

Legal Issues In Surface Mining

Coal Industry Issues

October, 2010

Presented By:

Terry R. Sammons, Esq.

Sammons Law Offices, PLLC

DISCLAIMER:

This presentation is **NOT**
to be construed as a legal
opinion.

Pinch Points in the Permitting Process

- U.S. Army Corps of Engineers Clean Water Act Section 404 Permits for the Discharge of Dredge and Fill Material
- West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits

EPA's April 1, 2010 Memo



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 01 2010

MEMORANDUM

SUBJECT: Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order

FROM: Peter S. Silva *Peter Silva*
Assistant Administrator for Water

Cynthia Giles *Cynthia Giles*
Assistant Administrator for Enforcement and Compliance Assurance

TO: Shawn Garvin
Regional Administrator, EPA Region 3

A. Stanley Meiburg
Acting Regional Administrator, EPA Region 4

Bharat Mathur
Acting Regional Administrator, EPA Region 5

I. Purpose

The purpose of this detailed memorandum is to provide further clarification of EPA's roles and expectations, in coordinating with our federal and state partners, to assure more consistent, effective, and timely compliance of Appalachian surface coal mining operations with the provisions of the Clean Water Act (CWA), National Environmental Policy Act (NEPA), and the Environmental Justice Executive Order (E.O. 12898).^{1,2} This memorandum reflects reviews of past practices and emerging science to improve and strengthen permit decision-making in order

¹ This memorandum is effective immediately. Concurrent with its release, however, EPA is seeking public comment on this interim final document. We fully understand the importance of this memorandum to our federal and state partners, the coal industry, and the public, and we recognize the value in receiving their input based on experience with its implementation. The public comment period will conclude on December 1, 2010. No later than April 1, 2011, EPA will issue final guidance after consideration of public comments and the results of the Science Advisory Board (SAB) review, and consistent with our experience in implementation of this memorandum. EPA may revise the guidance sooner, as appropriate, consistent with the SAB review. EPA is publishing a notice in the *Federal Register* that provides additional details on the public comment process.

² In addition to this memorandum, EPA is working with other federal agency partners to develop and implement an interagency environmental justice strategy to more fully evaluate environmental justice considerations in review of Appalachian surface coal mining activities. This strategy will provide more detailed information and specific actions to avoid and mitigate adverse impacts to low-income and minority populations.

EPA's April 1, 2010 Memo

On April 1, 2010, EPA issued a Guidance Memo (“Memo”) that addresses issues within both the Section 404 and the Section 402 or NPDES program. In both cases, although other issues were also addressed, the Memo primarily focuses on compliance with narrative water quality criteria (i.e. conductivity issues).

U.S. Army Corps of Engineers Clean Water Act Section 404 Permits for the Discharge of Dredge and Fill Material

- Scope of EPA authority
 - EPA may comment on pending applications. The applicant and the Corps may then address those comments. Once the comments are addressed to the Corps satisfaction, the permit can be issued.
 - EPA can then exercise their Section 404 (c) veto power to veto the permit.

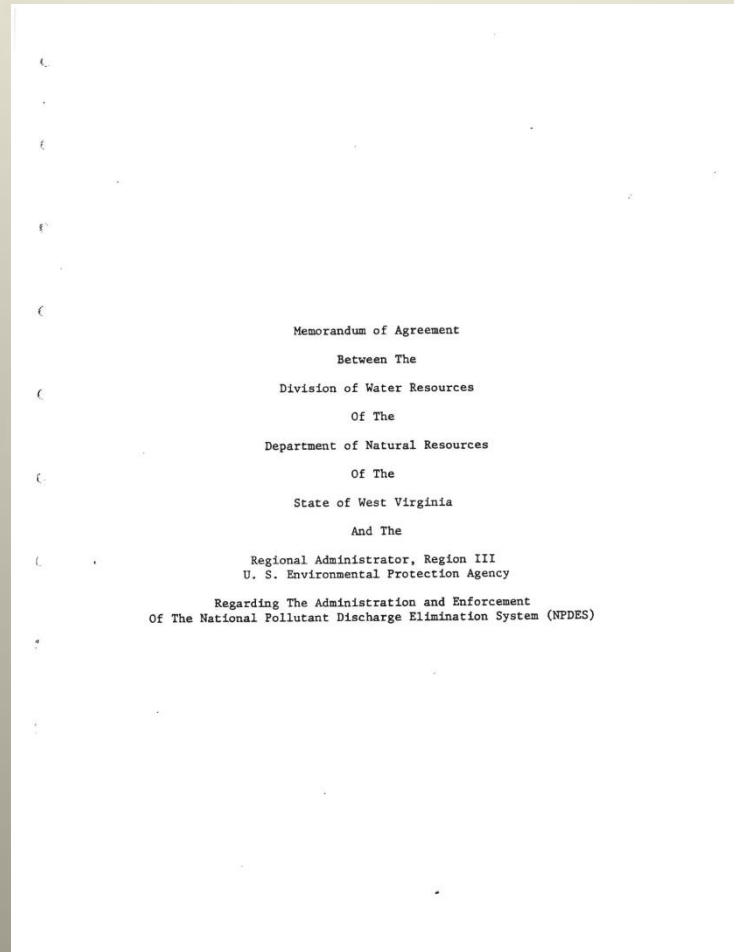
U.S. Army Corps of Engineers Clean Water Act Section 404 Permits for the Discharge of Dredge and Fill Material

- Future IPs may be difficult to obtain for large surface mines. EPA's oversight is likely to make the process cumbersome and costs associated with special material handling and other valley fill construction techniques will likely increase.
- On June 11, 2009, the EPA, CORPS, and the DOI released a Memorandum of Understanding: Implementing the Interagency Action Plan on Appalachian Surface Coal Mining.
- EPA to review surface mining permit applications from a list of one hundred eight (108).
- According to the Huntington District of the Corps, a clock started for the review of those permits by the EPA the last week of July.
- The EPA was given forty-five (45) days to request information on the one hundred eight (108) permits.
- Seventy-nine permits from the list of one hundred eight (108) permits were selected for enhanced coordination.
- Currently, it is a requirement that all Corps Section 404 IPs go through a pre-submittal meeting with the WVDEP, EPA, Corps, and other agencies. The process is similar to the Enhanced Coordination Process implemented by EPA for the seventy-nine permits discussed above.

U.S. Army Corps of Engineers Clean Water Act Section 404 Permits for the Discharge of Dredge and Fill Material

- Only mining permits that propose the discharge of dredge or fill material into **the waters of the U.S.** are required to apply for Section 404 permits.
 - Channels must have an ordinary highwater mark to be considered waters of the U.S.
 - If there is an ordinary highwater mark but the channels exhibit no obvious surface connection to a jurisdictional water then the channel is considered isolated and therefore non-jurisdictional and not waters of the U.S. (Corps concurrence needed)
 - If there is an ordinary highwater mark but the channels exhibit no significant nexus to Traditional Navigable Waters then the channel is considered non-jurisdictional and not waters of the U.S. (Corps concurrence needed)

West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits



West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits

Scope of EPA authority

- EPA has exercised its authority to review draft permits issued by WVDEP, therefore, currently, **any issuance, reissuance, or modification of a draft NPDES permit** in the state of West Virginia is being sent to EPA for their review and comment, prior to final approval.

EPA review of WVNPDES Permits

DRAFT

EPA receives Draft NPDES permit from WVDEP. EPA has 30 days to provide general comments.

No comments from EPA w/in 30 days Application deemed complete with respect to EPA.

EPA has general objections and requests additional time, not to exceed 90 days from EPA's receipt of draft permit to provide specific comments

If the information provided to EPA is inadequate, and the request for information is made within thirty days of receipt of Division of Water Resources submittal, this will constitute an **interim objection** and, if EPA's request for information on the specific inadequacies of the draft permit is submitted with the request for the complete record, the full time period of ninety days will be allowed.

Within ninety days of receipt by the DEP of an objection by EPA the state or interstate agency may request a public hearing.

A public hearing shall be conducted by EPA within sixty days of request.

EPA shall withdraw the objection and notify the State of the decision.

EPA shall modify the objection and notify the State of the decision.

EPA shall reaffirm objection, and notify the State of the decision.

No public hearing is held and the State does not resubmit a permit revised to eliminate the objection within ninety days.

Application deemed complete with respect to EPA


The State does not resubmit a permit revised to eliminate the objection or revised objection within thirty days of receipt of the notification.

The EPA may issue the permit. EPA then maintains jurisdiction.

West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits

In response to EPA's Memo, on August 12, 2010, WVDEP released a state Guidance document that is intended to facilitate compliance with applicable statutory and regulatory requirements and to provide reasonable means of effectuating the intent of the narrative criteria, as well as to enforce the mandate of the Clean Water Act ("CWA") that every permit contain effluent limitations that reflect the practicable pollution reduction a state can achieve. Said Guidance was revised on August 18, 2010.

West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits



RELEASE DATE: AUGUST 12, 2010
REVISED: AUGUST 18, 2010

west virginia department of environmental protection

**Permitting Guidance for Surface Coal Mining Operations to Protect
West Virginia's Narrative Water Quality Standards,
47 C.S.R. 2 §§ 3.2.e and 3.2.i**

INTRODUCTION

The purpose of this Permitting Guidance ("Guidance") is to assist West Virginia Department of Environmental Protection ("DEP") permit writers in developing site-specific National Pollutant Discharge Elimination System ("NPDES") permit conditions for surface coal mining operations using a holistic watershed management approach through the use of biological and chemical monitoring, whole effluent toxicity ("WET") testing, and the development of Aquatic Ecosystem Protection Plans ("AEPP") and, where necessary, Adaptive Management Plans ("AMP") to protect the State's narrative water quality standards. These standards are found in West Virginia's *Code of State Rules*, which states, in pertinent part, "No significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed."¹ These new procedures shall take effect immediately.²

This Guidance does not apply to outlets that are primarily precipitation induced, or for which the activities associated with those outlets have been substantially completed.³

REASONABLE POTENTIAL ANALYSIS

In deciding which permit conditions to include in a permit, the first thing a permit writer must do is perform a reasonable potential analysis and document the same in the Statement of Basis for the permit. If the applicant cannot demonstrate, by means of its chemical and biological monitoring and the control measures outlined in its AEPP, that it does not have reasonable potential ("RP") to cause or contribute to an excursion above the narrative criteria, the permit writer should treat new or expanded discharges as if they have RP and include WET limits in the permit, in accordance with 40 C.F.R. § 122.44(d)(1)(v).

At permit reissuance, DEP will use all valid and representative data to determine, on a case-by-case basis, whether an existing discharge causes, has the reasonable potential to cause, or contributes to an excursion from the narrative water quality criteria. Where DEP concludes that an existing outlet has RP, the permit will include WET limits. In cases where insufficient data is available to make a determination of RP upon permit reissuance, the permit writer will place WET monitoring requirements and triggers in the permit in order to determine RP (or lack of

¹ 47 C.S.R. 2 § 3.2.i
² In light of the changing nature of the policy concerns addressed herein, this document is intended to be dynamic and will likely be modified in the future as technology and best management practices develop and improve.
³ The term "substantially complete" shall mean that the operation is past the point when measures that could be undertaken under either an AEPP or an AMP could be effective in reducing the operation's impact on the aquatic ecosystem.

West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits

This Guidance added WVDEP the following requirements for non-precipitation induced outlets:

- Biological Assessment Sites (“BAS”) – separate from 401/404 benthic surveys. Benthics can only be collected by protocol from April 15th to October 15th. These sites are set in the first perennial riffle stream segment below the project by the WVDEP. Dry weather can be a limiting factor in the ability to meet protocol and collect samples in a timely manner.
- Whole Effluent Toxicity Testing (“WET”) – WET limits will be placed on outlets that are not primarily precipitation induced and where activities associated with said outlet are not substantially complete. Testing is to be done quarterly and two consecutive non-compliances will trigger the development and implementation of an Adaptive Management Plan identifying actions the permittee will take to achieve compliance with WET discharge limitations. However, if the acceptable data at the BAS shows that the aquatic ecosystem remains healthy, the WET discharge limitations will be re-evaluated.
- Aquatic Ecosystem Protection Plan (“AEPP”) - The AEPP describes measures to be taken by the permittee to protect the downstream aquatic ecosystem.

West Virginia Department of Environmental Protection Clean Water Act Section 402 Permits – National Pollutant Discharge Elimination System permits

At this time it appears that EPA is providing interim comments (requests for additional information) on most draft NPDES permits sent to them by WVDEP for review.

EPA does not appear to differentiate between precipitation induced outlets or non-precipitation induced outlets. The EPA requests for additional information may include, and may not be limited to, the following for both precipitation induced outlets and non-precipitation induced outlets:

- Information should include a reasonable analysis or antidegradation analysis to determine whether total dissolved solids, specific conductivity and/or total sulfates have a reasonable potential to cause or contribute to an excursion from the state narrative water quality criteria.
- Information should include baseline and annual WVSCI scoring for instream monitoring locations.
- Information should include documentation apparently relied upon by WVDEP in determining whether to include water quality based effluent limitations for selenium.

EPA and Best-Mine-and-Land Use

ADMINISTRATIVE RECORD WV 1543



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
Philadelphia, Pennsylvania 19104-0208

Re: W. Calhoun, Director
Charleston Field Office
United States Department of the Interior
Office of Surface Mining Reclamation and Enforcement
1027 Virginia Street, East
Charleston, West Virginia 25301

JUN 7 2010

Dear Mr. Calhoun:

This responds to your letter dated October 27, 2009 and received by the U.S. Environmental Protection Agency Region III (EPA) November 13, 2009 regarding EPA's comments, if any, on proposed activities to West Virginia's permanent surface mining regulatory program (Administrative Record Number WV 122). The proposed activities are described in two legislative actions taken during the 2009 regular legislative session. Enacted Committee Subchapter for Senate Bill No. 107 (Senate Bill No. 107) proposes activities that relate to continued oversight by the Secretary of the West Virginia Department of Environmental Protection (WVDEP) of approved projects and, in effect, corrects certain permit applications, classifications as to what certain types of coalfield activities are part of primary mining operations and criteria to be considered in evaluating incidental leachate emissions (ISLE) to existing permits, changing the term "no-off" to "no-far", and clarifying remedial standards that pertain to areas developed for herbicide or pasture use. Enacted Committee Subchapter for Senate Bill 1011 (Senate Bill 1011) would amend the West Virginia Code by revising surface mine reclamation plans to compare with approved surface land use plans and would authorize surface mine reclamation plans to contain alternative post-mining land uses.

Consistent with 30 C.F.R. § 732.1703(i)(3), you have requested EPA's views regarding the above-referenced program revision. To assist you, we have prepared the following EPA's comments pursuant to 30 C.F.R. § 732.1703(i)(3).

With respect to Senate Bill No. 107, EPA believes those proposed program revisions generally do not raise an air or water quality standard, with one exception. Senate Bill No. 107 would revise the way the WVDEP determines whether ISLEs. The former regulation states that, prior to approval, the Secretary "shall make findings that ISLEs will not result in adverse environmental impacts of a higher order of magnitude than those described in the approved permit" (former Code § 20-2-26.4). By contrast, the revised regulation states that "adverse environmental impacts of a higher order of magnitude than those described in the approved permit" is a "criteria" that provides "guidance" to the Secretary and requires public notice prior to approval. (see Code § 20-2-26.13). This revision would allow the Secretary to approve increased environmental impacts as ISLEs (subject to public notice and comment).

Historical best management practices have been proposed to prevent or minimize the discharge of TDS associated with surface mining. These include proposals to redesign the slopes on the surface of active fills, increasing them to 5% to the purpose of increasing the soil and limiting infiltration on the fill. Senate Bill 1011's effect of ensuring management of the land is necessary to offset the increase in slope. The effect is not achieved by any requirement that requires to remaining waters be considered in connection with development of water land use plans or that incorporate into reclamation plans and site-specific projects. Nor is consideration of water quality part of the provisions in Senate Bill No. 1011 that authorize the Secretary to approve alternative post-mining land use. While we recognize that the Probable Hydrologic Consequence and Cumulative Hydrologic Impact Analysis may partially address this concern, we note the issue document historically has focused more on issues related to water budget, rather than water quality, particularly with respect to sensitive water quality criteria.

Increase post-mining slopes to avoid infiltration, and it makes no provision for any site-specific determination regarding the water quality impacts associated with a land project project.

Senate Bill 1011 focuses on post-mining land uses that include renewable and alternative energy uses, residential uses, highway uses, industrial uses, commercial uses, agricultural uses, public facility uses or recreational uses. While Senate Bill 1011 in its text states that this list is not exhaustive, a regulation governing post-mining land uses that is more restrictive than the list that it is not encourage consideration of its forewaits or return to natural conditions. It is not established that the process of best management practices will result in water quality, including but not limited to temperature, nutrient cycling, and flow regulation.

Senate Bill No. 1011 also appears to encourage mining projects to create some amount of fill to accommodate the various identified post-mining land uses. In this way, Senate Bill 1011 may be contrary to a growing body of science that points to increased slopes to prevent infiltration and the discharge of acid mine drainage. Numerous studies have identified adverse water quality effects associated with the placement of EDS in streams. Surface coal mining with shallow mine discharge impairs water quality and impairs the aquatic life in streams streams in West Virginia and Kentucky in the Central Appalachian mountains (Crisis et al. 2006; Chanton and Hinkle 2001; Hinkle et al. 2001; Ford and McIlwaine 2002; Pond 2004; Ford et al. 2008). This shallow discharge is characterized by elevated levels of acid dissolved sulfur dissolved by nitrate, magnesium, bicarbonate and sulfate, iron, manganese, and in some cases, selenium, nickel, zinc and cadmium (Crisis et al. 2002; Ford et al. 2005; Hinkle et al. 2005; Mendenhall et al. 2007). The effects of acid dissolved sulfur (ADS) and increased conductivity associated with TDS on water life in Appalachian streams only recently in knowledge and understood. See EPA OED, A Field-Based Approach to Research for Conductivity in Central Appalachian Streams (Drafted Conductivity Study) available at http://pubs.epa.gov/caddisfly/centralappalachianstreams/2008/02/20080201_17_CTSR is commonly difficult to treat once released into streams by surface mining operations.

Historical best management practices have been proposed to prevent or minimize the discharge of TDS associated with surface mining. These include proposals to redesign the slopes on the surface of active fills, increasing them to 5% to the purpose of increasing the soil and limiting infiltration on the fill. Senate Bill 1011's effect of ensuring management of the land is necessary to offset the increase in slope. The effect is not achieved by any requirement that requires to remaining waters be considered in connection with development of water land use plans or that incorporate into reclamation plans and site-specific projects. Nor is consideration of water quality part of the provisions in Senate Bill No. 1011 that authorize the Secretary to approve alternative post-mining land use. While we recognize that the Probable Hydrologic Consequence and Cumulative Hydrologic Impact Analysis may partially address this concern, we note the issue document historically has focused more on issues related to water budget, rather than water quality, particularly with respect to sensitive water quality criteria.

The OED report is being submitted to the EPA Science Advisory Board (SAB) for review and is the publicly available. In the interim, EPA will share the reports as prevailing information, along with published, peer-reviewed scientific literature.

We note that "discharge[s] of water from areas disturbed by surface mining activities shall be such to comply with all applicable laws and Federal water quality laws and regulations and with the effluent limitations for acid mining promulgated by the U.S. Environmental Protection Agency but shall in no case exceed 40 C.F.R. § 464.42. Moreover, SMCRA clearly requires that surface waters be protected from the potential adverse effects of surface coal mining. See 16 U.S.C. § 1502(c); 30 U.S.C. § 1201(a)(1); 30 U.S.C. § 1201(b)(1); Implementation of the State's regulations, including the proposed amendments, must comply with the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., the regulations implementing the National Pollutant Discharge Elimination System (NPDES), and other relevant environmental statutes and regulations. See 30 U.S.C. § 1201(c). Accordingly, EPA expects that the revision to the regulations embodied in Senate Bill No. 107 would be implemented consistent with the flowchart, and discharge from ISLEs would be subject to the requirements of the Clean Water Act. It should be made clear that approval of an ISLE may require a major modification of the applicable NPDES permit (see 40 C.F.R. § 122.204(f)) before an approved ISLE could be implemented. In addition, an ISLE may encompass activities that trigger the new source provisions of the NPDES regulations.

In addition to changes to West Virginia's Surface Mining Reclamation Regulations, we note that Senate Bill No. 107 makes changes to the State's NPDES Rule for Coal Mining Facilities, 47 Code of West Virginia, Series 50. These changes have the potential to affect water quality. We have not requested comment on these provisions. The changes to the NPDES Rule have been submitted to us by WVDEP pursuant to 40 C.F.R. § 122.42(b) and will be reviewed consistent with our regulations.

The proposed program revision embodied Senate Bill No. 1011, if implemented, has the potential to significantly affect water quality. For that reason, EPA offers the following comments. Senate Bill No. 1011 revises the portions of the West Virginia permanent surface coal mining regulatory program that address reclamation plan requirements. Senate Bill No. 1011 requires preparation by the holder of a water land use plan that incorporates post-mining land use needs, "including, but not limited to, renewable and alternative energy uses, residential uses, highway uses, industrial uses, commercial uses, agricultural uses, public facility uses or recreational uses." It also requires that the post-mining land use proposed in any reclamation plan comply with the land use specified in the approved surface land use plan. An alternative post-mining land use may be approved when the approving land use proposed in any reclamation plan complies with the land use specified in the approved surface land use plan. An alternative post-mining land use may be approved when the approving land use proposed in any reclamation plan complies with the land use specified in the approved surface land use plan, site-specific conditions make attainment of the land use specified in the surface land use plan infeasible, or the post-mining land use that is specified in the surface land use plan would adversely interfere with future attainment of reasonable use. In addition, Senate Bill No. 1011 specifies that compliance with the surface land use plan also includes the requirements for a variance from approximate contour requirements provided in W.Va. Code § 20-2-10(c). We assume the term "higher or better" used in Senate Bill No. 1011 refers to the definition of "higher or better uses" in 30 C.F.R. 791.5.

EPA is concerned that Senate Bill No. 1011, if implemented in its current form, may have adverse water quality impacts because it allows a preference for post-mining land use that does not encourage consideration of environmental impacts arising from the post-mining land use. It may be added with current actions that require a need for reclamation design.

EPA wishes to emphasize that EPA supports efforts to promote post-mining land uses that create further reclamation opportunities for people of West Virginia. We note that, where surface mining will occur and there is a site-specific plan for potential activities (such as economic development), use of the reclamation area for the other activity requires water quality impacts. At the very least, however, there must be assurance that reusing post-mining land to accommodate economic development will not result in larger water quality impacts that otherwise would occur had the project been implemented as planned. The Surface Mine 409 permits (Surface Mine 409 Part 409) that provide the substantive criteria against which the Surface 409 permits the mining activities have been implemented. The Surface Mine 409 permit water resources be avoided or minimized to the extent practicable consistent with project purposes. Where there are dual purpose projects there would be case with post-mining land uses, such must be considered. As noted above, SMCRA and its implementing regulations require compliance with the Clean Water Act and by implementing reclamation requirements that Senate Bill 1011 does not provide for sufficient consideration of water quality impacts that may result from "best practices" projects that combine surface mining and post-mining land use to accommodate a water land use plan. Please note that we are not saying that such projects should not be favored or be discouraged by the land use plan that the water quality impacts from such dual purpose projects warrant project-specific consideration that is not part of Senate Bill No. 1011.

EPA would welcome the opportunity to work with OED and the West Virginia Department of Environmental Protection to propose appropriate revisions to Senate Bill 1011 and/or implementing procedures that will assure that impacts to water quality are adequately considered.

Thank you for the opportunity to offer EPA's comments on these proposed revisions to West Virginia's permanent surface coal mining regulatory program. Administrative Record Number WV 102. If you have any questions, please feel free to contact John Form, Associate Director, Office of Monitoring and Assessment, at (215) 814-2700.

Respectfully,

John Form
Associate Director
West Protection Division I

EPA and Post-Mine Land Use

Senate Bill No. 1011 proposes changes to the coal mining regulatory program that would encourage economically beneficial post-mine land uses.

Some of EPA comments on Senate Bill No. 1011

- Revisions proposed by Senate Bill No. 1011 have the potential to significantly affect water quality.
- Implementation of Senate Bill No. 1011 may be at odds with current science that suggests a need for revised mine design to increase post-mining slopes.
- Senate Bill No. 1011 emphasizes post-mining land uses based on economic considerations of the locality that do not encourage considerations of re-forestation or return to natural conditions.