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Permit hearing puts focus on EPA mining crackdown

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CHARLESTON, W.Va. -- Environmentalists and state regulators faced off Tuesday in the start of a major permit appeal hearing that puts the spotlight squarely on West Virginia's opposition to a federal crackdown aimed at reducing strip-mine pollution across the Appalachian coalfields.

Department of Environmental Protection officials sought an 11th-hour ruling Monday night to block any mention in the hearing of tougher new water quality guidelines issued by the U.S. Environmental Protection Agency earlier this year.

State Environmental Quality Board members turned down that request, and citizen group lawyers told the board the case is all about DEP's rejection of the EPA guidelines and a growing body of science they are based upon.

"DEP refuses to follow the law and the science when it issues permits for surface coal mines," said Joe Lovett, director of the Appalachian Center for the Economy and the Environment. "The permit at issue here is a prime example of DEP's recalcitrance."

Lovett's organization is working with the Sierra Club to appeal a DEP-issued permit for Scott Depot-based International Coal Group to expand a mining operation along Scotts Run near Cassville in Monongalia County.

ICG subsidiary Patriot Mining's New Hill West Mine would cover about 225 acres, and discharge pollution under a modification to an existing Clean Water Act permit that covers five other adjacent mine sites. In its appeal, the Sierra Club argued that DEP wrongly did not perform detailed studies of the mine's potential water quality impacts, and ignored the need for specific water discharge limits for electrical conductivity, total dissolved solids and sulfates.

Bob McLusky, a Jackson Kelley lawyer representing the company, argued that Patriot Mining's permit -- currently suspended by the board pending the appeal -- is "small potatoes" and not the Sierra Club's real target.

"They're not in this because of 225 acres," McLusky said. "They see this as a referendum on mining. Patriot sees itself caught up in a much larger issue."

Board members set aside four full days this week for the hearing. Expert witnesses for the Sierra Club will include biologists Margaret Palmer of the University of Maryland and Emily Bernhardt of Duke University, two of the authors of a study earlier this year in the prestigious journal *Science*, which concluded mountaintop removal's damaging impacts are "pervasive and irreversible."

Palmer testified Tuesday afternoon that peer-reviewed scientific literature clearly shows adverse water quality impacts downstream from coal-mining operations.

"There have been a lot of studies that have shown a pretty clear relationship between mining and stream impairment," Palmer told board members. "There are a lot of papers."

Since soon after taking office, the Obama administration has been citing that scientific consensus in putting strip-mining permits under much greater scrutiny. EPA has issued new guidance and a landmark science paper detailing how increased conductivity from mining pollution is harming aquatic life.

Environmental scientist Evan Hansen of the Morgantown firm Downstream Strategies, another expert for the Sierra Club, testified Tuesday morning that Scotts Run already shows signs of aquatic life impairment from sulfates and increased conductivity.

The situation could be made even worse, Hansen said, by Patriot Mining's plan to dispose of coal ash from the Morgantown Energy Associates power plant as part of the site's reclamation plan. Hansen conceded that coal ash's alkalinity can be of some help in reducing acid mine drainage from past and current mining in the area, but testified that DEP has not considered the potential long-term implications, such as more concentrated selenium runoff from the mine.

In part, the permit appeal focuses attention on a legal dispute over West Virginia's "narrative" water quality standard.

Unlike "numeric" water quality rules, the narrative standard itself does not specifically include numeric limits on allowable pollution. Instead, the narrative standard simply outlaws any condition that "adversely alters the integrity" of state waters or causes a "significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems."

As part of its mountaintop removal crackdown, EPA issued guidance intended to better define the narrative standard by putting numbers on what constitutes significant adverse impacts on

DEP lawyer Jennifer Hughes argued that her agency has issued its own guidance for the state's narrative standard and that therefore the EPA's guidelines are not legally relevant here. Hughes repeatedly objected to questions and testimony about the EPA guidelines.

"Science informs policy decisions, it doesn't dictate them," Hughes said. "It is the DEP's responsibility to make those policy decisions."

Hughes said that the EPA is seeking to force "unobtainable limits" on West Virginia's mining industry, and McLusky repeated the coal lobby's belief that EPA is putting the health of aquatic insects over the economy of the region.

But Palmer testified that DEP's own water quality guidance does not properly take into account the important functions of aquatic insects that provide food and energy that is vital to the overall health of streams, fish and birds. Changing the number and type of insects can have broader impacts, she said.

"When you shift the makeup of a community, that can cause many changes in ecological processes," Palmer told the board.

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