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After a three-and-a-half month delay for White House review, EPA has finalized its guidance for review of mountaintop removal mining permits in Appalachia. I needn't have worried that the White House would roll EPA Administrator Lisa Jackson on this one. The final guidance maintains the strong stand EPA took last April when it issued the interim guidance it finalized today.

The thrust of this final version, like the interim guidance, is that EPA will actually exercise its oversight authority to make sure that permit decisions follow the law. That hasn't exactly always been the case for mountaintop removal mining, or really for many Clean Water Act permits.

Mountaintop removal mining operations typically require two types of Clean Water Act permits: NPDES permits under § 402 for dumping pollutants into the nation's waters, and wetlands filling permits under § 404. The Clean Water Act sets up an intricate state-federal partnership for NPDES permits, and a Corps of Engineers-EPA partnership for § 404. In both cases, an important part of EPA's role is to oversee the actions of its partners. This guidance makes it clear that EPA will take that role seriously.

NPDES permits are typically issued by the states under authority delegated by EPA. They are required to include both technology-based pollution control requirements and, if those are not sufficient to protect water quality, additional limitations to make sure that state water quality standards are not exceeded. Those water-quality based restrictions are the key for mountaintop removal permits; this isn't like a factory outfall where pollution control equipment can be installed at the end of the pipe. But water-quality based restrictions are a notorious weak point of NPDES permits, both in general and specifically, as EPA found in a review before it issued the interim guidance, for surface coal mining permits. The Clean Water Act gives EPA the responsibility to oversee, and if necessary object to, state-issued NPDES permits. This guidance explains what EPA regions should look for in reviewing NPDES permits, including what information the permittee provides; how evaluation of whether the permit has the potential to cause a water quality violation is approached; how compliance with narrative water quality standards is evaluated; and what water-quality based effluent limits are included.

Although coal interests have objected that EPA's guidance usurps state authority, that objection is misguided. The Clean Water Act sets the standards for NPDES permits, including the requirement that they include conditions to insure that water quality standards are not violated. It gives EPA the authority to oversee state permit decisions to

make sure that the meet all of the law's requirements. This final guidance, like the interim one, simply puts the states on notice that they will need to comply with requirements of the Clean Water Act which, for too long, they've been able to more or less ignore.

The situation is similar with respect to § 404 permits, which are needed to allow mountaintop removal operators to fill in valley streams with mining spoils. The Corps of Engineers, which has primary responsibility for evaluating § 404 permit applications, has not always been enthusiastically attentive to environmental protection. The final guidance encourages EPA's regional offices to make sure that the Corps pays attention to the impacts of valley fills on water quality and wildlife, does not blindly accept state assurances that water quality will be preserved, looks closely at possible alternatives to proposed operations, and makes sure that impacts are minimized and mitigated. Again, this kind of oversight is fully consistent with, and indeed demanded by, the Clean Water Act, which provides EPA with the authority to veto any Corps-issued § 404 permit. Although EPA makes sparing use of its veto power, it showed earlier this year that it is not afraid to veto a mountaintop removal permit where necessary.

The only differences between the interim guidance and this final one are cosmetic. Not surprisingly, the final guidance emphasizes its explanatory, non-binding nature. That's because the coal industry and West Virginia are suing to invalidate the guidance on the grounds, among others, that it is really a new regulation that should have gone through the notice and comment process. A district court opinion issued in January tentatively agreed with that argument. The final guidance, by repeatedly emphasizing its non-binding nature and pointing more clearly to the statutory provisions it implements, seeks to blunt that argument and to reinforce EPA's claim that only permit decisions, not the guidance itself, are subject to judicial review.

The final guidance also incorporates updated scientific information, including comments from EPA's Science Advisory Board on the interim guidance, and makes it clear that each permit decision must consider the best scientific evidence available at the time.

And the final guidance adds a discussion of the use of "offsets" in NPDES permits, allowing water quality standards to be met by controlling some other pollution source. That looks to me like the kind of thing that might have been added to placate OMB, which is big on making sure regulations look for the most cost-effective pollution controls. I doubt that it will have much effect on these permit decisions, because it's hard to imagine what other sources in coal country could be responsible for the level of selenium and other pollutants discharged by these enormous surface mining operations. But perhaps new operations ones could help clean up old ones, where the permit decisions didn't adequately take water

quality into account.

The action now moves to the courts and the Congress. According to Coal Tattoo, the next substantive hearing in the challenge to the guidance is scheduled for late October. Even before issuance of this final guidance I thought EPA clearly had the better of the arguments in the case, but the judge apparently doesn't agree with me. In Congress, the House has passed H.R. 2018, which would limit EPA's oversight of state water quality standards and give states the right to block EPA vetos under § 404. H.R. 2018 is unlikely to get through the Senate, though, and even if it does the president has already threatened to veto it. And the FY 2012 EPA appropriations bill reported out of committee earlier this month includes a rider that would block implementation of this guidance. Stay tuned.