to comment has received comments from EPA. This effectively puts each of these applications on track for a potential EPA veto. Only two individual 404 permits have been issued by the Huntington District in 2009. One of these appears to have simply escaped EPA's scrutiny as EPA's new focus on the 404 permitting process for coal mining was beginning. The other was a permit that the EPA and the mining company negotiated apart from WVDEP standards and without WVDEP's involvement.

The coal producing region of northern West Virginia is served by the Pittsburgh District of the Corps. This office of the Corps has yet to respond to the WVDEP's request for information on coal-related 404 permits pending there. Due to differences in topography in northern and southern West Virginia, northern West Virginia tend to have less need for 404 permits.

8. **How many of the West Virginia 404 permits, including those pending and issued could be vulnerable to the same type of action EPA has pursued with the Spruce No. 1 permit?**

Potentially, all of the permits issued by or pending in the Huntington District could be vulnerable to similar action by the EPA.

9. **My staff has informed me that EPA's recent action on the Spruce No. 1 permit could possibly amount to a regulatory taking. Has your staff reached a similar conclusion?**

My staff has not analyzed this issue in any detail. However, the WVDEP acknowledges that any time required permits are withheld, a regulatory takings claim is a possibility.

10. **Do you believe EPA implements its policies in a manner that balances environmental protection with the need to create jobs and support economic growth and investment? Is there a need for greater oversight of EPA's policies as they relate to coal mining in West Virginia? And what actions, if any, can be taken to ensure that coal mining in West Virginia receives fair, objective, and balanced treatment by EPA and the federal government?**

EPA's recent actions represent a stark change in regulatory direction. This change has been undertaken in the absence of any change in statute, regulation or formal policy which would necessarily require transparency in the process. The purported scientific basis for most of the EPA's actions is the effect on benthic macroinvertibrates from increases in dissolved solids from surface coal mining operations. Increases in dissolved solids can be expected in the runoff from almost any activity which disturbs the surface of the earth. Any other type of mining disturbance or any construction activity of significance could be subject to attack by EPA on the same basis.

West Virginia's coal resources have been a major part of the industrial capacity which enabled this nation win two world wars and achieve a stable economic environment on a global scale. The impediments to production of these resources by EPA could cause the undesirable effect of making our country even more dependent on foreign sources on energy. The appropriate balance between the level of environmental protection to be afforded and the need to create jobs and economic growth and investment as well as the nation's energy policy and national security is a policy judgment that should be elevated beyond the bureaucratic functionaries at EPA who appear to be responsible for this recent shift.

The following recommendations have been shared with West Virginia's congressional delegation, as steps that can be taken to ensure that coal mining in West Virginia receives fair, objective and balanced treatment by EPA and the federal government:

1. **Return all water quality standard development and interpretation back to the State of West Virginia.**

EPA has developed and implemented its own interpretation of West Virginia's narrative water quality standard without consultation with the State of West Virginia.

2. **Stop using the CWA Section 404 permitting process, alone, to regulate water quality. Work with the State to interpret established water quality standards that are protective of human health and aquatic life using the already established legal framework for such development.**

Instead of applying the State's narrative water quality standards in the State's CWA 402 permitting process, which is where water quality is most directly regulated, the EPA is circumventing the State's authority by applying its own interpretation in the federal 404 permitting process.

3. **Use the Surface Mining Act as enforced by the Office of Surface Mining to address the avoidance and minimization issue and the effects of any cumulative impacts.**

The Corps has historically relied on fill minimization and cumulative hydrologic impact assessments conducted by the State in the SMCRA permitting process. The EPA's efforts to revisit these aspects of mine permitting in the 404 process results in unnecessary duplication and frustration and creates differing interpretations of regulations and permit requirements.

4. **Respect the sovereignty of the State and primacy of its regulatory programs.**

EPA has manipulated the federal CWA 404 permitting process so as to intrude on the State's primacy under SMCRA and its delegated authority under the CWA.

###