Clean Water Act & Company: Impact on Mining

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I. INTRODUCTION

A. The 1970s: A new body of federal water quality laws affecting mining:

1. Federal Water Pollution Control Act of 1972 (FWPCA) or more popularly the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq.


6. The "maybes":


7. State versions of the above (particularly water quality and mining reclamation acts).

B. The "bottom line",

1. Water pollution laws seldom present an absolute barrier to mining.

2. They require:
   a. Lengthen planning lead time.
   b. Elevate environmental planning considerations.
   c. Develop contingency plans.
   d. Expect increased government, lawyer, public involvement in all mining phases.
   e. Prepare for "delay."
   f. Calculate as "cost of doing business."

C. Overview of mine pollution:

1. Four basic types: sedimentation (TSS), dissolved solids (TDS), acid mine drainage (AMD), toxics.

2. Two basic means: "point source" (PS) and "nonpoint source" (NPS).


II CLEAN WATER ACT

A. Stated goals:

1. §101(a): "restore and maintain" the Nation's waters.

4. §101(a)(3): "prohibit" toxic discharges
5. Ironically, The Act's control mechanisms are designed to fall short of all of the above goals.
6. §§ 101(b), (e): state primacy and public participation.

B. Key definitions:

3. "Nonpoint source" - § 208+
5. "Navigable waters" - § 502(7).

C. Regulatory scheme - "point sources":

1. Central control mechanism: prohibit "discharge of any pollutant" without a permit - § 301(a).
2. Establish "technology-based" pollution limits:
   a. Existing sources: "effluent limitations"
      i. 1977 "BPT" - § 301(b)(1)(A).
      ii. 1984+ "BCT" for "conventional pollutants" - § 301(b)(2)(E) - and "BAT" for "toxics" and "nonconventional" pollutants - §§ 301(b)(2)(C), (D), (F).
3. Virtually all mining falls into one of three categories established by EPA:
4. "Effluent limitations" (existing mines) have been issued for all three categories; "new source performance standards" only for phosphate and coal mining subcategories.

5. These technology-based ELs and NSPSs are translated by EPA/State into specific discharge numerical limits in the "NPDES" permit - § 402; 40 C.F.R. Part 120; see proposed rules consolidating NPDES (CWA), RCRA, SDWA, PSD (CAA), and 404 (CWA) permits, 44 Fed. Reg. 34244 (1979). The NPDES permit contains:
   a. Effluent limits.
   b. Compliance schedule.
   c. Monitoring and reporting requirements.
   d. Boilerplate.


7. Sanctions - §§ 308, 309, 401(a), 504, 505, 508.

8. Court review - § 509.

9. Special problems:
   a. "Better than best": Water quality related effluent limitations (similar to Clean Air Act's "Non-attainment") - §§ 301(b)(1)(C), 303 (see II.E., below).
   c. Does the NEPA EIS requirement apply - § 511(c)?

D. Non-regulatory scheme - "nonpoint sources":

1. Congress adopted a "planning" (as opposed to regulatory) approach for the difficult problem of NPS.

2. Water quality management (WQM) planning - §§ 208, 303(e).

3. Is mining a "point source" or a "nonpoint source"? U.S. v. Earth Sciences Inc., 13 BNA ERC 1417 (10th Cir. 1976).
4. Impact of § 208 planning on mining:

   a. Theoretically: can lead to new, enforceable requirements:

      i. Prohibit point source permits in conflict with 208 plans - § 208(e).

      ii. 208 "best management plans" for nonpoint source pollution can be required of point source permit holders - § 304(e). See, e.g., proposed spill prevention control and countermeasure regulations, 43 Fed. Reg. 39276 (1978).

      iii. Methods to control nonpoint source mining pollution required - § 304(f)(B).

   b. Practically, § 208 planning under CWA "going nowhere slowly" - see GAO, CED-78-167 (12/11/78).

   c. But, SMCRA and the new permanent program regulations more than fill the gap for surface coal mining (see III, below).

E. Water quality standards (WQS) - § 303.

   1. Important carryover from old Act:

      a. Most significant for mining in western basins where natural and NPS pollution high.


   2. Setting WQS - §§ 303(a)-(b), (c).

   3. Water quality based effluent limitations - § 301(b)(1)(C); e.g., U.S. v. Homestake Mining Co., 13 BNA ERC 1018 (8th Cir. 1979).

   4. Total maximum daily loads - § 303(d).

   5. Integrated in WQM planning - §§ 303(e), 208.

F. Dredge and fill permit program - § 404.

   1. Entirely separate permit process applicable to mining - anytime there is a "discharge" of dredged or fill material into the navigable water.

   2. Administered by U.S. Army Corps of Engineers.

   3. State program delegation - § 404(g).
III SURFACE MINING CONTROL AND RECLAMATION ACT of 1977

A. SMCRA sets up strict water quality requirements as part of exploration, mining, and reclamation.

1. Act applies to:
   a. Coal mining only – §§ 102, 501 et seq.
   c. On public or private property – §§ 501 et seq.

2. Sets up another federal permit program, delegatable to the states – §§ 501-06.

3. Provides a weighty series of Congressional standards governing water quality impacts of stripmining e.g.:
   a. Backfill to prevent toxic leaching – § 515(b)(3).
   b. Grading to restore drainage, cover acid-forming and toxic layers – do.
   c. Stabilize to prevent erosion – § 515(b)(4).
   d. Control water quality in impoundments – §515(b)(8).
   e. Minimize disturbance to hydrologic balance – § 515(b)(10).
   f. Refrain from road construction in stream beds – § 515(b)(18).
   g. Underground mine requirements – §516(b).

B. A two-tiered federal regulatory program is in process:

2. "Permanent regulations" - § 501(b).
   a. Effectiveness in limbo.

C. Effect: SMCRA succeeds where CWA failed in merging controls over both point and nonpoint source mining pollution.