Cross-posted at CPRBlog.

Last week, I reported on EPA's proposed veto of a Clean Water Act section 404 permit for a major mountaintop removal coal mining project in West Virginia. My view at the time was something along the lines of two-and-a-half cheers. I wrote that it was very good news, but didn't articulate principals for distinguishing between acceptable and unacceptable mountaintop removal. Setting the proposed veto next to approval of the Hobet 45 project in January, EPA had not exactly ended confusion about the review of mountaintop removal projects, as Council on Environmental Quality chief Nancy Sutley had promised last summer when the administration unveiled a coordinated review procedure.

I spoke too soon. EPA has now issued detailed guidance for its review of Appalachian surface coal mining operations, and its a doozy. Actually, it shouldn't be remarkable; its a straightforward and careful implementation of the Clean Water Act. But in light of the long history of allowing mountaintop removal without much regard to the law, this new guidance is a real attention-getter.

The guidance addresses review of both Clean Water Act section 402 permits, issued by the states for discharges from mining operations, and Clean Water Act section 404 permits, issued by the Corps of Engineers for valley fills.

Here are some aspects of the guidance that stand out for me:

- **Water quality standards matter.** Duh, you might say, but this truism wasn't obvious to the prior two administrations. Under the Clean Water Act, section 402 (NPDES) permits must include both technology-based pollution limits and, if those won't adequately protect the receiving waters, additional water quality-based restrictions. But an EPA review of mountaintop removal permit practice found that it hasn't been working that way. The states don't have numeric standards for many of the pollutants these mining operations dump into their streams, relying instead on vague narrative criteria. Permits typically don't include restrictions designed to implement those standards. Sometimes even when the states have numeric standards, they don't implement those standards through permit restrictions. So the states often issue inadequate NPDES permits, which are then used to argue that the 404 permits don't need to consider water quality because its been taken care of. EPA plans both to require that NPDES permits actually protect water quality and to end the bootstrapping by requiring independent consideration of water quality in the 404 process.
- **The states are not the deciders.** In part, this point follows from the first. EPA has

found that the Appalachian states are not doing an adequate job. EPA regional officials, who have the authority to review NPDES as well as 404 permits, are being told to take a much harder look than they have in the past, insisting that the states document their water quality evaluation and develop permit conditions to ensure compliance with water quality standards. The regions are encouraged to use comment letters and meetings to express their misgivings, but ultimately they are told that they control the decision: "If . . . in the Region's judgment discussions with the state do not produce a permit that satisfies the requirements of the Act, and objection to the issuance of the proposed permit would be an appropriate response."

- **Neither is the Corps of Engineers.** EPA has already proposed to veto one section 404 permit. This guidance makes it clear that it will aggressively review others to ensure that they (like the state-issued NPDES permits) do not cause or contribute to a violation of water quality standards, that a range of alternatives have been considered, and that impacts have been avoided, minimized, and mitigated. In other words, EPA is going to be looking over the Corps' shoulder to make sure the Corps faithfully implements the 404 guidelines. In particular, EPA is going to insist on an independent evaluation of the water quality impacts of 404 permits for valley fills, and is not going to simply take the state's word, in the form of a Clean Water Act section 401 certification, that water quality is adequately protected.
- **Science matters, and EPA is ready to put the science to work**. EPA is also telling the states that they must consider the growing scientific consensus that increases in stream conductivity below mountaintop mining operations cause harm to aquatic life. EPA has reviewed that literature, prepared a report which is soon to be reviewed by the Science Advisory Board, and concluded that conductance above a specific benchmark level is unacceptable.
- **Review must consider the whole spatial and temporal picture.** As it did in the proposed Spruce No. 1 veto, EPA emphasizes in this guidance the need for watershed-scale evaluation of cumulative impacts. The guidance also notes the need for monitoring over time to insure that mitigation measures perform as expected, and permitting large-scale or multiple-fill projects in an incremental way, so that the impacts of early activities can be evaluated before the company is given permission to do more.

This guidance deserves three full and enthusiastic cheers, as do Lisa Jackson and her team for doing the hard work to develop it and having the political courage to issue it.