IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 10-cv-01220-RBW**
LISA JACKSON, in her official capacity as Administrator, U.S. Environmental Protection Agency, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff National Mining Association ("NMA") hereby submits the following memorandum of points and authorities in support of its motion for a preliminary injunction to set aside and enjoin implementation of the June 11, 2009 Enhanced Coordination Process ("EC Process") memoranda,[1] issued by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"), and the April 1, 2010 Detailed Guidance Memorandum ("Guidance"),[2] issued by EPA.

INTRODUCTION

> [O]ur company is in crisis . . . We literally exist from week to week . . . . If these permits are not issued, we will be out of business within 18 months.

Declaration of Randy Johnson, Best Coal, Inc. (Sept. 15, 2010) (Ex. 4) ¶ 19.

NMA petitions the Court for preliminary injunctive relief to respond to the extraordinary realities laid bare by the above statement and caused directly by the agency actions challenged in this case.[3] Since EPA and the Corps began issuing and implementing the EC Process in 2009, to be followed by the Guidance from EPA in 2010, NMA and its members have worked in good faith with the agencies to attempt to navigate the new processes and understand the new standards governing Clean Water Act ("CWA") permitting for coal mining, despite NMA's belief that the agencies were subverting federal law. What has evolved, however, is an unduly

[1] June 11, 2009 Memorandum to the Field on Enhanced Coordination Procedures for Pending Permits, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_11_pdf_Final_MTM_Permit_Coordination_Procedures_6-11-09.pdf (Ex. 1); June 11, 2009 EPA Letter to the Department of the Army Regard Key Factual Consideration for Surface Coal Mining Permit Review, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_07_11_wetlands_pdf_Final_EPA_MTM_letter_to_Army_6-11-09.pdf (Ex. 2).

[2] *See* April 1, 2010 Memorandum: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order ("Guidance"), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf (Ex. 3); *see* also 75 Fed. Reg. 18500 (solicitation for public comment).

[3] A full description of the EC Process and the Guidance, along with a discussion of their legal background and underlying facts, can be found in NMA's Complaint.

prohibitive and dramatically lengthened permitting process that is having immediate and irreparable effects on NMA members. NMA is now left with no choice but to seek judicial intervention to end EPA's crusade to achieve its policy goals through the regulatory back door. The codified permitting process grounded in Congressional intent must be restored, and EPA must utilize the lawful options available to it to effectuate any changes, affording both transparency and a full opportunity for public review and comment.

As described below, NMA meets all the requirements for preliminary relief. Not only are the EC Process memoranda and Guidance legislative rules that should have been issued in accordance with the APA, but they also substantively violate the CWA and the National Environmental Policy Act ("NEPA"), as discussed in Part I of the Argument, demonstrating that NMA is likely to succeed on the merits. Next, in Part II, and as dramatically illustrated in the attached declarations, it is not just likely but a near certainty that NMA's members will suffer irreparable harm if EPA continues to implement the EC Process and Guidance. The severity of this harm tips the balance of equities in NMA's favor, and the public interests in the integrity of the regulatory process, the domestic development of coal, and prevention of further job loss are all served by a preliminary injunction here. Accordingly, NMA respectfully requests that the Court enjoin further implementation of the EC Process Memoranda and Guidance during the pendency of this litigation, for the reasons described further below.

STATUTORY BACKGROUND

Coal mining operations require numerous permits and pre-project reviews, including two types of permits under the CWA, 33 U.S.C. § 1251 *et. seq.*: (i) Section 404 permits, issued by the Corps, for the discharge of dredged and fill material; and (ii) Section 402 permits, typically issued by states, for the discharge of all other pollutants. *See* 33 U.S.C. §§ 1342, 1344; *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.* ("*OVEC*"), 556 F.3d 177, 186-87, 190-91 (4th Cir.

2009). Section 404 permits govern material that fills or displaces receiving waters, while Section 402 permits govern pollutants that are assimilated by receiving waters. Such permits need to ensure compliance with applicable water quality standards, which are developed primarily by the states pursuant to Section 303. 33 U.S.C. § 1313.

I. CLEAN WATER ACT SECTION 404 PERMITTING PROCESS

Under Section 404 of the CWA, 33 U.S.C. § 1344(a), the Corps[4] has sole authority to issue permits for the discharge of "dredged or fill" material into navigable waterways at specified disposal sites. Prior to issuing a permit, the Corps must provide notice and an opportunity for public hearings. *See id.* In specifying disposal sites, the Corps must apply guidelines ("the 404(b)(1) Guidelines"), which it develops in conjunction with EPA. *See id.* § 1344(b). Congress intended for expeditious decisions on Section 404 permits. *See id.* § 1344(q). Specifically, it instructed that, "to the maximum extent practicable," decisions on Section 404 permits will be made within ninety days. *Id.*

The Corps' procedures for issuing a Section 404 permit are codified at 33 C.F.R. Part 325. Among other things, they require the Corps to review permit applications for completeness and, within 15 days of receiving applications, issue a public notice for applications deemed complete. 33 C.F.R. § 325.2(a). By regulation, the comment period shall last for a reasonable period of time within which interested parties may express their views, but generally should not be more than 30 days. *See id.* § 325.2(d)(2). The Corps generally must decide on all applications no later than 60 days after receipt of a complete application, unless one of several specific regulatory exceptions apply. *See* 33 C.F.R. § 325.2(d)(3).

[4] Section 404 refers to the Secretary of the Army, who has, in turn, delegated authority to the Corps. *See* 30 C.F.R. § 325.2(a).

"Section 404 assigns the EPA two tasks in regard to fill material." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). First, EPA must develop the 404(b)(1) Guidelines in conjunction with the Corps "for the Corps to follow in determining whether to permit a discharge of fill material." *Id.* Second, the Act confers EPA authority, under specified procedures, to prevent the Corps from authorizing certain disposal sites. *Id.*

EPA promulgated the 404(b)(1) Guidelines, which are codified at 40 C.F.R. Part 230 and guide the Corps' review of the environmental effects of the proposed disposal sites. For example, under 40 C.F.R. § 230.10(b), no permit shall be issued if it causes or contributes to any water quality standard violations. The guidelines also emphasize that "[n]o modifications to the basic application, meaning, or intent of these Guidelines will be made *without rulemaking by the Administrator under the Administrative Procedure Act*." 40 C.F.R. § 230.2(c) (emphasis added).

As described above, the Corps is responsible for applying the 404(b)(1) Guidelines to designate specific disposal sites for fill material. 33 U.S.C. § 1344(a), (b). EPA may comment on the Corps' application of the 404(b)(1) Guidelines to particular permit applications during the interagency review period required for each permit. In addition, EPA has limited authority under Section 404(c) to prevent the Corps from authorizing a particular disposal site. *See id.* § 1344(c). To exercise that authority, EPA must determine, after notice and an opportunity for public hearing, that certain unacceptable environmental effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas would result, *id.*; EPA does not have authority to exercise unfettered enforcement of compliance with the 404(b)(1) Guidelines. EPA must also consult with the Corps and publicize written findings and reasons for any determinations it makes under Section 404(c). *Id.*

II. CLEAN WATER ACT SECTION 303 WATER QUALITY STANDARDS DEVELOPMENT

Section 303 of the CWA, among other provisions, reflects Congress' policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(b). Section 303 allocates primary authority for development of water quality standards to the states. *See* 33 U.S.C. § 1313. A water quality standard defines the water quality goals of a water body by designating uses for a particular body of water and setting criteria necessary to protect those uses. 40 C.F.R. § 131.2. Such standards can be expressed as specific numeric limitations or as general narrative statements. Permit limitations are developed to meet these water quality standards.

Courts have consistently held that (i) "states have the primary role . . . in establishing water quality standards," and (ii) "EPA's sole function, in this respect, is to review those standards for approval." *Def. of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) (internal quotation marks and citation omitted); *see also Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 16 F.3d 1395, 1401 (4th Cir. 1993) (same). Moreover, Congress gave EPA limited authority to promulgate water quality standards only if "it determines that a state's proposed new or revised standard does not measure up to [the Act's] requirements *and* the state refuses to accept EPA-proposed revisions to the standard" or "a state does not act . . . but, in the EPA's view, a new or revised standard is necessary." *Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. § 1313(c)(3)-(4)).

III. CLEAN WATER ACT SECTION 402 PERMITTING PROCESS

The permitting program at Section 402 of the CWA, known as the National Pollutant Discharge Elimination System ("NPDES"), focuses on wastewater discharges to receiving waters and governs such discharges through the establishment of technology-based limits placed

on the constituent make-up of a wastewater discharge. 33 U.S.C. § 1342; *id.* § 1311(b)(2). When application of a technology-based limit to a particular discharge will not assure compliance with applicable water quality standards established for the particular receiving stream, the permitting authority must develop permit limitations that would work to maintain such water quality. 33 U.S.C. § 1312; 40 C.F.R. § 122.44(d).

Conforming to the statute's goal of allocating the "primary responsibilities" for water pollution control to the states, 33 U.S.C. § 1251(b), the Act establishes a system of cooperative federalism, whereby states assume primary administration and enforcement of the NPDES permitting program. 33 U.S.C. § 1342(b). Once EPA approves a proposed state permitting program, states have exclusive authority to implement the NPDES program within their boundaries, and EPA has only limited authority to review state action. EPA retains authority, in specified circumstances, to object to a particular NPDES permit. 33 U.S.C. § 1342(d); 40 C.F.R. § 123.44. If the state does not respond adequately to EPA's objection within specified timeframes, EPA may assume the authority to issue the permit. 33 U.S.C. § 1342(d)(4). If EPA does not object to a permit within the specified procedures and timeframes, the state may proceed in accordance with its delegated authority and issue the permit.

FACTUAL BACKGROUND

Beginning in January 2009, in a marked departure from prior, longstanding EPA practice and a harbinger of the agency actions challenged in this action, EPA initiated an extra-regulatory review process for CWA Section 404 permits that had no basis in the Corps' or EPA's codified procedures. EPA issued a series of letters to the Corps recommending denial of certain CWA

Section 404 permit applications for coal mining operations.[5] In each of these cases, the Corps was poised to imminently issue the permits, and EPA had already either commented or waived its opportunity to comment during the interagency comment process. *See, e.g.*, Declaration of Thomas Cook, Massey Coal Services (Sept. 16, 2010) (Ex. 8). Undaunted by the fact that the opportunity for comment, as provided by regulation, had passed, EPA's letters contained newly articulated positions questioning the legality of the permits at issue. Specifically, EPA raised concerns about conductivity levels in water quality, citing, for the first time, a 2008 study (Pond *et al.*) that analyzed the relationship between conductivity as a measure of water quality and aquatic life use.

EPA sent these letters despite a February 2009 decision from the Fourth Circuit that ended long-running litigation against various Section 404 permits and upheld the legality of the Corps' permit review process. *See OVEC*, 556 F.3d 177; *see also* Ex. 8 (Cook Decl. ¶¶ 8-11).

I. JUNE 11, 2009 EC PROCESS MEMORANDA

On June 11, 2009, EPA, the Corps, and the Department of Interior released a Memorandum of Understanding on Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (the "MOU"). Among other things, the MOU formalized the extra-regulatory review process of CWA Section 404 permits that EPA had previously commenced in January 2009 and signaled a further change in the Section 404 permitting process – the launch of the EC Process. Concurrent with the release of the MOU, EPA issued formal details on the EC Process, *see* n. 1 *supra*, which were immediately effective and imposed substantive changes to the Section 404 permitting process by creating a new level of review by EPA and an alternate permitting pathway not contemplated by the current regulatory structure, as explained below.

[5] *See, e.g.*, Letter from Jeffrey Lapp, EPA Region 3, to Ginger Mullins, Corps Huntington District (Jan. 20, 2009) (Ex. 5); Letter from John Pomponio, EPA Region 3, to Dana Hurst, Corps Huntington District (Mar. 23, 2009) (Ex.

In the EC Process, EPA first utilizes the Multi-Criteria Integrated Resource Assessment (the "MCIR Assessment") to screen all pending Section 404 permit applications for Appalachian coal mining operations. In the MCIR Assessment, EPA applies the 404(b)(1) Guidelines and determines which permit applications will proceed to review by the Corps under the long-standing existing permit processing procedures and which permit applications will be subject to the EC Process. It effectively sets a threshold of acceptable effects from coal mining to create a "fork in the road" in the Section 404 permitting process, and it expands EPA's role from mere commenter to gate-keeper. The Corps was not involved in developing the components of the MCIR Assessment, and the MCIR Assessment was not subjected to public notice and comment.

Once a permit application is earmarked for the EC Process as a result of the MCIR Assessment, the applicant faces a burdensome review process that is wholly separate from (i) the public hearing and comment process envisioned in Section 404(a) and (ii) EPA's exercise, if any, of its Section 404(c) authority. Specifically, the EC Process involves discussions among EPA, the Corps, the permit applicant, and other potentially relevant agencies during a 60-day coordination period that the Corps must initiate. There is no requirement for the Corps to do so in a timely fashion, which contrasts sharply with the permitting processing timelines set forth in Section 404 and its implementing regulations. *See* 33 U.S.C. § 1344(a), (q); 33 C.F.R. § 325.2.

Thus, the EC Process adds a *minimum* 60 days (and potentially many months) of review to the existing review process entirely outside of, and in addition to, the existing Section 404 procedures and timelines. At the end of the EC Process, only if issues identified by EPA are resolved in individual permit applications may those permits move forward to the Corps for processing and incorporation of new permit terms or conditions dictated by EPA during the EC

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6); Letter from John Pomponio, EPA Region 3, to Dana Hurst, Corps Huntington District (Apr. 3, 2009) (Ex. 7).

Process. If EPA's concerns remain unresolved at the close of the EC Process period, EPA may then initiate Section 404(c) procedures. Neither EPA nor the Corps proposed to revise the existing codified review procedures in 33 C.F.R. Part 325, and EPA did not propose to amend its existing 404(b)(1) Guidelines when formalizing the EC Process.

In practice, EPA announced, in September 2009, that it utilized the MCIR Assessment to identify 79 coal-related Section 404 permits currently pending with the Corps that would be subject to the EC Process, rather than the 33 C.F.R. Part 325 process. *See* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_09_11_wetlands_pdf_ECP_Initial_List_09-11-09.pdf. Not surprisingly, numerous permit applications remain indefinitely stalled. *See, e.g.*, Ex. 8 (Cook Decl. ¶¶ 9, 22); Declaration of Paul B. Horn, Jr., Booth Energy (Sept. 17, 2010) (Ex. 23) ¶¶ 6-7, 10. The timelines for those permit applications stray far from the deadlines that Congress envisioned in Section 404 and from the Corps' own regulatory deadlines. *See* 33 C.F.R. § 325.2.

II. APRIL 1, 2010 GUIDANCE

Next, EPA unilaterally released the Guidance on April 1, 2010 to provide "detailed guidance" to EPA Regions 3, 4, and 5 for the review of all coal mining operations under the CWA, National Environmental Policy Act ("NEPA"), and the Environmental Justice Executive Order. While EPA solicited public comment on the Guidance, 75 Fed. Reg. 18500, it nevertheless made the Guidance effective immediately. *See* Ex. 3 (Guidance at 2).

In the Guidance, EPA made sweeping pronouncements regarding the need for water quality-based limits in CWA Section 402 and 404 permits, as well as the adequacy of mitigation measures associated with Section 404 permits. First, the Guidance effectively established a region-wide water quality standard by directing that Section 402 and 404 permits should contain conditions that ensure that conductivity levels do not exceed 500 µS/cm. EPA's direction was

based on a draft, not-yet-peer-reviewed EPA report entitled, "A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams," which purports to recognize "stream-life impacts associated with conductivity." Ex. 3 (Guidance at 11). From that report, EPA established a presumption that it "expects that in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse impacts to water quality." *Id.* at 12, 22. Further, the Guidance seeks to provide EPA with a continuing review and approval role by "sequencing" the installation of valley fills such that fills must proceed one at a time and only after various permit conditions are met. *See id.* at 24-25.

EPA is using the Guidance to cause indefinite delays and impose new and unattainable conditions in the Section 402 and 404 permit processes for coal mining operations. In addition, various permitting authorities, at EPA's insistence, have begun inserting the conductivity limit from the Guidance into pending Section 402 and 404 permits. Ex. 4 (R. Johnson Decl. ¶¶ 11, 14); Declaration of William Wells, Jr., United Coal Company LLC (Sept. 1, 2010) (Ex. 9) ¶¶ 11-12, 24; Ex. 8 (Cook Decl.) ¶ 23; Declaration of Dr. Randall Johnson, Alabama Surface Mining Commission (Sept. 15, 2010) (Ex. 10) ¶¶ 8, 10; Ex. 23 (Horn Decl. ¶¶ 7-8). Yet, EPA has provided no basis to conclude that these conductivity levels will harm the uses protected by the various narrative water quality standards promulgated by the states, and, in some instances, natural background is higher than these levels. *See, e.g.*, Ex. 9 (Wells Decl. ¶ 7); Declaration of Jeffrey D. Jarrett (Sept. 14, 2010) (Ex. 11) ¶ 11; Declaration of Margaret H. Dunn, Stream Restoration, Inc. (Sept. 16, 2010) (Ex. 12) ¶¶ 5-8; Ex. 23 (Horn Decl. ¶ 9). Furthermore, as contemplated in the Guidance's "sequencing" policy (at 24-25), EPA recently began invoking the Guidance to reopen *previously issued permits* in order to impose the conductivity limit,

which works to effectively halt projects in their tracks. *See* Letter from John Pomponio, U.S. EPA to Ginger Mullins, Corps Huntington District (Sept. 14, 2010) (Ex. 13).

In short, the Guidance is wreaking havoc on the coal mining industry in the eastern United States and is threatening to cause significant financial losses and even drive some companies out of business. *See* Ex. 9 (Wells Decl. ¶¶ 24-25); Ex. 4 (R. Johnson Decl. ¶¶ 17-18); Ex. 8 (Cook Decl. ¶ 24); Ex. 23 (Horn Decl. ¶¶ 11-13). These dramatic effects have prompted a response from Congress. *See* Electricity Reliability Protection Act of 2010, H.R. 6113, 111th Cong., § 2(5) (2010)[6] (finding that the EC Process and Guidance will place "roughly 1 in every 4 coal mining jobs in the Appalachian region [] at risk of elimination" and that "81 small businesses will lose significant income and will be at risk of bankruptcy"). For these reasons, NMA seeks a preliminary injunction to restore order and the lawful process to CWA permitting for coal mining.

STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must demonstrate that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable injury absent an injunction; (3) the balance of equities tips in the plaintiff's favor; and (4) a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). Courts in this Circuit utilize a sliding scale analysis when evaluating whether to grant a motion for a preliminary injunction:

> In applying this four-factored standard, district courts may employ a sliding scale under which a particularly strong showing in one area can compensate for weakness in another. [] Accordingly, if the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak."

[6] H.R. 6113, which seeks to halt all federal funding related to implementation of the EC Process Memoranda and the Guidance, was introduced on September 14, 2010 by Congressman Harold Rogers (R-KY). Original cosponsors of that bipartisan bill include seven Republicans and four Democrats from states across Appalachia.

Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 11-12 (D.D.C. 2009) (internal quotation marks and citations omitted). This "sliding-scale standard remains viable even in light of the [recent Supreme Court] decision in *Winter*." *Id.* at 12; *see also Sherley v. Sebelius*, 704 F. Supp. 2d 63, 69-70 (D.D.C. 2010).

ARGUMENT

I. NMA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. The EC Process Memoranda And Guidance Are Legislative Rules That Were Promulgated In Violation Of The Administrative Procedure Act.

The agency actions challenged in this case are *de facto* legislative rules. Because they were promulgated without advance notice and comment, as required by the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553, their promulgation violates the APA.

1. The APA Requires Agencies To Provide Notice And An Opportunity To Comment On A Legislative Rule.

Legislative rules are those agency pronouncements that "have the force and effect of law." *Appalachian Power Co. v. U.S. Envtl. Prot. Agency*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). Such rules: (i) "grant rights, impose obligations, or produce other significant effects on private interests;" (ii) "narrowly constrict the discretion of agency officials by largely determining the issue addressed;" and (iii) "have substantive legal effect." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980). Of particular relevance to this case, "new rules that work substantive changes . . . or major substantive legal additions . . . to prior regulations are subject to the APA's procedures." *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (internal quotation marks and citations omitted).

Under the APA, an agency that intends to promulgate a legislative rule "must first provide the public with notice of, and an opportunity to comment upon, a proposed version of

it." *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999); *see also* 5 U.S.C. § 553.[7] While Congress has created exceptions to the notice and comment requirement for "interpretive rules,[8] general statements of policy,[9] or rules of agency organization, procedure, or practice,"[10] 5 U.S.C. § 553(b), courts in this Circuit have consistently cautioned that these exceptions are to be "construed narrowly" and "only reluctantly countenanced." *Hous. Study Group v. Kemp*, 736 F. Supp. 321, 325 (D.D.C. 1990) (collecting cases).

Of equal importance, an agency's characterization of its own actions is not controlling. *See, e.g.*, *Appalachian Power Co.*, 208 F.3d at 1020-23 (rejecting EPA's characterization of a rule as non-binding, and not final, guidance); *see also* Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1485 (1992) (describing EPA's boilerplate notice for guidance documents as "a charade, intended to keep the proceduralizing courts at bay").[11] Accordingly, an agency cannot avoid notice-and-comment obligations under the APA by denominating legislative rules as "guidance."

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[7] These requirements "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[8] Interpretive rules "are statements as to what [an agency] thinks [a] statute or regulation means." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[9] A policy statement "does not establish a binding norm [and] . . . is not determinative of the issues or rights to which it is addressed." *Chamber of Commerce*, 174 F.3d at 212. It "has only a prospective effect, and [] leaves agency decisionmakers free to exercise their informed discretion in individual cases." *Id.*

[10] Congress created the exception for rules of agency organization, procedure, or practice "to ensure that agencies retain latitude in organizing their internal operations." *Am. Hosp. Ass'n*, 834 F.2d at 1047. Such rules "do not themselves alter the rights or interests of parties, although [they] may alter the manner in which parties present themselves or their viewpoints to the agency." *Id.*

[11] Not surprisingly, EPA inserted the familiar incantation that "[t]his document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions[.]" Ex. 1 (EC Memo at 3). They further stated that the "[t]he policy and procedures contained within this document are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party." *Id.*

2. The EC Process Memoranda Were Promulgated In Violation Of The APA.

The EC Process Memoranda established: (i) the EC Process for Section 404 permits for coal mining projects in Appalachia; and (ii) the MCIR Assessment that EPA uses to review and screen applications to identify which applications will be subject to the EC Process. Rather than providing notice of either of these documents and making them available for public comment, the agencies simply posted them on EPA's website.

a. The EC Process Memoranda Change The Existing Permitting Regime Under Section 404 Of The Clean Water Act And Are Therefore Legislative Rules.

The EC Process Memoranda effectively amend the longstanding permitting regime set forth in Section 404, as well as the Corps' regulations implementing that section. *See* 33 C.F.R. Part 325. As such, the agencies violated the APA by promulgating them without notice and comment. *See U.S. Telecom Ass'n*, 400 F.3d at 34.

As described previously, the Section 404 permit regime is characterized by specified regulatory pathway, deadlines for the Corps' permitting decisions, and a clearly defined, statutory division of authority between the Corps and EPA. *See* Compl. ¶¶ 16-31. Specifically, the Corps gives itself (i) fifteen (15) days to determine if an application for a Section 404 permit is complete and (ii) sixty (60) days to issue a decision on a completed application. *See* 33 C.F.R. § 325.2(a)(2), (d)(3); *see also* 33 U.S.C. § 1344(q) (directing that permitting decisions should, "to the maximum extent practicable . . . be made not later than the ninetieth day" after notice of the permit application is published). Moreover, Congress intended for the Corps, and only the Corps, to apply the Section 404(b)(1) Guidelines when making permit decisions. *See* 33 U.S.C. § 1344(b). Last, the statute envisions consultations between EPA and the Corps on permitting, but only in the context of EPA's exercise of its authority to "veto" the Corps' designation of any

particular area as a disposal site.[12] *See* 33 U.S.C. § 404(c). The Supreme Court recognized EPA's limited role in the Section 404 process in *Coeur Alaska*, when it stated that "Section 404 assigns the EPA two tasks in regard to fill material"—writing the Section 404(b)(1) Guidelines and exercising its 404(c) authority. 129 S. Ct. at 2463.

The EC Process Memoranda substantially alter this regime. Specifically, EPA established a new screening process, *i.e.*, the MCIR Assessment, pursuant to which EPA, and not the Corps, will apply the Section 404(b)(1) Guidelines early in the permitting process to determine which pending permit applications "require further [enhanced] coordination between EPA and the Corps." *See* Ex. 2 (MCIR Assessment Memo at 2). Additionally, EPA's and the Corps' enhanced coordination procedures build in at least an additional sixty days of review and consultation into the Section 404 process,[13] which disrupts the deadlines envisioned under the Corps' existing regulations and ignores Congress' desire to have permitting decisions made within ninety days of submitting an application. *See* 33 C.F.R. § 325.2(a)(2), (d)(3); *see also* 33 U.S.C. § 1344(q). In short, the EC Process Memoranda allow EPA to use extra-regulatory processes to expand its role in the Section 404 permit process and cause delays in permitting, without having to abide by any of the formal requirements governing the exercise of its Section 404(c) authority. *See* 33 U.S.C. § 1344(c) (requiring notice, an opportunity for public hearings, consultation with the Corps, and the publication of written findings and reasons).

[12] Like any other federal agency or public citizen, EPA has the right to offer comment on any pending Section 404 permit application during the public comment process. *See* 33 U.S.C. § 1344(a). Such a right, however, does not justify the creation of an alternate permitting pathway that targets a category of operations within a particular industry.

[13] Some permit applicants are experiencing delays far in excess of sixty days. *See, e.g.*, Ex. 8 (Cook Decl.) ¶¶ 9, 22 (delay of twenty months and counting); Ex. 23 (Horn Decl.) ¶¶ 6-7, 10 (delay since September 30, 2009); *see also* http://water.epa.gov/lawsregs/guidance/wetlands/mining-projects.cfm.

Notably, the agencies' text demonstrates that the EC Process Memoranda are legislative rules. EPA and the Corps announced in no uncertain terms that "108 CWA Section 404 permit applications for surface coal mining activities in Appalachia *will be subject to* review in accordance with these procedures." *See* Ex. 14 (EC Memo Transmittal Letter at 1) (emphasis added); *see also* Ex. 1 (EC Memo at 1) (emphasis added) ("The procedures below *will apply* to applications for individual and Nationwide general permits . . ."); *id.* at 2 (emphasis added) ("Permit applications raising concerns *will be subject to* additional coordination and review following the procedures and timeframes identified below"). Similarly, EPA has unequivocally declared that the MCIR Assessment "*will form* the basis for [its] identification of pending permit applications that will require further coordination between EPA and the Corps." Ex. 2 (MCIR Assessment Memo at 1) (emphasis added); *see also id.* (emphasis added) (stating that, when undertaking the MCIR Assessment, the Section 404(b)(1) Guidelines "*will guide* [EPA's] review of the pending permit applications").

These unwavering statements are important because the D.C. Circuit has, in the past, "found decisive the choice between [an agency's use of] the words 'will' and 'may.'" *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (explaining that use of "will" indicates a legislative rule); *cf. Appalachian Power Co.*, 208 F.3d at 1023 (holding that the challenged guidance document constituted binding, final agency action and explaining that "the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase [because] [i]t commands, it requires, it orders, it dictates").

In addition to phrasing the EC Process Memoranda as if they were legislative rules, the agencies have effectively imposed them as binding, legislative rules. Numerous letters to permit applicants confirm that EPA and the Corps are required to apply the EC Process memoranda to

pending Section 404 permit applications. *See, e.g.*, Letter from John Pomponio, U.S. EPA Region 3 to CONSOL Energy Corp. (Aug. 7, 2009) (Ex. 15) (indicating that EPA and the Corps have "commit[ted] . . . to enhanced coordination procedures for certain pending [CWA] Section 404 permit applications"); *accord* U.S. EPA Briefing on the Mining Analysis for EPA Regions 3, 4, and 5 (July 13, 2009) (Ex. 16), at slides 3-4 (proclaiming that (i) "100% of pending permits to be reviewed" in accordance with the EC Process; and (ii) environmental criteria "*will be used* by EPA in its screening of pending permits" and "*will be used* in decision analysis screening tool," *i.e.*, the MCIR Assessment).

In light of the foregoing, the EC Memoranda, "[i]n practical effect, [] create[d] "a new regime, a new legal system governing permits, and as such [they] should have been, but [were] not, promulgated in compliance with notice and comment rulemaking procedures." *Appalachian Power Co.*, 208 F.3d at 1024.

b. The EC Process Memoranda Do Not Fit Within Any Of The Statutory Exceptions To Notice-And-Comment Rulemaking.

Despite the Corps' and EPA's inclusion of boilerplate language to suggest that the EC Process Memoranda are "general statements of policy" or "rules of agency organization, procedure, or practice," 5 U.S.C. § 553(b), the EC Process Memoranda do not satisfy either of those exceptions to notice-and-comment rulemaking.[14]

The EC Process Memoranda are not policy statements. As quoted above, the plain language of the EC Process Memoranda reflect that they: (i) have a present, binding effect on the agencies and permit applicants; and (ii) "leave[] no room for discretionary choices" by agency

[14] Neither of the EC Process Memoranda contained any language that would suggest that the Corps or EPA considered them to be interpretive rules. Were they to raise such an argument in this action, they are unlikely to succeed on the merits for the reasons described in Argument, Part I.A.2.a above. The EC Process Memoranda do not merely explain existing law or regulations; rather, they effectively amend Section 404 of the CWA and the Corps' implementing regulations. Accordingly, they are legislative, not interpretive rules.

decisionmakers regarding whether to undertake the MCIR Assessment and subject permit applicants to the EC Process. *Chamber of Commerce*, 174 F.3d at 212-13. Moreover, the Corps and EPA have "applied [the EC Process Memoranda] in a way that indicates [they are] binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). Like the vertical and horizontal spread model used by EPA in *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1987), EPA has effectively "treated [the MCIR Assessment] as conclusively disposing of certain issues," *i.e.*, which permits *will* be subject to enhanced coordination. In fact, EPA has declared—and letters to permit applicants have confirmed— that it has already used the MCIR Assessment to identify pending, coal-related Section 404 permit applications that are subject to the EC Process. *See* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_09_11_wetlands_pdf_ECP_Initial_List_09-11-09.pdf. Both the text of the EC Process Memoranda and the conduct of EPA and the Corps belie the agencies' assertions that they are policy statements exempt from notice and comment.

For similar reasons, the EC Process Memoranda are not procedural rules. The APA's exception for procedural rules "cannot apply . . . where the agency action trenches on substantial private rights and interests" such as, for example, "when applicants for food stamps are subject to modified approval procedures." *Batterton*, 648 F.2d at 708 (citation omitted). Yet, that is essentially what happened here. The EC Process Memoranda modified the established Section 404 permit review and approval procedures such that applicants for permits in connection with Appalachian coal mining are now subject to new substantive standards and a new, unique review and coordination process. Moreover, because EPA's MCIR Assessment "inserted a new standard of review governing [] scrutiny of a given procedure . . . it[] . . . surely require[d] notice and comment, as well as close scrutiny to insure that it was consistent with the agency's statutory

mandate." *Am. Hosp. Ass'n*, 834 F.2d at 1051. The MCIR Assessment inserted a new standard of review governing the permit process for coal mining operations by allowing EPA, instead of the Corps, to apply the Section 404(b)(1) Guidelines early on in the process to determine which permits will be subject to the alternate permitting pathway. This new standard, and the EC Process as a whole, reflects EPA's "substantive value judgment" that applications for Section 404 permits in connection with Appalachian coal mining projects are to be scrutinized differently than applications for such permits in any other context. *Id.* at 1047, 1051. In sum, EPA's and the Corps' view that the EC Process memoranda merely set forth non-binding policies and procedures is not defensible.

3. EPA Promulgated The Guidance In Violation Of The APA.

On April 1, 2010, EPA announced that the Guidance was "[e]ffective immediately" without any advance notice and comment. *See* 75 Fed. Reg. 18500 (Apr. 12, 2010);[15] *see also* Ex. 3 (Guidance at 2) ("We expect you to begin using this interim final guidance immediately in your review of Appalachian surface coal mining activities"). As explained below, the Guidance is a legislative rule promulgated in violation of the APA, and EPA's attempts to characterize the Guidance otherwise, *see* Ex. 3 at 2 n. 3, are unconvincing and warrant rejection.

a. The Guidance Substantively Amends EPA's Regulatory Authority Under The Clean Water Act And NEPA And Therefore Is A Legislative Rule.

Contrary to EPA's assertion, the Guidance does not merely "clarif[y] how EPA is applying its existing legal authorities in its review of Appalachian surface coal mining operations." 75 Fed. Reg. 18500. In reality, the Guidance significantly and substantively changes the existing CWA regulatory scheme, particularly with regard to water quality

[15] EPA is currently seeking public comments on the Guidance, which are due by December 1, 2010. Nonetheless, as explained herein, EPA has been applying the Guidance since April 1.

standards. *See Appalachian Power Co.*, 208 F.3d at 1024 ("In practical effect, it creates a new regime, a new legal system governing permits"). Accordingly, EPA promulgated the Guidance in violation of the APA.

Congress delegated to the States the primary authority for promulgating water quality standards that are specific to water bodies, and it delegated to EPA limited authority to approve and reject those standards. *See* 33 U.S.C. § 1313. Moreover, the Act contemplates that states will develop water quality standards for particular water bodies, "or portion[s] thereof," as opposed to on a region-wide basis spanning multiple states and water bodies therein. *See* 40 C.F.R. § 131.4; *see also* 33 U.S.C. § 1313(c)(2). Ignoring this statutory framework and state primacy, EPA promulgated the Guidance, which established a *de facto*, region-wide water quality standard for conductivity (500 μS/cm) for water bodies in the entire Appalachian region. *See* Ex. 3 (Guidance at 12, 18-21). EPA's Guidance directs State regulatory authorities and the Corps to incorporate that conductivity standard into permits issued under Sections 402 and 404 of the CWA. *See id.*; *see also* April 1, 2010 Memorandum Questions & Answers, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_02_wetlands_guidance_appalachian_mtntop_mining_qa.pdf (Ex. 17), at 1 (emphasis added) ("EPA *will* use these [conductivity] values as benchmarks in our work with States under Section 402 and with the Corps under Section 404 to ensure that permits are designed to meet the [CWA] requirements").

Without question, EPA has followed through on its assurance that it would use the *de facto* water quality standard in the Guidance to impose conductivity limits in pending permits. *See, e.g.*, Ex. 4 (R. Johnson Decl. ¶¶ 11, 14-15) (stating that both Section 402 and 404 Permits for the Jagger Mine and Mine #3 have been held up due to EPA's Guidance and the conductivity standard therein); Ex. 9 (Wells Decl. ¶¶ 11-12, 24) (noting that the Corps, at EPA's insistence,

imposed the conductivity standard from the Guidance in a recent Section 404 permit); Ex. 23 (Horn Decl. ¶¶ 7-8) (same); Ex. 10 (Dr. Johnson Decl. ¶¶ 8, 10) (referencing EPA statements that section 404 permits must conform to the Guidance and EPA objections to a Section 402 permit that included requirements that EPA expected to be incorporated into the permit such as the 500 µS/cm conductivity standard); Letter from James Giattina, U.S. EPA Region 4, to Col. Steven Roemhildt, U.S. Army Corps of Engineers, Mobile District (Jul. 26, 2010) (Ex. 18) (emphasis added) (directing that the individual Section 404 "permit *shall require*" various protections and including specific reference to conductivity and the 500 µS/cm standard set forth in the Guidance). And, in response to West Virginia's recent proposed guidance on water quality standards, EPA noted that its "guidance stands" and that it "will continue to use it to ensure that mining permits issued in West Virginia and other Appalachian states provide the protection required under federal law." Ken Ward, Jr., *EPA Says Its New Mining Guidance 'Stands,'* CHARLESTON GAZETTE, Aug. 13, 2010, *available at* http://blogs.wvgazette.com/coaltattoo/2010/08/13/epa-says-its-new-mining-guidance-stands/ (quoting Aug. 12, 2010 EPA Desk Statement on Newly Released West Virginia MTM Guidance). EPA's establishment and imposition of a *de facto* water quality standard in this manner violates the CWA regulatory scheme and is therefore a legislative rule.[16]

EPA's Guidance also makes substantive legal additions to the Section 404(b)(1) Guidelines by dictating what constitutes acceptable mitigation measures for Section 404 permits.

[16] In addition to demonstrating why the Guidance is a legislative rule and why none of the statutory exceptions to notice-and-comment rulemaking apply, such evidence confirms that the Guidance constitutes final agency action. Simply put, "the Guidance . . . is final agency action, reflecting a settled agency position which has legal consequences both for [the Corps and] State agencies administering their permit programs and for companies like those represented by [NMA] who must obtain [CWA] permits in order to" operate. *Appalachian Power Co.*, 208 F.3d at 1023; *see also* Ex. 10 (Dr. Johnson Decl. ¶ 8) ("After issuance of [the Guidance], EPA representatives stated that each permit must conform to that document"). Moreover, like the challenge to the guidance document in *General Elec. Co.*, NMA's challenge to the Guidance in this case is ripe for review. *See* 290 F.3d at 380.

See Ex. 3 (Guidance at 23-24). It also effectively amends EPA's authority under Section 309 of the Clean Air Act, 42 U.S.C. § 7609, to review the NEPA analyses of its sister agencies. EPA's Guidance seeks to establish a presumption that an entire category of agency actions—surface coal mining projects involving more than one mile of stream loss or more than one valley fill—are likely to result in significant impacts. In doing so, EPA is attempting to expand its authority under 42 U.S.C. § 7609 and to rewrite the CEQ's and the Corps' regulations implementing NEPA. In light of the foregoing, the Guidance "significantly broaden[s]" existing laws. *See Appalachian Power Co.*, 208 F.3d at 1028. EPA cannot fairly characterize the Guidance as merely its interpretation of what existing statutes and regulations require. *See Am. Hosp. Ass'n*, 834 F.2d at 1045.

b. The Guidance Does Not Fit Within Any Of The Statutory Exceptions To Notice-And-Comment Rulemaking.

As explained in the previous subpart, the Guidance does not merely "clarify" existing statutes and regulations and thus, it is a legislative rule, not an interpretive rule. Nor can the Guidance be shoehorned into the APA's exception for general statements of policy. The Guidance has a present, binding effect, and it constrains agency decisionmakers' discretion in individual cases. *See Chamber of Commerce*, 174 F.3d at 212. The Guidance did more than merely announce EPA's "tentative intentions for the future." *Id.* at 213. Quite the contrary, it directed EPA regions to begin applying the Guidance "immediately in [their] review" of permits. Ex. 3 (Guidance at 2); *accord* Ex. 17 (EPA Q&A at 2) ("EPA will immediately begin applying this memorandum . . .").

The manner in which the Guidance is being applied by EPA and the Corps confirms that it "leaves no room for further exercise of administrative discretion." *Batterton*, 648 F.2d at 706. As explained above, the Corps, at EPA's insistence, has begun inserting the strict conductivity

standard from the Guidance into pending Section 404 permit applications. As a result, even though the Corps bears responsibility for issuing Section 404 permits, *see* 33 U.S.C. § 1344, its decisionmakers are being compelled by EPA to impose the conductivity standard. *See, e.g.*, Ex. 10 (R. Johnson Decl. ¶¶ 8, 10); Ex. 18 (Giattina-Roemhildt letter). The Guidance is similarly constraining EPA's regional employees, illustrating that this is more than mere guidance to assist in regional decisionmaking. A recent email from EPA Region 4 illustrates that EPA Headquarters is directing permitting decisions for coal mining operations. *See* Email from Tom Welborn, EPA Region 4, to James Townsend, *et al.* (June 23, 2010) (Ex. 19) (noting that EPA Region 4 "tried to get [a letter regarding a pending Section 404 permit application for a coal mining operation] out of the Administrator's office most of the afternoon and just got clearance"). The language in the Guidance and the manner in which it is being applied defeats any attempt to characterize the Guidance as a general statement of policy.

Likewise, any attempt to characterize the Guidance as a procedural rule must fail, as the Guidance is already having "a 'substantial impact' upon private parties, and it 'puts a stamp of agency approval or disapproval on a given type of behavior.'" *Chamber of Commerce*, 174 F.3d at 211 (quoting *Am. Hosp. Ass'n*, 834 F.2d at 1047). The Guidance imposes substantial new burdens upon applicants for CWA permits in connection with coal mining operations. *See Chamber of Commerce*, 174 F.3d at 212; *see* Argument, Part I.A.3.a *supra*. The Guidance also creates new "presumption[s] of invalidity" for agency decisionmakers reviewing CWA permit applications for surface coal mining operations. *See Am. Hosp. Ass'n*, 834 F.2d at 1051. For example, Administrative Jackson has bluntly indicated that there are "no, or very few, valley fills that are going to meet this [conductivity] standard" set forth in the Guidance. In addition, the Guidance purports to dictate what constitutes acceptable mitigation measures, *see* Ex. 3

(Guidance at 23-24), including, in particular, which measures should not be used to support a Finding of No Significant Impact ("FONSI") by the Corps when preparing NEPA analyses in connection with Section 404 permits. *See id.* at 30.

For the foregoing reasons, the Guidance does not fall within any of the exceptions to notice-and-comment rulemaking set forth in Section 553 of the APA.

B. EPA Exceeded Its Statutory Authority Under The Clean Water Act, The National Environmental Policy Act, And The Administrative Procedure Act.

Under the APA, this Court "*shall* 'hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Colo. Wild Horse & Burro Coal. v. Salazar*, 639 F. Supp. 2d 87, 90-91 (D.D.C. 2009) (quoting 5 U.S.C. § 706(2)(C)) (emphasis in original). In determining whether the Corps and/or EPA "exceeded [their] statutory authority under 5 U.S.C. § 706(2)(C), the Court must engage in the two-step inquiry required by *Chevron* [*U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984).]" *Id.* at 91.

Under *Chevron*, if a statute reflects that Congress has directly addressed the exact question at issue, the Court and the agencies "'must give effect to the unambiguously expressed intent of Congress.'" *Colo. Wild Horse & Burro Coal.*, 639 F. Supp. 2d at 91. (quoting *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781). "[W]hether there is [a statutory] ambiguity, is for the court [to decide], and we owe the agency no deference on the existence of ambiguity." *See Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 468 (D.C. Cir. 2005). In the event the Court determines that "'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Colo. Wild Horse & Burro Coal.*, 639 F. Supp. 2d at 91 (quoting *Chevron*, 467

U.S. at 843, 104 S. Ct. at 2782). Here, EPA and the Corps are violating the CWA's plain language, as explained below.

1. The EC Process And MCIR Assessment Are Contrary To The Clean Water Act.

The EC Process and MCIR Assessment violate the statutory division of authority created by Congress in Section 404 of the CWA. *See* 33 U.S.C. § 1344. Section 404(a) "grants the Corps the power to issue permits . . . for the discharge of . . . fill material." *Coeur Alaska*, 129 S. Ct. at 2463. In addition, the Corps' regulations specify that an applicant has a right to a "full public interest review and *independent decision* by the division or division engineer." 33 C.F.R. § 325.2(e)(3).

By contrast, EPA's authority under Section 404 is limited, as the Supreme Court recently explained in *Coeur Alaska*:

> Section 404 assigns the EPA ***two tasks*** in regard to fill material. First, the EPA must write guidelines for the Corps to follow in determining whether to permit a discharge of fill material. CWA § 404(b); 33 U.S.C. § 1344(b). Second, the Act gives the EPA authority to 'prohibit' any decision by the Corps to issue a permit for a particular disposal site. CWA § 404(c); 33 U.S.C. § 1344(c).

129 S. Ct. at 2467 (emphasis added).

EPA and the Corps defied this statutory division of authority by establishing and implementing the EC Process and MCIR Assessment, which improperly expand EPA's role in Section 404 permitting decisions and relegate the Corps to a virtual lackey with no independent voice in the permitting process. Through these actions, it appears that EPA hopes to exercise Section 404(c)-like authority on a programmatic scale without any of the transparency and procedural rigors of the Section 404(c) process, which must occur on a permit-by-permit basis. Accordingly, and as explained further below, the EC Process and MCIR Assessment violate the plain language of Section 404.

As set forth in the Factual Background, *supra*, EPA and the Corps have crafted a new two-step process for the evaluation of Section 404 permit applications. First, through the MCIR Assessment, EPA (and only EPA) evaluates certain Section 404 permit applications for whether the applications exceed a threshold of acceptable mining impacts, utilizing an EPA-developed model for the analysis that incorporates elements of the 404(b)(1) Guidelines. *See* Ex. 2 (MCIR Assessment Memo at 1-2). From the MCIR Assessment, EPA alone determines which permit applications may proceed through the lawful permitting process in 33 C.F.R. Part 325 and which will be subject to the new EC Process. This new pre-screening process for Section 404 permits, in which the Corps has no role in development or implementation, violates basic principles from Section 404, as described below. First, nothing in Section 404 grants EPA authority to execute this role, and indeed, it directly subverts Congress' clear intent to have the Corps serve as the permitting authority and primary decisionmaker. In contrast to other sections of the Act that allow EPA to issue permits, *e.g.* Section 402, Congress cabined EPA in Section 404 to an advisory role in developing the 404(b)(1) Guidelines and to a limited case-by-case public objection role in Section 404(c). Nothing in Section 404 grants EPA authority to essentially usurp the Corps' role and graft a wholly new substantive permit evaluation process.

Next, EPA lacks authority to apply the 404(b)(1) Guidelines in the manner prescribed by the MCIR Assessment. Both the plain language of Section 404 and the Supreme Court recognize that it is EPA's role to develop the guidelines <u>that are applied by the Corps</u> in reaching permitting decisions. *See* 33 U.S.C. § 1344(b); *Coeur Alaska*, 129 S. Ct. at 2467. EPA is clearly applying the 404(b)(1) Guidelines and making substantive permitting decisions outside the Section 404(c) or public comment process, which is beyond the scope of any rational interpretation of Section 404's plain language.

After the MCIR Assessment occurs, those permits that exceed the EPA-determined threshold of acceptable mining impacts are steered away from the codified permitting process at Part 325, with its specified timeframes and procedures, and placed in the new EC Process, which adds at least sixty days, if not many months, to the permitting process. The EC Process is also contrary to Congress' explicit direction. The EC Process, by its own terms, "establish[es] a process" whereby EPA and the Corps have 60 days to coordinate to resolve any concerns that EPA may have regarding a pending 404 permit application. Ex. 1 (EC Memo at 1) (emphasis added). Such a 60-day "coordination process" is beyond the scope of the "two tasks" that Congress assigned to EPA in the Section 404 permit process, *see Coeur Alaska*, 129 S. Ct. at 2467, and indeed, as applied to those permit applications in the EC Process queue, it stretches reasonable timeframes for permit processing beyond the bounds of Congress' repeated calls for a prompt and expeditious process. *See* 33 U.S.C. § 1344(a), (q); *see also* Ex. 23 (Horn Decl. ¶¶ 6-7) (referencing delays resulting from EC Process); Ex. 8 (Cook Decl. ¶¶ 9, 22) (same).

No reasonable interpretation of the plain language of Section 404 could contemplate the EC Process and EPA's dramatically expanded role. And even if EPA could shoehorn the EC Process into its 404(c) authority, EPA has already eliminated that possibility by making clear that the EC Process precedes and is separate and distinct from the 404(c) process. *See* Ex. 1 (EC Memo at 3).[17] EPA and the Corps cannot now argue that the EC Process lies within the scope of consultation under Section 404(c) or coordination under Section 404(q). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870 (1983)

[17] While it is true that Section 404(c) requires consultation between the Corps and EPA, such consultation is to occur only after EPA actually initiates the 404(c) process or specifically invokes the 404(q) MOU, neither of which happened here. *See* 33 U.S.C. § 1344(c); *see also* 404(q) MOU, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm.

("[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").[18]

Thus, because Congress intended the Corps to evaluate and make independent determinations on Section 404 permit applications within reasonable and specified timeframes and limited the scope of EPA authority to two prescribed tasks, both the EC Process and MCIR Assessment violate the plain language of the CWA.

2. The Guidance Is Contrary To The Clean Water Act.

a. EPA Unlawfully Imposes A Water Quality Standard.

The Guidance requires a limit on water quality of 500 μS/cm. Specifically, the Guidance directs that EPA regional employees "should work with the permitting authority to ensure that the permit includes conditions that protect against conductivity levels exceeding 500 μS/cm." Ex. 3 (Guidance at 12). EPA is currently applying the Guidance, requiring that permits adhere to that limit. *See, e.g.*, Ex. 4 (R. Johnson Decl. ¶¶ 11, 14-15); Ex. 9 (Wells Decl. ¶ 11-12, 24); Ex. 8 (Cook Decl. ¶ 23); Ex. 10 (Dr. Johnson Decl. ¶¶ 8, 10); Ex. 23 (Horn Decl. ¶¶ 7-8); Ex. 18 (Giattina-Roemhildt letter). Yet, EPA plainly has no authority to impose a region-wide water quality standard under Section 303 of the CWA, 33 U.S.C. § 1313.

Under Section 303 of the CWA, "states have the primary role . . . in establishing water quality standards," and "EPA's sole function, in this respect, is to review those standards for approval." *Def. of Wildlife*, 415 F.3d at 1124 (internal quotation marks and citation omitted); *see also Natural Res. Def. Council*, 16 F.3d at 1401 (same); *see also* Statutory Background, Part II

[18] Should EPA and the Corps assert that "the absence of an express limitation" in Section 404 on their authority to engage in a 60-day enhanced coordination process "could be interpreted to mean that Congress intended to allow [the agencies] that authority, the Court [should] reject that statutory interpretation." *Colo. Wild Horse & Burro Coal.*, 639 F. Supp. 2d at 97. Indeed, the D.C. Circuit has instructed that it "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995).

supra. In addition to entrusting EPA with the review of state-promulgated standards, Congress delegated to EPA limited authority to promulgate water quality standards, as follows:

> In accord with Congress' intent to cast the states in the featured role in the promulgation of water quality standards, EPA may step in and promulgate water quality standards itself only in limited circumstances. It may act only where (1) it determines that a state's proposed new or revised standard does not measure up to CWA requirements *and* the state refuses to accept EPA-proposed revisions to the standard or (2) a state does not act to promulgate or update a standard but, in the EPA's view, a new or revised standard is necessary to meet CWA muster.

Am. Paper, 996 F.2d at 349 (citing 33 U.S.C. § 1313(c)(3)-(4)). EPA has acknowledged that "[f]ederal promulgation of State water quality standards should be a course of last resort. It is symptomatic of something awry with the basic statutory scheme." 57 Fed. Reg. 60848, 60858 (Dec. 22, 1992).

EPA has also repeatedly expressed in prior litigation that: (i) water quality standards are waterway-specific; and (ii) states, not EPA, are responsible for promulgating and updating such standards. *See, e.g.*, Corrected Brief for Defendant-Appellee U.S. EPA at 3, *Def. of Wildlife v. EPA*, 415 F.3d 1121 (10th Cir. 2005) (No. 04-2151), *available at* 2004 WL 3142769 (water quality standards "amount to a description of the desired condition of a waterway"); *id.* at 17 ("[s]tates are responsible for developing the specific [water quality] standards, and although EPA is required to review and approve those standards, it does so only to check for consistency with the [CWA]"); Brief for the Federal Appellees at 9, *Fla. Pub. Interest Research Group v. EPA*, 386 F.3d 1070 (11th Cir. 2004) (No. 03-13810), *available at* 2003 WL 23996384 ("Congress specifically intended for States to take the lead in devising water quality standards"); *id.* at 10 ("EPA's role is largely one of oversight, in which it reviews a State's new or revised standards as they are adopted"); *id.* at 10 n. 4 ("In 1965, Congress considered whether the federal government, and not the States, should have the primary authority to establish water quality

standards. Congress decided against placing that power with the federal government"); Brief for the Federal Appellee at 5, *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (No. 93-2315) (excerpted) (Ex. 20) ("water quality standards . . . are set by individual states;" "water quality standards express the desired condition of a particular waterway"); *id.* at 36 ("EPA reviews state standards for consistency with the Act, and to determine whether the criteria will adequately protect the designated use of a particular waterway").

EPA acted well beyond its statutory authority by promulgating a region-wide water quality standard through an informal guidance document. Imposition of the conductivity standard on a region-wide basis[19] conflicts with the existing regulatory scheme, under which water quality standards apply to "a water body, or portion thereof." 40 C.F.R. § 131.2. Significantly, numerous states have questioned the propriety of EPA's conductivity standard, emphasizing that conductivity varies widely depending on geography and other factors. *See* Alan Kovski, *State Officials, Mining Industry Question Science in Draft Mountain Studies*, BNA DAILY ENV'T REPORT, Aug. 25, 2010, *available at* WL 163 DEN A-8, 2010 (quoting criticisms by state regulators in West Virginia, Ohio, and Pennsylvania of the region-wide application of a conductivity standard).

Nor may EPA characterize its actions as an "interpretation" of existing state water quality standards or "guidance" as to how a particular water quality standard should be applied.[20] In fact, the Guidance is devoid of ***any*** mention of a specific state water quality standard. Instead,

[19] Though EPA originally directed that the Guidance would apply to permits in six Appalachian states (Kentucky, Ohio, Pennsylvania, West Virginia, Virginia, and Tennessee), *see* April 1, 2010 Memorandum Questions & Answers, at 1, it has subsequently applied the Guidance in Alabama as well. *See generally* Ex. 9 (Wells Decl.); Ex. 10 (Dr. Johnson Decl.).

[20] Although EPA notes that "nearly all Appalachian states do not currently have applicable numeric water quality criteria that account for the effects associated with high levels of conductivity," it acknowledged that "all Appalachian states have applicable narrative water quality criteria." Ex. 3 (Guidance at 10).

EPA simply assumes the authority to direct water quality without any reference to a particular water quality standard. For these reasons, the Guidance violates the CWA.

b. Application Of The Conductivity Standard To Section 404 Permits Is Unlawful.

Ignoring the Supreme Court's holding in *Coeur Alaska*, EPA's Guidance seeks to impose a water quality based effluent limit in Section 404 permits for coal mining operations, *see* Ex. 3 (Guidance at 22), which disrupts the distinctions between Section 402 and 404 permits upheld by the Court. In *Coeur Alaska*, the Court deferred to EPA's conclusion that a performance standard promulgated under Section 306 of the CWA, 33 U.S.C. § 1316, "does not apply to the initial discharge of [fill] into a lake, but rather, applied only to the later discharge of water from the lake into the downstream creek." 129 S. Ct. at 2474. In doing so, the court cited to the preamble for the current fill material regulation, which underscored that "EPA has never sought to regulate fill material under effluent guidelines." *Id.* at 2475 (quoting 67 Fed. Reg. 31129, 31135 (May 9, 2002)). According to that preamble, "[e]ffluent limitation guidelines and new source performance standards . . . establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued *under section 402 of the Act*." *Id.* (emphasis added).

As *Coeur Alaska* and the regulatory authorities cited therein instruct, where drainage from Section 404 fill areas passes through a Section 402-permitted pond in discharging downstream—as opposed to diffusing from the fill area into adjacent waters without a Section 402 permit—effluent limits and performance standards should apply only to those discharges that are regulated under the Section 402 program. *See Coeur Alaska*, 129 S. Ct. at 2472-76. The gold mining operation at issue in that case is closely analogous to coal mining operations involving valley fills. *Compare Coeur Alaska*, 129 S. Ct. at 2464-65 (explaining how fill placed

into a lake was regulated under a Corps-issued Section 404 permit, whereas discharge from the lake into a downstream creek was regulated under an EPA-issued Section 402 permit) *with OVEC*, 556 F.3d at 186, 190 (explaining how Corps-issued Section 404 permits authorize the valley fill activity itself and the construction of sediment ponds, whereas EPA-issued Section 402 permits authorize discharges from sediment ponds back into streams).

Here, EPA's Guidance disrupts the well-reasoned balance between regulating some activities under Section 402 permits and regulating others under Section 404 permits that the Supreme Court outlined in *Coeur Alaska*. EPA seeks to impose an effluent limit based on a *de facto* water quality standard for conductivity in *both* types of permits. *See* Ex. 3 (Guidance at 12, 22). To be sure, EPA has insisted upon, and the Corps has begun requiring compliance with that limit in Section 404 permits issued since the release of EPA's Guidance in April 2010. *See, e.g.*, Ex. 4 (R. Johnson Decl. ¶¶ 11, 14-15); Ex. 9 (Wells Decl. ¶¶ 11-12, 24); Ex. 23 (Horn Decl. ¶¶ 7-8); Ex. 18 (Giattina-Roemhildt letter); Ex. 13 (Pomponio-Mullins letter). Application of such a limit to Section 404 permits is forbidden under *Coeur Alaska*.

The inclusion of water quality-based effluent limits in Section 404 permits further disrupts the CWA regulatory scheme by allowing EPA and the Corps to cast aside State certifications under Section 401 of the Act. *See* 33 U.S.C. § 1341. Compliance with state water quality standards in the Section 404 process is accomplished through the Section 401 certification process. *See id.* EPA acknowledges that State certifications "will be considered conclusive by the Corps with respect to water quality considerations," Ex. 3 (Guidance at 19), yet it maintains at the same time that it will not honor that certification if it disagrees with the state's interpretation of its own water quality standards. *See id.* at 18. EPA thus fails to accord State certifications the proper deference under the statute. *See Mobil Oil Corp. v. Kelley*, 426 F.

Supp. 230, 234-35 (S.D. Ala. 1976) ("It therefore follows that certification under Section 401 is set up as an exclusive prerogative of the States"); *see also Am. Paper Inst.*, 996 F.2d at 352 (citing *In re Ina Road Water Pollution Control Facility*, NPDES Appeal No. 84-12, 2 E.A.D. 99 (1985) in support of the proposition that "where [a] state reasonably certifies a particular limitation as consistent with its water quality standards, EPA may not mandate *more* stringent limitations"). Indeed, the CWA and its implementing regulations do not contemplate that EPA will second-guess and overturn such certifications simply because it suspects that a state standard *could* be exceeded.

Thus while EPA attempts to exert its will and impose the conductivity standards through both 402 and 404 permits, the CWA does not authorize EPA to impose either in the manner that it has.[21]

3. The Guidance Is Contrary To NEPA.

Under longstanding practices and regulations, the Corps decides, based upon conditions of each mine, whether to prepare an Environmental Impact Statement ("EIS") pursuant to NEPA. The Corps has adopted regulations (i) specifying that "the district commander is the Corps NEPA official responsible for compliance with NEPA for actions within district boundaries," 33 C.F.R. § 230.5, and (ii) prescribing which actions normally require an EIS and which normally require only an Environmental Assessment ("EA"). *Compare* 33 C.F.R. § 230.6 (actions

[21] In addition, the conductivity standard contained in the Guidance is arbitrary and capricious because it is based upon unlawful presumptions. "[T]he [Supreme] Court has indicated that a court has a duty to review agency presumptions for consistency with their governing statutes, and for rationality." *Chem. Mfrs. Ass'n v. U.S. Dep't of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) (citing *Nat'l Labor Relations Bd. v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979). The presumptions underlying the conductivity standard are irrational for the reasons explained in NMA's comments on the studies cited by EPA in support of the standard. *See* National Mining Association, Conductivity Study Comments and Attachments (Sept. 3, 2010) (Ex. 21), *available at* http://www.nma.org/tmp/090310_comments.asp. Last, as explained in the Dunn, Jarrett, and Horn declarations, blanket imposition of the 500 μS/cm conductivity standard lacks a rational link to water quality and is actually detrimental to environmental restoration efforts through re-mining and other projects designed to remediate acid mine drainage impaired waters. *See* Ex. 12 (Dunn Decl. ¶¶ 5-11); Ex. 11 (Jarrett Decl. ¶¶ 10-11); Ex. 23 (Horn Decl. ¶ 12).

normally requiring EISs) *with id.* § 230.7 (actions normally requiring an EA, but not necessarily an EIS, which states that "most permits will normally require only an EA").

The Corps' regulations further the NEPA regulatory scheme, which directs that agencies "***shall*** as necessary adopt procedures to supplement [the NEPA] regulations." 40 C.F.R. § 1507.3(a) (emphasis added). These procedures are to be adopted by the agency "***only after*** an opportunity for public review and after review by the Council." *Id*. (emphasis added). Under the NEPA regulations, each agency must "establish criteria for and identification of those typical classes of action" that: (i) normally require the preparation of EISs, (ii) are normally categorically excluded from NEPA, and (iii) normally require the preparation of EAs but not necessarily EISs. *See id.* § 1507.3(b). Nothing in this regulatory scheme suggests that an agency can establish NEPA guidance or procedures for another agency.

The Guidance attempts to insert EPA into this carefully crafted implementation of NEPA. EPA seeks, first, to dictate to the Corps a decision as to what is acceptable mitigation that would avoid the necessity of preparing an EIS: EPA announced in the Guidance that "no mitigation credit should be given for sediment, groin, or other water control ditches" and that "mitigation measures that rely on establishing or re-establishing streams, rather than rehabilitating or enhancing existing streams, . . . should generally not be used to support a [Finding of No Significant Impact]," which explains an agency's decision not to prepare an EIS for a particular site. Ex. 3 (Guidance at 30). Second, EPA, as opposed to the Corps, prescribes its own preferences for when an EIS is "normally require[d]." Namely, EPA has directed that "projects that involve more than one mile of stream loss or more than one valley fill are likely to result in significant adverse impacts." *Id.*

EPA's effort is contrary to law in several respects. First, contrary to 40 C.F.R. § 1507.3, EPA attempts to substitute its preferences as the NEPA procedures for the Corps. Under that regulation, the agency adopts its own procedures for NEPA implementation; nothing authorizes a separate agency to impose NEPA procedures. Second, the Corps' regulations specify the Corps' own procedures about who will make NEPA decisions (*i.e.*, the district commander) and what actions normally do or do not require an EIS. EPA's Guidance contradicts these Corps regulations. *See* 33 C.F.R. § 230.5. Third, any "procedures" including guidance on when an EIS is "normally required" must be subjected to public notice and requires consultation with the Council on Environmental Quality. EPA's extra-regulatory dictates have not been the subject of public notice or consultation with CEQ. In short, nothing in the authority referenced in all of the Guidance would suggest that EPA has the power to impose NEPA procedures that contradict NEPA regulations.[22] Accordingly, EPA's NEPA regulation of Corps' decisions is contrary to NEPA and its implementing regulations.[23]

II. ABSENT A PRELIMINARY INJUNCTION, NMA'S MEMBERS ARE LIKELY TO SUFFER IRREPARABLE INJURY.

NMA's members are likely to be irreparably injured unless this Court preliminarily enjoins the regulatory actions challenged in this case. First, NMA's small business members are likely to be driven out of business by the delays in permitting that are resulting from the Guidance. Second, NMA's members are likely to incur substantial economic losses as a result of

[22] Congress envisioned that EPA would play a limited role with respect to the NEPA analyses of other agencies. *See* 42 U.S.C. § 7609. Specifically, EPA is empowered to review and comment on EISs written by other agencies. Presumably, EPA would not suggest that this limited statutory role would empower EPA to write NEPA procedures for other agencies. Congress "does not . . . hide elephants in mouseholes," *Am. Bar Ass'n*, 430 F.3d at 467 (internal quotation marks and citations omitted), and nothing suggests a sweeping authority conferred through provision of this limited role.

[23] It is of no consequence that EPA framed its NEPA guidance in a way that allows deviation from the guidance. *See* Ex. 3 (Guidance at 30). The decision as to what is "normally required" is always qualified by the recognition that individual circumstances may require a departure from "normal" requirements. Yet, these NEPA procedures

permit conditions being imposed under the Guidance, which are unrecoverable because of sovereign immunity. Third, the EC Process and Guidance are impermissibly interfering with the exercise of private property rights.[24]

A. Threat To Small Businesses

To demonstrate that irreparable injury is likely, NMA "must show that it will suffer harm that is more than simply irretrievable; it must also be serious in terms of its effect on" NMA. *LG Elecs. U.S.A., Inc. v. U.S. Dep't of Energy*, 679 F. Supp. 2d 18, 35 (D.D.C. 2010). NMA's small business members are losing millions of dollars of revenue and will continue to do so due to delays in permitting and prohibitive permit conditions being imposed as a direct result of the Guidance. These economic losses are sufficiently grave to constitute irreparable injury because the very existence of some of NMA's smaller members is in jeopardy. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843, n. 2 (D.C. Cir. 1977) ("The destruction of a business is, of course, an essentially economic injury. It is not, however, one of the 'mere' economic injuries which . . . are insufficient to warrant a stay"); *see also World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67 (D.D.C. 2000) (declaring that "economic loss may constitute irreparable harm where the loss threatens the very existence of the movant's business"); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 28-29 (D.D.C. 1997) ("Particularly because [the plaintiffs] are small companies, the time and person power spent, as well as the millions of dollars in costs, are indeed significant and irreparable losses").

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are precisely the types of decisions that (i) the NEPA regulations committed to the Corps, (ii) require particular procedures for their promulgation, and (iii) the Corps has already promulgated by regulation.

[24] We first note that, as to both process and product, the Court of Appeals recognizes that APA injuries are irreparable, providing the challenger need not show specific injury when an agency has failed to comply with the notice and comment requirements of the APA. *See McLouth Steel Prod. Corp.*, 838 F.2d at 1324. Rather, injury is inherent.

In this case, the application of EPA's Guidance and the imposition of the conductivity standard therein are causing substantial delays in permitting processes that are likely to result in the destruction of some of NMA's small business members. For example, Best Coal, Inc. has attributed the following to such delays:

> We were not able to ship our contract tonnage in 2009 and through June 2010 because our NPDES 402 and U.S. Corps 404 Permits for the Jagger Mine and Mine #3 have been held up due to EPA's directive concerning enhanced water quality standards. . . .
>
> In closing, our company is in a crisis. We want to finish our 10 year plan but we are not mining the tonnage sufficient to support even our equipment payments. We survived to this point in 2010 with cash from prior years profit but that cash is now gone. We literally exist from week to week. We have cost that cannot be recovered if the NPDES and Section 404 permits are not issued. Today, we are mining every possible ton to pay our employees, vendor bills, and bank note payments. If these permits are not issued, we will be out of business within 18 months.

Ex. 4 (R. Johnson Decl. ¶¶ 16,19); *see also id.* ¶ 18 (indicating that (i) the company's total lost revenue from 2009 and 2010 was nearly $6.7 million; (ii) the company laid off five of its twenty-eight employees; and (iii) the company will likely need to lay off more employees and "sell[] equipment to lower [its] cost and loan debt in the very near future").

Given the small size of some coal operators, the millions of dollars in lost revenue, and the potential that those operators will have to shut down as a result of the challenged agency actions, the economic losses in this case constitute irreparable injury under this Circuit's legal precedent. *See Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843, n. 2; *see also Bracco*, 963 F. Supp. at 28-29.

B. Unrecoverable Economic Loss

In the D.C. Circuit, "unrecoverable financial loss can constitute irreparable injury under some circumstances." *LG Elecs.*, 679 F. Supp. 2d at 36. In particular, if a movant seeking a

preliminary injunction "will be unable to sue to recover any monetary damages against" a government agency in the future because of, among other things, sovereign immunity, financial loss can constitute irreparable injury. *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66-67 (D.D.C. 2004) (holding that the "likelihood of irreparable financial harm to [the plaintiff] is more than sufficient" after finding that the plaintiff would be "unable to sue to recover any monetary damages against either Freddie Mac or [the Office of Federal Housing Enterprise Oversight]"); *accord Sherley*, 704 F. Supp. 2d at 72 (granting injunction after concluding that economic injuries can be irreparable when the Court cannot compensate the plaintiffs at a later date); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

Here, the financial injuries that NMA's members are likely to face as a result from complying with the challenged agency actions far exceed those at issue in *Edmondson*. *See id.* at 756-59. In order to obtain and comply with permits for surface mining operations that incorporate the unlawful standards set forth in the Guidance, including, in particular, the 500 μS/cm conductivity standard, NMA's members must commit to, and ultimately spend, considerable amounts. For some companies, those amounts will render previously planned projects infeasible. For example, one NMA member company received an estimate that it would cost approximately $5.3 million to install reverse osmosis technology to try to lower conductivity levels from the current baseline levels (at or above 700 μS/cm) to the 500 μS/cm standard required by the proposed permit. *See* Ex. 9 (Wells Decl. ¶ 13). In addition, the cost of operating such technology totals nearly $3 million per year. *See id.* Given those amounts, the contemplated re-mining project is not feasible and would result in losses of over $25 million

over an estimated 10-year project life. *See id.* ¶ 14. Like in *Edmondson*, the significant financial harms that NMA's members are likely to suffer as a result of complying with the EC Process and Guidance would not be recoverable even if NMA ultimately prevails on the merits because EPA, the Corps, and their officials "are immune from suit for retrospective relief." *See Edmondson*, 594 F.3d at 771.

Moreover, the procedural posture of the Guidance and the 500 μS/cm conductivity standard further enhance the risk and scope of harm to NMA's members. EPA is accepting comment on the scientific studies underlying that standard and on the Guidance itself, while at the same time applying the conductivity standard in permits now, forcing NMA members to assess and incur costs necessary to comply with the standard. What if EPA's public review reveals that the conductivity standard is inappropriate? What remedy is left for those who spent millions to comply, who laid off dozens of workers because the standard was unworkable, or who went out of business altogether? NMA's comments to the underlying studies demonstrate that serious technical and legal questions permeate EPA's application of the studies to Section 402 and 404 permits, warranting a halt in further application until a full scientific review occurs, followed by an appropriate water quality standard development process.[25] *See* Ex. 21 (NMA comments). And, as explained above, NMA's declarations make clear that irreparable injury will occur otherwise.

[25] Indeed, data development flaws have been exposed in recent EPA water standard work even after full notice and comment, as evidenced by the recent sequence of events surrounding the construction effluent limitation guideline. *See* EPA's Unopposed Motion for Partial Vacatur of the Final Rule, Remand of the Record, to Vacate Briefing Schedule, and to Hold Case in Abeyance, *Wisc. Builders Ass'n v. U.S. Envtl. Prot. Agency*, No. 09-4113 (7th Cir. filed Aug. 13, 2010). Even greater caution and scrutiny is warranted here where EPA is informally applying non-peer reviewed scientific work to current permit proceedings.

C. Interference With Property Interests

In addition to the unrecoverable financial losses that NMA's members are likely to suffer as a result of the EC Process and Guidance, those regulatory actions are already encroaching on the property interests of NMA's members. Such injuries will continue unless this Court preliminarily enjoins the application of the EC Process and Guidance. "As a general rule, interference with the enjoyment or possession of land is considered 'irreparable' since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute." *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989). Moreover, "when 'interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 1998 WL 1469541, at *6 (D.Del. Feb. 4, 1998)). In *RoDa Drilling*, the Court held that the plaintiff's inability to access and operate its interests in the oil and gas producing properties it purchased constituted irreparable harm. 552 F.3d at 1211.

Here, the Corps and EPA have placed a time consuming, costly, and unlawful obstacle in the path of the exercise of property rights in the form of the EC Process and Guidance. The Corps and EPA are delaying and effectively preventing NMA member companies from developing their private property interests. *See, e.g.*, Ex. 4 (R. Johnson Decl. ¶¶ 16-19) (describing how operations have idled and the company may go out of business due to ongoing delays in both Section 402 and 404 permitting processes resulting from EPA's Guidance); Ex. 8 (Cook Decl. ¶¶ 9-11, 22) (referencing ongoing delays in a Section 404 permit process beginning in early 2009 due to EPA's inaction). Moreover, the strict conductivity limit that the Corps is imposing as a result of EPA's Guidance will render certain contemplated mining projects unfeasible. *See* Ex. 9 (Wells Decl. ¶¶ 14, 22); Ex. 23 (Horn Decl. ¶ 13). Last, EPA is even using

the Guidance to revisit permitting decisions that pre-date the Guidance in order to impose the conductivity limit therein, completely disrupting the established regulatory certainty a permit provides in the exercise of property rights. *See* Ex. 13 (Pomponio-Mullins letter). As such, the Guidance is infringing upon NMA member companies' real property interests and causing irreparable injury sufficient to support a preliminary injunction. *See id.*

III. THE BALANCE OF THE EQUITIES TIPS IN NMA'S FAVOR.

In evaluating the balance of the equities, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S.Ct. at 376 (citations omitted). The balance tips strongly in favor of a preliminary injunction in this case.

As explained above in Part II, the EC Process Memoranda and Guidance are already significantly harming NMA's member companies by extensively delaying permit proceedings, allowing the Corps and EPA to impose unlawful permit conditions, and interfering with the exercise of property rights. The resulting delay is threatening to shut down some of NMA's smaller member companies and is rendering projects unfeasible for other companies, thereby resulting in layoffs and lost revenue. *See* Argument, Part II *supra*.

In contrast with these irreparable injuries, there will be no harm if the EPA and the Corps must wait until this Court addresses the legality of the EC Process Memoranda and Guidance in this case. A preliminary injunction in this case will do nothing more than restore the regulatory environment that existed prior to the unlawful application of the EC Process and the Guidance to coal mining operations. EPA has recourse under the CWA if it disagrees with any Corps or state permitting decisions made during the pendency of this litigation while a preliminary injunction is in place. It can engage in the Section 404(c) process for Corps-issued permits, and it can formally object to state permits issued under Section 402. Importantly, NMA companies are not

seeking to shirk their responsibilities under any environmental protection laws or regulations; rather, they are merely asking EPA and the Corps to regulate within bounds of their Congressionally delegated authority under the relevant statutes.

The Court should strike the same balance in this case as the court did in *Stupak-Thrall v. Glickman*, No. 2:96-CV-054, 1996 WL 466524, at *3 (W.D. Mich. May 15, 1996) (granting preliminary injunction and finding that harm to fishing resort operators, who had a property interest in the entire surface of the lake, outweighed the government's interest in protecting wilderness areas). Coal mining operations are the sole means of livelihood for many businesses and individuals across the Appalachian region, and the survival of some businesses depends on the exercise of private property rights without unlawful governmental impediments such as the EC Process and the Guidance. In addition, NMA's members are entitled to the lawful, codified regulatory permitting processes that have been in place for decades, without surprise or evolving standards that have not been subject to the required regulatory development procedure. If EPA wishes to amend the substantive permitting standards that have governed coal mining operations for decades, it must comply with the APA to achieve its policy goal. EPA would suffer no cognizable harm by being forced to halt its short-circuiting of rulemaking and fair notice and comment. At bottom, the harm to NMA that would result from the denial of a preliminary injunction greatly outweighs any harm to EPA and the Corps if such an injunction is granted.

IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S.Ct. at 376-77 (internal quotation marks and citation omitted).

A preliminary injunction against implementation of the EC Process and Guidance serves the public interest in several ways. First, it protects the integrity of the administrative regulatory

process, which is vital to ensuring fair and transparent governance. *See* Transparency and Open Government, 74 Fed. Reg. 4685-86 (Jan. 26, 2009). Neither the EC Process Memoranda nor the Guidance, both of which were conceived and developed behind closed doors and without the participation of the general public, serve the public interest in a transparent and participatory government that follows both the letter and spirit of the APA. Nor do they serve the public interest in an agency's proper exercise of its statutory authority because they effectively allow EPA to encroach upon the authority that Congress delegated to the Corps and to the states. *See Sherley*, 704 F. Supp. 2d at 73 ("It is in the public interest for . . . an agency to implement properly the statute[s] it administers") (internal quotation marks and citation omitted).

Additionally, the public has a strong interest in developing domestic sources of energy, which is reflected in numerous statutes. In SMCRA, for example, Congress plainly recognized the importance of coal and surface coal mining to the nation's energy requirements and economy. *See, e.g.*, 30 U.S.C. § 1202(f) ("It is the purpose of this chapter to . . . assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy"); *id.* § 1201(j); *accord* H.R. 6113, § 2(1) (finding that the U.S. "consumes over 1 billions tons of coal annually," "[m]ost of this coal is used to meet nearly one-half of the Nation's electricity needs"); *id.* § 2(7) (finding that EPA's EC Process and Guidance "is harming national security").

The EC Process and Guidance do not advance this public interest; rather, they frustrate it by making a key domestic source of energy harder to develop. *See* Ex. 9 (Wells Decl. ¶¶ 25-26) (permit conditions imposed as a result of the Guidance will render a proposed re-mining project expected to yield approximately 150,000 tons of processed low sulfur coal unfeasible); Ex. 4 (R.

Johnson Decl. ¶¶ 17-18) (delays in permit issuance have prevented a company from meeting its contractual obligations to sell coal to a power plant by approximately 88,850 tons over the past eighteen months); *see also* H.R. 6113, § 2(5) (finding that "more than 2 years of the Nation's coal supply is in jeopardy"). They also preclude the realization of the environmental benefits of mining achieved through reclamation, particularly in re-mining projects that restore land damaged by historic, pre-regulatory mining operations. *See, e.g.*, Ex. 11 (Jarrett Decl. ¶¶ 5, 10-11) (detailing the benefits of required reclamation practices for re-mining operations that have resulted in conductivity levels far exceeding 500 μS/cm, yet have restored aquatic life to previously "biologically dead" waters); Ex. 12 (Dunn Decl. ¶¶ 5-11) (explaining how EPA's 500 μS/cm conductivity limit will "place in jeopardy" many environmentally-friendly stream restoration "efforts by grass-roots and non-profit organizations, government agencies, the local community, and the active mining industry" in Pennsylvania that have proven effective in reintroducing various aquatic organisms in streams that were "essentially 'dead' for decades"); Ex. 9 (Wells Decl. ¶¶ 5-7, 26) (describing existing un-reclaimed conditions and anticipated environmental benefits of re-mining).

Last, a preliminary injunction against the EC Process and Guidance will promote the public interest in job growth and economic development. As detailed above, the EC Process and Guidance have given rise to permit conditions and requirements that are effectively shutting down proposed projects and resulting in job losses. *See* H.R. 6113, § 2(5) (finding that the EC Process and Guidance will place "roughly 1 in every 4 coal mining jobs in the Appalachian region [] at risk of elimination" and that "81 small businesses will lose significant income and will be at risk of bankruptcy"); *accord* Ex. 9 (Wells Decl. ¶ 25) (explaining that Sapphire Coal Company is in the process of laying of miners); Ex. 4 (R. Johnson Decl. ¶¶ 18-19) (detailing how

Best Coal, Inc. has laid off five of twenty-eight employees and "will be out of business within 18 months" if it does not receive the permits it applied for). In addition to these direct impacts on coal companies, the Guidance could have substantial, negative impacts upon the freight railroad industry, which is "vital to the Nation's economic health." Declaration of John T. Gray, Association of American Railroads (Sept. 15, 2010) (Ex. 22) ¶¶ 3-6. Because "[c]oal is by far the most important single commodity carried by U.S. railroads," *id.* ¶ 7, "a halt or significant curtailment in coal production would lead to a sharp reduction in railroad revenue and severe economic consequences for railroads, rail suppliers, their employees, and the communities they serve." *Id.* ¶ 10. The EC Process and Guidance are undermining the goal of economic recovery; therefore, a preliminary injunction would serve the public interest.

CONCLUSION

For the foregoing reasons, the Court should grant NMA's motion for a preliminary injunction.

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Respectfully submitted,

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