

MEMORANDUM

To: President Jeff Kessler, Chair
Speaker Richard Thompson, Chair
Joint Committee on Government and Finance

cc: Jason Pizatella, Legislative Director
Keith Burdette, Cabinet Secretary, West Virginia Department of Commerce
Angel Moore, Deputy Secretary/General Counsel, West Virginia Department of
Commerce

From: Jeff Herholdt, Director
West Virginia Division of Energy

Date: April 10, 2012

Re: Quarterly Report Ending March 31, 2012
Legal Challenges Potentially Impacting the Energy Industry

As mandated by West Virginia Code §5B-2F-2(s), the following information presents legal challenges with the potential to impact the state's energy industry. This submission has been summarized by the West Virginia Chamber of Commerce's Energy Committee. Future reports will be submitted on a quarterly basis.

REPORT ON LITIGATION RELATED TO
ENERGY AND NATURAL RESOURCES IN WEST VIRGINIA
FIRST QUARTER 2012
(Ending March 31, 2012)

1. Sierra Club Seeks to Impose Conductivity and Sulfate Limits on Discharges from Kentucky Mines

The Sierra Club and Kentuckians for the Commonwealth have appealed an NPDES permit issued to a coal operator in Kentucky which could have industry-wide implications in that State and in West Virginia.

Chronic vs. Acute Water-Quality Based Effluent Limits

The appeal claims that the permit should likely include water quality based limits for the chronic water quality criteria, but instead includes limits based only on the higher acute criteria. The appeal says that chronic standards are based on 96 hours of exposure, and that a “reasonable potential” (to violate the standard) analysis must show that there will not be 96 hours or discharge before it can impose limits only to meet the acute standards.

Conductivity, TDS and Sulfate Limits

The appeal claims that the permit should include limits for total dissolved solids (TDS), specific conductance (conductivity) and sulfate to prevent a violation of the narrative water quality standard. This claim is apparently similar to one raised in a challenge in West Virginia to an NPDES permit in West Virginia. There, the Sierra Club relied on testimony from Margaret Palmer (U. Md.), Emily Bernhardt (Duke) and Ryan King (Baylor) to argue that there is a high degree of correlation between unacceptable benthic impacts and conductivity at levels as low as 277 $\mu\text{S}/\text{cm}$. The in-stream limits that the Sierra Club seeks to impose through this process are generally considered unachievable by the mining industry without reverse osmosis—a technology not affordable to the surface mining industry.

The West Virginia Environmental Quality Board originally ruled that the West Virginia Department of Environmental Protection (WVDEP) should impose effluent limits on

conductivity, TDS and sulfate, but the case has been remanded to the Board by the Circuit Court of Kanawha County.

2. Earthjustice Notifies EPA of Planned Coal Ash Suit

On January 18, 2012, Earthjustice notified the EPA of its intent to sue the agency over an alleged failure to properly regulate coal ash under the Resource Conservation and Recovery Act (“RCRA”). Earthjustice sent the notice on behalf of eleven different environmental groups, including the Sierra Club, Kentuckians for the Commonwealth and Appalachian Voices.

In the written notice, Earthjustice alleges that EPA is required to review and revise RCRA regulations relating to coal ash every three years (note: RCRA actually requires only that regulations be reviewed and revised every three years “where necessary”). Earthjustice alleges that EPA has failed to fulfill this responsibility, noting that the agency has failed to follow through on proposed rulemaking aimed at coal ash. EPA is currently in the process of reviewing and evaluating more than 450,000 comments it has received regarding potential coal ash regulation by the agency.

RCRA requires citizens to provide 60 days’ notice of their intent to file suit. The letter from Earthjustice was issued to comply with RCRA’s notice requirement.

3. Court Denies Motion to Supplement Complaint With Hendryx Studies

On January 23, 2012, a federal judge denied a motion by anti-mining groups to add a NEPA-based health effects claim to a pending challenge to a “fill” permit issued by the Corps of Engineers. In *Ohio Valley Environmental Coalition, et al. v. U.S. Army Corps, et al.*, Civil Action No. 3:11-0149 (S.D. W.Va. 2012), Doc. No. 84 (“Order”), the Court ruled that the proposed additional claim was “futile.” This case involves a challenge to a permit issued by the Corps of Engineers under Clean Water Act §404 permit for Highland Mining Company’s Reylas Surface Mine located in Logan County, West Virginia. Plaintiffs’ motion claimed that the Corps violated the National Environmental Policy Act (“NEPA”) by failing to supplement its Environmental Assessment (“EA”) of the Reylas permit in light of “new” studies authored by West Virginia University Professor Michael Hendryx. Even though Hendryx’s papers do not claim that mining “causes” the health effects examined, many blogs and news outlets have cited the reports as evidence that mining is causing health effects such as cancer and birth defects.

The most recent iteration of the Reylas permit was issued by the Corps on September 20, 2011 after the Corps suspended an earlier version of the permit to reexamine portions of its decision document. Soon after the Corps re-issued the permit, OVEC filed a motion for a preliminary injunction and moved to supplement an earlier complaint with its NEPA-based health effects claim.

NEPA is triggered by “major federal actions” and requires an Environmental Impact Statement when such an action will “significantly affect the quality of the human environment.” The Corps’ permit action is considered a “federal action.” Here, the Corps evaluated the application and determined in an EA that the permitted action would not have a significant effect, thereby concluding that no EIS was necessary. OVEC sought to force a reexamination of that decision by relying on the recent Hendryx publications.

NEPA regulations require a federal agency to supplement draft or final environmental impact statements when there are “significant new circumstances or information relevant to the **proposed action** or its impacts.” 40 C.F.R. §1502.9. The Supreme Court previously held that no supplementation is required if there is no remaining federal action. *SUWA*, 542 U.S. 55, 72 (2004). The Court ruled that “[t]he major federal action which triggers NEPA compliance in this case is the issuance of a permit, not the mining activity.” Order, p. 3. Determining that the permit had been issued, the Court held that there was no remaining major federal action and hence no new NEPA “trigger.”

Plaintiffs advanced two arguments: (1) that the duty to supplement the EA continued because the impacts of the proposed action were not completed; and (2) that the permit was effectively an “ongoing action” because the Corps retained oversight authority and the power to revoke or modify Highland’s permit at any time. Order, p. 4-5. The Court rejected Plaintiffs’ arguments, determining that “[n]either of Plaintiffs’ inconsistent positions can be correct.” According to the Court, Plaintiffs’ first argument “simply cannot be correct in a world where the impacts of permitting decisions are potentially permanent.” Order, p. 4. Rejecting Plaintiffs’ second argument, the Court observed that while the Corps retains oversight authority, the issuance of the permit is the major federal action requiring NEPA compliance. Order, p. 5. Additionally, the Court stated that following Plaintiffs’ interpretation of relevant case law, applying NEPA after the issuance of the permit, would “render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” Order, p. 5.

4. Court Strikes Portions of EPA’s Numeric Water Quality Standards for Nutrients in Florida: Harbinger of Future Battle over EPA Conductivity Standards in Appalachia?

On February 18, 2012, the U.S. District Court for the Northern District of Florida struck down as arbitrary and capricious portions of a numeric nutrient standard that EPA developed for Florida to ensure compliance with the CWA. The case is *Fla. Wildlife Fed’n v. Jackson*, No. 4:08-cv-324 (N.D. Fla. Feb. 18, 2012).

Florida has long had a narrative water quality standard for nutrients that reads “nutrient concentrations of a body of water [must not] be altered so as to cause an *imbalance* in natural populations of aquatic flora or fauna.” Fla. Admin. Code R. 62-302.530(47)(b)(emphasis added). Due to widespread pollution normally in the form of algal blooms caused by excessive nutrient loads, EPA pressured Florida to replace its

narrative nutrient standard with a numeric standard. After many years of delays and setbacks by Florida, EPA made a formal determination that Florida's narrative nutrient standard was not protecting Florida's waters and took it upon itself to develop numeric nutrient standards. As soon as EPA's standards were finalized they were challenged by both environmental and industry groups.

The district court upheld EPA's determination that Florida's narrative standard was insufficient to protect water quality. It also upheld several of EPA's nutrient standards based on evidence, including computer models, laboratory studies, and field studies, demonstrating that nutrient concentrations beyond a threshold point cause a *harmful* imbalance in a waterbody's flora or fauna. It also rejected some of EPA's standards, however, that had prohibited nutrient levels that caused *any* change to the flora or fauna, and not changes shown to be harmful.

After failing to develop a nutrient standard for Florida's streams based on computer modeling and field studies, EPA next identified minimally-disturbed reference streams on a regional basis for which nutrient data was available. EPA then calculated the amount of nutrients in these reference streams and set the numeric nutrient standard at the 90th percentile for four of the geographic regions and the 75th percentile for a fifth region. EPA considered a stream with nutrient levels above these percentiles for more than one year out of every three years in violation of the nutrient standard.

The court rejected EPA's stream standard, claiming the 90th percentile standard was set without any accompanying evidence that this concentration of nutrients actually results in harmful imbalances of flora or fauna in Florida's streams. The court noted at least 10 percent of the pristine reference streams used to establish the standard receive higher levels of nutrients but "are apparently unimpaired". Pg. 65. While all parties agreed that any nutrient increase leads to some change in the flora and fauna, not every increase causes harmful imbalances. Since any legal discharge of pollution arguably changes the receiving water in some way, the court concluded that "[t]he relevant permitting question, therefore, is not whether the receiving waters are changed, but whether the changes are permissible under the law." Pg. 46 (quoting *Lane v. Int'l Paper Co.* No. 2010 WL 333011 at *14 (Mar. 10, 2010)). The court observed that "Florida's narrative nutrient criterion addresses *harmful* effects, not *all* effects." Pg. 46.

While the court rejected EPA's stream nutrient standard because EPA did not document how nutrient levels beyond the 90th percentile correlate with a harmful imbalance, the court stopped short of requiring EPA to conclusively show nutrients above the standard will in all cases cause harm. "It may well be that there is a sufficient correlation. An experienced environmental scientist might be able to conclude, as a matter of sound scientific judgment, that above the 90th percentile, harmful change is likely. But a reviewing court cannot properly make its own analysis of an issue that the agency did not address." Pg. 66.

The court also rejected EPA's "downstream-protection criteria" designed to protect lakes meeting the nutrient standard from adverse impacts from incoming streams in violation of the nutrient standard. The court upheld EPA's determination that such downstream criteria are needed, but ruled that EPA's default downstream protection values (DPVs) were arbitrary and capricious because they forbid streams flowing into lakes to have nutrient levels above ambient conditions. Again, the court found that the EPA's standard was incorrectly based on the theory that any increase from ambient conditions ordinarily causes a change in flora and fauna – not that it causes a harmful change. "[T]he rule in effect disapproves *any* change in nutrients, even a change that will have no harmful effect." Pg. 70. The court found EPA provided no evidence that a stream with nutrient levels marginally above ambient concentrations would have harmful imbalances of flora or fauna.

The district court's decision has implications regarding any effort to translate West Virginia's narrative water quality standards into numeric standards for conductivity, TDS, and sulfate. An important take-away from this case is that any numeric water quality standards developed by EPA must demonstrate that a given concentration of pollution causes not just changes to a waterbody, but *harmful* changes.

Thus far, the evidence provided in support of limits on conductivity, TDS, and sulfate has been almost exclusively field data allegedly showing a not particularly robust correlation between increased levels of conductivity, TDS, and sulfate and a decrease in the diversity of sensitive aquatic macroinvertebrates species, most notably mayflies. Little laboratory evidence exists to establish a dose-response relationship between concentrations of conductivity, TDS, or sulfate and diminished macroinvertebrate diversity. Also, little tangible evidence has been produced to show that a diminished diversity of select sensitive aquatic macroinvertebrates actually causes harm to the overall health or productivity of West Virginia streams. The logic in the district court's decision, therefore, suggests that there is still a lot of science to be done before EPA can create numeric water quality standards for conductivity, TDS, and sulfates that can withstand judicial review.

5. U.S. Supreme Court Reaffirms Traditional Tests for Determining Navigable Waters

The Supreme Court delivered a unanimous opinion on February 22 in a case that involves a doctrine rarely reviewed (the "equal-footing doctrine") and of little importance in the original states. What does make the case interesting, and potentially significant, is its almost matter-of-fact reaffirmation of traditional principles by which the Supreme Court has determined whether waters of the United States are "navigable" and therefore subject to regulation by the United States.

The petitioner in the case, PPL Montana, LLC owns and operates ten hydroelectric facilities built upon riverbeds underlying segments of the Upper Missouri, Madison, and

Clark Fork Rivers in Montana. The hydro facilities have been in existence for decades, licensed under the original authority of the former Federal Power Commission (now FERC) and unquestionably known to exist by the state. For years the company has paid a rental to the United States for its occupation of the riverbeds in which the facilities are constructed. A lawsuit was brought to determine whether Montana was owed a rental for the hydro sites, which the Montana Supreme Court decided in favor of the state. Although each of the rivers is navigable in the traditional sense, they are not navigable along their entire reach including the precise locations where the hydro facilities are located. It is these riverbeds to which title was disputed.

Under the equal footing doctrine a state admitted to the Union is the complete equal of the original states. “The rule [is] that the States, in their capacity as sovereigns, hold title to the beds under navigable waters” (Slip Op. at 10).

Upon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced, see *Phillips Petroleum Co. v. Mississippi*, 484 U. S. 469 (1988), although that is not relevant in this case). It may allocate and govern those lands according to state law subject only to “the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.” *Oregon, supra*, at 14; see *Montana v. United States*, 450 U. S. 544, 551 (1981); *United States v. Holt State Bank*, 270 U. S. 49, 54 (1926). The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses. (Slip Op. at 12)

Writing for a unanimous Court, Justice Anthony Kennedy held that the portion of the riverbeds occupied by the facilities were not navigable. Montana did not gain title to the portions of the riverbed upon admission to the Union. Therefore, the United States did retain title to that portion of the riverbed, and the company had no obligation to pay any rental to the state.

In explaining its decision, the Court recited long established, if obscure, caselaw. “[T]he people of each State, based on principles of sovereignty, ‘hold the absolute right to all their navigable waters and the soils under them,’ subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842).” (Slip Op. at 11) This rule of title is based upon the navigability in fact of the stream as formulated under an 1871 case, *The Daniel Ball*, 10 Wall 557. As the Court explained,

The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. See, e.g., *ibid.*; *The Montello*, 20

Wall. 430, 439 (1874); *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 406, and n. 21 (1940) (Federal Power Act); *Rapanos v. United States*, 547 U. S. 715, 730–731 (2006) (plurality opinion) (Clean Water Act); *id.*, at 761 (KENNEDY, J., concurring in judgment) (same). . . It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases. . . [A]dmiralty jurisdiction extends to water routes made navigable even if not formerly so, see, *e.g.*, *Ex parte Boyer*, 109 U. S. 629, 631–632 (1884) (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, see, *e.g.*, *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634–635 (1912), were once navigable but are no longer, see *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123–124 (1921), or are not navigable and never have been but may become so by reasonable improvements, see *Appalachian Elec. Power Co.*, *supra*, at 407–408. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. See *The Daniel Ball*, *supra*, at 564. And, of course, the commerce power extends beyond navigation. See *Kaiser Aetna v. United States*, 444 U. S. 164, 173–174 (1979). In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. See *Utah*, *supra*, at 76. This list of differences is not exhaustive. Indeed, “[e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration.” *Appalachian Elec. Power Co.*, *supra*, at 406. (Slip Op. at 13-14).

Finally, the Court explained that in questions of title, “this Court considers the river on a segment by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.” (Slip Op. at 14). The court not only justified its evaluation of stream segments on the basis of its own jurisprudence, it relied again on common law applications to private property.

A segment approach to riverbed title allocation under the equal-footing doctrine is consistent with the manner in which private parties seek to establish riverbed title. For centuries, where title to the riverbed was not in the sovereign, the common-law rule for allocating riverbed title among riparian landowners involved apportionment defined both by segment (each landowner owns bed and soil along the length of his land adjacent) and thread (each landowner owns bed and soil to the center of the stream). See J. Angell, *A Treatise on the Law of Watercourses* 18 (6th ed. 1869); *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (No. 14,312) (CC RI 1827) (Story, J.).

This case is important for at least three reasons. First, the Court reached its conclusions regarding the precise question of title to the Montana riverbeds based largely on 19th Century formulations of principles of navigability and its application to title. The

analysis was thorough as to each issue in the case. It found no reason to extend or enlarge upon those formulations to explain why the federal government, and not Montana, retains the ownership of riverbeds.

Second, and of more importance to the Central Appalachian region, the opinion is a reminder that ownership of rivers and streams is at once both established and complex. The reliance by the Court of the segmented approach to determine title reaffirms the fact that private landowners in Central Appalachia in most instances actually own the stream beds in intermittent and ephemeral streams regardless of the extent to which federal agencies assert a right to regulate their use.

Third and finally, the regulation of rivers and streams by the federal government is grounded in concepts of navigation and commerce which, although expansive, are limited.

6. Judge Overturns EPA Veto of Spruce Mine

On Friday, March 23, 2012, the U.S. District Court for the District of Columbia overturned EPA's retroactive veto of the Mingo Logan Coal Company Spruce No. 1 coal mine.

On January 22, 2007, the Army Corps of Engineers ("Corps") issued a permit to Mingo Logan pursuant to section 404 of the Clean Water Act ("CWA"), which authorized Mingo Logan to discharge fill material from its Spruce No. 1 mine into nearby streams. Nearly three years later, EPA published its Final Determination purporting to withdraw the specification of two streams as disposal sites and thereby invalidate the 404 permit for those sites. Section 404 of the Clean Water Act is unique in that it gives the Corps of Engineers the authority to issue "fill" permits but also authorizes EPA, under Section 404(c):

to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site . . . whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Prior to its "veto" of the Spruce permit, EPA had only exercised its 404(c) authority 12 times, and in each of those cases had done so before the Corps finished issuing a 404 permit. U.S. District Judge Amy Berman Jackson in Washington, D.C., characterized EPA's action as unprecedented in the history of the CWA. The Court concluded that the CWA does not give EPA the power to render a 404 permit invalid once it has been issued

by the Corps. The Court held that EPA's view of its authority was inconsistent with clear provisions of the statute.

The Court analyzed the agency's interpretation of the statute by following the two-step procedure set forth in *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* mandates a potential two-step process for interpreting statutes administered by the government. Under step one, an agency is owed no deference if the statute is clear and unambiguous—the clear language of the statute controls regardless how it is interpreted by the government. If, however, the statutory language is vague or ambiguous, then reviewing courts are to defer to any reasonable construction of the statute by the agency entrusted with its administration. Here, the Court initially determined that when the whole of the Clean Water Act is considered, Section 404 clearly requires under *Chevron* “step one” that EPA exercise its so-called “veto” authority before the Corps finally issues a permit. The Court observed that the language of the statute does not authorize EPA to withdraw a permit, but only to prohibit or withdraw “specification” of a disposal area, a step which the Court determined precedes the issuance of a permit by the Corps.

Despite ruling that EPA's interpretation fail the first step of *Chevron*, the Court determined that if there was any ambiguity to the language that EPA's position also failed under step two of the *Chevron* analysis. Here, the Court's analysis was complicated by the fact that the Clean Water Act provides authority to both the Corps and EPA, and in such a case there is an argument that EPA is owed no deference as a result. However, the Judge ruled that even according EPA some deference, EPA's interpretation of its authority to allow it to exercise its 404(c) authority after the Corps had issued a permit was unreasonable. The Court used a variety of strong language in discussing EPA's interpretation, characterizing it as illogical and impractical, along with stating that EPA had resorted to magical thinking.

Of note, the Court pointed to the various amici briefs filed expressing concern with eliminating finality from the permitting process as additional grounds for finding EPA's interpretation to be unreasonable. It thus relied on the primary argument made by industry—certainty of a permit is a foundation of the permitting process. The Court's opinion is also notable for its strong language in places, making such statements as: EPA's “reading does not exactly leap off the page” and “[t]his is a stunning power for an agency to arrogate to itself to itself when there is absolutely no mention of it in the statute.”