

# Coal, Commerce and Liberty



by Michael Maharrey

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Over the last couple of months, we've seen increased media attention focused on state efforts opposing the federal health care act passed last year. Along with state legal challenges and health care freedom legislation focused on the insurance mandates, [eight states recently proposed bills declaring the entire health care act null and void](#), and imposing criminal penalties on any agent enforcing the act within their state borders.

But health care does not stand alone as an issue drawing the ire of state lawmakers. Many state legislators have grown increasingly frustrated with overreaching federal activity into areas rightly reserved to the states by agencies such as the EPA and FDA.

West Virginia Assembly Delegate Gary Howell (R-Keyser) recently introduced legislation into the House of Delegates "establishing that the environmental regulation of coal and certain coal products mined and used within the state are exclusively regulated by the West Virginia Department of Environmental Protection."

[H.B. 2554](#) finds its basis in the Ninth and Tenth Amendment of the U.S. Constitution, as well as the West Virginia state constitution.

"The regulation of intrastate commerce, including the natural environment as affected by intrastate business, is vested in the states under the Ninth and Tenth Amendments to the United States Constitution and is specifically retained by the State of West Virginia according to Section 2, Article I of the West Virginia Constitution."

Howell said a recent EPA decision to pull a permit and shut down Spruce 1 mine shocked many state lawmakers and increased the possibility of passing the legislation.

"The odds jumped as West Virginia legislators are looking hard to fire back," Howell said.

Spruce 1, located in Morgan County, was the largest surface mine permitted in Appalachia. The U.S. Army Corps of Engineers issued the permit in 2007 after a 10 year approval process, which included an assessment indicating the mine met clean water standards. But on Jan. 13, the EPA vetoed the permit and shut down the mine.

"EPA is taking this action under Section 404(c) of the Clean Water Act because the discharges associated with the DA Permit in Pigeonroost Branch, Oldhouse Branch and

their tributaries will have unacceptable adverse effects on wildlife,” reads the agency’s final determination. “In addition, the impacts downstream due to the destruction of those streams will result in unacceptable adverse impacts to wildlife and also warrant EPA’s action under Section 404(c).”

Arch subsidiary Mingo Logan Coal Co. operates the mine. The company stands to lose a \$250 million investment and officials estimate it will cost more than 200 high paying jobs.

“To give the EPA that much authority and the willingness to use it means that investors are going to be very cautious about investing in supplying energy when the federal government can nullify those investments and send your workforce home simply because they, on second thought or hindsight, decide that’s what they want to do,” Bill Bledsoe, executive director of the Norton-based Virginia Mining Association, said. “This EPA veto power doesn’t extend only to coal; it extends to anything. It means EPA can come in and shut any operation down without due process.”

Howell said the shutdown of a single mine represents just the tip of an iceberg, with federal regulation hobbling West Virginia’s coal industry and hitting the state hard in the pocketbook.

“It is costing thousands of jobs and millions in reduced taxes to the state,” he said.

Howell said the bill will face its biggest hurdle in the judiciary committee. He fears committee members may kill the bill, thinking it unconstitutional. But Howell has already considered that possibility.

“Constitutional lawyers from the Cato Institute and the Goldwater Institute have both looked at the bill and say it passes Constitutional muster,” Howell said.

Federal judges would likely disagree. [Courts have stretched the commerce clause far beyond its intended meaning](#), ruling that Congress can regulate virtually anything. But the framers intended the commerce clause to simply regulate trade between states, and never envisioned federal power extending inside state borders or to areas such as mining. James Madison wrote:

*“It is very certain that [the commerce clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.”*

(For an in depth look at the original understanding of commerce click [here](#).)

Howell said that his concerns run even deeper than protecting the Mountaineer State’s most important industry. It’s a matter of liberty.

“I’m the direct decedent of one of George Washington’s soldiers. For more than 230 years my family has defended the Constitution by force of arms in the service of our nation,” he said. “I have chosen to serve our nation as an elected official. I’m tired of big government ignoring the Constitution and damaging my state and my nation. I’m fighting back to provide jobs and economic stability to West Virginia by using the very tool the founders gave us as state legislators, the 10th Amendment.”

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