

EPA's Selenium Decision Will Transform Coal War

By **Sean McLernon**

Law360, New York (August 29, 2013, 5:38 PM ET) -- The U.S. Environmental Protection Agency's upcoming decision on Kentucky's proposed water-quality standard for selenium will carry significant weight in the ever-expanding battle over coal, potentially providing financial relief to the energy industry and making it tougher for environmental groups to sue, experts say.

Current selenium limits in states like West Virginia have helped the Sierra Club and other nonprofits force coal companies to hand over millions of dollars in fines and cleanup costs, but those standards are based on older EPA water criteria and guidance that hasn't been revised in nearly a decade. New data has suggested less stringent requirements would be adequate and the EPA has said it is updating the acute and chronic freshwater ambient water quality standards for selenium, though the agency has yet to act.

Kentucky is now trying to move ahead while the agency drags its feet, having developed its own criteria with help from the EPA and submitted it for federal approval. The proposal would require that high selenium levels be present in fish tissue before triggering a violation, and it would likely be emulated by neighboring states if it gets the green light from the EPA.

In taking the initiative, Kentucky is hoping to put more regulatory control in its own hands on an issue that has been litigated frequently in other states like West Virginia, according to Crowell & Moring LLP partner Kirsten L. Nathanson.

"The environmental groups have been driving enforcement through lawsuits," Nathanson said. "Kentucky is trying to find an instructive solution to these issues and avoid some of these ad-hoc enforcement actions by taking affirmative control of its regulatory program for selenium."

The compliance costs stemming from the current EPA standard has made selenium a core regulatory hot-button issue for U.S. coal mining, as the chemical often contaminates streams when coal seams and rock layers are exposed during surface mining.

Environmental groups have been urging the EPA to reject Kentucky's proposal, arguing it would increase the acute selenium standard to more than 12 times the current level and would be nearly impossible to enforce. The industry has pushed back, pointing to growing consensus among scientists that examining the direct impact on aquatic life is the best way to determine if selenium is harming fish.

Kentucky has science on its side, according to Barnes & Thornburg LLP partner Fredric P. Andes, who leads the firm's water team. Scientists have told him that the standards should focus more on the concentration of selenium in fish because it is a better measure of the chemical's impact.

"Does it mean they are less stringent in terms of the level of control? Probably so," Andes said. "But more to the point is [that] scientists are saying this is more accurate."

The Sierra Club has filed numerous complaints against companies including Consol Energy Inc. and Fola Coal Co. LLC over chemicals that seep into the water from mine runoff. The group has faulted Kentucky for failing to impose selenium effluent limits on any coal mines despite "abundant evidence" of high selenium discharges.

Sierra Club President Michael Brune wrote a letter to new EPA Administrator Gina McCarthy last week asking the agency to deny Kentucky's proposal and move ahead with "strong, enforceable water-column based standards" to protect all aquatic life. Fish tissue sampling is much more costly and time-intensive, making Kentucky even less likely to enforce the standards, according to Brune.

"Fish tissue sampling also presumes the presence of fish in the receiving streams, but most fish species have already been extirpated from the streams below coal mines," Brune wrote in the letter. "Citizen groups who currently fill the enforcement gap will similarly be unable to satisfy the burdensome fish tissue sampling requirements, leaving the revised standards unenforced."

Other Appalachian states like West Virginia, Virginia and Ohio could easily follow Kentucky's lead if the EPA endorses the proposal. Brune claims that would lead to widespread harm to aquatic life.

Meanwhile, the coal industry is arguing that the quality of the science should be the No. 1 concern of federal and state governments as they consider water quality standards. EPA last updated its national recommended ambient water quality criteria for selenium in 1999 and issued draft selenium criteria in 2004 without ever finalizing the proposal.

"The current standards for selenium are outdated and based on problematic studies," Andes said. "They are far too low and far more stringent than they should be. We don't think it makes sense to make people spend millions of dollars when they are not causing a problem."

The EPA is starting to do more testing of aquatic life as part of its standards, according to Andes. He pointed to the agency's standards for mercury, which initially measured only what was in the water but now looks at contamination levels in fish.

"It is really the direction that regulators have been going for a number of pollutants," Andes said.

The deadline for the agency to make a decision on Kentucky's plan has already passed, but the EPA has said it has not yet concluded its review. No matter what the EPA does with the proposal, however, a court battle over the agency's decision won't be too far behind, according to Nathanson.

"I would have a hard time seeing this not end up in the courts in one form or another," Nathanson said. "There's a lot of money at stake and there's been so much energy put into this issue by all sides. I can't imagine EPA's approval or rejection would be the final word."

--Editing by Elizabeth Bowen and Katherine Rautenberg.