

BB Coal and Surface Mining Update

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Prepared by the Environmental and Natural Resources Section of Balch & Bingham LLP

EPA's Push for Conductivity Limits and WET Testing

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On April 1, 2010, EPA Headquarters issued a memo to EPA Regions 3, 4 and 5 concerning the need for conductivity limits in NPDES permits for surface mining operations. Among other things, relying on a 2008 study conducted by EPA personnel in West Virginia, EPA's memo states EPA's conclusion that aquatic life is likely to be adversely affected by specific conductivity greater than 500 $\mu\text{S}/\text{cm}$. As a result, EPA says it will presume all discharges from mining operations that will potentially exceed 500 $\mu\text{S}/\text{cm}$ will "cause or contribute" to a violation of Clean Water Act narrative water quality standards. EPA's memo states that the agency will expect NPDES permits within ecoregions 67, 68 and 69 to include conditions protecting against conductivity exceeding 500 $\mu\text{S}/\text{cm}$. EPA is currently attempting to bolster these conclusions through a Benchmark Study for conductivity undertaken by EPA's Office of Research and Development.

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Alabama Coal Mining Litigation Update

- *Black Warrior Riverkeeper v. ADEM and MCoal Corporation*

On June 25, 2010, the Alabama Environmental Management Commission (AEMC) issued an order adopting the recommended findings of fact and conclusions of law issued by the hearing officer on May 27, 2010, in favor of the Alabama Department of Environmental Management (ADEM) and MCoal Corporation, who is represented by Balch & Bingham LLP. After a week-long evidentiary hearing, the Hearing Officer recommended approval of ADEM's issuance of an NPDES permit for the entirety of MCoal Corporation's Rosa Mine in Blount County, Alabama. The AEMC's decision is currently on appeal before the Alabama Circuit Court for Montgomery County.

Balch & Bingham Knows Coal Mining

WITH 20 ATTORNEYS in Alabama, Georgia and Mississippi focused exclusively on environmental law, and another dozen extensively engaged in environmental litigation, Balch & Bingham's Environmental & Natural Resources section is one of the largest full-time environmental practice groups in the country. Balch & Bingham's Environmental & Natural Resources section has represented members of Alabama's coal mining industry across the board in legislation, rule making, permitting, and litigation issues on both the federal and state levels for years.

Balch & Bingham's Labor & Employment section represents industries, including the coal mining industry, in a wide range of labor and employment issues. In particular, Balch & Bingham has extensive experience addressing health and safety regulatory issues involving OSHA, MSHA and related state agencies.

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Fish and Wildlife Services Extends Comment Period on Cahaba River National Wildlife Refuge to December 6, 2010

Faced with a public and political backlash against an initial public notice and comment period that many landowners considered inadequate, FWS has agreed to extend the comment period on its proposed 106,415-acre expansion of the Cahaba River National Wildlife Refuge until December 6, 2010. The proposed expansion (which would make the refuge larger than all other refuges in Alabama combined) should be of particular concern to holders of mineral and timber rights within the proposed expansion, particularly if such rights are severed from surface rights and the surface rights are sold to FWS. The draft Environmental Assessment and its associated documents fail to address such issues and instead suggest that development of such resources would be incompatible with the management of the refuge. The proposal can be downloaded at: <http://www.fws.gov/southeast/planning/LA/CahabaRiverDraftEAsinglePgDoc.html>.

Comments should be addressed to Ms. Kimberly Eldridge, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 420, Atlanta, Georgia 30345.

MSHA Ramps Up Enforcement Activity

On August 16, 2010, the Mine Safety and Health Administration (MSHA) issued guidelines for industry compliance with ventilation regulations applicable to mines across the country. These guidelines are a product of the congressional hearings on the explosion of Massey Energy's Upper Big Branch mine in West Virginia. MSHA inspectors have also been instructed to enhance enforcement efforts relating to violations of ventilation standards. This month, MSHA conducted surprise inspections of four mines located in Kentucky, Tennessee and West Virginia. As a result of these inspections, MSHA issued dozens of citations and compliance orders.

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Conductivity Limits and WET Testing

At the same time, EPA continues to push for Whole Effluent Toxicity (WET) testing to be included in state-issued NPDES permits for mining operations. WET tests measure wastewater's effects on specific test organisms' ability to survive, grow and reproduce. Permit holders who cannot meet test organism survival rates under EPA guidelines will be considered in violation of their permits and will be required to conduct further toxicity reduction and identification evaluations (TRE/TRI) in order to identify the cause of the toxicity and to establish new permit limits as necessary.