



# **KENTUCKY COAL ASSOCIATION**

*Plaintiff*

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***Versus***

# **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**AND**

# **LISA JACKSON**

in her official capacity as the  
Administrator of the U.S. Environmental Protection Agency

*Defendants*

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On behalf of the Kentucky Coal Association (KCA) and its member companies, we would like to thank Lloyd Cress, who shares his time with KCA and the law firm of Dinsmore & Shohl LLP, for the creation of this white paper. With more than 30 years of experience in water regulation and the mining sector, his analysis is thorough and accurately explains the legal roadblocks that Kentucky coal mining has faced in Appalachia during the last several years under the Obama Administration.

Since the original filing of the KCA lawsuit, the Kentucky Energy and Environment Cabinet has intervened in the litigation. The lawsuit has now become the Commonwealth of Kentucky v. the United States Environmental Protection Agency and Lisa Jackson. We would like to thank Kentucky Governor Steve Beshear and Cabinet Secretary Len Peters for their leadership and support with this important legal action.

KCA is committed to continuing its 60 plus years tradition of telling the story of Kentucky coal and coal mining. The representation of our membership includes Eastern and Western Kentucky operations, as well as surface and underground production. This statewide membership creates a diverse but representative perspective on issues involving our coal industry. This diversity helps the Association build a consensus approach in problem solving and addressing the complex challenges facing our industry today.

Please contact me at KCA with any questions or comments in regards to the compilation and distribution of this publication at 859/233-4743 or by email at [bbissett@kentuckycoal.com](mailto:bbissett@kentuckycoal.com).

Sincerely,

A handwritten signature in black ink that reads 'Bill Bissett'. The signature is written in a cursive style with a long horizontal stroke at the end.

Bill Bissett  
President



## KCA LITIGATION AGAINST THE EPA AND DIRECTOR LISA JACKSON

On **June 11, 2009**, the United States Environmental Protection Agency (EPA) entered into a Memorandum of Understanding with the United States Army Corps of Engineers to implement a newly-developed Enhanced Coordination Process (ECP) for the review of applications for Clean Water Act (CWA) Section 404 dredge-and-fill permits for coal mining activities in the Central Appalachian region. Under the ECP, EPA's role in the processing of CWA 404 permit applications was greatly expanded, the time required for review of permit applications was greatly extended, and the issuance of CWA 404 permits for coal mining activities in Central Appalachia came to a virtual standstill.

On **April 1, 2010**, the EPA extended its hold over the applications for CWA permits for coal mining activities in Central Appalachia by issuing Interim Guidance on Clean Water Act permit procedures for Appalachian surface mines. The guidance, issued without prior public notice or opportunity for public comment, was effective immediately and directed all Clean Water Act permitting authorities in Ohio, Pennsylvania, Virginia, West Virginia, Tennessee and Kentucky to limit wastewater discharges from surface coal mining activities

to achieve a benchmark instream conductivity level of 500 micro-siemens/CM. When the April 1, 2010 Interim Guidance was issued, EPA Administrator Lisa Jackson acknowledged that few, if any, mining valley fills would be able to comply with the new conductivity benchmark.

In **July 2010**, the National Mining Association initiated litigation in federal court in the District of Columbia challenging the legality of both the ECP and the Interim Guidance.

Subsequent to **April 1, 2010**, the Kentucky Energy and Environment Cabinet proposed to issue 21 individual KPDES permits for new and expanded surface mines in Eastern Kentucky that did not include limitations based on the 500 conductivity benchmark but which, in all

### NUMBER OF COAL MINERS

Kentucky	17,966
Ohio	2,826
Pennsylvania	8,268
Tennessee	564
Virginia	4,957
West Virginia	21,091

other respects, imposed limitations that EPA had approved as recently as March 2010. In September 2010, EPA issued specific objections to Kentucky's issuance of the 21 individual KPDES permits thereby preventing their issuance.

In **October 2010**, the Kentucky Coal Association filed suit against EPA in the United States District Court for the Eastern District of Kentucky - Pikeville Division contending that EPA's issuance of the Interim Guidance violated the Administrative Procedures Act (APA) and the CWA by ignoring public notice and comment rulemaking requirements and unlawfully usurping the state's role in establishing water quality standards under the CWA. Shortly thereafter the City of Pikeville and the Kentucky Energy and Environment Cabinet intervened in the KCA litigation in support of the Association's position.

In **February 2011**, the EPA succeeded in having the Kentucky case and similar litigation that had been filed in West Virginia transferred to the federal court in the District of Columbia for consolidation with the National Mining Association litigation.

On **July 1, 2011**, the Kentucky Energy and Environment Cabinet proposed to issue more than 50 individual KPDES permits for coal mining activities. 19 of those proposed permits were for new or expanded surface mining activities in Eastern Kentucky. These proposed permits included a number of additional provisions to assure protection of aquatic life.

On **July 21, 2011**, the EPA withdrew its April 1, 2010 Interim Guidance and issued new Final Guidance on issuance of CWA

permits. The Final Guidance suggested that the conductivity level should be 300 micro-siemens/CM rather than 500 but that CWA permit-issuing authorities had flexibility to apply other approaches such as biological assessment, toxicity testing, and offsets in lieu of a numerical standard for conductivity. In response to comments by its own Science Advisory Board, EPA limited the geographic applicability of its Final Guidance to West Virginia and Eastern Kentucky.

In late **September 2011**, the EPA issued a letter purporting to be a specific objection to all 19 of the proposed individual KPDES permits for surface mines in Eastern Kentucky. The letter did not specify the deficiencies associated with the individual permits and did not exercise any of the flexibility afforded it under the July 21, 2011 Final Guidance.

Since the **April 1, 2010**, Interim Guidance that was challenged in the original KCA litigation had been withdrawn and replaced by the July 21, 2011 Final Guidance, KCA, the Kentucky Energy and Environment Cabinet and the City of Pikeville amended their complaint in October 2011 to include a challenge to the July 21, 2011 Final Guidance.

On **October 6, 2011**, the Federal District Court for the District of Columbia issued an order in the National Mining Association litigation invalidating EPA's use of the ECP in processing CWA 404 permits for coal mining activities. The Court held that EPA had failed to comply with the Administrative Procedures Act (APA) and had exceeded its legitimate authority under the CWA.

In regard to the legal challenges to the Final Guidance pursuant to the order of the D.C.



Federal Court, the Kentucky litigants joined in the brief of the National Mining Association that was filed in **December 2011**. EPA's brief is to be filed shortly and the case is set for hearing in late spring 2012.

In the meantime, the EPA has not allowed the Kentucky Energy and Environment Cabinet to issue a single individual KPDES permit for a new or expanded surface mining operation in Eastern Kentucky since EPA's issuance of its Interim Guidance on **April 1, 2010**.

## SUMMARY

### **Clean Water Act Permit Requirements for Kentucky**

There are two principal Clean Water Act permitting requirements that are generally applicable to coal mining activities.

- **Section 402 NPDES** permits authorize and regulate the point source discharge of pollutants to waters of the United States, and
- **Section 404 Dredge-and-Fill** permits authorize and regulate the placement of fill material in waters of the United States.

#### **Section 402 Permits**

These permits are issued by Kentucky as KPDES permits under authority delegated from the United States Environmental Protection Agency which retains general oversight authority.

The Kentucky Energy and Environment Cabinet which administers the KPDES permit

program has issued a general KPDES permit authorizing most coal mining activities in Kentucky. The KPDES general permit for coal mining activities applies standard effluent limitations and monitoring requirements, can be issued in a relatively short time frame and is subject to EPA review but not subject to EPA objections. Approximately 95% of coal mining activities in Kentucky are authorized under the general KPDES permit.

Coal mining activities in Kentucky that do not qualify for general KPDES permit coverage must obtain individual KPDES permits. These permits contain varying effluent limitations and monitoring requirements, are subject to more lengthy procedures for issuance and are subject to EPA review and oversight including the authority to prevent Kentucky's issuance of permits if EPA objects.

#### **Section 404 Permits**

These permits are issued by the United States Army Corps of Engineers with involvement by the Kentucky Energy and Environment Cabinet and EPA. An applicant for a Section 404 permit must obtain certification from the state agency that the activity to be permitted will not cause or contribute to a violation of state water quality standards.

Prior to issuance of a Section 404 permit, the Corps of Engineers must afford EPA an opportunity to review and comment on the permit application. Under certain limited conditions EPA has the authority to veto Section 404 permits proposed for issuance by the Corps.

## So WHAT DOES all THIS MEAN ?

### EPA Action on 9/28/2011

- EPA objects to nineteen (19) permits.
- These new objections are similar to the previous twenty-one (21) objections from more than a year ago.
- No specificity to these new objections. Contained in one letter. Vague language used.
- KCA will amend its lawsuit regarding this recent action.

### EPA - Which Guidance?

“Interim Guidance of April 1, 2010”

*versus*

“Final Guidance of July 21, 2011”

Which one is it?

### Important to Remember

Since April 1, 2010, no new or expanded Eastern Kentucky surface mine has received an individual permit.



### THE ECONOMICS LOST IN TRANSLATION BY THE OBAMA ADMINISTRATION\*

Coal Severance Taxes	\$123,861,000
Coal Production	125,476,000 Tons
Total Employment	3,800 Kentucky Coal Jobs (Direct/Indirect)

\*These numbers from this chart are derived from only the nineteen permits objected to on September 28, 2011.



## *Special Thanks to*

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**Mike Haines**

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**Mindy Barfield**

*and*

KCA STAFF  
**David Moss *and* Roberta James**

Without the contributions of these people, this litigation and  
the development of this white paper would not  
have been possible.



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