



Overreach of the Clean Water Act

Similar to the Clean Air Act, the EPA has recently taken several actions under the auspices of the Clean Water Act that will have a substantial impact on coal mining and coal-fired electricity generation.

Waters of the United States

The EPA and the Army Corps of Engineers recently released a draft rule to significantly broaden the scope of their authority under the Clean Water Act by expanding the definition of “waters of the United States.” The guidance would reverse U.S. Supreme Court decisions setting limits on the federal government’s authority to regulate waters without Congressional action.

Under the draft rule, the EPA and the Corps intend to expand their regulatory control beyond “navigable waterways” to include waters now considered entirely under state jurisdiction. This expansive federal approach signals a clear intent to restrict the use of private land and supersede the authority of state and local governments to make local land and water use decisions. This regulation will greatly increase the number of waters found to be subject to CWA jurisdiction and will increase the permitting burden on mining companies.

Clean Water Act 404 Permits

Under section 404 of the Clean Water Act, the Army Corps of Engineers, in consultation with the EPA, is authorized to issue permits for activities that would affect navigable waterways, including the placement of dredged or fill material. Despite longstanding interpretation that the EPA can only block the issuance of a 404 permit during the permitting process, the EPA under the Obama Administration opted to veto a permit for a coal mine in West Virginia after it had been issued by the Corps. This retroactive veto was an unprecedented move that was done after one of the most extensive environmental analysis in the history of the coal industry.

In addition to retroactively vetoing a final 404 permit, the EPA has also recently announced that it was beginning the process of issuing a veto for a proposed mine in Alaska, before the mine developers have even submitted a 404 permit application to the Corps.

Both of these actions to retroactively and preemptively issue vetoes for 404 permits greatly undermines the authority of the Corps of Engineers to issue permits, as well as longstanding application of the Clean Water Act. These actions create significant uncertainty for future permitting undertaken by the coal industry.