Cross-posted at CPRBlog.

EPA has announced that it will delay finalizing its guidance memorandum on Clean Water Act permitting for mountaintop removal mining projects pending review by the White House Office of Management and Budget. The announcement is bad news for Appalachian streams, and worse news for environmental interests hoping the Obama administration won't completely cave to regulated interests.

The guidance was issued in interim form on April 1 of last year. EPA described the memorandum as clarifying how it would review requests for Clean Water Act permits in support of mountaintop removal mining and its expectations of state permitting agencies and the Corps of Engineers. Despite the date of the guidance, EPA wasn't fooling. The guidance signaled a new, more aggressive attitude toward EPA's oversight role, an attitude associated with enhanced review of permit applications and even a rare veto of a permit that had been approved by the Corps.

Not surprisingly, the coal industry is fighting back in all available venues. It's had some initial success in the courts and is working hard on the Congress, as I hope to explain in another post. Today's news, though, shows that the White House might turn out to be the easiest of targets.

Last year, EPA described the guidance memo as "interim," but "effective immediately." The agency invited public comments and promised to issue final guidance no later than April 1, 2011. That self-imposed deadline passed on Friday, with EPA issuing the following explanation:

> *Last year, EPA issued interim mountaintop mining guidance to clarify existing requirements under the law and relying on the best available science to protect clean waters in Appalachia. As we announced at the time, we are improving the guidance based on its implementation over the past year, our review of thousands of public comments and scientific reviews conducted by EPA's Office of Research and Development and independent scientists. The Office of Management and Budget will conduct an interagency review process before final guidance is issued later this Spring.*

(As quoted on Coal Tattoo.)

Why is OMB involved?

Its Office of Information and Regulatory Affairs (headed by former law professor Cass Sunstein) is tasked by Clinton-era Executive Order 12866 with reviewing major rules. The Executive Order limits OIRA's authority to reviewing "significant regulatory actions," defined as those "that may:

> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

That's pretty broad, but not broad enough to cover this guidance, or for that matter any guidance that merely clarifies existing rules. As I wrote when the guidance was announced it is "a straightforward and careful implementation of the Clean Water Act." It's simply an explicit commitment to enforce the statute and pre-existing implementing regulations. OIRA doesn't belong in the mix at this stage.

So why is the White House really involved? Because since the mid-term elections it has been only too willing to bend to big-money attacks on regulatory agencies. In January, President Obama grabbed headlines with an op-ed in the Wall Street Journal promising to reduce regulatory burdens on business. He followed up with an Executive Order calling on federal agencies to make sure that future regulations impose the least possible burden and to review existing regulations with an eye to weeding out those that are "outmoded, ineffective, insufficient, or excessively burdensome." The White House might as well have put up a sign on the door reading "Bring us your complaints about excessive regulation."

That seems to be exactly what happened in this case. Environment and Energy News has posted a letter (subscription required) from West Virginia Democratic Congressman Nick Rahall to OIRA Administrator Sunstein asking that OIRA review the guidance to see if it should be issued as a rule and if EPA jumped through the right procedural hoops. The letter is dated March 29, 2011, just days before EPA announced that OMB will review its guidance. It refers to an earlier meeting between Rahall and Sunstein, so the response may

not have been quite as instantaneous as that timeline makes it appear.

Just where OIRA gets the authority to review the guidance is unclear. President GW Bush had issued an executive order calling for OIRA review of guidance documents, but President Obama revoked that order shortly after taking office. Nor does OMB have some special expertise related to whether the EPA's guidance is a new rule in disguise. OMB know nothing about the nuances of the Clean Water Act; EPA has a far better understanding of the requirements of the statute and current regulations. It seems that neither legal authority nor expertise is needed to justify centralized review in this White House, however, so long as the political outcry is loud enough.

At a minimum, the White House's actions will delay further implementation of a guidance that had brought needed clarity to the permitting process for mountaintop removal mining and put states on notice that they must fulfill their obligations under the Clean Water Act. Worse, it strengthens the public message that the White House will bring agencies which aggressively pursue their environmental missions to heel. That invites a variety of demands for White House intervention in areas better left to the agencies assigned statutory responsibility. Those demands are already coming in; earlier this year, for example, eighteen member of Congress wrote to ask the Council on Environmental Quality (another White House branch) to override the National Marine Fisheries Service's authority under the ESA to evaluate the impacts of pesticide registration on endangered and threatened fish. (Hat tip: Endangered Species Law & Policy blog.) Expect lots more along the same lines.