



west virginia department of environmental protection

Executive Office
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0440
Fax: (304) 926-0446

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

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Charleston DMR
JUL 13 2009

July 10, 2009

Colonel Dana R. Hurst
District Engineer
Huntington District
U.S. Army Corps of Engineers
502 Eight Street
Huntington, West Virginia

Re: EPA Comment and Objection Letters
PN 2007-000099-GUY; Highland Mining Company; Reylas Surface Mine
PN 2008-01098; Frasure Creek Mining, LLC, Spring Fork No. 2 (King Coal Highway)
PN 2003-00238-KAN; Alex Energy, Inc.; Republic No. 1
PN 2008-491; Consol of Kentucky; Buffalo Mountain (King Coal Highway)
PN 2006-2290-BCR; Colony Bay Coal Company

Dear Colonel Hurst:

This letter conveys the general comments of the West Virginia Department of Environmental Protection (WVDEP) on the various letters which the United States Environmental Protection Agency (USEPA) sent to you concerning the above referenced permits. In these letters, the USEPA recommended that certain applications for authorization of fills in waters of the United States under section 404 of the federal Clean Water Act (CWA) be denied or restricted. The WVDEP's comments also respond to USEPA's clarification of its position in subsequent informal communications.

As you are aware, the WVDEP has issued or is processing various regulatory approvals for these proposed mines, including surface mine permits, NPDES permits and state water quality certifications. The State has had exclusive jurisdiction over the regulation of surface mining in West Virginia since January 21, 1981. It has operated a NPDES permitting program under the CWA since USEPA delegated authority to the State in May, 1982.

The approach USEPA has taken with its letters is a stark departure from the permitting procedure and interpretations which were developed late in the Clinton administration and have been followed since. With the exception of the area of mitigation, there has been no change in

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the law in this time to justify this sharp change in direction. The new mitigation regulations, which were finalized by the USEPA and the Corps in 2008, do not provide any justification for this change, either. Indeed, as I will explain below, the USEPA's demands exceed its legitimate authority under the new mitigation regulations. The only new development which appears to have precipitated the EPA change is the publication of a study conducted USEPA's Region 3 freshwater biology group in 2008 (Pond, et al., 2008). The WVDEP does not believe that this study justifies the sweeping change in regulatory approach USEPA is making. Below, the WVDEP responds generally to the issues the USEPA raises in these letters.

Water Quality Issues

Based on the Pond study, USEPA letter contends that water quality is not being protected downstream of the fills proposed by these mining companies. As you are aware, the downstream water quality is principally regulated through the NPDES permit issued by the WVDEP. The WVDEP believes that the NPDES permits it issues for these types of mining operations fully comply with all requirements. The recently published Pond study does not change this belief.

During the development of the Mountain Top Mining/Valley Fill (MTM/VF) EIS nearly a decade ago, there were permitting protocols/agreements entered into by the Corps, USEPA and WVDEP which outlined what needed to be included in all the regulatory applications to allow for the issuance of the various permits required. These agreed upon requirements were intended to minimize effects of MTM/VF on water quality and the environment as a whole. The approach also reduces the amount of time required to obtain permit approval as well as making the review of permits more consistent and providing a stable playing field for the applicant. USEPA is now departing from that approach.

The WVDEP has followed the agreed upon approach. It assigns water quality-based effluent limitations in its NPDES permits in accordance with all applicable State requirements: the West Virginia Water Pollution Control Act, W.Va. Code §§ 22-11-1 through 22-11-29; the Coal NPDES Rule, 47 CSR 30; Water Quality Standards Rule, 47 CSR 2; and, the Anti-degradation Implementation Rule, 60 CSR 5, all of which have been approved by USEPA. In addition to complying with all applicable State requirements, the effluent limitations in the WVDEP's NPDES permits also comply with all applicable TMDLs.

Based on the Pond study, the USEPA contends that these mines will violate one of the State's narrative water quality standards. This water quality standard prohibits a "significant adverse impact to the . . . biologic component[] of aquatic ecosystems." The Pond study concludes that this standard has been violated downstream from valley fills associated with mining operations, based on its application of two biologic assessment tools, the West Virginia Stream Condition Index (WVCSCI) and the draft Genus Level Index of Most Probable Stream Status (GLIMPSS), to samples of benthic macroinvertebrate life taken from these streams. A first observation about this study is that West Virginia does not use the draft GLIMPSS in its assessment of the biologic health of state streams. Second, these tools are just that, tools. They

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are not stand-alone determinants of compliance with the narrative standard. Any application of these assessment tools in determining compliance with the narrative standard must faithfully apply the language of the standard itself, which prohibits significant adverse impacts on the biologic component of the aquatic ecosystem. The WVDEP understands that the Pond study found a shift in the benthic macroinvertebrate community downstream from mining activity but did not otherwise correlate this finding with any significant or adverse impairment of the ecosystem. Where the only impacts to this component of the ecosystem are diminished numbers of certain genera of mayflies, without evidence that this has had any adverse impact of any significance on the rest of the ecosystem, the State cannot say that there has been a violation of its narrative standard.

Alternatives/Avoidance/Minimization

Beyond the water quality issues, EPA also questions whether the extent of the fills, as proposed, have been sufficiently avoided and minimized. A related concern it has expressed is whether alternatives to the projects' purposes have been adequately examined. For example, in the case of the proposed Reylas mine, which proposes a trailer park for use by FEMA for emergency housing following flood events as the post-mining land use, EPA further questions whether there is even a need for emergency flood housing in this area. EPA also questions whether the extent of the fill for the other proposed operations has been minimized.

Apparently because a flat area will be left on the Highland Mining, Consol of Kentucky and Frasure Creek project sites, instead of backfilling these areas so the post-mining topography will resemble the ridgelines that are present there now, EPA is questioning whether application of the AOC formulae would result in less aerial extent of fill. Nine years ago the EPA agreed that it would accept the application of the AOC and AOC + formulae as determinative of whether the extent of fill proposed in connection with a surface mine site has been sufficiently avoided and minimized. On each of these projects, the formula EPA agreed to accept for purposes of fill optimization was used to establish the location of the toes of the fills. The Alex Energy and Colony Bay projects have both followed this formula to minimize fill and restore the approximate original contour of the mined area. Leaving a flat area on the mountain top to accommodate emergency flood relief housing on the Highland project and construction of the King Coal Highway on the Consol of Kentucky and Frasure Creek projects will not cause the extent of the fill to be larger than it would be if these sites were restored to their approximate original contour. The toes of the proposed fills for these projects would not be moved upstream if they were reclaimed to AOC because the AOC formula was used to establish the location of the toes of these fills. The volume of spoil material that would have been used in reclamation to approximate original contour (rebuilding the ridgelines that are present in the pre-mining topography) will be spread out over the extent of the fill and backfill areas to provide a sufficient footprint of flat land for the emergency flood relief housing and highway portions of these projects. As a result of spreading this material out instead of using it to rebuild the ridgeline, the elevation of the top of the fill will be higher than the target fill elevation dictated by the AOC

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formula. Despite that AOC is not being restored on the Highland, Consol of Kentucky and Frasure Creek projects, the extent of the fill is no greater than if these projects were reclaimed to AOC.

Anyone who is familiar with the topography and history of flooding in the Logan County area could not seriously question the need for emergency flood relief housing there. The topography in Logan County is characterized by steep slopes and narrow valleys. With very little flat land outside the flood plain in Logan County, its residents tend to live in the flood plain where they have repeatedly suffered from devastating floods. Jimmy Gianato, Director, WV Division of Homeland Security and Emergency Management, has provided a detailed explanation of the flood relief experience and response and recovery costs for Logan County in a letter, which is attached. Alternative housing for times of flooding is something for which there is a particular need in Logan County. There is little or no land available outside the flood plain in Logan County where emergency flood relief housing could be located. When completed, this project will supply this need.

Construction of the King Coal Highway through reconfiguration of the land by mining operations will provide many benefits for the State, the local area and the federal government. The cost savings to the State and federal governments for highway construction will exceed \$100 million. This highway and development along its corridor will assist the local area and the State in developing a post-coal mining economy. Construction of the highway along the ridge top, where the mining will take place, will remove the road related disturbance from stream hollows, where it would be if this road was built in the same manner as highways have been in the past. Putting the highway on the ridge top will also cause it to be a much more scenic drive, making it a possible draw for tourism in the area.

The approach EPA has taken in its objection letters for the Highland, Consol of Kentucky and Frasure Creek permits appear to indicate that EPA is hostile to post-mining land uses which call for something other than a return of mined land to its approximate original contour (AOC). This approach is contrary to the intent regarding development of mined lands Congress announced when it adopted the federal surface mining act. The Report of the House of Representatives' Committee on Interior and Insular Affairs, H.R. 95-218, which accompanied and recommended adoption of the bill that became the Surface Mining Control and Reclamation Act of 1977, said:

[S]urface mining also presents possible land planning benefits as such mining involves the opportunity to reshape the land surface to a form and condition more suitable to man's uses. In such instances, the overburden and spoil become a resource to achieve desired configurations rather than a waste material to be disposed of or handled by the most economic means. The performance standards recognize that return to approximate premining conditions may not always be the most desirable goal of reclamation and thus appropriate exceptions to the general requirements are provided.

H.R. 95-218, p. 94. This committee report also went on to state:

[I]t may not always be best to return mountain lands to their approximate original contour. In various areas such as the mountainous Appalachian coalfields, there is a paucity of flood free, relatively flat developable land. Thus some surface mining operations offer the opportunity for creating a resource which otherwise might not be available or might be prohibitively expensive.

The mining application process and environmental standards allow the regrading and spoil placement requirements for mountaintop mining in order to achieve post mining land uses including industrial, commercial, agricultural, residential, or public facility (including recreational facilities) development.

H.R. 95-218, p. 124. To take advantage of the opportunity to create flat, developable lands in Appalachia presented by surface coal mining operations, Congress specifically provided for variances from the AOC requirement in 30 U.S.C. § 1265(c) so industrial, commercial, agricultural, residential or public facilities, including recreational facilities could be created. This opportunity is very important in the southern West Virginia coal mining region where no flat land exists. To assure that these opportunities are not lost, this year, the State has adopted legislation that requires a mine's post-mining land use to comport with county master land use plans that are developed by local economic development officials and approved by the State's Office of Coalfield Community Development. These master land use plans target lands which are proximal to transportation or other infrastructure for development, so these areas of the State, which historically have had little economic activity other than coal mining, can develop sustainable post-coal economies. EPA's objection to land uses which would allow for development of mined lands is contrary to the expressed intention of both the Congress and the West Virginia Legislature.

Mitigation

While the State has some concerns about the use of on-site stream recreation as mitigation, its concerns may not be the same as USEPA's. For example, the WVDDEP reviewed the Corps' Compensatory Mitigation Plan (CMP) for the Highland Mining 404 project, and advised Highland that on-site mitigation would not suffice for aquatic impacts of the proposed project. To assure adequate mitigation, the State executed a Mitigation and Compensation Agreement with Highland for the loss of West Virginia's resources. This agreement requires that Highland Mining Company compensate the State for the impacts caused by the Reylas Surface Mine to waters of the State. Highland is required to identify and complete a mitigation project(s) in the county of the mining operation or counties adjacent thereto. To secure performance of its mitigation obligations, Highland has posted a performance bond in the amount of \$388,000 with the State.

The type of mitigation USEPA has demanded of Highland and others is a concern for the WVDEP in administering the in lieu fee program under its MOU with the Corps. USEPA has indicated to Highland that it expects Highland's mitigation to "match the lost flow regime (frequency, duration and seasonality of flow annually), provide the same structural habitat (riffle/pool, step/pool, shading, etc.), and meet the same water chemistry characteristics (hardness, pH, conductance), and support the same biologic communities (macroinvertebrates, fish, etc.)" to "ensure the replacement of the lost functions and services of the impacted streams". USEPA has made similar demands with respect to WVDEP mitigation projects using in lieu fees. These demands threaten the viability of both permittee-performed and in lieu fee mitigation because it is rarely possible to replace lost flow regime, structural habitat, water chemistry characteristics and biologic community with precisely the same regime, habitat, characteristics and community, as USEPA demands. The type of mitigation being demanded is not what the Corps' and USEPA's 2008 mitigation regulations require. These regulations were adopted pursuant to a Congressional mandate which required the agencies "to the maximum extent practicable, 'maximize available credits and opportunities for mitigation, provide flexibility for regional variations for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.'" 73 Fed. Reg. at 19596 (April 10, 2008), quoting section 314 of the National Defense Authorization Act for Fiscal Year 2004. Pursuant to this mandate, the regulations establish a watershed approach to mitigation which focuses, in part, on the practicability of mitigation. 73 Fed. Reg. at 19598. The regulations specifically provide that mitigation under this watershed approach, "should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource." 40 C.F.R. § 230.93(c)(2)(i). The Corps' district engineer is supposed to have flexibility so mitigation projects that most effectively address the case-specific circumstances and needs of the watershed, while remaining practicable for the permittee can be authorized. 73 Fed. Reg. At 19598. The district engineer is given discretion to authorize out-of-kind mitigation where it is more appropriate for offsetting the losses of aquatic resource functions caused by the permitted impacts. 73 Fed. Reg. at 19632. As the EPA and the Corps explained, the district engineer is to determine the appropriateness and practicability of requiring in-kind versus out-of-kind compensation for permitted losses of ephemeral streams on a case-by-case basis. *Id.*; 40 C.F.R. 230.93(e)(2). The replacement of functions lost with precisely the same functions, without regard to practicability or the needs of the watershed, as demanded by the EPA, is contrary to the regulations on this very subject it adopted just one year ago as well as the Congressional mandate of practicability and flexibility.

Cumulative Impacts

The EPA has identified two types of cumulative impacts in its objection letters: water quality impacts, based on the Pond study, and forest fragmentation. The WVDEP has addressed the first of these above in a general way in its discussion of water quality issues. The second, forest fragmentation, is something that necessarily occurs, albeit on a temporary basis, with all surface mining operations. The destructive, but temporary impacts from surface coal mining formed some of the debate when the federal surface mining act was being considered and

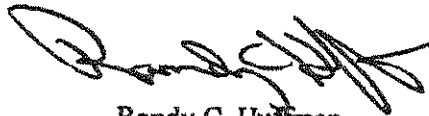
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enacted by the Congress. Then, one of the options being considered was a total ban of surface coal mining. Instead of doing this, the law Congress enacted called for expansion of coal mining to meet the nation's energy needs. After the temporary impacts from surface coal mining were completed, the federal Surface Mine Control and Reclamation Act required restoration of the land and vegetation on mine sites. In recent years, the federal Office of Surface Mining Reclamation and Enforcement has promoted reforestation as a primary means of revegetation of mine sites through its Appalachian Regional Reforestation Initiative. Research has identified mining and reclamation practices which most effectively promote restoration of native hardwood forests on mine sites. Collectively, these practices are called the Forestry Reclamation Approach (FRA). In West Virginia, both industry and regulators have been enthusiastic in their pursuit of reforestation. Numbers have not yet been compiled for 2008, but during the five year period from 2002 through 2007, over 85 % of all acres permitted to be mined in West Virginia were permitted under the FRA. So, while some degree of temporary forest fragmentation is an unavoidable aspect of surface coal mining, the surface mining regulatory program has adapted to assure that forest fragmentation will not be an issue for the long term in West Virginia.

The WVDEP is committed to application of the existing laws, rules and policies to protect the environment. In addition, it undertakes regular reviews of its water quality standards and other rules to assure appropriateness. It does not support retroactive, ad hoc departures from existing laws, rules and guidelines. As regulators, operating within the authority of existing rules and laws, such an approach is unsupportable and undermines the considerable efforts over the years by the WVDEP, Corps and USEPA to develop consistent, predictable and fair permitting programs and procedures.

Thank you for the opportunity to provide comments and information relating to the USEPA's expressed concerns on these projects. Please feel free to contact me with any comments or questions you may have.

Sincerely,



Randy C. Huffman
Cabinet Secretary

RCH/tcc