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## Court rejects DEP on mine water pollution

Emboldened by ruling, activists set sights on more abandoned land

By Ken Ward Jr.

Read the ruling [here](#).

CHARLESTON, W.Va. -- A federal appeals court on Monday affirmed a decision that requires West Virginia regulators to improve the treatment of acid mine drainage and other pollution at abandoned coal mines that are being reclaimed by the state.

The 4th U.S. Circuit Court of Appeals upheld a January 2009 ruling that the state Department of Environmental Protection must obtain water pollution permits for mine sites being cleaned up by its Special Reclamation Fund program.

The lower court ruling by U.S. District Judge Irene M. Keeley in Northern West Virginia, and a similar decision by U.S. District Judge John T. Copenhaver in Southern West Virginia, would force the DEP to improve treatment so discharges from abandoned mine sites comply with state water pollution standards.

"The state was running these sites 'off the books' to try to escape accountability for necessary water treatment," said [Jim Hecker](#), environmental enforcement director at [Public Justice](#) and lead lawyer for the West Virginia Highlands Conservancy, which brought the case.

DEP spokeswoman Kathy Cosco said agency officials are disappointed with the ruling and are considering their options.

Eventually, the court ruling could force the DEP and state lawmakers to increase coal taxes to fund millions of dollars of pollution reductions at former coal-mining sites across West Virginia. It also could affect how the DEP handles permit applications for future operations where acid mine drainage is predicted to continue after mining is completed.

In rejecting the DEP's appeal of Keeley's earlier decision, a three-judge panel of the 4th Circuit turned down arguments that requiring permits and pollution compliance at these abandoned mines was impractical, if not impossible.

"These arguments about the heavy burdens imposed by the permit program are hardly novel," Judge J. Harvie Wilkinson wrote in the 17-page 4th Circuit decision. "Any time Congress imposes a permit scheme, some regulated entities will complain that the permits impose onerous costs and will led to all manner of hazardous consequences. We are not in the business of rewriting laws whenever parties allege it is difficult to comply with them."

The 4th Circuit also rejected the DEP's argument that it did not have to obtain permits because the original pollution was caused not by the agency, but by coal companies that operated mines at the sites.

"The statute takes the water's point of view: Water is indifferent about who initially polluted it so long as pollution continues to occur," Wilkinson wrote.

The case focused on long-standing problems with West Virginia's Special Reclamation Fund, a program meant to clean up coal mines that were abandoned after the 1977 federal strip-mining law was created. Mines abandoned before 1977 are covered by the separate Abandoned Mine Lands program and funded by a federal tax on coal production.

Over the years, the special reclamation program has never had enough money. Thousands of acres of abandoned mines sat unreclaimed. Hundreds of polluted streams went untreated.

Historically, the fund has been short of money because coal operators had not posted reclamation bonds sufficient to cover the true cost of mine cleanups at sites they abandon. A state tax on coal production was never set high enough to cover the difference.

Today, the DEP operates treatment systems at dozens of abandoned mine sites, but the agency does not reduce the pollution from those sites enough to meet water quality limits, and does not obtain Clean Water Act permits for the site discharges.

The case before Keeley concerned 18 abandoned sites in north-central West Virginia, while the lawsuit before Copenhaver focused on three abandoned mines in the state's southern coalfields.

Hecker said environmental groups would now try to force the DEP to obtain permits for its discharges at 131 similar mine sites not included in the original lawsuits.

"The district court ordered the state to obtain the required discharge permits, and the 4th Circuit today affirmed that decision," Hecker said. "The state will now have to comply with the water-quality standards it is violating."

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