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Kentucky Coal: What Authority Does the EPA Actually Have? (/full-blog/2013/10/kentucky-coal-what-authority-does-epa.html)



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By: Elizabeth Combs, Staff Member

Shortly after Congress passed the National Environmental Policy Act, President Richard Nixon established the U.S. Environmental Protection Agency (EPA) in 1970 as an independent regulatory agency intended to administer and manage environmental policy.[i] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn1) Founded in large part in response to decades of “rampant and highly visible pollution,”[ii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn2) the EPA was given far-reaching powers[iii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn3) to ensure the protection of public health and the natural environment.[iv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn4)

Since the EPA manages the protection of the land, air, and water, it naturally follows that this agency also regulates many industrial activities. The EPA’s regulation of the mining industry is mostly

concerned with waste rock, wastewater, and air emissions created during these activities.[v] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn5) The EPA relies mostly on the statutory authority granted to it by the Clean Water Act (CWA) to regulate mining activities. According to the CWA, a mining company must first obtain a permit before any mining operations take place[vi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn6). These permits ensure that any wastewater discharges that result from the mining operations are treated, stored, and disposed of in compliance with relevant water quality standards.[vii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn7)

While this permit program, referred to as the National Pollutant Discharge Elimination System (NPDES), has been in place since the 1970's,[viii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn8) the EPA's interpretation and implementation of this regulatory authority has varied depending on the goals and objectives of each Presidential administration.[ix] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn9) During the current administration, much focus has been placed on the need to reduce greenhouse gas emissions.[x] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn10) As a result, the EPA has launched many new regulatory initiatives while tightening the requirements of long-standing mandates, like that of the CWA, leading to devastating effects on the energy industry.[xi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn11) Of particular importance in Kentucky is the EPA's issuance of more stringent guidelines for permitting procedures specifically applied to Appalachian surface coal mining operations.[xii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn12) These new regulations have created massive delays in the permitting process, causing many mining companies to be inoperable and thus, leading to massive layoffs of thousands of both direct and indirect coal mining jobs.[xiii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn13)

However, it is not completely clear whether the EPA actually has the authority to issue these regulations, especially given the other federal and state authorities involved in the surface mining permitting process.[xiv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn14) In addition to the EPA's use of the CWA to issue NPDES permits, the Surface Mining Control and Reclamation Act (SMCRA) requires compliance with its own, albeit EPA-approved, environmental protection standards via the issuance of permits by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement.[xv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn15) Further, individual states have the opportunity to control and regulate their own surface mining activities by having their own permitting program approved by the Secretary of the Interior.[xvi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn16)

As a result of the EPA's drastically increased standards and uncertain statutory authority, several groups, including the National Mining Association, the Kentucky Coal Association, and the West Virginia Department of Environmental Protection, recently challenged the EPA's authority in federal court.[xvii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn17) In July of last year, the U.S. District Court for the D.C. Circuit ruled in favor of these plaintiffs, finding that the EPA had exceeded its authority in issuing these new, more stringent regulations, having "impermissibly interjected" into the SMCRA permitting process.[xviii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn18) While the outcome of this case was certainly a victory for the coal industry, particularly for the targeted surface coal mining companies in Appalachian states, what is often referred to as "the war on coal" is far from over. The EPA has appealed this decision, and that case is currently pending in the U.S. Court of Appeals for the D.C. Circuit. With a decision expected in late 2013 to early 2014, the "war on coal" wages on in this and other EPA-related litigation. Given its potential impact on the coal industry in Kentucky, this pending case will certainly be an interesting and important one to watch.

[i] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref1) The Guardian: Origins of the EPA, EPA Historical Publication, Spring 1992, available at <http://www2.epa.gov/aboutepa/guardian-origins-epa>.

[ii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref2) Jack Lewis, The Birth of the EPA, EPA Journal, Nov. 1985, available at <http://www2.epa.gov/aboutepa/birth-epa>.

[iii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref3) The Guardian, *supra* note 1.

[iv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref4) Jack Lewis, Looking Backward: A Historical Perspective on Environmental Regulations, EPA Journal, Jack Lewis, Mar. 1988, available at <http://www2.epa.gov/aboutepa/looking-backward-historical-perspective-environmental-regulations>.

[v] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref5) Mining Overview, National Pollutant Discharge Elimination System, U.S. Envtl. Prot. Agency

Website, available at <http://cfpub.epa.gov/npdca/ndpermitting/mining.cfm> (last visited Oct. 14, 2013).

[vi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref0) Id.

[vii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref7) Id.

[viii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref8) Id.

[ix] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref9) Richard L. Gordon, *An EPA War on Coal: Regulation*, Spring 2013, available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/36n1-7.pdf>.

[x] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref10) Id at 16.

[xi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref11) Id at 16.

[xii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref12) Environmental Issues & Kentucky Coal, Kentucky Coal Association Website, available at <http://www.kentuckycoal.com/documents/CoalWhitePaperV11.pdf> (last visited Oct. 14, 2013).

[xiii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref13) Id at 3.

[xiv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref14) *Natl Mining Ass'n v. Jackson*, 880 E.Supp.2d 119 (D.C. Cir. 2012).

[xv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref15) Id at 124.

[xvi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref16) Id.

[xvii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref17) *Natl Mining Ass'n v. Jackson*, *supra* note 14.

[xviii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref18) Id at 119.

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