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### **Coal Mining**

## **Need to Assess Coal Mine Air Impacts In Flux After Vacature of Permit Approval**



*By Rachel Leven*

April 9 — A federal court's recent vacature of an Interior Department office's environmental assessment and permit approval has raised questions about when air impacts from combustion of the coal mined must be considered in a mine's permit or lease approval.

Some attorneys hold that the U.S. District Court for the District of Colorado's March ruling, which led to the court's April vacature, is limited in scope, since it involved a coal mine and power plant that were each others' sole provider and consumer, and is vulnerable to appeal. Others told Bloomberg BNA this decision is just the latest in an emerging trend in which courts and the Obama administration see indirect air impacts—whether mercury or other emissions—related to coal mining as important to consider prior to approving an action with or without a definitive connection to a given power plant.

"If you're producing more coal, you're going to sell that coal," Jennifer Klein, an attorney at the Sabin Center for Climate Change Law, told Bloomberg BNA. "It doesn't matter whether it goes to one power plant or 50 different power plants when you're talking about greenhouse gas emissions that have global impacts. For mercury, the difference is how localized the impacts are."

### **NEPA No 'Bureaucratic Formality.'**

The federal court on April 6 vacated the Office of Surface Mining Reclamation and Enforcement's environmental assessment and approval of a permit revision for the New Mexico coal mine, following a ruling in March that the office should have considered the mercury emissions from the mined coal's combustion (*Dine Citizens Against Ruining Our Environment v. OSM*, 2015 BL 98552 (D. Colo. 2015); 44 DEN A-9, 3/6/15).

This vacature—in practical and immediate terms—will cost the Navajo Transitional Energy Co. LLC mine owner approximately \$400,000 monthly to alter its mining operations to meet its contractual obligations with the Four Corners Power Plant, its sole consumer, the order said. However, the court said vacating the approval is necessary to protect the environment from the effects of the mine expansion and to ensure that complying with the National Environmental Policy Act (NEPA) doesn't become "a mere bureaucratic formality."

"There's an obvious connected action under National Environmental Protection Act" to the coal's mining and its combustion, Mike Eisenfeld, New Mexico Energy Coordinator for one plaintiff, the San Juan Citizens Alliance, told Bloomberg BNA. "Now how that's going to be defined with other percentages, I'm not sure. But I do think that this is a precedent-setting action that coal mines are not independent of coal-fired power plants."

The Navajo Transitional Energy Co. appealed the decision, as an intervenor defendant, on April 8.

### **Unique Circumstances**

Two attorneys from Hunton & Williams LLP, meanwhile, downplayed the significance of the March 2 ruling.

This ruling was for a specific situation where the coal mine and the power plant were interdependent, and in this case, the court erroneously relied on that to expand the NEPA analysis, Tauna Szymanski, a senior Hunton & Williams associate, said. The ruling would only have any legal effect in Colorado and would only be applicable where there were equivalent levels of interdependence, she said.

"This is very fact-specific," Karen Bennett, counsel for the firm, told Bloomberg BNA. "I wouldn't really read into this decision that the burning of the coal at the ultimate destination would be something that OSM would need to consider in any coal mine expansion."

Furthermore, the attorneys told Bloomberg BNA the ruling was improper and could be reversed, if appealed.

The case is "vulnerable" specifically in the federal court's interpretation of the Office of Surface Mining rules under 30 C.F.R. Section 773.15, Bennett said. Office of Surface Mining rules require the agency to consider the mine expansion's effect on endangered species, not the effect of the burning of the coal at a power plant over which it has no control, in approving or denying an action, Bennett said.

The court also erred in determining that mine and power plant activities were "connected" actions, Bennett said in a later e-mail.

### **'Emerging Authority.'**

However, two lawyers from Columbia Law School's Sabin Center for Climate Change Law said the ruling actually builds on an "emerging authority" in court decisions related to mining's greenhouse gas impacts.

Klein said that the lawsuit brought regarding mercury emissions resulting from the combustion of the mined coal could similarly be brought regarding greenhouse gas emissions.

Other federal court decisions and recent White House guidance on greenhouse gas emissions indicate that combustion impacts of mining should be considered by government agencies, Michael Gerrard, director of the Sabin Center, told Bloomberg BNA.

In *High Country Conservation Advocates v. U.S. Forest Service*, a different judge from the same Colorado district court ruled that the agency violated NEPA in its assessment of a coal lease modification because it failed to adequately disclose the effects of greenhouse gas emissions from the mine (*High Country Conservation Advocates v. U.S. Forest Service*, 2014 BL 252899 (D. Colo. 2014)).

Additionally, draft White House guidance released in December said the indirect and direct effects of resource extraction such as mining should be disclosed in environmental impact statements, Gerrard said.

"This [decision] solidifies the existing authority that when analyzing proposed coal mining activity, the air pollution from the inevitable combustion of the coal should be assessed," he said.

### **Threshold for Assessment**

Much of the strength of the case is in being able to determine where the coal will be burned, because then it is easier to conduct an air quality analysis and to quantify the indirect impacts of combustion from the coal that is mined, Gerrard said. However, even if it is unclear how much coal will be burned at any given power plant, the air impacts from combustion of the mined coal will occur and should still be considered, Klein said.

Even if air quality impacts are widely considered in federal environmental analyses for mining actions, it doesn't necessarily mean that fewer coal mining projects would be approved, Gerrard said.

"As the [March 2] decision rightly says, NEPA does not mean that environmentally negative activities cannot be allowed," Gerrard said. "It merely requires the disclosure and consideration of the impacts, but these quantified emissions will become a factor among others that the government will consider in allowing whether to permit the mine."

The Office of Surface Mining and the Navajo Transitional Energy Co. LLC didn't respond to Bloomberg BNA messages requesting comment.

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### **For More Information**

The April 6 order in *Dine Citizens Against Ruining Our Environment v. OSM* is available at [http://www.bloomberglaw.com/public/document/Dine\\_Citizens\\_Against\\_Ruining\\_Our\\_Environment\\_e](http://www.bloomberglaw.com/public/document/Dine_Citizens_Against_Ruining_Our_Environment_e)

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