



## Our coal, our rules in West Virginia?

By: Taylor Kuykendall – March 20, 2013

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Some members of the West Virginia Legislature would like to see the feds keep out of permitting matters, at least with regards to coal that is mined in and never leaves the state's borders.

The bill is the idea of Delegate Gary Howell, R-Mineral, who first introduced the bill in 2011. Basically, the bill says the ability to approve and deny coal permits would be taken from the U.S. Environmental Protection Agency because interstate commerce has not occurred, and should thus be treated constitutionally as a state matter.

The bill has been reintroduced to the 2013 Legislature as House Bill 297.

"The recent actions of the United States Environmental Protection Agency, specifically affecting Logan County, by denying or shutting down mining permits long after the basic permits had been approved presents the threat of the United States Environmental Protection Agency shutting down all coal mining in West Virginia, costing the jobs of thousands of miners and driving the state into bankruptcy," the bill states, referencing the Spruce mine permit, a large operation that had its permit revoked by the EPA after U.S. Army Corps of Engineer approval.

"Changing the rules after the permitting process has long been in effect is improper, illegal and amounts to the executive branch of the United States legislating new law, without authority, proper procedure and with no protection to the West Virginia coal industry or its employees."

The West Virginia Department of Environmental Protection would instead regulate intrastate coal permits. The mine operations would still be held accountable for compliance with state and federal environmental laws.

Currently, the EPA permits mining related discharges into U.S. waters under section 404 of the Clean Water Act. The EPA reviews those permits, first approved by the U.S. Army of Corps of Engineers. The EPA can reject the permit if it does not meet legal requirements.

The CWA also gives the EPA authority over construction of valley fills, road crossings, mine face-ups, coal waste impoundments, in-stream mining and other coal mining-related activities in U.S. waters.

Delegate Josh Stowers, D-Lincoln, is lead sponsor the Democrat-branded version of the bill this year, which was discussed Wednesday by the House Energy, Industry and Labor, Economic Development and Small Business Committee. The bill has attracted a number of both Democrats and Republicans for support in the House.

"We do export coal around the country, around the world, but there is a set volume 20 or 22 percent, about 32 million tons we consume within the borders," West Virginia Coal Association Vice President Chris Hamilton said during the committee meeting.

However, some delegates on the committee were skeptical of the constitutionality of the bill.

"I'm incredibly sympathetic to the folks who are trying to make a living and generate power in West Virginia," said Delegate Stephen Skinner, D-Jefferson. "I'm going to do in my role whatever I can to see that done in a safe way. This bill is unconstitutional, however. It's going to waste a lot of folks' time. I understand the point and what's trying to be done, but it's unconstitutional. For that reason, I'm going to vote no."

The Goldwater and Cato Institute have already reviewed Howell's original version of the bill and said it passed constitutional muster. The American Legislative Exchange Counsel has used the bill as an example of model legislation for representatives of other states.

Hamilton also thought the bill would be proven constitutional and cited the John Amos Power Plant as an example of a large in-state user of West Virginia coal.

Hamilton said that the bill might also encourage the West Virginia plants to buy more West Virginia coal.

"There's a universe of 600 to 700 mining permits in some state of federal approval," Hamilton said, adding that localizing permitting to the state level could speed development. He said the state has lost marketing opportunities due to a lack of permits.

Delegate Mike Caputo, D-Marion, is a United Mine Workers of America representative. He said he was concerned that lifting EPA requirements for some could put some operators that export in-state at a disadvantage, a point Hamilton said was "conceivable."

"My concern is, and I'll take Harrison Power Plant for example, fueled largely by Robinson Run operation," Caputo said. "They also ship coal all over the world. They would not receive this same privilege as an operator selling coal strictly in state of West Virginia. That concerns me."

The committee also expressed concerns about how the coal would be catalogued and tracked to ensure interstate commerce had not occurred.

Delegate Josh Nelson, R-Boone, added an amendment to the bill that would afford the same permitting authority to the oil and gas industry. Nelson's amendment was adopted and the bill passed to the general floor, but will first be reviewed by the Judiciary Committee.