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Environmental Federalism at the Crossroads

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Leonard Knee is a partner in the Charleston, West Virginia office of Bowles Rice and leader of the firm's Environmental and Regulatory Practice Group.

Mr. Knee has focused his practice in environmental law since 1978. His experience encompasses all facets of environmental law and litigation. He also has significant experience developing and lobbying environmental laws and regulations.

He served as an assistant attorney general with the West Virginia Environmental Task Force, and in 1983, he was appointed a deputy attorney general for the organization. He was later appointed by former West Virginia Governor Gaston Caperton to the Brownfields Task Force. In 2001, he was appointed to the Energy Task Force by Governor Robert Wise. In 2009, Mr. Knee was appointed to the Carbon Capture and Sequestration Working Group.

Mr. Knee has been named to *Best Lawyers in America* in the areas of Energy Law, Environmental Law and Environmental Litigation. He has also been recognized by *Chambers USA* for Environmental Law.

Mr. Knee earned his law degree from the West Virginia University College of Law in 1976. He also received a master's degree in public administration and a bachelor of arts degree from WVU.

The ability to obtain the necessary environmental permits for a complex facility is extraordinarily difficult. A multitude of permits is required. Frequently, the same activity requires different permits from different agencies.

Once these permits are issued, appeals are inevitable. Even when these appeals have been resolved, a serious risk of collateral attacks, or agency withdrawals of approvals exists. The process can drag on for years. All of this makes building new facilities very difficult.

Equally problematic is the overlapping jurisdiction between the United States Environmental Protection Agency and the states. The EPA routinely injects itself into permitting and enforcement decisions. The original premise of environmental regulation was state primacy, with federal oversight. That premise has given way to federal control.

The Spruce Laurel Fork decision is a microcosm of these problems. In June 1999, Hobet Mining, Inc., applied for a section 404 permit to discharge material into four West Virginia streams. These permits, issued by the Army Corps of Engineers, allow the EPA to object to the specification of certain areas for disposal. The EPA specifically declined to do this in 2006, and the permit was finally issued in January 2007.

In September 2009, the EPA requested that the Army Corps of Engineers suspend, revoke or modify the permit, because of supposedly new information. The Army Corps of Engineers refused. In January 2011, the EPA used its authority to withdraw the previously granted approval for the fills. This decision was ultimately upheld by the United States Court of Appeals for the District Of Columbia Circuit.

Four years after the permit was issued – 12 years after the permit was first applied for – substantial parts of the original approval were revoked. Leaving aside whether the Court of Appeals decision is correct, the process is clearly broken. No business can make multimillion-dollar decisions in such an environment.

Issuing environmental permits is today a confusing, overlapping, disjointed, hyperpolitical exercise. Delay is inevitable and lack of certainty unavoidable. It is not an environment that encourages business development.

How do we change this, but preserve a fair opportunity for project opponents to make their challenges? Certain first principles need to be established and adhered to.

The key principle is that all challenges to a permit must be made in the permitting process. Any challenges not made in the permitting process cannot later be heard. Project opponents must comment on permits to appeal them, and their appeals are limited to things on which they commented. Collateral attacks on permits will be rejected, if the issue raised could have been raised in the permitting process.

The EPA and the states cannot revoke or withdraw a permit for reasons that could have been used during the original permitting without providing a written justification. Newly discovered evidence is insufficient, if due diligence during the original permitting process could have provided it. The EPA and the states could continue to revoke permits for violations by the permittee. Equally, citizen suits directed at enforcing permits would not be affected.

The goal of these principles, which clearly will require statutory changes, is to provide one full, fair, and free opportunity to challenge permits. Not all permits should be issued. But interminable appeals and challenges serve no one's interests. At a time when we need to redevelop the United States economically, common sense changes like this are a necessity. V