IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION, *et al.*, **Plaintiffs,** **and** **COMMONWEALTH OF KENTUCKY and CITY OF PIKEVILLE, KENTUCKY,** **Plaintiff-Intervenors,** **v.** **LISA JACKSON, in her official capacity as Administrator, U.S. Environmental Protection Agency, *et al.*,** **Defendants,** **and** **SIERRA CLUB, *et al.*,** **Defendant-Intervenors.**	**Nos. 10-cv-1220-RBW** **11-cv-0295-RBW** **11-cv-0446-RBW** **11-cv-0447-RBW**

STATE OF WEST VIRGINIA'S
AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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Plaintiff Randy C. Huffman, in his official capacity as Cabinet Secretary of the West Virginia Department of Environmental Protection ("WVDEP"), and acting on behalf of the State of West Virginia (collectively "West Virginia," the "State," and "Plaintiffs"), hereby files this Amended Complaint for Declaratory and Injunctive Relief pursuant to the Court's September 16, 2011 Scheduling Order. With this amendment, the State of West Virginia revises its challenges to the Interim and Final Guidance documents.

Introduction

1. This civil suit seeks relief from a series of actions taken by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") that unlawfully seek out and target surface coal mining in West Virginia and five other Appalachian states. With these actions, EPA and the Corps have demonstrated a brazen disrespect for the notice-and-comment rulemaking that forms the backbone of proper regulatory action by giving the states and other interested parties a meaningful opportunity to comment upon proposed rules before implementation. EPA has attempted to aggregate regulatory power over all aspects of coal mining to itself in violation of several federal laws, usurping that power from the Corps and the State of West Virginia where it rightly belongs. EPA has acted with complete disregard for the strictures of the Clean Water Act ("CWA"), the Surface Mining Control and Reclamation Act ("SMCRA"), and for the sovereignty of the State of West Virginia by seeking to circumvent the scheme of cooperative federalism that governs coal mining. Moreover, EPA unilaterally created an arbitrary and capricious new water quality standard in reliance on questionable scientific literature. The State asked the Court to set aside the

agencies' unlawful actions, seeking injunctive and declaratory relief, fees and costs, and any other relief that the Court should determine is just and proper.

2. Concerned that EPA's unjustified and unlawful actions could sound the death knell for all types of mining, the State of West Virginia filed suit in the Southern District of West Virginia on October 6, 2010, challenging the agencies' adoption and implementation of the Enhanced Coordination Process (the "EC Process") and the April 1, 2010 Interim Detailed Guidance document (the "Interim Guidance"). The State filed a seven-count complaint asserting claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702.

3. The State's suit thereafter was transferred from the Southern District of West Virginia to this Court and consolidated with three similar actions brought by the National Mining Association ("NMA"), the Commonwealth of Kentucky, the Kentucky Coal Association, the City of Pikeville, Kentucky, and five Kentucky-based coal companies (collectively "Plaintiffs").

4. After consolidation, Plaintiffs proposed, and the Court accepted, a bifurcated briefing schedule with respect to the challenged agency actions—the EC Process and the Interim Guidance. The parties filed cross-motions for partial summary judgment on both issues and briefing commenced pursuant to that schedule.

5. The parties fully briefed their claims regarding the Multi-Criteria Resource ("MCIR") Assessment (which the State did not challenge) and the EC Process, and the Court heard oral argument on those claims on September 16, 2011. Concluding that Defendants had violated the APA, the Court granted Plaintiffs'[1] motion for partial

[1] The Commonwealth of Kentucky, the Kentucky Coal Association, and the City of Pikeville did not challenge either the EC Process or the MCIR Assessment.

summary judgment and set the MCIR Assessment and the EC Process aside as unlawful agency actions under 5 U.S.C. § 706(2).

6. The parties also filed cross-motions for summary judgment challenging the second part of this case, EPA's Interim Guidance, but their briefing of that issue was interrupted when EPA issued its Final Guidance on July 21, 2011, and declared that the Interim Guidance had been "superseded" by the new guidance document. As the parties previously had agreed, they proposed a modified briefing schedule, approved by the Court and providing for the instant Amended Complaint, which updates the original Complaint and adds allegations relating to the Final Guidance.

7. The rationale behind the Court's ruling invalidating the MCIR Assessment and the EC Process applies with equal force to EPA's actions in adopting and implementing the Interim and Final Guidance documents, which attempt to dictate certain permitting standards and best practices to the states and the Corps with no statutory support for doing so. EPA is not the primary permitting authority—the Corps is the primary permitting authority for Section 404 permits and the State of West Virginia is the primary decision-maker for Section 401 certifications and the primary permitting authority for Section 402/National Pollutant Discharge Elimination System ("NPDES") permits. The State, not EPA, is responsible for adopting water quality standards, subject to federal approval, and for regulating the disposal of excess spoil material from surface coal mining operations under SMCRA. The Corps, not EPA, generally is responsible for evaluating the environmental impacts of Section 404 permits, and the State of West Virginia, not EPA, is responsible for conducting an environmental analysis under SMCRA of the placement of fill material in areas outside of the waters of the United

States. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir. 2009) ("*OVEC*").

8. Despite the clear allocation of decision-making authority in the CWA and SMCRA, which define the parameters of and limit EPA's involvement in permitting decisions, EPA continues to act as if it were the primary decision-maker for all types of mining permits. With the Interim and now Final Guidance documents, EPA has attempted to impose on the State of West Virginia a new numeric water quality standard based on specific conductance or conductivity, without following the proper procedure provided by the CWA. EPA has "recommended" that the State require certain best management practices ("BMPs") in its CWA Section 402 permit conditions. EPA has attempted to undermine the force of the State's CWA Section 401 water quality certifications and encourages the Corps to second-guess those certifications. EPA has attempted to modify the CWA Section 401(b)(1) guidelines without formal rulemaking. And EPA has attempted to impose on the Corps its new conductivity standard, sequencing requirements and other BMPs, and to dictate to the Corps certain NEPA presumptions, all while acting far outside of its statutory authority.

9. Moreover, the substance of the Final Guidance, like the Interim Guidance before it, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because, in adopting a new water quality standard based on conductivity, the Guidance documents rely on certain studies that purport to be scientific but actually are policy driven. The new standard focuses on the effect of conductivity on one order of insects, *Ephemeroptera,* commonly known as "mayflies," while ignoring the broader effects, if any, on other plants and animals, and on human activity. Congress gave the

State of West Virginia, not EPA, the authority to establish numeric and narrative water quality standards that it determines will best protect the overall well-being of the State's waters. The West Virginia Legislature has done just that, concluding that the most effective way to protect the State's waters and aquatic life is to take a holistic approach to measuring quality rather than focusing on only one numerical criterion such as EPA's new conductivity water quality standard. The guidance documents override West Virginia's properly promulgated water quality standards and, because conductivity alone does not accurately measure the overall quality of a stream, EPA has compromised WVDEP's ability to adequately monitor and protect the quality of the State's streams and other waters, and the aquatic ecosystems therein.

10. To protect the State's sovereign interest in the integrity of its waters and wildlife, the welfare of its people, and its role in regulating mining within its borders, the State seeks an order from this Court declaring EPA's actions to be unlawful, enjoining their implementation, and vacating those documents as arbitrary, capricious, an abuse of discretion, and otherwise contrary to law in violation of the APA, the CWA, NEPA, and SMCRA. The State also asks this Court to order that the proper regulatory and statutory review processes, which existed prior to and were improperly amended by the EC Process and the two guidance documents, be reinstated. And finally, Plaintiffs ask this Court to declare that the State of West Virginia retains its right to establish and implement water quality standards for the State's waters and that WVDEP retains the authority to control the relevant permitting processes under its purview, including the right to apply and interpret the State's water quality standards.

II. Jurisdiction and Venue

11. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. This Court may grant the relief requested herein under 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. §§ 701-706.

12. Venue is proper in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1391(e).

III. Parties

13. Plaintiff Randy C. Huffman brings this action in his official capacity as Cabinet Secretary of WVDEP and acting on behalf of the State of West Virginia. WVDEP is an agency of the State of West Virginia headquartered in Charleston, West Virginia. WVDEP is charged with administering all relevant permits for surface coal mining operations in the State and with interpreting and following the water quality standards set by the West Virginia Legislature. WVDEP's mission is to "[u]se all available resources to protect and restore West Virginia's environment in concert with the needs of present and future generations."

14. Defendant EPA is the federal agency charged with the administration and enforcement of many federal environmental laws. EPA is headquartered in Washington, D.C. As is relevant to this particular case, EPA promulgates CWA Section 401(b)(1) Guidelines, which the Corps must follow in issuing CWA Section 404 dredge-or-fill disposal permits. *See* 33 U.S.C. § 1344(b)(1). EPA also has the ability to approve state water quality standards under certain circumstances, *see* 33 U.S.C. § 1313, to object to the Corps' decision to issue a Section 404 permit under certain circumstances, *see* 33

U.S.C. § 1344(c), and to object to a state's decision to issue a Section 402 permit under certain circumstances, *see* 33 U.S.C. § 1342(d)(2).

15. Defendant Lisa P. Jackson is named in her official capacity as the EPA Administrator. As EPA Administrator, Ms. Jackson bears the ultimate responsibility for EPA's actions; she also is a signatory to the EC Process and other relevant agency letters and/or memoranda discussed in greater detail below. Although she is not a signatory thereto, she also ultimately is responsible for the Interim and Final Guidance documents. The Administrator's office, like EPA headquarters, is located in Washington, D.C.

16. Defendant the Corps is the federal agency charged with issuing dredge-or-fill discharge permits under CWA Section 404, including those associated with surface mining operations. *See* 33 U.S.C. § 1344(b)(1). The Corps is headquartered in Washington, D.C.

17. Defendant John M. McHugh is named in his official capacity as the Secretary of the Army, which has ultimate responsibility for the issuance of CWA Section 404 permits by the Corps. The Department of the Army is headquartered in Washington, D.C.

18. Defendant Lieutenant General Robert L. Van Antwerp is named in his official capacity as the Chief of Engineers and Commanding General of the Corps, located in Washington D.C. As head of the Corps, Lt. Gen. Van Antwerp is charged with the supervision and management of all of the Corps' decisions and actions.

IV. Statutory Framework and Relevant Common Law Principles

19. The State of West Virginia's interests in this suit arise from deeply rooted principles of common law. It has long been recognized that the State "has an interest

independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). The State's waters, and the fish and other creatures within those waters, may therefore be seen as property of the State. *See McCready v. Virginia*, 94 U.S. 391, 394 (1876); *see also Cont'l Ins. Cos. v. Northeastern Pharm. & Chemical Co., Inc.*, 811 F.2d 1180, 1186 n.14 (8th Cir. 1987); *United States v. Turner*, 175 F.2d 644, 647 (5th Cir. 1949); *State v. Taylor*, 214 S.W.2d 34, 36 (Mo. 1948); *cf. Barre v. Flemings*, 1 S.E. 731, 737-38 (W. Va. 1887) (recognizing the state's sovereign right to use its waters). Although the State does not possess absolute ownership over its natural resources, historic references to the State's "ownership" is meant to "express[] the importance . . . that a State have power to preserve and regulate the exploitation of an important resource." *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (internal quotation marks omitted).

20. The State has a "legitimate state concern[] for [the] conservation [of natural resources] and [the] protection of wild animals" that is "similar to the State['s] interests in protecting the health and safety of [its] citizens." *Hughes*, 441 U.S. at 336-37. When pollutants are released into the water, air, and soil, the State itself suffers injury. *See Tenn. Copper Co.*, 206 U.S. at 237; *see also Cont'l Ins. Cos.*, 811 F.2d at 1185 (citing *Tenn. Copper Co.*, 206 U.S. at 237). The State's interests in its resources, and the derivative interests of its citizens, is properly prosecuted or defended by the State. *See South Carolina v. North Carolina*, __ U.S. __, 130 S. Ct. 854, 867 (2010) (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953)).

21. In addition to the State's sovereign interest in the protection and quality of its land and waters, the State plays an important and often primary role under various federal

statutes in regulating discharges into those waters and regulating coal mining operations within West Virginia. Coal mining is subject to a complicated web of statutory and regulatory provisions under a cooperative federalism approach that carves out "distinct roles" for the federal and state governments. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). Both the CWA and SMCRA emphasize the important and primary role the State plays in protecting its waters and in regulating mining activities. *See* 30 U.S.C. §§ 1201(f), 1253; 33 U.S.C. § 1251(b).

22. To fully understand the factual background of this case, therefore, one also must understand the relevant statutory and regulatory framework within which those facts operate. That framework is described below.

A. Clean Water Act

23. In crafting the CWA, Congress allocated the primary responsibility for water pollution control to the states, declaring

> [i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b). Accordingly, "Congress carefully constructed a legislative scheme that imposed major responsibility for control of water pollution on the states. . . . [] Congress envisioned the EPA's role as largely a supervisory one." *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980); *see also, e.g., Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (describing the states as "the prime bulwark in the effort to abate water pollution" under the CWA). Congress did so because it was "[c]oncerned that federal promulgation [of water quality standards] would discourage state plans for

water quality and would place [undue power] in the hands of a single Federal official." *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1272 (5th Cir. 1980) (internal quotation marks omitted).

1. Water Quality Standards under Section 303

24. In keeping with Congress' intent, CWA Section 303 allocates the primary authority for the development of water quality standards to the states, requiring them to establish, review, and revise comprehensive water quality standards "to protect public health or welfare, enhance the quality of the water and serve the purposes of the Clean Water Act." 40 C.F.R. § 131.2; *see also* 33 U.S.C. § 1313; 40 C.F.R. § 131.4; *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 704. A water quality standard establishes the water quality goals of a body of water by designating the uses for that body of water and then setting criteria intended to protect those uses. The Act's implementing regulations instruct that, "whenever attainable,"

> water quality standards should . . . provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

40 C.F.R. § 131.2. Those standards may be specific numeric criteria or holistic narrative standards and are subject to federal approval. Once the EPA Administrator gives that approval, "such standard shall thereafter be the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3).

25. Because Congress intended states to take the lead in setting water quality standards for their own waters, EPA's role is limited. First, EPA is empowered, after consulting with the appropriate federal and state agencies, officials, and other interested

persons, to develop and publish water quality criteria reflecting the latest scientific knowledge. *See* 33 U.S.C. § 1314(a). But those criteria are not binding on the states and are not independently enforceable; a state may adopt, modify, or reject EPA's published criteria so long as it has a sound scientific rationale for doing so. Secondly, EPA reviews and approves or disapproves state-adopted new or revised water quality standards. *See* 33 U.S.C. § 1313; 40 C.F.R. § 131.21. If EPA determines that a state's new or revised water quality standard does not satisfy the CWA, or determines that a new or revised standard is necessary to satisfy the Act, EPA must notify the state within a particular timeframe and specify the changes that EPA feels are necessary. *See* 33 U.S.C. § 1313(a), (c); 40 C.F.R. §§ 131.5, 131.21. If either circumstance arises, the Administrator must prepare and publish proposed regulations setting forth a revised or new water quality standard and allow for a minimum comment period of 90 days, unless a state adopts a new or revised standard during that time period which the EPA Administrator determines is in accordance with the Act. 33 U.S.C. §1313(c)(4).[2]

26. West Virginia water quality standards are different from those in Kentucky, illustrating the primary role each separate state plays in this system of cooperative federalism.

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[2] One example of the EPA doing so is described in *Florida Wildlife Federation, Inc. v. South Florida Management District*, 647 F.3d 1296, 1300 (11th Cir. 2011). In that case,

> the Administrator made an explicit and unequivocal determination by a letter . . . that the Florida narrative nutrient standard was inadequate and that a revised or new standard was necessary to meet the Clean Water Act's requirements. The EPA's formal determination that Florida's water-quality standards were inadequate triggered the agency's statutory obligation to "promptly prepare and publish proposed regulations setting forth a new or revised water quality standard."

Id. (citation omitted) (quoting 33 U.S.C. § 1313(c)(4)). That passage illustrates the formality and procedures by which the EPA Administrator proposes a new water quality standard.

27. West Virginia has adopted water quality standards in accordance with the public policy set forth by the State Legislature. The West Virginia Water Pollution Control Act ("WVWPCA") provides that it is "the public policy of the state of West Virginia to maintain reasonable standards of purity and quality of the water of the state consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development." W. Va. Code § 22-11-2(a). "It is also the public policy of the state of West Virginia that the water resources of this state with respect to the quantity thereof be available for use by all the citizens of the state." *Id*. § 22-11-2(b).

28. In accordance with that policy, the State adopted narrative and numeric water quality standards through the legislative review and adoption process. *See generally* W. Va. Code R. 47-2; *see also* W. Va. Code R. § 47-2-3.2.i; App. E, Table 1 to Chapter 47 § 2; West Virginia Department of Environmental Protection, "Water Quality Standards," *available at* http://www.dep.wv.gov/WWE/getinvolved/sos/Pages/WQS.aspx (last visited Oct. 11, 2011) (describing the State's water quality standards and containing links to those standards).

29. The State adopted numeric standards for parameters such as dissolved aluminum, arsenic, chloride, manganese, and zinc. In 2009, EPA approved the State's latest changes to its numeric standards.

30. The State has not adopted a numeric standard for conductivity.

31. The State also adopted a narrative water quality standard, which states in relevant part: "[N]o significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed." W. Va. Code R. § 47-2-3.2.i. EPA approved that narrative standard.

32. WVDEP has interpreted "significant adverse impact" to mean "more than a change in the numbers or makeup of the benthic macroinvertebrate community in a segment of a water body downstream from a point source discharge. It is, instead, a material decline in the overall health of an aquatic ecosystem. A goal of the CWA and the WVWPCA is to protect the aquatic ecosystem as a whole; it is a holistic standard that requires a holistic approach to ecosystem assessment." Ex. A at 3 ("Justification and Background for Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards, 47 C.S.R. 2 §§ 3.2.e and 3.2.i" (dated Aug. 12, 2010)). The State's narrative standard predates West Virginia's attainment of primacy over the NPDES permitting program in 1982.

33. The West Virginia Legislature recently rejected the adoption of a numeric conductivity standard. In House Concurrent Resolution 111, unanimously adopted in the 2010 Regular Legislative Session, the Legislature resolved:

a. That WVDEP is charged with any interpretation and implementation of West Virginia's narrative water quality standards;

b. That the narrative water quality standards are satisfied when a stream:

i. Supports a balanced aquatic community diverse in species composition;

ii. Contains appropriate trophic levels of fish (that is, appropriate levels of fish on each level of the food chain), provided that the stream has sufficient water flow to support fish populations;

iii. And the aquatic community is not composed only of pollution-tolerant species or the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or if the assessed reach has insufficient flows to support a fish community, in the downstream reaches where fish are present;

c. That interpretation of West Virginia's water quality standards must faithfully balance environmental protection with the need to maintain and expand employment, agricultural, and industrial opportunities.

34. The Legislature declared that "[t]he State of West Virginia has not adopted subcategories of special use to protect a certain species of mayfly but protects the aquatic community consistent with the Legislature's statement of public policy." Similarly, WVDEP reasoned:

> [i]n contrast to numeric criteria, which can be applied by samples of water taken at any discharge or monitoring point in a stream, compliance with a standard that protects the aquatic ecosystem must be assessed in the broader area comprising the ecosystem. An ecosystem does not exist at a single point and, accordingly, its health cannot be assessed at a single point.

Ex. A at 3.

35. EPA approved West Virginia's numeric and narrative water quality standards. EPA has not determined that West Virginia's water quality standards are inadequate, published a new water quality criterion under the CWA, or published a proposed regulation supplanting those standards.

2. Section 402 Permits (NPDES Permits)

36. Also relevant to this action are the two types of CWA permits generally required for surface coal mining operations: Section 402/NPDES permits and Section 404 permits. Section 402/NPDES permits regulate point source discharges of pollutants into waters of the United States, set specific discharge limits and establish monitoring,

reporting, and other requirements. *See* 33 U.S.C. § 1311(b)(2). A NPDES permit includes effluent limits for a pollutant if WVDEP determines that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a state numeric criteria within a State water quality standard for an individual pollutant. *See id.* § 1312; 40 C.F.R. § 122.44(d).

37. EPA is charged with administering the NPDES program, but because Congress intended to allocate the primary responsibility for water pollution control to the States, *see* 33 U.S.C. § 1251(b), CWA Section 402(b) authorizes each state to establish its own permitting program for discharges into navigable waters within its jurisdiction. *See id.* § 1342(b). Once a state is so authorized, EPA suspends its own program. *See id*. § 1342(c)(1).

38. West Virginia is among those states that have assumed NPDES permitting authority. West Virginia has had primacy to administer that program since 1982 and WVDEP is the state agency charged with that administration.

39. EPA has limited authority to review WVDEP's actions as they relate to NPDES permitting. Specifically, EPA has the authority to object under specific circumstances to a particular NPDES permit authorizing discharges within West Virginia. *See id*. § 1342(d)(2), (4); 40 C.F.R. § 123.44. If WVDEP does not adequately respond to EPA's objection within a specified time, EPA may assume authority to issue the particular permit. *See* 33 U.S.C. § 1342(d)(4). But if EPA does not object to a permit, within specified times and by following specified procedures, WVDEP may proceed.

40. EPA and WVDEP entered into a Memorandum of Agreement ("MOA") governing WVDEP's NPDES permitting program in accordance with § 1342(d)(2), (4)

and 40 C.F.R. § 123.44. *See* Ex. B (MOA). Under the MOA, the EPA Regional Administrator has up to thirty days after receiving a draft NPDES permit to make comments upon, objections to, or recommendations with respect to that permit. *See* Ex. B. at 12. The Regional Administrator may issue a general objection to the permit, gaining an additional sixty days to issue a specific objection (which must be issued within ninety days). *Id.* If the Regional Administrator does not object or ask for an extension of time, the application is complete and WVDEP may issue the permit. The MOA also sets forth in detail the grounds upon which EPA may object to a permit. *See id.* at 13-14.

41. WVDEP has adopted a Permitting Guidance, discussed below, describing the procedures it uses to develop NPDES permits for the coal mining industry.

3. Section 404 Permits

42. CWA Section 404 regulates the discharge of dredge-or-fill material in the waters of the United States. Section 404(a) grants authority to the Secretary of the Army to issue permits for the discharge of dredge-or-fill material. *See* 33 U.S.C. § 1344(a). The Secretary of the Army has delegated that authority to the Corps. *See* 30 C.F.R. § 325.2(a).

43. The Corps has issued regulations governing the issuance of a Section 404 permit, which are codified at 33 C.F.R. part 325. Sections 325.1(d) and (e) specify what information must be contained in a Section 404 permit application and provide that the district engineer is the decision-maker in this permitting process—he or she has the authority to determine what, if any, additional information is needed from the applicant to make a public interest determination and to determine whether the application complies with the EPA-established CWA Section 404(b)(1) Guidelines.

44. Those regulations also mandate the procedures and deadlines by which the Corps must process Section 404 permit applications, which include public notice and comment procedures. *See* 33 U.S.C. § 1344(a); 33 C.F.R. § 325.2(a), (d); *id*. § 325.3. A district engineer normally must issue a public notice of the application within fifteen days of receiving it. 33 C.F.R. § 325.2(a)(2). The district engineer also may consider whether a public hearing should be held on the application. *Id*. § 325.2(a)(5).

45. The CWA and the Corps' regulations emphasize the timely processing of Section 404 permit applications. The statute provides that "to the maximum extent practicable, a decision with respect to an application for a permit . . . will be made not later than the ninetieth day after the date the notice for such application is published[.]" 33 U.S.C. § 1344(q). The regulations have interpreted that ninety-day window to provide for a sixty-day decision timeframe, with a thirty-day extension at the applicant's request. *See* 33 C.F.R. § 325.2(a)(3); *id*. § 325.2(d)(3). The sixty-day window may be extended only for certain reasons, as the regulations provide that

> [d]istrict engineers will decide on all applications not later than 60 days after receipt of a complete application unless (i) precluded as a matter of law or procedures required by law . . . , (ii) The case must be referred to higher authority . . . , (iii) The comment period is extended; (iv) A timely submittal of information or comments is not received from the applicant, (v) The processing is suspended at the request of the applicant, or (vi) Information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period.

33 C.F.R. § 325.2(d)(3).

46. The Corps must follow NEPA in considering Section 404 permit applications. *See* 33 C.F.R. § 325.2(a)(4), (6).

47. The Corps provides that a permit applicant has the right to "an independent decision by the [Corps'] district or division engineer," and states that the regulatory

decisionmaking process "must be strictly observed." 30 C.F.R. § 325.2(e)(3). Moreover, district engineers may add conditions to a permit when necessary to satisfy legal requirements or the public interest, but those conditions must be directly related to the impacts of the proposed project, appropriately scaled to the scope and degree of those impacts, and reasonably enforceable. *See* 33 C.F.R. § 325.4(a).

48. As this Court has recognized, the CWA establishes a limited role for EPA in the Corps' permitting process. First, EPA is empowered to establish CWA Section 404(b)(1) Guidelines by which the Corps will evaluate Section 404 permit applications and which are developed in conjunction with the Corps. *See* 33 U.S.C. § 1344(b)(1). Those Guidelines are codified at 40 C.F.R. part 230 and state that

> [g]uidance on interpreting and implementing these Guidelines may be prepared jointly by the EPA and the Corps at the national or regional level from time to time. No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the [EPA] Administrator under the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*).

40 C.F.R. § 230.2(c).

49. EPA also may prevent the Corps from authorizing certain disposal sites under limited circumstances. More specifically, the EPA Administrator "whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas" is empowered to prohibit the specification of any defined area as a disposal site. 33 U.S.C. § 1344(c). However, "[b]efore making such determination, the [EPA] Administrator shall consult with the [Corps]. The [EPA] Administrator shall set forth in writing and make public his findings and his reasons for

making any determination" that the Corps may not issue a Section 404 permit under EPA's Section 404(b)(1) Guidelines. *Id.*; *see also* 40 C.F.R. § 231.2(e).

4. Section 401 Certifications

50. The State of West Virginia is responsible for issuing CWA Section 401 water quality certifications that are required for the Corps' Section 404 permits. *See* 33 U.S.C. § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . ."). This ensures that that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3). Section 401(d) further requires that any certification shall set forth effluent or other limitations and monitoring requirements to assure that an applicant will comply with state water quality certifications or any other appropriate requirement of State law. 33 U.S.C. §1341(d). Those limitations become a condition on the permit.

51. WVDEP is the state agency in West Virginia that issues Section 401 water quality certifications.

52. Once WVDEP certifies that proposed mining activity will not cause or contribute to a violation of applicable water quality standards, the Corps views such certification as "conclusive" and "no independent analysis [by the Corps] of the certification is required" unless the EPA Regional Administrator "advises [the Corps] of other water quality aspects to be taken into consideration." 33 C.F.R. § 320.4(d); *OVEC*, 556 F.3d at 208.

B. National Environmental Policy Act ("NEPA")

53. NEPA, 42 U.S.C. § 4331 *et seq.*, requires that federal agencies must take a "hard look" at the potential environmental consequences of their proposed actions before acting. NEPA is a procedural statute rather than a substantive one—it does not mandate the outcome of an agency's environmental analysis or provide any substantive standards. Rather, NEPA dictates the steps an agency must follow to ensure that it fully considers the potential environmental consequences before acting. There are three levels of NEPA analysis, the application of which depends on whether an agency's proposed action could significantly affect the environment.

54. First, a proposed undertaking may be excluded categorically from further environmental analysis if it meets certain criteria that an agency previously has determined will have no significant environmental impact. *See* 40 C.F.R. § 1501.4.

55. If the proposed action is not categorically excluded, the agency prepares an environmental assessment ("EA") to determine whether or not the proposed action would significantly affect the environment. *See id.* §§ 1501.4(b), 1508.9. An EA is a "concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement [("EIS")] or a finding of no significant impact [("FONSI")]." 40 C.F.R. § 1508.9(a)(1); *see also id.* §§ 1501.4(e), 1508.13.

56. If the EA reveals that the environmental consequences may "significantly affect[] the quality of the human environment," the agency must prepare an EIS, which is a more detailed evaluation of the proposed action and alternatives to that action. 42 U.S.C. § 4332(2)(C). The phrase "human environment" has been defined

"comprehensively to include the natural and physical environment" as well as "the relationship of people with that environment." 40 C.F.R. § 1508.14. Significance is measured by evaluating both the context of the action and the severity of its environmental impact. *See* 40 C.F.R. § 1508.27. The EIS must include a detailed statement on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between the environmental uses and enhancement of productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action. *See id.*

57. It is possible for a federal agency to bypass preparation of an EA and to proceed directly to the preparation of an EIS if the agency anticipates that the proposed undertaking is likely to significantly affect the environment.

58. Even if an agency concludes that a proposed agency action will have a significant environmental impact, the agency may avoid preparing an EIS if it finds that mitigating measures can be taken that will reduce the environmental impact of an action below the level of significance. In that instance, the agency may issue what is known as a mitigated FONSI.

59. After the preparation of a draft EIS, the public has an opportunity to submit comments and a final EIS follows.

60. Because NEPA's requirements are procedural and not substantive, even agency action that causes adverse environmental effects can satisfy NEPA as long as the agency properly has considered those effects and determined that competing values of the action outweigh its adverse environmental effects.

61. NEPA applies to the issuance of CWA Section 404 permits. *See* 33 C.F.R. § 325.2(a)(4), (6); *see also* 33 C.F.R. pt. 325, App. B, § 7(b)(1), (2) (providing that the Corps must "address the impacts of the specific activity requiring a [Department of the Army] permit and those portions of the entire project over which the [Corps] district engineer has sufficient control and responsibility to warrant federal review").

62. The Corps is the lead agency responsible for preparing NEPA documents relating to Section 404 permit applications and, in preparing those documents, the district engineer must follow the Corps' NEPA Implementation Procedures codified at Appendix B to 33 C.F.R. pt. 325. EPA may submit comments expressing its NEPA concerns to the Corps when commenting on draft Section 404 permits.

C. Surface Mining Control and Reclamation Act ("SMCRA")

63. SMCRA, 30 U.S.C. § 1201 *et seq.*, is a regulatory program that, among other things, regulates the disposal of excess spoil material resulting from surface coal mining operations. Congress passed SMCRA in 1977 (five years after the CWA) to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. § 1202(a), and to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential form of energy," *id.* § 1202(f).

64. Like the CWA, SMCRA utilizes a "cooperative federalism approach" in the regulation of surface coal mining. *See* 30 U.S.C. §§ 1201(f), 1253; *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001). Congress reasoned that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing,

authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States." *Id.* § 1201(f).

65. SMCRA recognizes that valley fills may be used in the disposal of excess spoil material from surface coal mining operations and that such material may be placed in waters of the United States. *See* 30 U.S.C. § 1265(b)(22)(D); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003).

66. Under SMCRA, states have exclusive jurisdiction over the regulation of surface coal mining and reclamation operations so long as the Department of Interior ("DOI") has approved the state's regulatory program. *See* 30 U.S.C. § 1253.

67. WVDEP's SMCRA program was approved by DOI in 1981. Accordingly, WVDEP has exclusive jurisdiction over the regulation of valley fills and the disposal of excess spoil in the State of West Virginia. Anyone wishing to engage in surface coal mining in the state must obtain a permit from WVDEP. *See id.*§ 1256(a).

68. In issuing a SMCRA permit, WVDEP examines the manner in which surface mining will be conducted.

> A SMCRA permit applicant must provide detailed information about possible environmental consequences of the proposed operations, as well as assurances that damage to the site will be prevented or minimized during mining and substantially repaired after mining has come to an end. [] WVDEP must ensure compliance with SMCRA's environmental protection performance standards.

OVEC, 556 F.3d at 196 (citing 30 U.S.C. §§ 1257, 1260, 1265). Those performance standards include an evaluation of

> the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and

> surrounding areas so that an assessment can be made by the [State] of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability.

30 U.S.C. § 1257(b)(11). The State will not issue a SMCRA permit unless it has assessed the probable cumulative impact of all anticipated mining in the area on the hydrologic balance, ensured that the proposed operation has been designed to prevent "material damage" to that balance, *id.* § 1260(b)(3), and has required the operation to minimize the disturbances to that balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems during and after surface coal mining operations, *id.* § 1260(b)(10). *See also* W. Va. Code § 22-3-18(b)(3).

69. Under SMCRA, a State must provide "a coordinated and non-duplicative approach to environmental review." *Id.* To be awarded primacy, the State of West Virginia was required to establish "for the purposes of avoiding duplication, . . . a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations." 30 U.S.C. § 1253(a)(6).

70. Because West Virginia has primacy, the federal Office of Surface Mining ("OSM") retains only a limited oversight role. *See id.* §§ 1201(f), 1267(a); *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 9 (D.C. Cir. 1999). The Secretary of the Interior's oversight role is "strictly circumscribed"—the State has "exclusive on the scene regulatory authority, and the Secretary's role is limited to making such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs." *Nat'l Mining Ass'n*, 177 F.3d at 10 (internal quotation marks omitted).

71. EPA plays an extremely limited role if and when the State proposes a SMCRA program amendment, which must be approved by the Secretary of the Interior, 33 C.F.R. §732.17(g), and for which the Director of OSM must have solicited the views of EPA and obtained written concurrence from the EPA Administrator if there are aspects of an amendment that relate to air or water quality standards promulgated under the Clean Air Act and CWA, 30 C.F.R. § 732.17(h)(11).

D. Administrative Procedures Act ("APA")

72. Under the APA, a party "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Parties may bring suit "in a court of the United States seeking relief other than monetary damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *Id.*

73. The APA allows a court to set aside agency actions that are "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency acts in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law when it violates federal statutes such as the CWA, NEPA, and SMCRA.

74. Section 553 of the APA establishes notice and comment procedures for federal rulemaking. *See* 5 U.S.C. § 553. This procedure ensures that the public receives notice of proposed agency rules or amendments and allows the public or other interested parties "an opportunity to participate in the rule making through submission of written data, views or arguments . . . ." *Id*. § 553(c).

75. When agencies make substantive revisions to applicable regulations without following formal APA-rulemaking procedures, they violate the APA.

V. Factual Background

76. Plaintiff sets forth the following facts, which are alleged to the best of his current knowledge, information and belief. Any specific examples of agency actions referenced in this Amended Complaint are intended to be illustrative only and are not intended to be exclusive or exhaustive.

A. EPA Objections and Comments Applying a New Conductivity Water Quality Standard.

77. The agency actions challenged herein arose from events beginning on or about January 2009. On or about that time, EPA and the Corps began to adopt new extra-regulatory processes and standards used to review all types of mining permits. Those processes and standards have resulted in undue delay and obstruction in the issuance of mining permits in West Virginia. The permitting process has grown increasingly lengthy, EPA's comments on and objections to permits have increased, and markedly fewer mining permits have been approved than in previous years.

78. EPA sent a letter to the Corps on January 20, 2009, in which it expressed its significant concerns about a proposed surface mining operation in West Virginia. In that letter, EPA discussed the impact of surface coal mining on in-stream conductivity and cited for the first time a 2008 study by Pond *et al.* analyzing in-stream conductivity as a measure of water quality and aquatic life.[3]

79. On March 23, 2009, EPA sent letters to the Corps expressing concerns about two coal mining operations in West Virginia and Kentucky. At the same time, EPA

[3] That study is also referred to by EPA as the "Pond-Passmore Study."

issued a press release describing those letters, stating that EPA had "serious concerns about the need to reduce the potential harmful impacts on water quality caused by certain types of coal mining practices, such as mountaintop mining. The letters specifically addressed two new surface coal mining operations in West Virginia and Kentucky. EPA also intends to review other requests for mining permits." Ex. C, Press Release, EPA, EPA Acts to Reduce Harmful Impacts from Coal Mining (Mar. 24, 2009). Administrator Jackson was quoted as saying that "[t]he two letters reflect EPA's considerable concern regarding the environmental impact these projects would have on fragile habitats and streams." *Id*. EPA indicated that it "expects to be actively involved in the review of these permits," *id*., following the Fourth Circuit's decision affirming the Corps' permit review procedures in *OVEC*.

80. On or about April 2009, EPA issued a series of letters to the Corps recommending that the Corps deny certain Section 404 permit applications for surface coal mining operations in West Virginia. EPA's letters contained its newly articulated conductivity water quality standard. EPA commented on and objected to the permit applications based on its belief that the CWA 404(b)(1) Guidelines had not been met, or more specifically, that the water conductivity standard derived from the Pond *et al.* study had not been satisfied. EPA demanded that the Corps and the permit applicant(s) should, *inter alia*, develop more stringent mitigation plans that would ensure that the affected streams would meet the conductivity standard.

B. Memorandum of Understanding

81. On June 11, 2009, EPA, the Corps, and DOI entered into an interagency Memorandum of Understanding ("MOU") in which they committed to a more stringent

review of surface coal mining permits in six Appalachian states: West Virginia, Kentucky, Ohio, Pennsylvania, Tennessee, and Virginia.[4] *See* Ex. D. The MOU announced the agencies' plan to minimize the adverse environmental consequences of surface coal mining, to coordinate environmental review of pending permit applications under the CWA and SMCRA, and to engage in more robust public outreach to inform federal, state, and local decision-making.

82. The signatories to the MOU were Lisa P. Jackson, the Administrator of the EPA, Terrence "Rock" Salt, the Acting Assistant Secretary of the Army, Civil Works, and Ken Salazar, the Secretary of DOI. Neither the State nor WVDEP were consulted about the MOU.

C. Enhanced Coordination Procedures ("EC Process")

83. Also on June 11, 2009, EPA and the Corps issued a memorandum entitled "Enhanced Surface Coal Mining Pending Permit Coordination Procedures" ("EC Process"), which established a new review process for 108 pending Section 404 surface coal mining permits in the aforementioned Appalachian states (WV, VA, KY, PA, OH, and TN). That process began immediately and was intended to identify permit applications "about which the [relevant EPA] Regions have concerns" as well as those "with which the Corps may proceed without further action by EPA." Ex. E, Memorandum from Lisa P. Jackson, Administrator, EPA, and Terrence "Rock" Salt, Acting Assistant Secretary, Civil Works, Dept. of the Army (June 11, 2009), at 2.

[4] The MOU, attached to this Complaint as Exhibit D, may also be found at Office of Surface Mining Reclamation and Enforcement, Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining, http://www.osmre.gov/resources/ref/mou/ASCM061109.pdf.

84. More specifically, the Corps and EPA identified 108 pending permits for which the Corps would provide requested additional information to the relevant EPA Regions. Within forty-five days of EPA's receipt of that information, EPA would propose a list of permits distinguishing between those permit applications that "concerned" EPA and those applications for which EPA had no environmental concerns and therefore for which the Corps was free to proceed with processing.

85. Permit applications identified as "raising concern" would be subject to additional coordination and review. *Id.* When the Corps was ready to proceed with enhanced coordination for each identified permit, it would notify the relevant EPA Region.[5] At that time, the agencies would have sixty days "to coordinate and resolve each permit application of concern," although extension of that time period could be sought if necessary. *Id.* If, after that time period ended, the Corps chose to issue a permit despite "unresolved issues," the Corps would provide EPA with a written notice of decision to issue a permit detailing its response to EPA's concerns. *Id.* at 2-3. Upon receiving that notice, EPA would have ten days either to "advise the Corps District that it does not intend to pursue further action and the Corps, therefore, is free to make a permit decision" or to "initiate action under CWA Section 404(c)." *Id.* at 3.

86. The EC Process was issued without public notice and comment and was effective immediately upon its issuance. Administrator Jackson and Acting Assistant Secretary Salt were signatories to the EC Process. Neither the State nor WVDEP were consulted about the EC Process.

[5] Three EPA regions cover the six Appalachian states—EPA Regions III, IV, and V.

87. Administrator Jackson, acting on behalf of EPA, sent a letter dated June 11, 2009, to Acting Assistant Secretary Salt of the Corps, detailing what factors EPA would use to identify pending permit applications that would require further coordination and review.[6] *See* Ex. F, Letter from Lisa P. Jackson, Administrator, EPA, to Terrence "Rock" Salt, Acting Assistant Secretary, Civil Works, Department of the Army (June 11, 2009).

88. EPA proceeded to screen pending CWA Section 404 applications pursuant to a decision-making process that it called "MIRA," the Multi-criteria Integrated Resource Assessment (and that NMA calls the MCIR Assessment). That process was developed independently of the Corps and did not follow formal rulemaking procedures under the APA.

89. As part of EPA's increased scrutiny of surface mining operations, EPA revoked the waiver of review of WVDEP's Section 402/NPDES permits. EPA agreed to that waiver in the 1981 MOA with West Virginia. *See* Ex. B. In that document, EPA originally waived its authority under the CWA to review NPDES permits issued by WVDEP, but retained its right to terminate the waiver upon sufficient notice.

90. In July 2009, EPA revoked that waiver for all West Virginia NPDES permits for discharges associated with surface coal mining permits and announced it would begin reviewing those permits. EPA also "requested" that WVDEP provide it with copies of all current and pending NPDES permits associated with all mining operations (not limited to surface mining). Those actions have led to increased objections or "comments" from EPA on NPDES permits.

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[6] That letter is attached to this Complaint as Exhibit F.

91. On September 11, 2009, EPA announced that its screening process had identified seventy-nine Section 404 permits currently pending with the Corps that it proposed should undergo a more stringent review under the EC Process. That more stringent review allegedly was necessary because EPA had environmental concerns about those mining operations and believed that "[a]ll of the permits on the list showed the potential to violate one or more of the requirements in the [Section 404(b)(1)] Guidelines." Ex. G, EPA, Surface Coal Mining Activities Enhanced Coordination Procedures, Questions and Answers About the Final List (undated), at 3.

92. Twenty-three, or 34%, of the proposed surface mining projects identified for EC Process review were located in West Virginia. *See* Ex. H, ECP Initial List (Sept. 11, 2009). Of that number, as of the date that West Virginia filed its original Complaint, only two surface mining projects had been approved (that is, the Corps has issued CWA Section 404 permits for those projects), six permit applications had been withdrawn, and fifteen remained pending. At the time of the hearing on the parties' cross motions for summary judgment on the EC Process (September 16, 2011), twelve of the original twenty-three West Virginia permits had been withdrawn, eight were stalled in the EC Process, and only three had been issued (two surface mine permits and one deep mine permit).

93. Not only has the EC Process led to the increased denial of permit applications, but it also has caused unlawful delay in permit processing beyond the ninety-day statutory timeframe set forth in 33 U.S.C. § 1344(q). That section provides that "to the maximum extent practicable, a decision with respect to a [dredge-or-fill] permit . . . will not be made later than the ninetieth day after the notice for such application is published .

. . ." 33 U.S.C. § 1344(q). That timeframe cannot be and is not being met under the EC Process because the sixty-day coordination period does not even begin to run until after the Corps receives EPA's list of permits allegedly causing EPA environmental concern. After the Corps receives the list, the Corps can, at its leisure, notify EPA when it is ready to proceed with that process as to each identified permit application—only then does the sixty-day coordinated review begin. Moreover, as described above, under the EC Process, EPA and the Corps are authorized to seek an extension of that sixty-day period.

94. Delay caused by the EC Process has been experienced by West Virginia surface mine operators and permit applicants. For the eight permits that were stalled as of September 16, 2011, EPA indicated that those permits were "awaiting the start of ECP review" and that "EPA is awaiting additional information from applicant." Accordingly, the sixty-day clock had not begun to run for those permits. WVDEP's experience has been that EPA is not truly awaiting "additional information," but is waiting for the applicant to meet its conductivity and sequencing standards imposed by the Interim Guidance document.

95. EPA expanded the EC Process review to permits that ripened after September 11, 2009, and called those meetings "pre-submittal meetings." In those meetings, permit applicants are asked to meet the standards imposed by the Interim Guidance document.

96. The EC Process generated a substantial amount of uncertainty in the permitting process that extended not only to Section 404 permits, but to NPDES and SMCRA permits as well. EPA "invited," and thus effectively required, WVDEP to refrain from issuing NPDES permits while the EC Process was ongoing, which caused further delay and interfered with WVDEP's authority to administer its NPDES and SMCRA programs.

Because the 401 certification, NPDES permit, Section 404 permit, and SMCRA permit all must contain similar water quality standards and requirements, all of WVDEP's mining programs were stalled by the EC Process. Moreover, WVDEP was not privy to many of the communications between applicants and EPA during the EC Process. Often, permit standards were negotiated between those two entities without WVDEP's participation. WVDEP was then expected to conform its Section 401 certifications and NPDES and SMCRA permits to whatever was negotiated, without input from WVDEP.

D. Interim Guidance

97. On April 1, 2010, EPA issued its Interim Guidance document, entitled "Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order",[7] *attached hereto as* Exhibit I. The Interim Guidance was sent to the three EPA Regional Administrators whose jurisdictions include the six previously identified Appalachian states (including West Virginia).[8] Neither the State nor WVDEP were consulted about the Interim Guidance and the standards announced therein.

98. The Interim Guidance stated that EPA had conducted assessments of CWA Section 402 and 404 permitting in Appalachia in September/October 2009 that had "identified concerns related to effective protection of downstream water quality consistent with requirements of the CWA." *Id.* at 6. Additionally, under the EC Process,

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[7] The Interim Guidance is also available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf. The Environmental Justice Executive Order, issued by President Clinton on February 11, 1994, directed federal agencies to make the goal of achieving environmental justice part of their mission. It is available at http://www.epa.gov/fedreg/eo/eo12898.htm (last visited Oct. 5, 2010).

[8] West Virginia is served by EPA Region III, based out of Philadelphia.

EPA and the Corps allegedly had "found that many of these projects may not be consistent with EPA and Corps regulations, including the Section 404(b)(1) Guidelines. As many as 80% of these permits raised concerns with respect to compliance with state narrative water quality standards, while more than half raised concern for the potential for significant degradation of aquatic ecosystems." *Id.* Accordingly, the Interim Guidance set forth new standards to be employed in reviewing those permits, including, *inter alia*, a new water conductivity standard derived in part from two studies that had not been subjected to peer review, new parameters of the types of mining that presumptively have significant negative impacts on the environment, standards and procedures for NPDES permits and for NEPA review, and amendment of existing CWA Section 404(b)(1) Guidelines.

99. Although EPA engaged in the process of seeking public comment on the Interim Guidance, which it called an "interim final document," the Interim Guidance nevertheless became effective immediately upon issuance, and the EPA Regions were instructed "to begin using [it] immediately in [their] review of Appalachian surface coal mining activities." *Id.* at 1 n.1 & 2.

100. EPA applied the standards announced in the Interim Guidance to review, comment upon, and object to proposed surface (and other) mining operations in West Virginia.[9] For example, on or about April 15, 2010, EPA began issuing comment and objection letters to WVDEP regarding pending permit applications in which it referenced the Interim Guidance—two weeks after the Interim Guidance was issued. EPA's actions in applying the Interim Guidance, described in greater detail below, blatantly contradict

[9] WVDEP received objections from EPA using the Interim Guidance and the standards announced therein for deep mining operations as well as haul roads, refuse piles, loading docks, special reclamation sites, and surface mining operations.

its professed interest in receiving comments from the public, the states, and the coal industry, and its pretense that the Interim Guidance does not constitute a final, binding agency action. *See* Ex. I, at 1 n.1 & 2 n.3.

1. The Interim Guidance Created a New Water Quality Standard That Unlawfully Amends CWA Sections 303, 401, 402, and 404.

101. EPA's Interim Guidance announced a new water quality standard based on in-stream conductivity that EPA expected would be used in issuing both Section 402 and Section 404 permits. *See* Ex. I, at 8-13, 16-17, 18-19, 20, 22.

102. EPA's conductivity standard provided that in-steam conductivity levels above 500 µS/cm are deemed "likely to be associated with adverse impacts to water quality that may rise to the level of exceedances of narrative state water quality standards." *Id.* at 12. If water quality modeling indicates that conductivity levels will exceed 500 µS/cm, "EPA believes that reasonable potential likely exists to cause or contribute to an excursion above applicable water standards; unless, based on site-specific data, the state has an alternative interpretation of their [sic] water quality standards that is supported by relevant science." *Id*. at 22. If in-stream conductivity levels are between 300 µS/cm and 500 µS/cm, EPA declared that the "permitting authority [should] ensure that the permit includes conditions that protect against conductivity levels exceeding 500 µS/cm." *Id.* at 12, 22. But if conductivity levels are below 300 µS/cm, EPA announced that it expects that those projects "will not cause a water quality standard violation." *Id.*

103. EPA relied on at least three studies in adopting its new conductivity standard, two of which had not been peer reviewed.[10] *See id*. at 11-12; and Ex. J, at 2, 3-4.[11]

[10] Those studies are: (1) EPA's study entitled "The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields;" (2) EPA's "A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams" (hereinafter referred to as "Benchmark

Specifically, EPA relied upon two non-peer-reviewed studies: (1) its non-peer-reviewed study summarizing the aquatic impacts of mountaintop mining and valley fills and (2) its draft Benchmark Conductivity Study, which concluded "that genus-level impacts to the biological community occur at conductivity levels of 300 µS/cm." *See* Ex. I, at 12. After the Interim Guidance was issued, those studies underwent public comment and peer review by the EPA Science Advisory Board.

104. Even though two of the studies upon which EPA relied had not been peer reviewed, EPA stated that "[i]n the interim, EPA views the reports as providing information . . . that informs the review of" proposed mining permits. *Id*. at 2. Rather,"[o]nce EPA's draft conductivity report is finalized" following peer review, it promised that it "will evaluate whether changes to the conductivity benchmarks are appropriate." *Id*. at 22.

105. The Interim Guidance instructed that EPA regions "should convey their conclusions with respect to possible exceedences of water quality standards to the Corps and, if appropriate changes to the permit are not made in response to those water quality concerns, may proceed under the 404(q) MOA and/or Section 404(c)" to block the permit's issuance. *Id.* at 19.

106. EPA used the new conductivity standard to supplant West Virginia's properly adopted (and EPA-approved) narrative water quality standards. EPA stated that it would ensure that the conductivity standard was not exceeded "*even if a state has issued a water quality certification under Section 401 of the CWA*." *Id.* at 18 (emphasis added).

Conductivity Study"); and (3) the aforementioned study by Pond et al. entitled "Downstream effects of mountaintop coal mining: comparing biological conditions using family- and genus-level macroinvertebrate bioassessment tools."

[11] Exhibit J is EPA's Guidance Summary issued on April 1, 2010.

107. EPA announced that it expected states to use its new conductivity standard in issuing NPDES permits under CWA Section 402. The Interim Guidance stated:

> The state must provide adequate documentation in the permit fact sheet or statement of basis to demonstrate that it has assessed reasonable potential and, where necessary, developed effluent limits (or other permit conditions) adequate to protect all applicable water quality standards, including narrative water quality standards. . . . Where EPA concludes that the state's explanation is not adequate, or the state fails to provide an explanation of how it has interpreted or applied its narrative quality standards, EPA may object to the permit in accordance with the provisions of 40 C.F.R. Section 123.44(c).

Id. at 13.

108. EPA's conductivity standard ignored all other measures of the environmental health of a stream, concentrating instead on a single measure affecting one order of insects, *Ephemeroptera*, commonly known as "mayflies."

109. The standard usurped West Virginia's authority to establish water quality standards under CWA Section 303, WVDEP's authority to interpret and implement those standards under CWA Section 402, and WVDEP's authority to issue water quality certifications under CWA Section 401.

110. West Virginia's properly promulgated narrative water quality standards, and the factors developed by WVDEP to implement those narrative standards, look more holistically at the affected aquatic environment and provide a more accurate measure of a stream's well-being.

111. On August 18, 2010, WVDEP promulgated a Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards, described in further detail below and attached to this Complaint as Exhibit K. The Permitting Guidance was intended to assist WVDEP permit writers in developing

NPDES permit conditions for surface coal mining operations and to provide guidance for the issuance of those permits under West Virginia's narrative water quality standards. In the Permitting Guidance, WVDEP reaffirmed its commitment to West Virginia's narrative water quality standards and the agency's "holistic watershed management approach." Ex. K, at 1.

112. As WVDEP explained in its Justification and Background document that explains its conclusions in the Permitting Guidance, it concluded that its Permitting Guidance, rather than EPA's Interim Guidance,

> is the more appropriate approach for West Virginia for several reasons. First, it involves subject matter uniquely within DEP's expertise and special knowledge. Further, while [the Permitting Guidance] specifically addresses concerns related to the mining industry, it is designed to be adapted in the future to address all discharges to water bodies that will cause, or that have the reasonable potential to cause or contribute to, excursions from water quality standards. Finally, [the Permitting Guidance] does not use an overbroad, generic criterion (i.e., conductivity) to set unattainable limits, but instead identifies specific pollutants that can be managed through the inclusion of appropriate whole effluent toxicity ("WET") monitoring and/or limits and best management practices ("BMPs") in NPDES permits, where there is reasonable potential to cause or contribute to excursions from water quality criteria.

See Ex. A at 2.[12]

113. WVDEP also determined that the Pond et al study is "flawed." *Id*. at 3. WVDEP stated that

> [t]he Pond-Passmore Study . . . concludes that West Virginia's narrative standard is violated by surface coal mining operations based on the Study's application of two biologic assessment tools, the West Virginia Stream Condition Index ("WVSCI") and the draft Genus Level Index of Most Probable Stream Status ("GLIMPSS"), to samples of benthic

[12] WVDEP's Permitting Guidance may also be found at http://www.dep.wv.gov/pio/Documents/Narrative/2010-08-18.%20Narrative%20Standards%20Permitting%20Guidance%20(Rev.%201).pdf. WVDEP's Justification behind the Guidance Document is attached to this Complaint as Exhibit A, and is also available at http://www.dep.wv.gov/pio/Documents/Narrative/Narrative%20Standards%20Guidance%20Justification.pdf.

> macroinvertibrate life taken from these streams. This conclusion is flawed for two reasons. First, West Virginia does not use the draft GLIMPSS in its assessment of the biologic health of State streams. Second, these tools are just that—tools. They are not stand-alone determinations of compliance with the narrative standard.

Id. WVDEP opined that EPA's conductivity standard is not sufficient to determine the health of a stream. *See id.* at 5.

114. Consequently, and for reasons discussed in greater detail in the Justification and Background document, WVDEP concluded that its Permitting Guidance "is the appropriate methodology for implementing West Virginia's narrative water quality standards, because it is consistent with the Federal Regulations regarding establishing limitations, standards, and other permit conditions for NPDES programs, and it incorporates a holistic approach to ecosystem assessment and protection." *Id*. at 4.

115. Despite West Virginia's continued adherence to its properly promulgated narrative water quality standards, EPA began referring to its new conductivity standard in comment and objection letters to WVDEP on or about April 19, 2010, and continued to do so until its issuance of the Final Guidance document.

116. EPA explicitly began to refer to the draft, non-peer-reviewed Benchmark Conductivity Study in letters to WVDEP on or about May 17, 2010, and used the new conductivity standard to object to NPDES permits under consideration by WVDEP. EPA used the Interim Guidance and its new conductivity standard to cause undue delay in the issuance of Section 402 permits for surface coal mining operations within West Virginia. EPA "requested" that WVDEP delay issuing NPDES permits until EPA determined that the conductivity water quality standard has been satisfied. EPA also issued interim objections to pending NPDES permits based on WVDEP's failure to provide such

conductivity data. In some cases, EPA's objections were received by WVDEP after the comment period had closed. Nevertheless, EPA urged WVDEP to consider its comments, including those regarding conductivity, because EPA claimed that WVDEP's failure to do could result in a final permit that was inconsistent with the NPDES permit regulations.

117. There has been a marked decrease in WVDEP's issuance of NPDES permits issued to surface mining operations, underground mining operations and related support facilities, and bond forfeiture sites as compared to previous years.

118. EPA used the Interim Guidance and its conductivity standard to delay and otherwise impede the Corps' issuance of Section 404 permits for surface coal mining operations within West Virginia.

2. The Interim Guidance Unlawfully Amended the Section 404(b)(1) Guidelines.

119. The Interim Guidance also adopted new standards for the Corps to follow, effectively amending the Section 404(b)(1) Guidelines outside of the formal rulemaking process required by the APA and 40 C.F.R. § 230.2(c). For example, the Interim Guidance instructed the Corps that its cumulative impacts analysis should be based on a watershed scale, stating that "[u]sing a watershed-scale analysis (e.g., HUC-12 analyses) would be an effective way to examine the cumulative environmental and human health impacts from past, present, and reasonably foreseeable actions, including federal and non-federal actions." Ex. I at 29.

120. The Interim Guidance also amended the Section 404(b)(1) Guidelines by instructing the Corps to review Section 404 permits using the new conductivity standard.

3. The Interim Guidance Usurped the Corps' Analysis of Section 404 Permits under the National Environmental Policy Act.

121. In the Interim Guidance, EPA announced a blanket rule prohibiting the Corps' issuance of a Finding of No Significant Impact or "FONSI" under NEPA based on certain types of mitigation. The Interim Guidance stated that no mitigation credit should be given for sediment, groin, or other water control ditches required for mining projects under SMCRA and Section 402. *Id.* at 24, 30. It provided that "construction of these ditches should not be used as a basis for supporting a FONSI" and that "mitigation measures that rely on establishing or re-establishing streams, rather than rehabilitating or enhancing existing streams, have less certainty of successfully offsetting impacts and should generally not be used to support a FONSI." *Id.* at 30.

122. The Interim Guidance also imposed a general presumption for the Corps to apply in analyzing Section 404 permits under NEPA. Specifically, EPA stated 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.* at 30. Consequently, if a proposed permit would result in more than one valley fill or the loss of more than one mile of stream, the Corps was required to complete an Environmental Impact Statement or "EIS."

123. Regulations promulgated by the Council on Environmental Quality ("CEQ") require agencies to include an assessment of the cumulative impacts of human activity in their NEPA analysis, that is, the combined, incremental effects of human activity on the environment. *See* 40 C.F.R. §§ 1507.3, 1508.7, 1508.25. In the Interim Guidance, EPA directed the Corps that its cumulative impacts analysis should be based on a watershed scale. *Id.* at 29.

124. EPA is not authorized to direct the Corps to utilize that scale or to promulgate any of the NEPA rules and presumptions discussed above. NEPA procedures may be adopted only *after* an opportunity for public review and after review by CEQ. *See* 40 C.F.R. § 1507.3. EPA has not submitted those procedures to the public or to CEQ and the Corps (not EPA) is the authority responsible for conducting a NEPA analysis of Section 404 permitting activities.

125. As a related matter, the Interim Guidance also established standards under which EPA would *always* challenge the issuance of a Corps permit. It stated that, "although the decision to prepare an EIS rests with the Corps and OSM . . . EPA must 'refer' to [the Council on Environmental Quality] matters that the Administrator finds are 'unsatisfactory from the standpoint of public health or welfare or environmental quality.'" *Id.* (emphasis added). EPA therefore would not follow the objection procedure established in 33 U.S.C. § 1344(c), but would automatically object if the Corps approved a permit that does not comply with the extra-regulatory standards set forth in the Detailed Guidance.

126. This point was emphasized in the Guidance Summary Memorandum EPA issued on April 1, 2010. That Memorandum summarized the more lengthy Detailed Guidance, and stated that "[EPA] expect[s] that, generally, it will be easier for projects with no or few valley fills to demonstrate that they comply with the requirements of the CWA and the 404(b)(1) Guidelines. Conversely, projects with multiple valley fills will generally raise serious questions about their compliance with CWA requirements and

may require permit objection under 402 or elevation and possible veto under 404." Ex. J, at 4.[13]

4. The Interim Guidance Improperly Regulated Mining Operational Practices under SMCRA.

127. Finally, in the Interim Guidance, EPA included several directions to the Corps that improperly infringed upon West Virginia's SMCRA authority. For example, EPA stated that Section 404 mitigation credit should be denied for lateral drainage ditches, *see* Ex. I, at 24, which are an approved mitigation technique under 30 U.S.C. § 1265(b)(22)(D).[14]

128. Similarly, the Interim Guidance Memorandum enumerated several "best management practices" that EPA "expects . . . will help to reduce or eliminate potential increases in conductivity levels in surface waters downstream of mining-related discharges . . . ." *Id.* EPA rejected many of the mining industry's proposed management practices as "currently unproven in their effectiveness to protect water quality and to prevent significant degradation." *Id.* EPA also prescribed what it considered to be a "best practice," saying that multiple valley fills should be sequenced for projects proposing more than one valley fill and that permittees should demonstrate compliance with applicable water quality standards at each valley fill before being allowed to begin construction of the next fill. *See id.* at 24-25.

129. The Interim Guidance set forth a presumption that "[h]igh-ratio mining operations generally do not represent the least environmentally damaging alternative" and

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[13] That Memorandum may also be found at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_summary.pdf.

[14] SMCRA provides that the surface mining waste disposal area may not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed so that water will not filtrate into the spoil pile. *See* 30 U.S.C. § 1265(b)(22)(D). EPA improperly instructed the Corps to deny Section 404 mitigation credit for those types of drains.

directed that "[p]rojects should also incorporate environmentally effective limits on the linear extent of steam impacts per ton of excess soil produced through a robust alternatives analysis." *Id.* at 26.

130. Mining management practices such as sequencing are part of the SMCRA permitting process and fall under the authority of WVDEP. EPA's attempt to regulate those practices was contrary to SMCRA.

E. Final Guidance

131. Even though EPA actively was using the Interim Guidance as a binding rule beginning on April 1, 2010, it nevertheless purported to seek and consider public comments on that document. The public comment period on the Interim Guidance ran for eight months, concluding on December 1, 2010. EPA reports that it received more than 60,000 public comments on the Interim Guidance. WVDEP submitted comments, generally objecting to the Interim Guidance and raising many of the same arguments it has put forth during the instant litigation. *See* Ex. L.

132. The public comment period was not a true opportunity for any interested party, including the State of West Virginia, to submit meaningful comments to EPA regarding the Interim Guidance. And as the substance of the Final Guidance demonstrates, EPA did not relax any of the new standards announced therein in response to the comments it received. In fact, it tightened the conductivity standard significantly. The public comment period was purely a *pro forma* exercise, as demonstrated by EPA's response to the public comments it did receive: EPA either disagrees with the critical comments or simply reiterates the positions it has taken since 2009. *See generally* Ex. O ("Response to Public Comments on April 1, 2010 Interim EPA Guidance Memorandum on Improving

EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, dated July 21, 2011).

133. On July 21, 2011, EPA issued its Final Guidance document, *see* Ex. M, along with a summary of that document, *see* Ex. N, and its responses to the public comments it received on the Interim Guidance, *see* Ex. O.[15] EPA pronounced that the Final Guidance "replaces EPA's interim final guidance issued on April 1, 2010, and the Regions should begin consulting it immediately." Ex. M. at 1 n.1. EPA insisted that its development of the Final Guidance was "motivated" in part by the "significant experience [gained by EPA] since releasing its April 1, 2010 interim final guidance." *Id.* at 4. EPA also relied on the final Science Advisory Board reports issued on May 27, 2011.

134. EPA acknowledged that much of the Final Guidance was written in reaction to the instant litigation, stating that "[w]hile developing this guidance, EPA . . . has recognized, and responded to, key concerns raised by Appalachian States and the mining industry in litigation associated with EPA's April 1, 2010 interim final guidance." *Id.*

135. But EPA did not make any real changes in reaction to that litigation; instead, EPA has imposed the same (or even stricter) standards in an attempt to meet the goal it has held since 2009: destroying the mining industry in Appalachia. The most obvious changes are superficial and directed at softening the language employed by EPA. For example, in the Interim Guidance, although EPA briefly stated in a footnote that the Interim Guidance "d[id] not impose legally binding requirements," it more frequently used language that commanded, not recommended. *See, e.g.*, Ex. I at 7 (stating that

[15] Although EPA promised to issue the Final Guidance "[n]o later than April 1, 2010," Ex. I at 1 n.1, its issuance was delayed by the inter-agency review process.

"[e]stablishing enforceable numeric limits for conductivity, selenium, and other parameters in Section 402 permits will help to improve water quality and better protect public health and aquatic life in streams downstream from Appalachian surface coal mining"); *id.* at 11 ("EPA expects that a permit that fails to include provisions implementing the narrative water quality standards and fails to explain why such omission is appropriate under the regulations will not be consistent with the requirements of the CWA"); *id.* at 12 ("As a general matter, EPA expects that the conductivity impacts of projects with predicted conductivity levels below 300 µS/cm generally will not cause a water quality standard violation and that in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse impacts that may rise to the level of exceedances of narrative state water quality standards."). By contrast, in the Final Guidance, EPA repeats *ad nauseum* that the document is not a binding rule, that it does not impose any legally binding requirements, that permits should be reviewed on a case-by-case basis, that it is merely a guide, that the conductivity standard is merely a benchmark, etc. In doing so, however, EPA doth protest too much. EPA is attempting to prevail in this pending litigation while still imposing new and unlawful standards upon the State of West Virginia and the Corps. In doing so, EPA violates the same federal laws as originally charged by the State.

1. The Final Guidance Creates a New Water Quality Standard That Unlawfully Amends CWA Section 303.

136. The Final Guidance continues EPA's reliance on a new water quality standard based on specific conductance or conductivity.[16] West Virginia has not adopted a water

[16] EPA did acknowledge that the SAB found that the use of the conductivity standard was not appropriate for ephemeral streams that only flow in response to rainfall or runoff and instructed that "[f]or the time being, EPA regions should not use this benchmark in connection with ephemeral streams . . . until

quality standard for conductivity, and EPA did not follow 33 U.S.C. §1313(c)(4) to properly promulgate a new water quality standard itself.

137. Although EPA protests that the Final Guidance does not establish a water quality standard, *see* Ex. M at 10, it clearly continues its reliance on conductivity as a measure of water quality, reliance that predates even the Interim Guidance. Despite its protestations, EPA states that "discharges from surface mining activities in many if not most cases will have a reasonable potential to cause nonattainment of applicable water quality standards downstream from valley fills, impoundments, and sediment ponds in Appalachia." Ex. M at 11. EPA therefore "recommends that applications for surface coal mining facilities in Appalachia generally include discharge[]- or watershed-specific data on conductivity, TDS, and selenium, and that States request these data if not provided." *Id.* at 13. EPA urges West Virginia and Kentucky to adopt their "numeric interpretation of a narrative criterion" because EPA contends that it is "appropriately protective and scientifically defensible" under the CWA. *Id.* at 16. EPA "recommends" that states require chronic levels of not more than 300 µS/cm to "prevent[] impacts to aquatic life that may rise to the level of excursions above applicable narrative water quality standards." *Id.* at 18.

138. There is no indication that EPA, which based objections and "comments" on NPDES permits and Section 404 permits firmly on the conductivity standard since early 2009, suddenly has changed tack and decided to abandon its use of that standard as a binding rule. For example, on September 28, 2011, the Kentucky Department for

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additional validation can be performed." Ex. M at 5. EPA is actively trying to perform that validation, however, and has urged WVDEP staff to somehow attempt to reach remote areas quickly to capitalize on a rainfall event for testing in-stream flow.

Environmental Protection received a specific objection from EPA Region IV to nineteen draft NPDES permits based in part on the absence of a reasonable potential analysis for sulfate, conductivity, and total dissolved solids.[17] *See* Ex. P (Letter from James D. Giattina, Director, Water Protection Division, EPA Region IV, to Sandy Gruzesky, Director, Division of Water, Kentucky Department for Environmental Protection, dated Sept. 28, 2011).

139. Indeed, EPA has tightened the conductivity standard from the numeric levels announced in the Interim Guidance. While in the Interim Guidance EPA declared that if in-stream conductivity levels are between 300 µS/cm and 500 µS/cm, the "permitting authority [should] ensure that the permit includes conditions that protect against conductivity levels exceeding 500 µS/cm," Ex. I at 12, 22, EPA now indicates that even 300 µS/cm may be inadequate to protect aquatic life. EPA stresses that, in its opinion, "substantial aquatic life effects have already occurred when conductivity levels reach 500 µS/cm." Ex. M at 16 & n.19. A conductivity level of 300 µS/cm is now the "magic number" above which "substantial and increasing aquatic life impacts occur."[18] *Id.* at 16. Determining what impacts are "substantial" is the State's responsibility, not EPA's.

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[17] Kentucky has a narrative standard that specifically references total dissolved solids and conductivity. West Virginia does not. The Legislature has rejected the policy determination that those parameters (and their impacts on mayflies at certain levels) have the potential to cause an exceedance of the State's water quality standards or will adversely affect the holistic aquatic environment. Such determination is one for the State to make, not EPA. The difference between West Virginia and Kentucky's standards highlights just how inappropriate EPA's application of its conductivity standard to the State of West Virginia has been.

[18] EPA has also used its new water quality standard in a more subtle way, using a surrogate parameter correlated with conductivity levels of 300 µS/cm. In a "comment letter" on a deep mine permit modification dated September 28, EPA Region III informed WVDEP that the draft NPDES permit should include an adaptive management plan to reduce the discharge of "ionic stress parameters (sulfates plus bicarbonate discharge no greater than 159 mg/l at outfall 001." And at a meeting with EPA in September 2011, EPA gave a science presentation in which it correlated 159 mg/l in "sulfate plus bicarbonate" with a conductivity level of 300 µS/cm.

2. The Final Guidance Impermissibly Intrudes Upon the State's Section 402 Authority.

140. The Final Guidance usurps the State's 402 authority without statutory support in several ways, including but not limited to the following. First and foremost, EPA has instructed the State to include conductivity as a water quality standard when drafting NPDES permits. The Final Guidance also impermissibly instructs the State of West Virginia that Numeric Whole Effluent Toxicity Limits ("WET" Limits) are not sufficient in and of themselves to protect water quality from conductivity. *See* Ex. M at 19-20. This stricture is in direct conflict with West Virginia's own Permitting Guidance, which provides for WET limits and monitoring for specific pollutants in combination with best management practices in NPDES permits if WVDEP determines that there is reasonable potential to cause or contribute to excursions from water quality criteria. *See* Ex. A at 2 (summarizing WVDEP's Permitting Guidance).

141. EPA purports to dictate which best management practices or BMPs should be included in NPDES permits, and instructs the States that such BMPs should include quantifiable "triggers" for parameters including conductivity levels that would then require implementation of an adaptive management plan. *See* Ex. M at 21.

142. And, for the first time, EPA attempts to impose the same mining strategies and techniques on the State's NPDES permits that it has "recommended" to the Corps, including use of offsets and sequencing of valley fills. *See id.*at 21-22. EPA has no authority to do so.

143. Finally, EPA tells its regional offices that they "should address the adequacy of the technical and scientific aspects of the draft permit" while considering environmental justice considerations, concluding without any basis in the CWA that EPA may now

ground its objections to NPDES permits on those environmental justice considerations rather than on applicable water standards. *See id*. at 26. Although the State is always mindful of and concerned with such impacts under its sovereign interest in the welfare of its citizens, EPA is acting far outside of any grant of statutory authority in including those issues in its Final Guidance document.

3. The Final Guidance Undermines the State's Section 401 Certification.

144. The Final Guidance also instructs that, even though the Corps' regulations provide that a State's CWA Section 401 certification for a particular permit is conclusive unless EPA advises of other water quality aspects to be taken into consideration, *see* 33 C.F.R. § 320.4(d), its regional offices "should review each Section 404 permit application carefully and provide comments on whether the discharge of dredged or fill material into waters of the U.S. will cause or contribute to a violation of water quality standards"—the precise standards used by the State to determine that the proposed mining operation will not cause such a violation. Ex. M at 31. EPA is not instructing its regions to tell the Corps about "other water quality aspects to be taken into consideration" but instead is directing its regions to do the State's work over again, second-guessing the State's certification in an attempt to insert more stringent water quality standards based on conductivity into the Section 404 permit.

145. EPA also seeks to undermine the State's role under Section 401 by instructing its regions that they "should determine if a discharge subject to Section 401 certification may affect the water quality of other States or tribes, and, if there may be such an effect, EPA Regions should notify other jurisdictions whose water quality may be affected." *Id.* at 41. Although EPA is authorized to do so by statute, the implication is clear: EPA

wants to become a player in the Section 401 certification game and will do so actively and aggressively if it does not agree with a state's certification.

4. The Final Guidance Unlawfully Amends the Section 404(b)(1) Guidelines.

146. Under the guise of "clarify[ing] EPA's CWA roles and responsibilities in the review of proposed mining projects under Section 404, in coordination with the Corps, States, and permit applicants, to help to achieve compliance with the Section 404(b)(1) Guidelines," Ex. M at 29, EPA effectively amended those guidelines without following the APA or 40 C.F.R. §230.2(c).

147. EPA impermissibly imports best management practices under SMCRA into its 404(b)(1) analysis, including sequencing and conductivity testing between the construction of valley fills, *see* Ex. M at 29-30, 35, and urges the Corps to require conditions in Section 404 permits to control conductivity-generating materials and to write triggers into those permits that require adaptive management actions when in-stream conductivity levels are elevated, *see id*. at 32. EPA instructs the Corps that "elevated [conductivity] levels" occur above 300 µS/cm. *See id*. at 32-33.

148. EPA also impermissibly amends the Section 404(b)(1) Guidelines by, *inter alia*, instructing the Corps to assess the potential cumulative adverse effects of discharges on a watershed scale (HUC 12), addressing the consequences of past, present, and reasonably foreseeable future discharges in the affected watershed on water quality and the aquatic environment, and instructing the Corps that no Section 404 mitigation credit should be given for sediment, groin or other water control ditches "without a sound, science-based showing that they will successfully mitigate for lost stream structure and function." *Id.* at 34, 38.

5. The Conductivity Standard in the Final Guidance is Arbitrary and Capricious in Violation of the APA.

149. The latest version of EPA's new conductivity standard articulated in the Final Guidance is arbitrary and capricious in violation of the APA for several reasons. First, in the Final Guidance, EPA cautions that the conductivity standard should not be used outside of the areas where the relevant studies were conducted. Specifically, EPA states that the conductivity water quality standard should only be used in those parts of ecoregions 68, 69, and 70 that are located in the States of West Virginia and Kentucky "until validation [outside those areas] can be performed." Ex. M at 5. That geographic grouping is arbitrary and capricious because ecoregions 68, 69, and 70 reach beyond West Virginia and Kentucky to include other states, including Alabama, Tennessee, and Pennsylvania. Ecoregions are by definition not political borders; rather, an ecoregion is an area with a similar ecosystem and similar type, quality and quantity of environmental resources. *See* EPA, Western Ecology Division, Ecoregion Maps and GIS Resources, *available at* http://www.epa.gov/wed/pages/ecoregions.htm (last visited Oct. 12, 2011). State lines are irrelevant when defining an ecoregion. Accordingly, EPA's targeted application of its conductivity standard to two states—West Virginia and Kentucky— is arbitrary and capricious.[19]

150. Second, hidden in EPA's conductivity standard is a value judgment that concerns public policy, one that should be made by the State of West Virginia, not EPA. EPA's conductivity standard of 300 µS/cm is based on a (now peer reviewed) study[20] that

[19] Moreover, EPA admits that it improperly applied the conductivity standard in the Interim Guidance to Virginia, Ohio, Tennessee, and Pennsylvania.

[20] EPA makes much of the fact that the studies from which it gleans its new water quality standard are now peer reviewed, but it chooses to ignore the fact that it utilized those studies in draft form before

concluded that 5% of "native macroinvertebrate genera are extirpated." Ex. M at 16. Even assuming that finding to be true, the State takes issue with the value judgment underlying that finding, a judgment that EPA cannot make in a guidance document. At that level of conductivity, 5% of a certain genera of mayflies may be extirpated, but the State of West Virginia explicitly rejected the population density of such a sensitive benthic organism as an adequate measure of the holistic health of a stream. The West Virginia Legislature declared that "[t]he State of West Virginia has not adopted subcategories of special use to protect a certain species of mayfly but protects the aquatic community consistent with the Legislature's statement of public policy." And WVDEP has interpreted a "significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems," W. Va. Code R. § 47-2-3.2.i, to mean "more than a change in the numbers or makeup of the benthic macroinvertebrate community in a segment of a water body downstream from a point source discharge. It is, instead, a material decline in the overall health of an aquatic ecosystem. A goal of the CWA and the WVWPCA is to protect the aquatic ecosystem as a whole; it is a holistic standard that requires a holistic approach to ecosystem assessment." Ex. A at 3. EPA's decision to the contrary is arbitrary and capricious.

6. The Final Guidance Usurps the Corps' Analysis of Section 404 Permits under the National Environmental Policy Act.

151. Like the Interim Guidance, the Final Guidance document attempts to dictate the substance and outcome of the Corps' environmental analysis under NEPA, which

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such review was final on May 27, 2011. That choice clearly lead to some mistakes, including EPA's new revelation that the standard should not be applied outside of West Virginia and Kentucky. In the Interim Guidance, EPA applied that standard to West Virginia, Kentucky, Virginia, Ohio, Tennessee, and Pennsylvania. EPA only narrowed that standard once the Science Advisory Board peer-reviewed its studies and recommended that the "conductivity benchmark" be limited to ecoregions 68, 69, and 70. *See* Ex. M. at 5. The same goes for the final PQR reports (or Permit Quality Review) reports, the draft forms of which EPA used to justify the Interim Guidance document.

EPA has no statutory authority to do. EPA may comment during the NEPA evaluation process, like other federal agencies. But with the Final Guidance, EPA seeks to do more, instructing regions to "work collaboratively with the Corps and OSM early in the NEPA process to provide technical assistance and recommendations." *Id.* at 41. EPA is once again promoting extra-statutory "coordination" with no clear authority for doing so.

152. EPA announces that "[w]hen working with the Corps and OSM to help define the proper scope of a NEPA cumulative impact assessment, Regions should be clear that while Cumulative Hydrologic Impact Assessments (CHIAs) prepared as part of the SMCRA process can provide useful information regarding impacts to the hydrologic balance of an area, a NEPA cumulative impact assessment should consider the full suite of relevant environmental and human health impacts." *Id.* at 42. With that statement, EPA clearly intends to be a large part of the early decision-making process under both NEPA and SMCRA, even though it is not authorized to play such a role.

153. EPA also disparages the use of sediment, groin, or other water control and drainage ditches as effective mitigation techniques, instructing the regions that "you should recommend [to the Corps] that these ditches not be relied upon as the sole basis for supporting a FONSI." *Id.* Further, EPA tells the regions to "encourage the development of adaptive management approaches to mitigation monitoring" because, in EPA's view, mitigation measures that rely on establishing or re-establishing streams are not certain to be successful and should not be relied upon to support a FONSI. *Id.* EPA also tells the regions to "take a hard look at the potential for significant impacts for those proposed projects that involve more than one mile of stream loss or more than one valley

fill." *Id.* at 43. EPA has no statutory authority to impose these kinds of NEPA presumptions upon either OSM or the Corps.

7. The Final Guidance Improperly Intrudes Upon The State's SMCRA Authority.

154. Finally, with the Final Guidance, EPA arrogate unto itself the State's role under SMCRA in coordinating mining permits. It directs that the "Regions should work closely with the Corps, OSM, State SMCRA agencies, and mine operators to promote the inclusion of . . . practices" such as sequencing, strategic soil placement, raising the height of slurry embankments, "piece-mealing" multiple small mines "at the initial stages of mine design to increase consistency between SMCRA and CWA permits." Ex. M at 30. EPA has no authority to take on that extra-statutory coordination; that is for the State.

155. EPA has no statutory authority to dictate surface mining practices to the Corps, OSM, or the states. Like the Interim Guidance, the Final Guidance opines that many of the best management practices used in surface mining "remain unproven in their effectiveness to protect water quality and to prevent significant degradation." *Id*. at 34.

156. EPA baldly (and boldly) states that "[i]t is EPA's experience that mine plans do not always reflect the 'on-the-ground' construction and operation of a mine project." *Id.* at 35. EPA seeks to control all aspects of mining practices, regardless of the authority delegated to other governmental bodies and agencies. EPA has confused its environmental expertise with the State of West Virginia's long experience in regulating and permitting mining operations. EPA also forgets that SMCRA has its own environmental protection performance standards that govern issues such as soil placement. Those issues are properly left to WVDEP as the primary permitting authority and expert agency. *See* 30 U.S.C. § 1265(b)(22).

CLAIMS FOR RELIEF

COUNT I

The EC Process is a Federal Rule Promulgated in Violation of the Administrative Procedure Act[21]

157. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

158. The EC Process constitutes a substantive federal rule. It binds both EPA and the Corps to a decision-making process that affects the outcome of those agencies' permitting decisions. This, in turn, has a direct effect upon WVDEP's permitting responsibilities under Sections 401 and 402 of the CWA and SMCRA.

159. The EC Process also amounts to a substantive revision of prior federal regulations codified at 33 C.F.R. part 325.

160. The EC Process is a final agency action because it became effective upon its issuance. As detailed herein, EPA and the Corps have reviewed and continue to review permit applications from West Virginia under the EC Process.

161. Therefore, because the EC Process is a substantive, final federal rule, and also because it revised prior federal regulations, Defendants should have complied with the notice and comment requirements of APA Section 553 (5 U.S.C. § 553(b) and (c)) in promulgating those documents. They did not; Defendants issued the EC Process without giving the public notice or an opportunity to comment.

162. Accordingly, Defendants impermissibly evaded the requirements of APA Section 553 when they issued the EC Process, and the EC Process should be set aside as

[21] Counts I and III, although resolved in the State's favor on summary judgment, are included in this Amended Complaint for the sake of completeness.

arbitrary, capricious, an abuse of agency discretion, and as issued outside the procedure required by federal administrative law.

COUNT II

EPA's Interim Guidance Document Was A Federal Rule Promulgated In Violation Of The Administrative Procedure Act.

163. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

164. Although the Interim Guidance nominally was an interim non-binding guidance document, in practice the Interim Guidance became effective upon issuance and was used by EPA as a binding rule with immediate and substantial impacts upon WVDEP and the Corps. EPA applied the Interim Guidance and the standards announced therein to review, comment upon, and object to permit applications from West Virginia. EPA also applied the Interim Guidance to Section 404 permits in the EC Process and sought to impose the standards therein on the Corps' NEPA analysis.

165. The Interim Guidance was a substantive federal rule that revised and amended the 404(b)(1) Guidelines (40 C.F.R. pt. 230), CWA water quality standards regulations (40 C.F.R. pt. 131), and CWA permitting regulations (40 C.F.R. pts. 122 and 125). It intruded upon the State's regulatory authority under CWA ections 303, 401, and 402, and its SMCRA authority. It also invaded the Corps' authority under CWA Section 404 and NEPA.

166. Because the Interim Guidance was a substantive, final federal rule that became effective immediately upon issuance, and because it revised and amended prior federal regulations and statutes, EPA should have complied with the notice-and-comment

rulemaking requirements of APA Section 553 (5 U.S.C. § 553(b) and (c)) in promulgating the Interim Guidance. It did not do so.

167. EPA's issuance of the Final Guidance does not render the State's claims against the Interim Guidance document moot under the well-established voluntary cessation doctrine. There is nothing to stop EPA from employing similar tactics in the future; circumventing the APA and other federal laws through the guise of a "non-binding" guidance document, that in actuality is applied by EPA as if it were a rule.

168. Accordingly, the Court should declare that the Interim Guidance was an unlawful agency action that should be aside under 5 U.S.C. § 706(2).

COUNT III

The EC Process Violates the Clean Water Act.

169. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

170. CWA Section 404(a) gives authority to the Corps to issue permits for the discharge of dredged-or-fill material into the navigable waters of the United States. *See* 33 U.S.C. § 1344(a). Consistent with this authorization, the Corps has recognized in its regulations that a Section 404 permit applicant has the right to a "full public interest review and *independent decision* by the [Corps'] district or division engineer." 33 C.F.R. § 325.2(e)(3) (emphasis added).

171. The EC Process was not issued pursuant to any statutory direction or authorization.

172. The EC Process allows EPA to supplant the Corps at the outset of the Section 404 permitting process. Through the EC Process, EPA controls a new permit review

process that falls completely outside of the codified statutory framework. EPA and the Corps have applied, and continue to apply, the EC Process to review permit applications originating in West Virginia.

173. Accordingly, the EC Process violates the CWA's delegation of authority to the Corps as the Section 404 permitting authority, thereby upsetting the balance of authority that Congress struck between EPA and the Corps. *See* 33 U.S.C. § 1344(a)-(b).

174. The EC Process violates 33 C.F.R. § 325.2(e)(3)'s guarantee to permit applicants that their applications will be independently reviewed by the Corps.

175. Additionally, the EC Process violates Section 404's directive "to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section." 33 U.S.C. § 1344(q). The EC Process runs completely counter to the congressional goal of assuring "to the maximum extent practicable" that the Corps reach a decision on Section 404 permit applications "not later than the ninetieth [90th] day after the date the notice for such applicants is published," *id.*, which publication must occur within 15 days after an application is wholly submitted, *id*. The history of Section 404 permit applications in West Virginia since the institution of the EC Process as described above makes it abundantly clear that the EC Process is thwarting the congressional timelines expressed in Section 404(q).

176. For the above reasons, the EC Process violates the CWA in multiple respects and should be set aside under 5 U.S.C. § 706(2).

COUNT IV

To The Extent That The Final Guidance Incorporates And Relies Upon the EC Process, It Must Be Set Aside Under The Administrative Procedures Act.

177. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

178. One of EPA's goals in issuing the Final Guidance is to "strengthen[] EPA's environmental review under CWA Section 404" and to "coordinate with and provide comments to the Corps" by controlling the Corps' consideration of amended Section 404(b)(1) Guidelines, an unlawful agency action and clear reference to the EC Process. Ex. M at 27.

179. EPA also admitted in Appendix 6 to the Final Guidance that the Interim Guidance and EC Process were interrelated, providing a chart explaining how conductivity was being addressed in the EC Process.

180. Because the EC Process has been set aside by this Court as an unlawful agency action under 5 U.S.C. § 706(2), to the extent that the Final Guidance incorporates and relies upon the EC Process, it too must be set aside.

COUNT V

The Final Guidance Violates The Administrative Procedure Act's Notice-And-Comment Rulemaking Provisions.

181. Plaintiffs reassert the allegations contained in the preceding paragraphs as thought the same were fully set forth herein.

182. EPA should have complied with the notice-and-comment rulemaking requirements of APA Section 553 (5 U.S.C. § 553(b) and (c)) in promulgating the Final Guidance.

183. The opportunity to comment is meaningless unless the agency responds to significant points raised by the public. *See ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987). EPA did not make new policy through the medium of notice and comment proceedings; it merely reformulated the standards announced in the Interim Guidance to disguise the mandatory nature of those standards.

184. Additionally, although EPA submitted the Interim Guidance for public comment, it did not offer the public and the State of West Virginia a meaningful opportunity to submit comments because it simultaneously applied the Interim Guidance as a rule while purportedly taking such comments into account in formulating the Final Guidance. It is impossible to perform both functions at once.

185. Moreover, the two main studies upon which EPA relies in the Final Guidance were not peer reviewed and did not become final until May 27, 2011, well over five months after the comment period for the Interim Guidance closed. It is "a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). The public and the State of West Virginia were denied that meaningful opportunity.

186. For the above reasons, the Court should declare that the Final Guidance was an unlawful agency action that was arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law and set it aside under 5 U.S.C. § 706(2).

COUNT VI

The Final Guidance Violates The Administrative Procedure Act Because EPA Has Exceeded Its Authority Under The Clean Water Act.

187. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

188. EPA has exceeded its authority under Section 303. CWA Section 303(c)(1) empowers "[t]he Governor of a State or the State water pollution control agency" to "review[] applicable water quality standards and, as appropriate, modify[] and adopt[] standards." 33 U.S.C. § 1313(c)(1). EPA has affirmed the states' authority over water quality standards by regulation, pronouncing that "States . . . are responsible for reviewing, establishing, and revising water quality standards. 40 C.F.R. § 131.4.

189. The West Virginia Legislature has adopted numeric and narrative quality standards. WVDEP is charged with interpreting and implementing those standards. West Virginia has not adopted a water quality standard based on conductivity under Section 303, and has explicitly rejected conductivity as an adequate measure of the holistic health of a stream.

190. In a marked departure from EPA's prior practice, and in violation of the CWA, the Final Guidance imposes upon the State of West Virginia and the Corps a new water quality standard based on conductivity levels of less than 300 µS/cm, and certainly not more than 500 µS/cm.

191. The EPA Administrator did not prepare and publish proposed regulations setting forth that new standard, *see* 33 U.S.C. § 1313(c)(4).

192. EPA has exceeded its authority under CWA Section 402 because it has objected to and commented upon WVDEP's draft mining NPDES permits using the

conductivity standard. EPA also impermissibly instructs the State that it cannot use WET testing alone, thereby overriding the State's own permitting guidance document. EPA purports to dictate to the State best management practices to include in its Section 402 permits and indicates that it will object to draft NPDES permits based on environmental justice considerations, with no support for that basis in the CWA.

193. The Final Guidance undermines the State's Section 401 certifications by instructing EPA regional offices to second guess the State's certification without the need to consider any additional water aspects, contrary to 33 C.F.R. §320.4(d).

194. With the Final Guidance, EPA also unlawfully has amended the Section 404(b)(1) Guidelines without following the APA or 40 C.F.R. §230.2(c). EPA amended the Guidelines through including such new standards as the importation of best management practices including sequencing of valley fills based on conductivity levels and the adoption of a water-shed scale cumulative impacts analysis.

195. Because the Final Guidance violates both the CWA and EPA's regulations interpreting the Act, it should be set aside under 5 U.S.C. § 706(2), and EPA and the Corps should be enjoined from applying the water conductivity standard to Section 402 or 404 permitting decisions and to Section 401 certifications.

COUNT VII

The New Water Conductivity Standard is Arbitrary and Capricious under the Administrative Procedure Act.

196. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

197. Through the Interim and now Final Guidance, EPA announced a new water conductivity standard based on conductivity levels of less than 300 µS/cm, and certainly

not more than 500 µS/cm. EPA has used that standard to object to and comment upon WVDEP draft NPDES mining permits and has applied that standard to Section 404 permits in the EC Process.

198. EPA has not explained why the new conductivity standard applies only to West Virginia and Kentucky, not the other states in the same ecoregions. Its decision to rely on artificial political boundaries rather than ecoregions is arbitrary and capricious.

199. In adopting the new water quality standard, EPA has made a policy or value judgment as well as a scientific one. Although EPA contends that at 300 µS/cm conductivity, 5% of a certain genera of mayflies is extirpated, the State of West Virginia has rejected the population density of a single, sensitive benthic organism as an adequate measure of the holistic health of a stream. The West Virginia Legislature declared that "[t]he State of West Virginia has not adopted subcategories of special use to protect a certain species of mayfly but protects the aquatic community consistent with the Legislature's statement of public policy." And WVDEP has interpreted a "significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems," W. Va. Code R. § 47-2-3.2.i to mean "more than a change in the numbers or makeup of the benthic macroinvertebrate community in a segment of a water body downstream from a point source discharge. It is, instead, a material decline in the overall health of an aquatic ecosystem. A goal of the CWA and the WVWPCA is to protect the aquatic ecosystem as a whole; it is a holistic standard that requires a holistic approach to ecosystem assessment." Ex. A at 3. EPA's decision to the contrary is one left to the State under CWA Section 303, and EPA's decision to declare certain conductivity levels as violative of the State's narrative water quality standard is arbitrary and capricious.

200. Accordingly, this Court should set aside the conductivity standard announced in the Detailed Guidance as arbitrary, capricious and unlawful under 5 U.S.C. § 706(2), and EPA should be enjoined from applying its new standard to all types of mining permits.

COUNT VIII

The Final Guidance Violates the Administrative Procedure Act Because It Is Contrary To And Exceeds EPA's Authority Under The National Environmental Policy Act.

201. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

202. The Corps is the agency responsible for analyzing CWA Section 404 dredge-or-fill permit applications under NEPA. *See* 33 C.F.R. § 325.2(a)(4), (6); 33 C.F.R. pt. 325, App. B, § 7(b)(1), (2). In preparing NEPA documents, the district engineer must follow the Corps' NEPA Implementation Procedures codified at 33 C.F.R. pt. 325, Appendix B.

203. EPA's role is limited. EPA generally may review and comment on federal actions that affect the quality of the environment. Moreover, if the Corps prepares an EIS, EPA may review its sufficiency. EPA instead seeks to "work collaboratively with the Corps and OSM early in the NEPA process to provide technical assistance and recommendations," Ex M. at 41, with no basis for such extra-statutory coordination.

204. The Final Guidance attempts to dictate the substance and outcome of the Corps' NEPA analysis. EPA does not have the statutory or regulatory authority to decide as a general matter that certain types of projects, certain mining practices, or certain

mitigation measures will have significant adverse environmental impacts and that, as a consequence, the Corps must prepare an EIS in those cases.

205. NEPA procedures may be adopted only *after* an opportunity for public review and after review by CEQ. *See* 40 C.F.R. § 1507.3. EPA has not submitted those procedures to the public or to CEQ. Accordingly, they violate NEPA and exceed EPA's authority.

206. Despite the invalidity of the new NEPA presumptions and standards announced in the Final Guidance, EPA has applied them in reviewing Section 404 permits from West Virginia and in making recommendations to the Corps regarding the same.

207. Because the Final Guidance violates NEPA, it should be held unlawful and set aside under 5 U.S.C. § 706(2), and EPA and the Corps should be enjoined from applying the NEPA standards announced therein.

COUNT IX

The Final Guidance Violates The Administrative Procedure Act Because It Usurps The State's Authority Under The Surface Mining Control and Reclamation Act.

208. Plaintiffs reassert the allegations contained in the preceding paragraphs as though the same were fully set forth herein.

209. The Final Guidance improperly intrudes upon the State's SMCRA authority. SMCRA, 30 U.S.C. § 1201 *et seq.*, establishes a regulatory program that regulates the disposal of excess spoil material from surface coal mining operations. SMCRA utilizes what is known as a cooperative federalism approach, whereby States have "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" so

long as the Department of Interior ("DOI") and the Office of Surface Mining ("OSM") have approved the state's regulatory program. *See* 30 U.S.C. §§ 1201(f), 1253.

210. WVDEP's SMCRA regulatory program was approved in 1981. Accordingly, WVDEP has exclusive jurisdiction over the regulation of valley fills and the disposal of excess spoil in the State of West Virginia, and anyone wishing to engage in surface coal mining in the State must obtain a permit from WVDEP. *See id.* § 1256(a).

211. EPA has no authority to regulate surface mining management practices or to dictate those practices to the Corps, OSM, or the states.

212. EPA's proposed best management practices, and its rejection of existing practices, have not been evaluated by OSM or the State of West Virginia.

213. EPA's attempt to regulate surface mining procedures though the Interim and Final Guidance documents invades the regulatory authority that Congress granted to the State West Virginia under SMCRA.

214. Accordingly, EPA has exceeded its authority, and the Final Guidance should be set aside as contrary to SMCRA and as unlawful agency action under 5 U.S.C. §706(2).

PRAYER FOR RELIEF

WHEREFORE, in light of the allegations herein, Plaintiffs Randy C. Huffman, Cabinet Secretary of the West Virginia Department of Environmental Protection, and the State of West Virginia respectfully request that this Court enter judgment in their favor and against Defendants, along with the following relief:

1. A declaration that EPA and the Corps violated the Administrative Procedures Act by issuing the EC Process without following formal rulemaking procedures and by using the extra-regulatory EC Process

review process to review and delay pending West Virginia mining permits;

2. A declaration that EPA violated the Administrative Procedures Act by issuing the Interim Guidance without following formal rulemaking procedures and in following the standards announced in the Interim Guidance as *de facto* substantive rules that EPA has used to review, comment upon, and object to West Virginia permits in contrary to governing federal law;

3. A declaration that the EC Process and the Final Guidance are contrary to the Clean Water Act, the National Environmental Policy Act, and the Surface Mining Control and Reclamation Act, or are otherwise arbitrary, capricious, or an abuse of discretion for the reasons discussed herein, and have caused undue delay in mining-permit review affecting West Virginia permits at the federal and state levels;

4. A declaration that the Interim and Final Guidance documents infringed upon the State of West Virginia and WVDEP's authority to set and interpret water quality standards, to administer NPDES and Surface Mining Control and Reclamation Act permits, and to monitor and protect the quality of the State's streams and the aquatic ecosystems therein;

5. A declaration that EPA's conductivity water quality standard is arbitrary, capricious, and otherwise contrary to law;

6. An order vacating the EC Process, the Interim Guidance, and the Final Guidance as violative of the Administrative Procedures Act;

7. An order enjoining and restraining Defendants, their agents, employees, successors, and all persons acting in concert with or participating with them from enforcing, applying or implementing the EC Process and the Interim and Final Guidance documents;

8. An order directing the Corps and EPA to process and review all pending surface mining permits pursuant to the properly codified regulatory process and timelines in place before the issuance of the EC Process and the Final Guidance;

9. A declaration that the State of West Virginia has the authority to establish water quality standards under the existing statutory and regulatory regime, and that WVDEP has the authority to implement those standards and to administer the National Pollutant Discharge Elimination System and Surface Mining Control and Reclamation Act regulatory processes;

10. An order awarding reasonable attorney's fees and costs; and

11. An order granting Plaintiffs such other relief as may be necessary and appropriate or as the Court deems to be just and proper.

Respectfully submitted,

RANDY C. HUFFMAN, in his official capacity as
CABINET SECRETARY OF THE WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
and acting on behalf of the STATE OF WEST VIRGINIA,

Plaintiff, by Counsel

/s/Benjamin L. Bailey

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Dated: October 14, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION, *et al.*, **Plaintiffs,** **and** **COMMONWEALTH OF KENTUCKY and CITY OF PIKEVILLE, KENTUCKY,** **Plaintiff-Intervenors,** **v.** **LISA JACKSON, in her official capacity as Administrator, U.S. Environmental Protection Agency, *et al.*,** **Defendants,** **and** **SIERRA CLUB, *et al.*,** **Defendant-Intervenors.**	**Nos. 10-cv-1220-RBW** **11-cv-0295-RBW** **11-cv-0446-RBW** **11-cv-0447-RBW**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2011, I filed the foregoing "STATE OF WEST VIRGINIA'S AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF" via email upon all counsel of record.

/s/ Benjamin L. Bailey
Benjamin L. Bailey
Special Assistant Attorney General
State of West Virginia