

Client Alert

May 2013

4th Circuit Upholds Corps' Assessment That Increased Conductivity Associated With Surface Coal Mine Will Not Cause Significant Adverse Effects

On May 15, 2013, the United States Court of Appeals for the Fourth Circuit upheld a permit that the US Army Corps of Engineers (Corps) issued to Highland Mining Company pursuant to Section 404 of the Clean Water Act. The three-judge panel unanimously affirmed a district court decision ruling that the Corps properly considered baseline conditions in the mine's watershed and that the Corps rationally concluded that increased stream conductivity associated with the mine would not have significant adverse effects. This important ruling upholds the Corps' assessment of the data concerning the controversial topic of conductivity. In recent years, the Environmental Protection Agency (EPA) and environmental groups have used conductivity data to oppose surface mining permits.

In 2007, the Corps issued Highland Mining a Section 404 permit for its Reylas mine in Logan County, West Virginia, authorizing the discharge of dredged or fill material into stream segments. That permit followed a four-year review period during which Highland Mining reconfigured the proposed operations and adopted various best management practices and mitigation measures, in order to address concerns raised by EPA and environmental groups. EPA advised the Corps after these changes that the permit could be issued with appropriate conditions. The environmental groups nonetheless sued, contending that the Corps materially misapprehended the baseline conditions in the mine's watershed. They also argued that the Corps' determination that the mine would not have significant adverse effects was irrational because of the potential for increased stream conductivity associated with the mine.

The court of appeals rejected both arguments. Regarding the baseline conditions, the court of appeals disagreed that the inclusion of the stream segments on West Virginia's 303(d) list of impaired streams meant the mine would have significant adverse effects on the watershed. Contrasting the single test score underlying the designation against the more abundant water quality data obtained through a variety of assessments over time, the court held that the Corps' baseline determination was not contradictory to, and was more exhaustive than, the 303(d) list.

Regarding the Corps' cumulative effects determination, the environmental groups contended that in making its finding of no significant impacts, the Corps failed to take a "hard look" at the data associating surface mining with increased stream conductivity. The court of appeals again disagreed. It pointed to the fact that the Corps spent four years grappling with the issues, extensively conferring with EPA and the West Virginia Department of Environmental Protection (WVDEP). The combined decision document set forth and examined in detail the competing views on the issue of conductivity.

Of additional note, a concurrence by one of the judges commended the process in which Highland Mining worked with the Corps to address concerns about the mine. This underscores the importance that input from operational personnel during the permit phase can have on eventual success in ensuing litigation over the permit. The concurrence also noted that courts should not seize on adverse comments during one point in the review process to invalidate a permit, where the Corps and the applicant implemented substantial measures to address those comments.

Hunton & Williams LLP was co-counsel for Highland Mining on the appeal.

About the Environmental Practice

Hunton & Williams' environmental practice is among the oldest and largest in the nation. Since 1970, our attorneys have helped clients navigate every major federal environmental statute as well as those of most states and many international jurisdictions. This team of more than 70 lawyers represents companies in litigation, administrative permitting and regulatory proceedings; advises a range of industries on innovative responses to environmental compliance; and ensures that clients have a voice in shaping policy. Known historically as a leader representing electric utilities, the firmwide practice—with specialties in air; water; waste, mining and chemicals, petroleum and multi-national environmental policy and transactional work—has become a recognized national and global leader. The environmental practice has been named an "Environmental Group of the Year" by Law360 for three consecutive years (2010-2012) and is nationally ranked by Chambers USA (2008-2013).

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