



KENTUCKIANS FOR THE COMMONWEALTH

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Action for Justice

Background information and suggested talking points

For EPA Hearings in Kentucky on June 5 and June 7, 2012

I. Basic Information about the EPA hearings

WHAT: The U.S. Environmental Protection Agency will hold a series of public hearings in early June in Kentucky to allow the public to share written or verbal comments and data about the EPA's objections to 36 mine-related water pollution permits. Go to

<http://www.epa.gov/region4/kycoalminehearings/index.html> for more information.

WHERE/WHEN: The hearings will be held on Tuesday, June 5th from 7:00 p.m. to 11:00 p.m. at the Frankfort Convention Center and on June 7th from noon to 4:00 p.m. and from 7:00 p.m. to 11:00 p.m. at the Eastern Kentucky Expo Center in Pikeville.

WRITTEN COMMENTS: You can email your comments **by June 21** to ow-docket@epa.gov. Put "Docket ID: EPA-HQ-OW-2012-0315" in the subject line. Or mail your comments to Water Docket ID: EPA-HQ-OW-2012-0315, US EPA, Mail Code 2822-1T, 1200 Pennsylvania Ave, NW, Washington DC 20460.

II. Understanding the EPA's objections to 36 mine-related water pollution permits¹

Over the last two years, the U.S. EPA has objected to 36 draft mine-related water pollution permits (called NPDES permits) approved by the Kentucky Energy and Environment Cabinet. The Beshear Administration recently requested these public hearings, apparently as a way to create political pressure on the federal agency to back down from its objections and help shield coal companies from the costs of complying with the Clean Water Act.

Under the federal Clean Water Act, companies must apply for and receive water pollution permits to discharge certain pollutants into streams. These permits are called National Pollutant Discharge Elimination System (NPDES) permits. In Kentucky, the agency responsible for reviewing and issuing NPDES permits (called KPDES) is the Kentucky Division of Water, which is housed within the KY Energy and Environment Cabinet.

Under section 402 (d) of the Clean Water Act, Congress gave the EPA the responsibility to review draft NPDES permits issued by the state to make sure they comply with the Clean Water Act. The EPA can

¹ Appreciation to organizations and people who provided useful background materials, including Appalachian Mountain Advocates and Sierra Club.

comment or object to draft permits and recommend changes that are needed. Kentucky may not issue a permit until it has addressed EPA's objections.

The KY Division of Water actually uses two different procedures for coal mining related NPDES permits. The vast majority of mining operations receive authorization to pollute the water under a simplified process called the General Coal Permit. Since 2009, Kentucky has used this process to authorize water pollution discharges at approximately 2,500 new and existing coal-related operations. Unfortunately, the EPA gave its blanket approval to this process in 2009, and the agency does not have the ability to object to these permits on a case-by-case basis. (KFTC members are highly critical of the state's use of the General Coal Permit and have called upon Governor Beshear to end the practice.)

A much smaller number of mining projects are not eligible to apply under the General Coal Permit and must seek an individual NPDES permit instead. An individual NPDES permit is required, for example, if a coal company plans to discharge pollution within 5 miles upstream of a public water intake or if the receiving stream is already heavily polluted. Since August 2009, the Kentucky Division of Water has issued individual NPDES permits for 87 surface mine operations and 28 other mining projects. The EPA has objected to just 36 individual NPDES permits.

For each of those 36 permits, the EPA has written an objection letter, spelling out the reasons why the permit does not comply with the Clean Water Act and actions that must be taken by the Kentucky Division of Water before the permit can be given. These objection letters can be found at:

<http://www.epa.gov/region4/kycoalminehearings/resources.html#letters>.

In nearly all cases, the EPA found that the state failed to do a proper analysis, as required by federal law, to determine the likelihood that a mining operation would cause or contribute to violations of Kentucky's water quality standards. This analysis is called a "reasonable potential analysis," and it's a fundamental part of how the Clean Water Act is supposed to work. Before a permit can be issued, the state is supposed to analyze the reasonable potential for that mining operation to result in violations of federal water quality standards. The permit must then be written with specific limitations for all pollutants that have a reasonable potential to cause violations of water quality standards. If the state fails to do the proper analysis, then the permits will likely not contain adequate limits on key pollutants. It's a case of "see no evil, hear no evil, specify no limits for evil." The Clean Water Act requires state agencies like the Kentucky Division of Water to do a proper Reasonable Potential Analysis, and the EPA is obligated to object when the state fails to do so. (See 33 U.S.C. § 1311(b)(1)(C) and EPA's regulations at 40 CFR § 122.44(d) and 40 CFR § 122.4((a) and (d)).

The EPA objection letters also describe numerous other fundamental problems with the draft pollution permits. The EPA notes that KY's Division of Water failed to require adequate collection of water quality data before issuing the permits, failed to evaluate the impacts of conductivity, total dissolved solids and sulfates on receiving streams, failed to develop appropriate discharge limitations to comply with water quality standards, failed to accurately evaluate the frequency and flow of the discharges, failed to accurately characterize the existing pollution in the receiving stream, and failed to comply with state mixing zone regulations.

The draft water pollution permits issued by the KY Division of Water also ignore the growing body of evidence that many mining operations in Central Appalachia are discharging toxic amounts of selenium to rivers and streams. According to an analysis by Appalachian Mountain Advocates, there is evidence of a selenium problem at many of the 36 permits. Yet Kentucky has not adequately evaluated whether there is a reasonable potential for selenium toxicity downstream from mine sites.

Once these public hearings are over, the EPA will consider all written and verbal comments, along with any data submitted and the requirements of the Clean Water Act. Then the EPA has the option to reaffirm, withdraw, or modify its objections to the contested permits. If the EPA reaffirms the original objection or modifies its objection, the Kentucky Division of Water has 30 days to submit to EPA a revised permit that meets the terms of the remaining objection. If the state fails to do so, then the EPA assumes the exclusive authority to issue or deny that permit. If the EPA withdraws its objection to any permit, the Kentucky Division of Water may immediately issue that permit.

III. Suggested Talking Points

- **It is time for transition in Kentucky and Appalachia.** As Kentuckians, we call for a just economic transition for coal workers and communities and an end to the destruction of our land, water and people caused by surface coal mining.
- **The health of Kentuckians living near surface mining operations is significantly at risk.** The rate of children born with birth defects is 42% higher in areas with mountaintop removal mining, compared to nearby non-mining communities. People living in mining communities also suffer higher rates of cancer, chronic heart, lung and kidney disease, and mortality.
- **Kentucky's approach to permitting water pollution for coal mining operations is fatally flawed and does not comply with state and federal law.** Kentucky's Division of Water does not properly evaluate whether a mining operation has a "reasonable potential" to generate discharges high in conductivity, total dissolved solids or metals that would violate water quality standards. The state's water pollution permits lack enforceable, chemical-specific limits. The state permits rely on unenforceable practices and biological monitoring that are not sufficient to protect water quality.
- **The Beshear administration continues to act as if its primary role is to issue pollution permits and shield coal companies from the law.** Since 2009, the KY Division of Water has used a simplified process to authorize water pollution from more than 2,500 coal operations. The state has joined a lawsuit against the EPA over its approach to Clean Water Act enforcement. And Governor Beshear's Energy and Environment Cabinet has gone to court repeatedly (and unsuccessfully) to prevent citizens groups from challenging its weak enforcement efforts. In fact, It is time for the EPA to take over all Clean Water Act permitting and enforcement in Kentucky and do the job right.
- **The EPA must hold the line and affirm its mandate to object to water pollution permits that do not comply with the Clean Water Act.** The EPA's objections are supported by overwhelming scientific evidence about the relationship between surface mining and harm to water quality. Discharges from these 36 sites would affect public drinking water systems or streams that are already severely

polluted. These permits, written by the Kentucky Division of Water, contain troubling flaws and errors. If granted, they would allow coal companies to legally discharge toxic mine pollution into our streams, violate water quality standards, and avoid the costs of complying with the Clean Water Act.

- **Kentucky's coal industry and political leaders should stop peddling fear and falsehoods.** Coal production in Central Appalachia has been declining steadily since the early 1990s. This is a long-term trend, which is now accelerating as a result of economic and geologic conditions. Efforts by the U.S. EPA to protect our health are not the cause. Shielding companies from the Clean Water Act is not the solution.