

Additional Scrutiny Expected for US Coal Mining

Mountaintop removal or “MTR”, has become an increasingly common form of surface mining in the Eastern United States and involves the removal of up to 1,000 feet of overburden covering coal seams. Sparked by tighter emission controls under the US Clean Air Act, demand for cleaner burning low-sulfur coal has been on the rise and, with it, the practice of MTR. Currently, MTR yields approximately 130 million tons of such coal a year and accounts for roughly 10% of the United States’ coal production. In addition to its clean-burning attributes, MTR coal is retrieved in a much more efficient manner than traditional underground mining, producing nearly two-and-a-half times more coal per worker per hour.

However, because of the large displacement of overburden required for MTR mining (at a ratio of 16 tons of overburden to 1 ton of coal), the issue of the disposal or placement of the overburden has grown along with the practice of MTR. Given the geographic contours of the Appalachian mountains, overburden is often moved to adjacent drainage valleys, creating “valley fill”. This has allowed mining opponents to raise concerns regarding the potential pollution of nearby waterways, oftentimes a source of or tributary to drinking water.

Under the US Surface Mining Control and Reclamation Act, as amended (SMCRA), mining operators were barred from depositing substantial amounts of valley fill within 100 feet of any “intermittent or perennial stream” unless the regulatory authority specifically authorized surface mining activities within such area and determined that such activities would not harm such stream’s water quality or reducing its flow. This rule is often referred to as “the stream buffer zone rule” or “SBZ rule”. However, conflicting interpretations of the law and the permitting process abounded, resulting in disagreement over how companies were permitted to dispose of overburden created by MTR.

In the last month of the Bush administration, the SBZ rule was revised in several key respects. On December 12, 2008, the Office of Surface Mining Reclamation and Enforcement (OSM) issued a final rule requiring companies to avoid the 100-foot stream buffer zone unless they show why they cannot do so. If they do dispose of the valley fill in the buffer zone, they must try to minimize or avoid harming streams “to the extent practicable” and compensate for the damage elsewhere. Thus, the SBZ rule no longer requires that a regulatory authority determine that such activities do not cause or contribute to violations of water quality standards under the US Clean Water Act (CWA). In addition, the rule change extends the buffer to all waters, including lakes, ponds and wetlands. Mining opponents, typified in a New York Times article, announced that the new rule “gives coal companies a legal right to do what, in the past, they could do only in exceptional circumstances, with special permission from the government”.

The new rule has been met with mixed response, ranging from approval from representatives of the coal industry to a lawsuit by a coalition of environmental groups filed against the US Environmental Protection Agency (EPA), claiming that its concurrence with the new rule is unlawful and contrary to its authority under the CWA. The new Obama administration is expected to enact policies that discourage the mining and burning of coal. Accordingly, some have asked whether the new administration may undertake to overturn the changes.

Because the rule went into effect on January 12, 2009, shortly before the Obama administration personnel assumed their offices, the rule remains on the books unless action is taken to reverse the rule. However, the new Congress has 60 session days under the Congressional Review Act to introduce a resolution to disapprove of the rule. If such a resolution were introduced, passed by both the House of Representatives and the Senate and signed by the President, then the rule would be effectively undone. As a presidential candidate, Mr. Obama expressed “serious concerns about the environmental implications” of MTR. His appointees are expected to implement policies and decisions that make MTR mining more difficult or impossible.

Such efforts to reverse or nullify the revised SBZ rule may be an early test of how strongly and quickly campaign pledges will be implemented in the Obama administration, and offer a picture of the road ahead for the US mining industry.

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