

# **Legislative & Regulatory Update**



**Mine Drainage Task Force Symposium**

Jason Bostic

West Virginia Coal Association

March 27, 2012

# Overview



- Regulatory Update
- Legislature and the Coal Industry
- Litigation
- Outlook

# The Assault Continues...

June 11, 2009 MOU:

-SMCRA (OSM)

-CWA (Corps, EPA)

-Section 401

-Section 402

-Section 404



MEMORANDUM OF UNDERSTANDING AMONG THE  
U.S. DEPARTMENT OF THE ARMY,  
U.S. DEPARTMENT OF THE INTERIOR,  
AND U.S. ENVIRONMENTAL PROTECTION AGENCY

IMPLEMENTING THE INTERAGENCY ACTION PLAN ON APPALACHIAN  
SURFACE COAL MINING<sup>1</sup>

JUNE 11, 2009

## PREAMBLE

The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities. These mountains also contain some of the nation's richest deposits of coal, which have been mined by generations of Americans to provide heat and electricity to millions in the U.S. and around the world. After generations of mining, however, the region's most readily available coal resources have diminished, and the remaining coal seams are less accessible to non-surface mining methods.

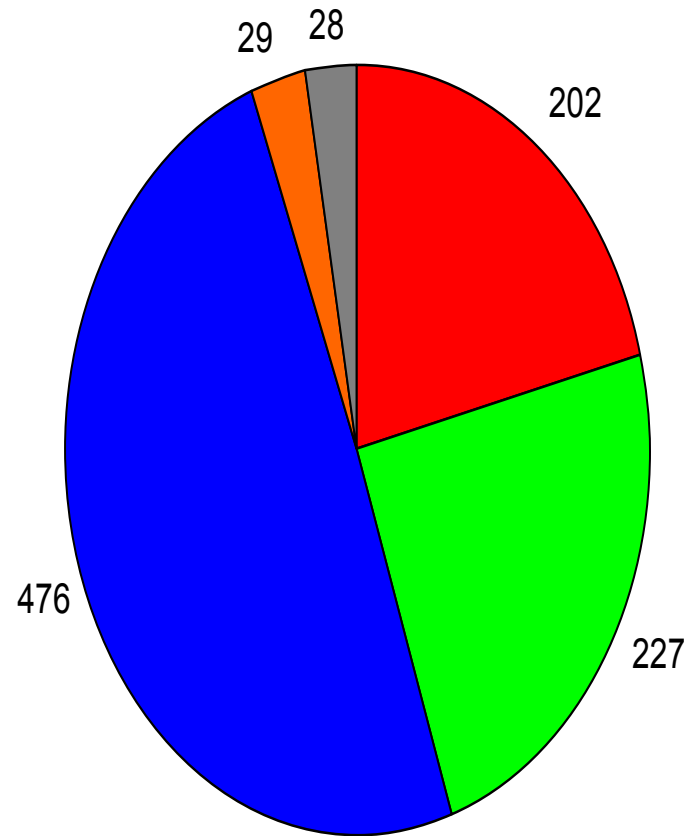
In response, a surface mining technique commonly referred to as "mountaintop mining"<sup>2</sup> has become increasingly prevalent in the Appalachian region. Although its scale and efficiency has enabled the mining of once-inaccessible coal seams, this mining practice often stresses the natural environment and impacts the health and welfare of surrounding human communities. Streams once used for swimming, fishing, and drinking water have been adversely impacted, and groundwater resources used for drinking water have been contaminated. Some forest lands that sustain water quality and habitat and contribute to the Appalachian way of life have been fragmented or lost. These negative impacts are likely to further increase as mines transition to less accessible coal resources within already affected watersheds and communities.

With this Memorandum of Understanding (MOU), the Department of the Interior (DOI), U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps)

<sup>1</sup> For purposes of this MOU, "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

<sup>2</sup> The term "mountaintop mining" may also be referred to as "mountaintop removal" or "valley fill mining."

## Pending NPDES Permit Actions (962 Total)



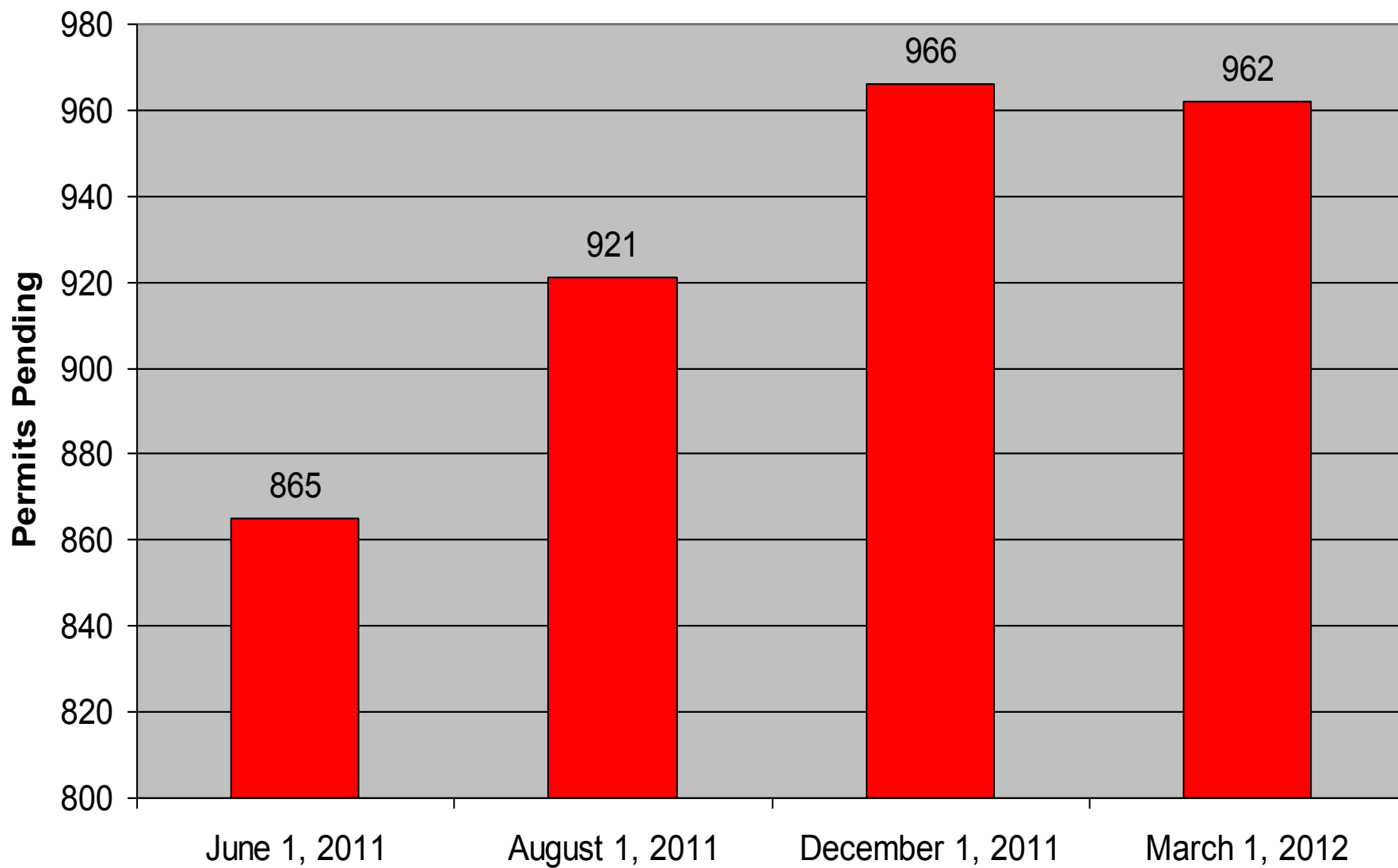
- New Permits
- Permit Modifications
- Permit Reissuances
- Permit Transfers
- Permit Extensions

# Real Crisis Yet to Come

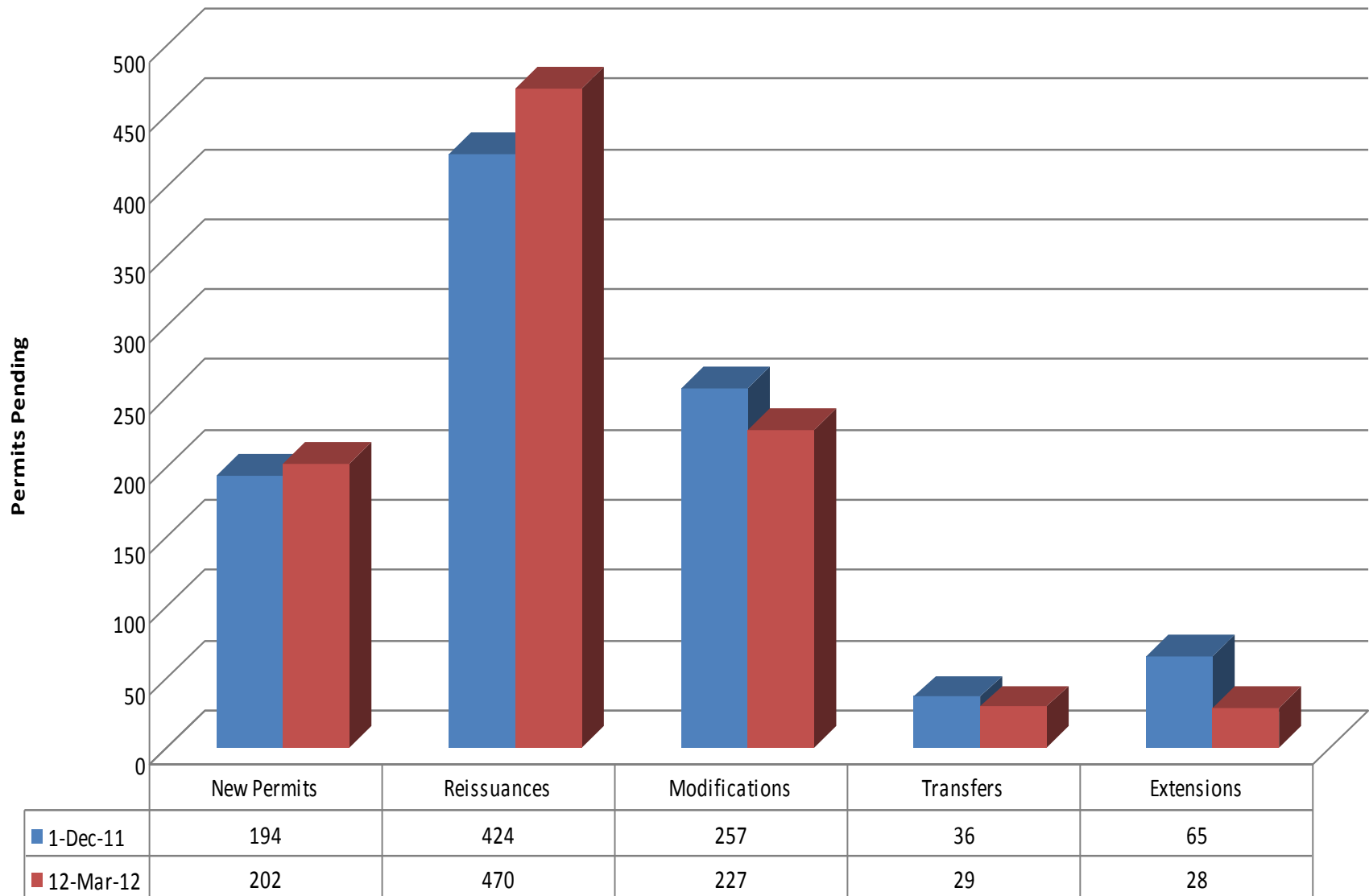
2012-2013 Over  
700 Mining  
NPDES Permits  
will EXPIRE in  
W.Va. and must  
be renewed



## Pending NPDES Permits

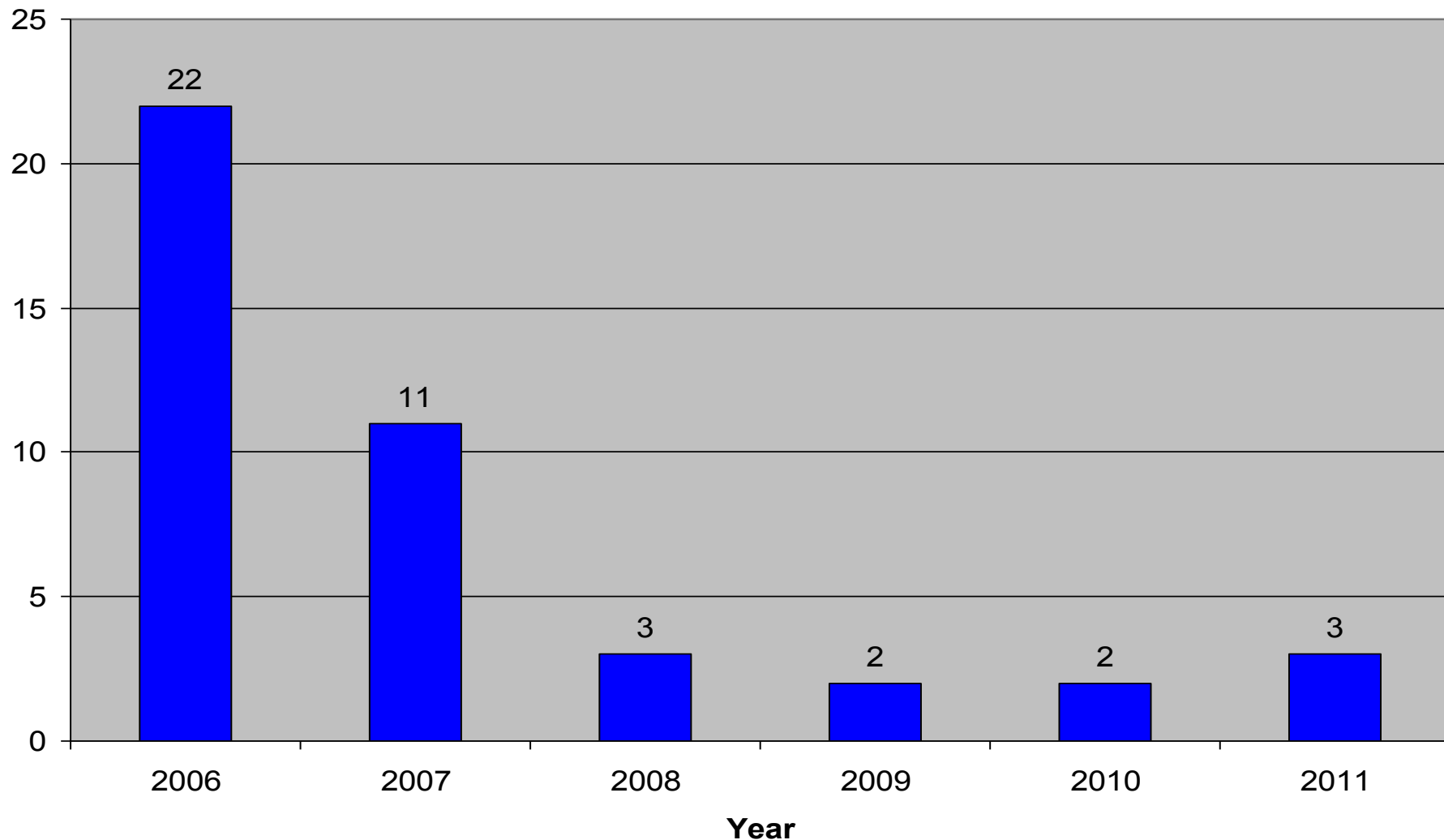


## NPDES Permits Pending: December 1, 2011 / March 12, 2012



# Section 404 Permitting

CWA Section 404 Individual Permits Issued in Huntington District





# New Mining NWP's

- Issued on Feb. 21, 2012

## -NWP 21

-300 Linear Feet / 1/2 acre, No Valley Fills, Linear Restriction Can be Waived by DE After Consultation

## -NWP 49

-Independent Confirmation of 40% Newly Mined Area

## -NWP 50

--300 Linear Feet / 1/2 acre, Linear Restriction Can be Waived by DE After Consultation

# 2012 Legislative Session

- 2,029 Bills Introduced
- 214 Passed
- 116 Bills Related to Coal  
In Some Form or  
Fashion



# Specifics— Legislature & Coal Taxes (Special Reclamation Fund)

## Senate Bill No. 579

(By Senators Kessler (Mr. President), Beach, D. Facemire, Palumbo, Helmick, Hall, Foster and Browning)

[Introduced February 13, 2012; referred to the Committee on Energy, Industry and Mining; and then to the Committee on Finance.]

A BILL to amend and reenact §22-3-11 of the Code of West Virginia, 1931, as amended, relating to the special reclamation tax and funds of the Surface Coal Mining and Reclamation Act; continuing and reimposing the special reclamation tax on clean coal mined at an increased rate; and dedicating portion of special reclamation tax to Special Reclamation Water Trust Fund.

- Senate Bill 579
- *Special Reclamation Fund Tax*
  - Increase SRF Tax (14.4 to 27.9 cents)
  - Entire Increase to Water**
  - Consent Decree**

# Specifics— Legislature & Coal Water Quality

- Senate Bill 615
  - *Coal Mining NPDES Conformity Act of 2012*
- Removes Unique Provision of Coal Mining NPDES Rule that Requires Compliance with WQStd's Regardless of Effluent Limits

COMMITTEE SUBSTITUTE  
FOR  
**Senate Bill No. 615**

(By Senators Kirkendoll, Hall, Wells and Stollings)

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[Originating in the Committee on the Judiciary;  
reported February 24, 2012.]

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A BILL to amend and reenact §22-11-6 of the Code of West Virginia, 1931, as amended, relating to making West Virginia's Water Pollution Control Act consistent with the federal Water Pollution Control Act, also known as the Clean Water Act, by clarifying that compliance with the effluent limits contained in a National Pollution Discharge Elimination System permit is deemed compliant with West Virginia's Water Pollution Control Act.

# Specifics— Legislature & Coal

## Narrative Water Quality Standards

COMMITTEE SUBSTITUTE  
FOR  
**Senate Bill No. 562**

(By Senators Kessler (Mr. President), Beach, D. Facemire, Fanning, Hall, Helmick,  
Prezioso, Plymale and Klempa)

[Originating in the Committee on Natural Resources;

reported February 15, 2012.]

A BILL to amend and reenact §22-11-7b of the Code of West Virginia, 1931, as amended, relating to establishing a public policy for narrative water quality standards; establishing a procedure to determine compliance with the biologic component of the narrative water quality standard; clarifying rule-making authority.

- Senate Bill 562
  - Codifies Legislative Intent re: Narrative Water Standards Interpretation and Implementation (HCR 111)

# **Specifics— Legislature & Coal Mine Safety**

## ■ House Bill 4531

- Comprehensive Mine Safety Legislation
  - Methane Cut-Off (1.25% sustained)
  - Mandatory Drug Testing Program
  - Superintendent to Review Fire boss examinations bi-weekly
  - Codifies 80% Rock Dust Standard
  - Apprentice Miner “Sight & Sound” from 90 Days to 120 Days



# Specifics— Legislature & Coal “Special Reclamation Fund Fix-It”

- House Bill 4609  
(Didn't Make It)
  - Clarified NPDES Liability at SRF sites
  - Termination of Jurisdiction
  - Tax Credit for Voluntary Reclamation of SRF sites



# Specifics— Legislature & Coal

## Legislative Rulemaking-Review

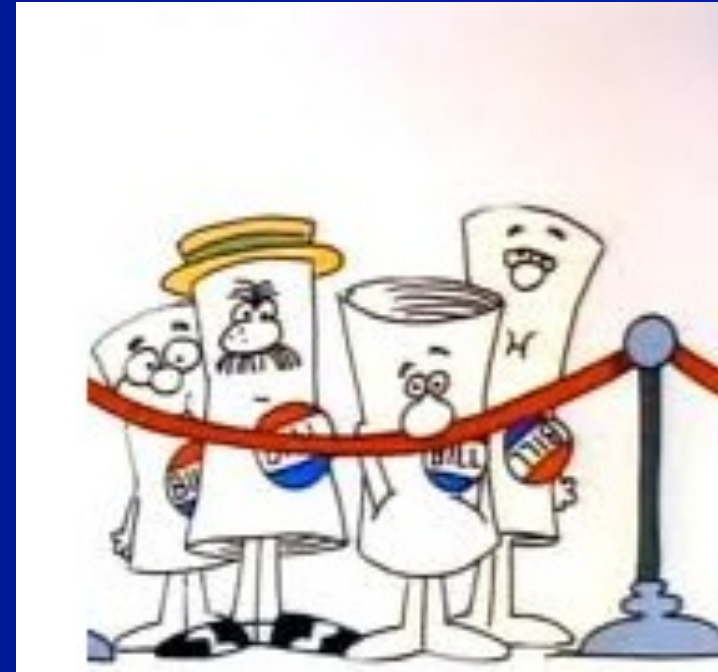
- Senate Bill 402 /  
House Bill 4261
  - Allowed “**federally-mandated**” changes to bypass normal rulemaking process / Legislative review
  - Amendment exempted SMCRA and CWA changes
  - Bill ultimately failed





# Specifics— Legislature & Coal Other Things (Didn't Make It)

- Six bills related to coal slurry
- Bill to mandate a TDS / Conductance standard
- **Certified Sampler Program**
- **NO Mining or Water Rule Packages**



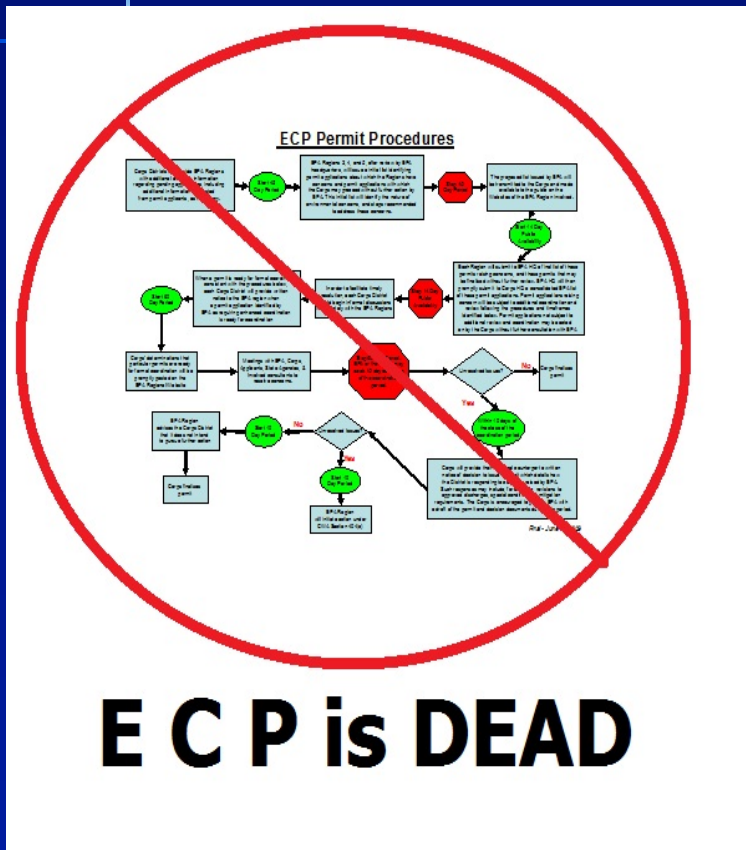
# Litigation:

## *State of West Virginia vs. EPA*

October 6, 2011—

*“ECP Decision”*

(Judge Reggie Walton, D.C. Circuit)



**“It is clear that the EPA has implemented a change in the permitting process.”**

**“EPA has exceeded the statutory authority conferred upon it by the Clean Water Act.”**

# Litigation:

## Spruce Permit Revocation-- March 23, 2012

***“EPA engaged in magical thinking to reach an illogical and impractical conclusion.”***

**“EPA’s position proposes a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof!”**



U.S. District Court Judge Amy Berman Jackson

**“EPA’s decision... has the air of a disappointed player’s threat to take his ball and go home when he didn’t get to pitch.”**

# Other Stuff



## WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION RETIREMENT ELIGIBILITY REPORT

DATA REFRESH DATE 2/29/2012

FISCAL YEAR 2012

	0 to 3 YEARS UNTIL ELIGIBLE	3 to 5 YEARS UNTIL ELIGIBLE	5 to 10 YEARS UNTIL ELIGIBLE	CURRENTLY ELIGIBLE TO RETIRE	GREATER THAN 10 YEARS UNTIL ELIGIBLE	Total Filled FTEs
DIVISION OF AIR QUALITY	7.00	7.00	19.50	9.00	46.90	89.40
DIVISION OF LAND RESTORATION	9.90	10.00	9.00	8.00	29.00	65.90
DIVISION OF MINING AND RECLAMATION	30.00	14.00	30.00	40.00	96.50	210.50

# ***Assessment***

## **2009-2012**



**1/20/09**  
**Inauguration**  
**day**

**First EPA**  
**objection**  
**letters on**  
**404 permits**

**3/10/10**  
**W.Va. Legislature**  
**Passes**  
**H.C.R. 111**

**8/18/10**  
**WV DEP**  
**Narrative**  
**Guidance**  
**Issued**

**7/13/11**  
**House Passes**  
**H.R. 2018**

**3/10/12**  
**W.Va. Legislature**  
**Passes**  
**S.B. 562**

**6/11/09**  
**MOU**  
**& ECP**

**4/1/10**  
**EPA Issues**  
**Conductivity**  
**Manifesto**

**10/6/10**  
**WV**  
**sues**  
**EPA**

**10/6/11**  
**ECP is**  
**dead**

# Outlook

***“EPA’s position... is stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute.”***



**Our Constitution works;  
our great Republic is a  
government of laws and  
not of men.**

**My fellow Americans,  
our long national  
nightmare is over.**

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

**H. R. 2018**

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IN THE SENATE OF THE UNITED STATES

JULY 14, 2011

Received; read the first time

JULY 18, 2011

Read the second time and placed on the calendar

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## **AN ACT**

To amend the Federal Water Pollution Control Act to preserve the authority of each State to make determinations relating to the State's water quality standards, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*



# Outlook / Assessment

## 2012

112TH CONGRESS  
1st Session

### H. R. 2018

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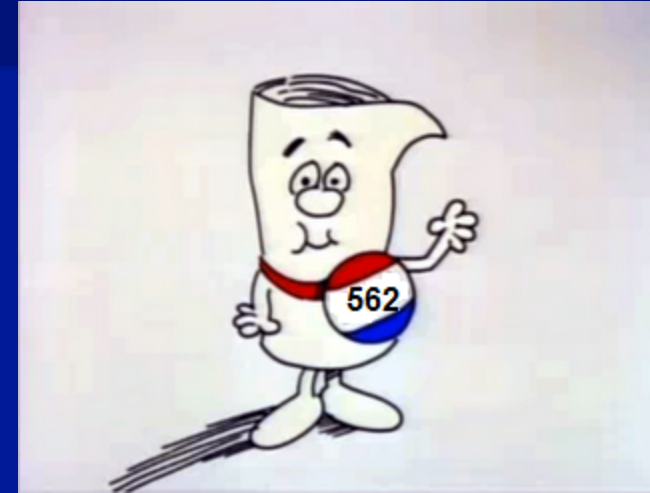
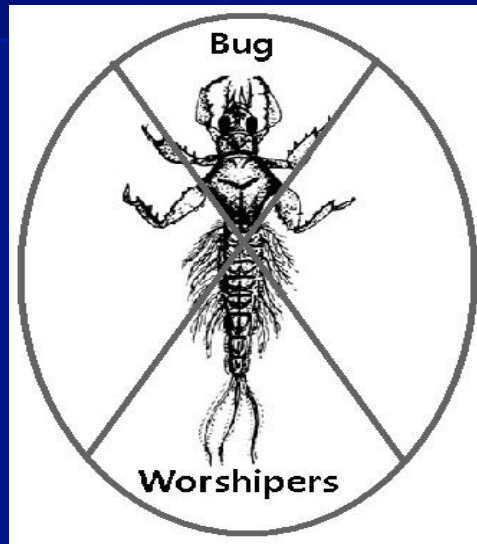
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## Three Years is Long Enough

### *Time to Put the Program Right:*

Courts (ECP, Spruce) + Congress (H.R. 2018) + Legislature (H.C.R. 111 & SB 562) +  
WV DEP + Industry