



Judge Buries EPA Mountaintop Mining Guidance

By **Keith Goldberg**

Law360, New York (July 31, 2012, 6:30 PM ET) -- A Washington federal judge on Tuesday said the U.S. Environmental Agency overstepped its authority in issuing guidance over environmental permitting regulations for mountaintop mining in Appalachia, the second time he's struck down agency action on the issue in less than a year.

U.S. District Judge Reggie B. Walton said the EPA infringed on the authority given to state regulators by the Clean Water Act and Surface Mining Control and Reclamation Act when it issued the final guidance in June 2011. The judge, who struck down the EPA's interim guidance in October, said that once the agency has approved a state permitting program under SMCRA, it has no further oversight or administrative authority under the statute.

The judge also agreed with the plaintiffs — including the states of Kentucky and West Virginia and the National Mining Association and Kentucky Coal Association — that the EPA overstepped its authority under the CWA by setting a new water quality standard for states, as well as usurping the states' primary authority under the statute to determine if discharges from coal mining projects violate water quality standards.

"This is a huge victory for West Virginia and our coal miners," West Virginia Gov. Earl Ray Tomblin said in a statement Tuesday. "As the court correctly recognized, the West Virginia [Department of Environmental Protection] knows what's best for West Virginia, not the federal government."

The EPA sought in its final guidance to clarify existing requirements of the CWA permitting programs that apply to pollution from surface coal mining operations in streams and wetlands, a particularly critical issue in Appalachia, where an estimated 2,000 miles of headwater streams have already been buried by mining debris.

It replaced interim guidance the agency issued in April 2010 that set water quality limits for valley fill permits need for coal mining and altered timelines for such permits.

Kentucky, West Virginia, the NMA and others sued the EPA shortly after that initial guidance was issued. Judge Walton set it aside in October, ruling that the agency overstepped its authority under the CWA, though his decision was rendered moot due to the agency having already issued its final guidance.

"Today's decision has truly given coal miners and coal mining communities their 'day in court' and has affirmed NMA's long-standing belief that EPA overreached its authority in its virtual moratorium on eastern coal mining permits and denied those operations the protections provided for under the law," NMA President and CEO Hal Quinn said in a statement. "It is now time to get miners back to work by allowing the state permitting agencies to do their jobs."

Environmental groups panned the decision.

"For years, mining companies have fought science and even minimal clean water protections under the 40-year-old Clean Water Act using every legal trick in the book. In some cases, such as today's federal court decision, they have won," Cindy Rank of the West Virginia Highlands Conservancy said in a statement. "This continues to put us living in Appalachia in the unconscionable position of having to document our own communities' sickness, disease and other unexplained health impacts as reasons to finally stop the devastating practice of mountaintop removal coal mining."

The NMA is represented by Kirsten L. Nathanson, John C. Martin, David Chung, Providence Spina, Antonio Gonzalez Mendoza, Christopher Leopold and Sherrie A. Armstrong of Crowell & Moring LLP.

West Virginia is represented by Michael L. Murphy, Benjamin L. Bailey, Gregory Y. Porter and Michael B. Hissam of Bailey & Glasser LLP.

Kentucky is represented by its Office of General Counsel.

The KCA is represented by Sadhna G. True and Mindy G. Barfield of Dinsmore & Shohl LLP.

The case is National Mining Association et al. v. Jackson et al., case number 1:11-cv-00447, in the U.S. District Court for the District of Columbia.

--Additional reporting by Maria Chutchian and Greg Ryan. Editing by Katherine Rautenberg.

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