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MEMORANDUM

TO: MEMBERS OF COAL OPERATORS AND ASSOCIATES

FROM: CHARLES J. BAIRD, CHAIRMAN

SUBJ: U.S. EPA REGION 4 SITE VISIT TO MARTIN COUNTY

On February 4th, representatives from U.S. EPA's Region 4 office in Atlanta came to Martin County to do a site visit in connection with a Section 404 permit currently pending under the Enhanced Coordinated Review (ECP) process. Because of the discussions that occurred, and the information presented by U.S. EPA, this memorandum is being provided to members of the coal associations as it seems apparent that written information, guidance and directives from the agencies attempting to eliminate surface mining in Kentucky will not be forthcoming in any timely fashion. Also, it is critical that all companies belonging to the associations share information about conversations or discussions with these agencies whenever possible as we must work together in order to combat this regulatory assault and keep our companies and employees working.

As noted, the purpose of the visit by EPA Region 4 representatives was to conduct, at their request, a site visit of the areas associated with a coarse fill permit request. As has been typical of EPA's site visits associated with ECP projects, the agency is interested in seeing the watershed, checking conductivity, and asking several questions related to the project. As an example, EPA personnel requested to see the coarse refuse site, all KPDES discharge points associated with the SMCRA permit – not just the project under consideration, and all surface water monitoring points associated with the SMCRA permit.

Also attending the meeting were representatives of Kentucky DSMRE, Kentucky Division of Water, the U.S. Army Corps of Engineers and Congressman Hal Rogers' office.

The EPA Representatives, Stephanie Fulton and Kip Tyler, began the meeting with an overview of the current Corps/EPA Enhanced Review Process. They indicated that there were 108 permit applications held up by EPA which included 49 in Kentucky. Currently, there are 44 Section 404 permits held up as several applications have been withdrawn and EPA expects **all permits** going forward to receive this enhanced review.

The primary focus of the enhanced review process is on five areas: water quality, fill avoidance and minimization, cumulative effects, mitigation, and environmental justice (based on a petition filed by the

Sierra Club and referenced in EPA's National Enforcement Priorities relative to Mining and Resource Extraction). The EPA Region 4 office is adding additional staff that includes seven new personnel for the Wetlands section, two stream ecologists and one mining engineer. These additional personnel will focus, according to the EPA representatives, on all surface mining issues across the board but with particular focus on violations of water quality standards and "anything that has fill material." In response to questions regarding hollow fills, the EPA representatives indicated that EPA was specifically focused on the coal industry, and not concerned with other activities that utilize fill material such as residential or commercial development, highway construction, etc. Additionally, there was discussion on nationwide permitting, particularly for non-coal related activities, and the EPA representatives indicated that it was EPA's intention to eliminate ALL nationwide permitting programs.

The EPA representatives also indicated quite clearly that this focus on coal was politically driven. When told of the coal industry's desire to have clear and consistent rules in order to make business decisions and that compliance requirements when this permit in question was submitted (January 2008) was now somehow inadequate, the EPA representatives said "well, we've had a change in the administration" and that, with regard to EPA's actions against the coal industry, "we had to wait for eight years to do these things."

In discussions regarding the specific permit in question, the EPA representatives indicated that the necessary water quality testing had not been performed. Company representatives outlined for the area in question the Benthic studies performed, and that they were done in a greater amount than required by current law or regulation. Upon that review, the EPA representatives indicated that the benthic studies needed to look at the genus and species level versus the family level as was done originally.

EPA personnel spent considerable time during the meeting discussing their notion that the stream is "impaired" although the stream was not listed on the 2008 303(d) list issued by the Kentucky Division of Water. EPA's determination is based upon a violation of the narrative water quality standards rather than the numeric water quality standards for metals, TSS, etc. The narrative water quality standard states, "Surface waters shall not be aesthetically or otherwise degraded by substances that: ... Injure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish, or other aquatic life" (401 KAR 10:031 Section 2(1)(d)). EPA has determined, based on Greg Pond's work (EPA Region 3), that elevated conductivities cause an adverse physiological response in mayflies. Based on Pond's work, EPA has concluded that any stream with elevated conductivity is "impaired".

With regards to conductivity, the EPA representatives stated that it was the agency's intention to apply a standard of no more than 300 $\mu\text{S}/\text{cm}$ for impairment designations for all streams; and, in addition, EPA would move that no discharge could be made into an impaired stream regardless of that discharge having zero negative effect on the existing impairment. For this particular permit, the stream in question is not impaired but, because it eventually flows into an impaired stream, EPA will not agree to issuance of a discharge permit.

Once that statement was made, there was discussion on possible test or demonstration-type activities to alleviate the discharge and its' effect on conductivity but, quite frankly, there seemed to be little interest from the EPA representatives as to a possible solution for discharge permit issues. They are not there to find solutions that allow permits to move forward.

At this point, EPA has indicated that the issuance of a 402 permit will be required before any 404 permit moves forward in the Enhanced Review Process. Simultaneously, EPA seems to be saying by their actions that they will not agree to Kentucky issuing any 402 permits needed for surface mining operations. Further, it appears that the Corps of Engineers policy on the start of the review time outlined in the Memorandum of Understanding between the agencies will be one that corresponds to the EPA's position – the clock will not start till all permits connected to the 404 are in place.

The tactics being taken by the EPA with regard to surface mining issues are designed to produce the maximum delay and the greatest impairment to planning and permitting. They have a clear agenda, and have been empowered by the Administration to target surface mining in Appalachia. It seems the height of hypocrisy for the Obama Administration to make statements and pronouncements about utilization of coal as part of the domestic energy portfolio and the need for clean coal technology while, at the same time, creating regulatory policies that make it impossible to mine that coal. EPA's actions regarding the 402 permit, the 404 permit, the nationwide permitting programs, and other coal mining issues are part of an aggressive, proactive stance this agency is taking to eliminate surface mining not just in Appalachia but across the country.