Ohio Environmental Council

1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212

614 487-7506
www.theOEC.org

[UNLEASHING THE POWER OF GREEN]

Testimony of Trent Dougherty, Director of Legal Affairs, Ohio Environmental Council

Before the Ohio Senate Environment and Natural Resources Committee
Honorable Tom Niehaus, Chair
Honorable Tim Schaffer, Vice Chair
Honorable Sue Morano, Ranking Minority Member

Thursday, December 4, 2008 – Statehouse, Columbus, Ohio

Subject: Ohio Senate Bill 386 – Coal Regulation

Chairman Niehaus, Vice Chair Schaffer, Ranking Member Morano, and Members of the Ohio Senate Environment and Natural Resources Committee:

Thank you for this opportunity to testify today on Ohio Senate Bill 386 (As Introduced). My name is Trent Dougherty and I am Director of Legal Affairs for the Ohio Environmental Council (www.TheOEC.org). The OEC is a non-profit network of more than 100 local and state environmental-conservation organizations. Our mission is to secure healthy air, land, and water for all who call Ohio home.

The OEC respectfully opposes Senate Bill 386. Not because we believe that jobs are not important, because clearly they are. Not because we believe that coal has no place in America's energy future, because clearly it does. And not because we believe it is not possible to mine coal responsibly, because responsible coal operators have proven that they can.

The OEC opposes Senate Bill 386 because:

1. Senate Bill 386 is built on a pair of dubious premises.

First, the bill supporters would have you believe that the current system of water permitting at the Ohio EPA is absolutely broken and needs a complete overhaul. Their supporters point to the transfer of the water quality permitting program for animal livestock feeding facilities from the Ohio EPA to the Ohio Department of Agriculture as proof positive that such as transfer is achievable, even desirable.

We do not accept this assertion. Consider the following:

- Unlike the animal agriculture issue that involved an operator (Buckeye Egg) that the Ohio Department of Agriculture termed a "bad actor" and that the Ohio EPA could not seem to control (and of which the State eventually moved to revoke its operating permits), to our knowledge there does not exist a similar rogue coal operator – at least not one that is beyond control.

100% RECYCLED

- It is our understanding that, according to the Ohio EPA, there is not a single coal permit application for a Clean Water Act Section 401 Water Quality Certification currently pending before the Ohio EPA that has exceeded its 180-day permit review deadline. Although the OEPA must remain vigilant, the new Administration has made good on its goal to clean up the backlog of pending permits.

- The Ohio DNR is a responsible and well respected regulatory agency. We have the utmost regard for its officials and staff. However, it also is true that DNR has been unable to meet all of its responsibilities to implement and enforce all provisions of the federal Surface Mining Control and Reclamation Act (SMCRA) and for more than 25 years has been operating under conditional approval of a portion of its coal program.

- A primary point of contention is the draft denial that the both the Ohio EPA and the Ohio DNR have proposed for a draft permit submitted by a single operator for a single permit – the so-called "Casey Run" permit application. The operator proposes to build a massive coal waste impoundment along six miles of headwater stream in Belmont County. Current Ohio law does not do not allow the construction of a coal waste impoundment in the high-quality Casey Run. To our knowledge, this is the first 401 Water Quality Certification for coal that has been denied in Ohio in more than a decade.

If this system is so horribly broken, why hasn't the coal industry raised this concern long before now—in the closing weeks of this lame duck session of the legislature? If it was so critical to pass this legislation, why did the industry wait until the public would have only a few weeks to learn about this dramatic change in regulation? Why must this legislation suddenly be passed by December 31, 2008?

Second, the bill's backers would have you believe that transferring the water permitting program from the EPA to the DNR will in and of itself suddenly keep and grow Ohio coal jobs.

How?

Given that the DNR would have to administer the exact same State and Federal water quality laws as does the Ohio EPA, and given that both the EPA and the DNR have jointly reached the same conclusion and jointly have expressed their deep misgivings about the high-profile Casey Run permit application...how, then, will simply moving the permitting authority from one agency that opposes this permit to another agency that opposes the permit resolve the industry's concerns over this high-profile "test case" – and, moreover, over constructing slurry impoundments in streams?

It won't ...unless Senate Bill 386 does something more than simply transfer the program from one agency to another.

2. Senate Bill 386 is NOT environmentally neutral:

The bill's backers claim that Senate Bill 386 does not in any way weaken existing environmental protections. This is not true:

- The bill's proposed amendment to O.R.C. Sec. 6111.30 (p. 82, lines 2533-2535) is a major rollback of clean water protections. Under Ohio law (OAC 3745-1-07), projects that require a Federal Clean Water Act Section 401 water quality certification shall "maintain and protect" all "existing uses...and the level of water quality necessary to protect existing uses." Under the law, "There may be no degradation of water quality that results in either a violation of the applicability of the water quality criteria for the designated uses...or the elimination or substantial impairment of existing uses." In conjunction with and in fulfillment of this requirement, O.R.C. Sec. 6111.30 requires that a use attainability analysis must be performed for any 401 project that involves a stream for which a specific aquatic life use designation has not been made.

Senate Bill 386 guts this requirement. Under the bill, applicants no longer will need to obtain a determination of the aquatic uses of a stream proposed for filling, if one does not already exist. This "Don't Ask, Don't Tell" loophole will engender the silent filling of unknown numbers and miles of streams and the foreclosure of untold public benefits and the wildlife resources associated with those streams. The public may never know how many healthy streams that otherwise would have been preserved may be forever filled with coal waste. Their destruction will be swift and complete.

- Current Ohio law exempts the use of coal combustion byproducts from three sections of O.R.C. Chapter 6111—the Ohio Water Pollution Control Act. Senate Bill 386 (Sec. 1513.02 – p. 4, lines 90-91) appears to expand this to exempt this material from the entire Chapter 6111 and the rules adopted under it—all 88 different sections (if our addition is correct) of the Revised Code. We are not certain of the intent or the potential impact of this colossal expansion of the existing exemptions. This is potentially a very serious concern, as coal combustion waste byproducts contain toxic heavy metals. We wonder if this is an attempt to divert certain coal combustion waste byproducts from a landfill to reclamation uses which have minimal engineering protections to protect groundwater resources from the migration of heavy metals. This, however, is only speculation. At a minimum, this law change commands careful scrutiny—and it clearly is an environmental weakening current law.

- The bill would transfer the authority of the State Environmental Review Appeals Commission (ERAC) to review appeals of Clean Water Act Permits and transfer it to the State Reclamation Commission. The Reclamation Commission, as it is currently structured, does not have the expertise or background that is required to hear appeals of water quality issues. In addition, the Reclamation Commission has built a less than distinguished track record, frequently siding with industry to the detriment of responsible regulation of coal mining. The Taft Administration actually proposed its abolition and replacement with the ERAC or a similar panel. The Environmental Review Appeals Commission that currently hears these appeals consists of members with vast more experience in pollution control and abatement technology, ecology, public health, environmental law, etc.

Senate Bill 386 is a complex bill that involves many proposed law changes. We respectfully urge the Committee to consult with the OEPA and the DNR to gain their perspective on the bill and how its operations may affect protection of air, land, and water resources.

3. Senate Bill 386 does NOT promote efficiency.

Transferring regulatory authority over clean water from the Ohio EPA to the Ohio DNR may sound reasonable, but consider the following:

- The Ohio EPA – not the Ohio DNR – has 30 years of experience with permitting, inspection, and enforcement of federal and state clean water laws and rules. Senate Bill 386 asks you to jettison that experience and start all over at another agency. That makes about as much sense as putting term limits on lawmakers.

- The Ohio DNR will have to build a new program – a program that complies with the same Federal and State laws with which the EPA must enforce. This is like tearing down an existing fire station and rebuilding it -- using the same bricks and mortar -- across the street. And then hiring and training a brand new class of firefighters. This will be more expensive than keeping the "firefighters" in the existing "fire house." The bill even anticipates this. It expressly authorizes the hiring of new staff, paying independent contractors, and paying overtime.

- Incidentally, those original "firefighters" and their "fire station" will still remain at the Ohio EPA. While

reclamation operations are being conducted, the OEPA would retain jurisdiction at all other sites. In effect, there will be a duplication of services and duplication of the expertise needed to perform the functions of these programs. OEPA has the infrastructure, including scientists, already in place to administer these programs. Transferring jurisdiction would require DNR to develop a similar infrastructure.

Is that how you spell efficiency?

- The bill may even be missing a critical “service counter” from the “1-Stop Shop” for coal mining permits that its backers suggest: air pollution control permits. At best, the bill is unclear about with which agency the authority to issue air permits would reside. Ohio EPA has issued air permits to approximately 85 coal mining/coal processing facilities, although some of those facilities are now shut down. We suppose that a new “firehouse” could be built and a new “class” of “firefighters” recruited and trained at DNR to issue air permits. Eventually, the DNR could even build up the 30-year expertise that the Ohio EPA has achieved.

Again, is that how you spell efficiency?

4. Senate Bill 386 poses an unknown price tag.

Why would the coal industry and its backers be supporting legislation that allows for the DNR to ask for up to a four-cent increase in coal severance tax to implement the bill?

Coal industry leaders are smart businessmen. That’s how they produced and sold 23 million tons of coal in Ohio in 2007 with a value of $655 million. But let’s be clear—Senate Bill 386 does not commit the coal industry to a tax increase. It only allows for DNR to ask for a tax increase.

The DNR does not need additional legislation to request an increase in the coal severance tax. There was no special legislation needed to authorize the DNR to request the an increase in the coal severance tax in Ohio House Bill 443 from the 126th General Assembly in 2006—a tax increase that was supported by the coal industry.

As you may recall, though, DNR Assistant Director Glenn Alexander did make a plea for an additional two cents a ton tax increase at one of the last Senate committee hearings on the bill. The industry did not agree to another two cents in severance tax, and the General Assembly did not approve it.

We believe that DNR needs more funds to administer its existing coal mining programs. In fact, the OEC would welcome an increase in the coal severance tax. That’s because, for years, the Ohio has struggled to adequately fund an adequate coal regulatory program.

The Federal Office of Surface Mining’s (OSM) annual evaluation summary report of Ohio’s regulatory and AML programs issued in September, 2008 , observed:

“As previously reported, questions about adequate staffing to carry out all program requirements have existed for several years. Ohio continues to point to inadequate staffing resources as the main cause of incomplete implementation of several program areas.”

As the OSM report acknowledges, the Strickland Administration and the General Assembly deserve credit for freeing up $1.5 million in General Revenue Funds for Ohio’s coal regulatory program this past year:

“Despite serious budget restraints on other program areas within the State, Ohio’s coal regulatory program recently received additional funding that should help stabilize and rebuild the program. This new funding

source is from General Revenue Funds. The State's share of funds supporting the coal regulatory program is primarily from an excise tax on coal production."

This begs a question: Should the General Assembly move the water permitting program for coal from the EPA—which is 100% independent of the GRF—to the DNR—which is partially dependent upon the GRF—can the public and businesses look forward to their tax dollars and the GRF to be a continuing revenue source for oversight of the coal industry? Is the coal industry prepared to pledge its support to hold the GRF harmless as a future funding source for any future revenue needs for the EPA's and the DNR's coal programs?

Finally, before approving a new regulatory scheme that likely will result in an increase in State spending, wouldn't it be prudent to first require a cost-benefit analysis?

A Fiscal Note exists. We respectfully urge the Committee to ask DNR if the note looks accurate and complete.

Alternative Solutions

At this point, you may be wondering how can Ohio develop its coal resources in an environmentally responsible way? In particular and most urgently, is there a way to responsibly develop the coal at the mine
proposed in the "Casey Run" permit?

That is a fair question. We respectfully suggest:

1. Instead of investing precious time and energy in litigation over the proposed permit or in an end-of-session, major rewrite of Ohio water quality and mining law, why not encourage the interested parties and the Administration to cooperatively search for viable alternatives, such as:

- Building a slurry line to an alternative, lower-quality stream
- Injecting coal waste back underground
- Drying and disposing of the coal waste in an above-ground landfill

None of these alternatives are cheap. None of these alternatives are environmentally benign, either. But—if a suitable alternatives could be identified—it could accomplish the goal of developing the coal resources while still mainlining the public benefits of Casey Run and other high-quality and headwater streams. And a reasonable alternative may be arrived at earlier that DNR could even hope to begin to build with a whole new permitting program.

2. Strive for balance. The coal industry believes it has been grievously harmed by state regulators. Our organization looks at Senate Bill 386 as legislation by, of, and for the coal industry. Are there not other opinions and sources of information?

3. Get at least a third opinion on Senate Bill 386 from the Ohio EPA and the Ohio DNR – which you are doing today. Thank you!

Thank you for considering our perspective.

from roadways, storage piles and loading operations. Coal processing plants may prepare coal by breaking, crushing, screening, and wet or dry cleaning and thermal drying. Fugitive dust may be emitted by the
following operations: unloading (truck or railcar); primary crushing; secondary crushing or screening; cleaning; transfer and conveying; storage; and loading. See the final page for additional background.

Applicable Regulations
The following State and Federal air pollution regulations may be applicable to coal processing plants and coal loading facilities. Note that there may be other regulations which apply to this emissions unit which are not included in this list.

Federal: 40 CFR 60, (NSPS) Subparts A and Y (coal preparation plants that process more than 200 tons/day and commenced construction or modification after October 24, 1974).

State: Ohio Administrative Code (OAC) Rules:
3745-31-02 (Permit to Install)
3745-35-02 (Permit to Operate)
3745-17-07 (Control of visible particulate emissions from stationary sources)
3745-17-08 (Restrictions of emission of fugitive dust)
3745-17-10 (Restrictions on particulate emissions from fuel burning equipment)
3745-17-11 (Restrictions on particulate emissions from industrial processes)
3745-77 (Title V permitting)

Air Permits Required
For new installations, in most cases, Ohio EPA would issue a Permit to Install and Operate (PTIO) to coal processing plants and coal loading facilities. The PTIO would contain terms and conditions that require the control of fugitive dust from the operations. These permits may include the federal NSPS requirements when applicable.

Large coal mining/ coal preparation plants operations may be subject to the federal Title V permitting program. For coal preparation plants at larger installations (e.g., power plants), the coal preparation plant would be part of the larger federal Title V permit that covers all of the air pollution sources at the facility. In this case, any changes to the coal preparation plant would also require a modification of the Title V permit for the power plant. Large coal mining operations may be subject to the federal Title V permitting program.