

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001
(202) 463-2600,

Plaintiff,

v.

LISA JACKSON, sued in her official capacity,
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, D.C. 20460,

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460,

JOHN MCHUGH, sued in his official capacity,
Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310,

MAJOR GENERAL MERDITH W.B.
TEMPLE, sued in his official capacity,
Acting Chief of Engineers and Acting
Commanding General of the U.S. Army Corps of
Engineers
441 G Street, N.W.
Washington, D.C. 20314, and

UNITED STATES ARMY CORPS OF
ENGINEERS
441 G Street, N.W.
Washington, D.C. 20314,

Defendants.

No. 10-cv-01220-RBW

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

TABLE OF CONTENTS

INTRODUCTION1

JURISDICTION AND VENUE4

PARTIES4

LEGAL FRAMEWORK6

 A. Clean Water Act.....6

 1. Section 404 and the Codified Regulatory Permitting Process7

 a. The Corps’ Role.....7

 b. EPA’s Role.....9

 2. Section 303 Water Quality Standards Development11

 3. Section 402 Permitting and Water Quality Standards12

 4. Section 401 Certification14

 B. National Environmental Policy Act14

 C. Surface Mining Control and Reclamation Act of 197715

 D. Administrative Procedure Act.....16

FACTUAL BACKGROUND16

 A. June 11, 2009 Memorandum of Understanding.....18

 B. June 11, 2009 EC Process Memoranda.....19

 1. New Screening Process for Section 404 Permit Applications19

 2. The EC Process21

 C. EPA’s Detailed Guidance22

 1. Section 402 Permits23

 2. Section 404 Permits25

 3. Operational Practices Regulated Under SMCRA27

 4. NEPA Review of Section 404 Permits28

CLAIMS FOR RELIEF29

PRAYER FOR RELIEF41

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff NATIONAL MINING ASSOCIATION (“NMA”) hereby files this First Amended Complaint for Declaratory and Injunctive Relief in accordance with the Court’s Scheduling Order, dated September 16, 2011. To assure a complete record, all allegations and claims relating to the June 11, 2009 Enhanced Coordination Process memoranda remain in this Amended Complaint, even though the Court declared unlawful and set aside the Enhanced Coordination Process memoranda and granted partial summary judgment in Plaintiffs’ favor with respect to these claims on October 6, 2011.

INTRODUCTION

1. NMA seeks declaratory and injunctive relief against Defendants LISA JACKSON, in her official capacity as Administrator of the United States Environmental Protection Agency; JOHN MCHUGH, in his official capacity as Secretary of the Army; MAJOR GENERAL MERDITH W.B. TEMPLE, in his official capacity as Acting Chief of Engineers and Acting Commanding General of the U.S. Army Corps of Engineers, the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA”); and the UNITED STATES ARMY CORPS OF ENGINEERS (“Corps”) (collectively, “Defendants”) for violating Federal law.

2. This civil action challenges a series of EPA and Corps actions that have unlawfully obstructed Clean Water Act permitting processes for coal mining. NMA brings this action under Section 702 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702, seeking review of the June 11, 2009 Enhanced Coordination Process (“EC Process”) memoranda (http://www.epa.gov/owow/wetlands/pdf/Final_MTM_Permit_Coordination_Procedures_6-11-09.pdf; and http://www.epa.gov/owow/wetlands/pdf/Final_EPA_MTM_letter_to_Army_6-11-09.pdf) and the July 21, 2011 Detailed Guidance Memorandum (“Final Detailed Guidance”)

(http://water.epa.gov/lawsregs/guidance/wetlands/upload/Final_Appalachian_Mining_Guidance_072111.pdf)¹ as contrary to the APA, the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1201 *et seq.*, and other federal law. As explained in the Factual Background section, *infra*, these memoranda substantially and illegally amend the statutory and regulatory permitting processes for coal mining that form the backbone of coal companies’ expectations in planning to extract coal for our nation’s power supply, particularly for those companies that require “valley fills” for their coal mining operations. By dramatically altering timelines and imposing new requirements in complete disregard of existing federal law and procedure, EPA and the Corps have launched a moving target in coal mining permitting that is substantially and irreparably harming NMA’s coal mining members.

3. In addition, through these actions, EPA has radically altered the statutory delegation of regulatory authority over coal mining to rob the Corps, the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior (“OSM”), and states of their respective statutory roles as permitting authorities and regulators of the environmental effects of coal mining, and to arrogate primary authority to itself. Taken together, these actions also amount to a *de facto* moratorium on permitting for coal mining, particularly in Central Appalachia. Administrator Jackson explained the effects of EPA’s actions during the press conference releasing the Interim Detailed Guidance, stating that, “You’re talking about no, or very few, valley fills that are going to meet this [new] standard.” <http://www.washingtonpost>.

¹ In its original complaint, filed on July 20, 2010, NMA challenged the Interim Detailed Guidance issued by EPA on April 1, 2010. *See* 75 Fed. Reg. 18500. That document is no longer available on EPA’s website. *See* <http://water.epa.gov/lawsregs/guidance/wetlands/mining.cfm> (last visited Oct. 14, 2011). Based on EPA’s issuance of the July 21, 2011 Detailed Guidance, the parties agreed to stop briefing NMA’s (and the other plaintiffs’) claims relating to the Interim Guidance and instead allow all plaintiffs to amend their complaints to challenge the July 21, 2011 Detailed Guidance.

com/wp-dyn/content/article/2010/04/01/AR2010040102312.html. “Jackson said the EPA will now instruct its local offices not to approve new CWA valley-fill permits that are likely to produce a certain level of pollution in waters downstream,” *id.*, even though that “certain level” of water quality set by the Interim Detailed Guidance has never been promulgated under the APA and CWA. Nothing has changed as a result of EPA’s issuance of the Final Detailed Guidance. EPA continues to presume the applicability of this new “standard.” In addition, despite EPA’s and the Corps’ initial claims that the EC Process (and related screening process) would only apply to a select group of permits pending as of March 2009, EPA has repackaged the substantive requirements of those unlawful processes in the Final Detailed Guidance.

4. NMA seeks an order from this Court holding unlawful, enjoining implementation of, and vacating both the EC Process and the Final Detailed Guidance as arbitrary, capricious, an abuse of discretion, and contrary to law in numerous respects, including:

- (i) failing to comply with the APA’s notice and comment rulemaking requirements;
- (ii) violating the delegation of authority between the Corps and EPA in CWA Section 404;
- (iii) violating the delegation of authority to the states for development of water quality standards set forth in CWA Section 303, 33 U.S.C. § 1313, and unlawfully promulgating a water quality standard;
- (iv) creating illegal presumptions in the development and implementation of a conductivity water quality standard;
- (v) displacing the Corps’ determinations and regulations on the application of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331, *et seq.*, to coal mining permitting; and
- (vi) invading the exclusive regulatory authority Congress granted to OSM and the primacy states in SMCRA, 30 U.S.C. § 1201, *et seq.*

NMA asks this Court to order the Corps to reinstate and adhere to the codified Section 404 permit review process and order EPA to perform, and not exceed, the role Congress crafted for it in the Section 404 permitting process.

5. The EC Process and Final Detailed Guidance are having immediate adverse effects on coal mining through the implementation of an illegal permit review process that seeks to impose prohibitive conditions on mining. Should the EC Process and Final Detailed Guidance be left to stand and their implementation continues on its current course, NMA's coal mining members, particularly the small businesses, will be unable to provide coal for our nation's energy supply, despite Congressional directives to the contrary. *See, e.g.*, 30 U.S.C. § 1202(f).

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction); and the APA, 5 U.S.C. § 702 (judicial review of final agency action). This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706, CWA, 33 U.S.C. § 1251, *et seq.*, SMCRA, 30 U.S.C. § 1201, *et seq.*, and NEPA, 42 U.S.C. § 4331, *et seq.*

7. Venue is proper in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1391(e) in that (i) Defendants reside in the District of Columbia, (ii) a substantial part of the events giving rise to this claim occurred in the District of Columbia, and (iii) the Plaintiff resides in the District of Columbia.

PARTIES

8. Plaintiff NATIONAL MINING ASSOCIATION is the national trade association of the mining industry. NMA's members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery,

equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA's members are significantly and adversely affected by the agency actions challenged in this case. NMA is headquartered in Washington, D.C.

9. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is the federal agency charged with the administration and enforcement of many of the federal environmental laws, pursuant to specific delegations of authority from Congress. With respect to the CWA Section 404 permitting program, Congress instructed EPA to develop guidelines related to environmental protection that would be applied by the Corps, the permitting authority, in evaluating Section 404 permit applications. Congress also granted EPA specifically defined authority to object to certain decisions by the Corps in issuing Section 404 permits. Such authority can only be exercised following notice and an opportunity for public hearings, consultation with the Corps, and publication of written findings and reasons for such objection. EPA is headquartered in Washington, D.C.

10. Defendant LISA JACKSON is the Administrator of EPA and is sued in her official capacity. Administrator Jackson has ultimate responsibility for EPA's actions pursuant to CWA Section 404, and is the signatory to several of the EPA letters and memoranda being challenged in this action. The Administrator's office is located within EPA's headquarters in Washington, D.C.

11. Defendant UNITED STATES ARMY CORPS OF ENGINEERS is the federal agency charged with issuing permits for the discharge of dredged or fill material into the waters of the United States pursuant to Section 404 of the CWA, including permits for the discharge of fill material associated with coal mining operations. The Corps is headquartered in Washington, D.C.

12. Defendant JOHN MCHUGH is the Secretary of the Army and is sued in his official capacity. The Secretary of the Army, acting through the Corps, has ultimate responsibility for the issuance of Section 404 permits by the Corps. The Department of the Army's headquarters is located in Washington, D.C.

13. Defendant MAJOR GENERAL MERDITH W.B. TEMPLE is the Acting Chief of Engineers and Acting Commanding General of the U.S. Army Corps of Engineers. The Office of the Chief of Engineers is located in the Corps' headquarters in Washington, D.C. Defendant Temple is charged with the supervision and management of all Corps decisions and actions, and is sued in his official capacity.

LEGAL FRAMEWORK

14. Coal mining operations are subject to complex and myriad statutory and regulatory requirements, including permitting under SMCRA and the CWA (with two categories of CWA permits under Sections 402 and 404, both of which require Section 401 certifications from states), and NEPA review of permits issued by the Corps under CWA Section 404. The paragraphs below outline some of the key provisions governing this permitting process that are implicated by the EC Process and the Final Detailed Guidance.

A. Clean Water Act

15. Coal mining operations generally require two types of CWA permits for operation:

- (i) Section 404 permits, issued by the Corps, for the discharge of dredged and fill material; and
- (ii) Section 402 permits, ordinarily issued by states with delegated permitting programs, for the discharge of all other pollutants. Section 402 permits govern pollutants that are assimilated by receiving waters, while Section 404 permits authorize the discharge of material that fills or displaces receiving waters.

1. Section 404 and the Codified Regulatory Permitting Process

a. The Corps' Role

16. Section 404 of the CWA, 33 U.S.C. § 1344(a), gives the Secretary of the Army sole authority to issue Section 404 permits for the discharge of “dredged or fill” material into navigable waterways at specified disposal sites. Under 30 C.F.R. § 325.2(a), the Secretary of the Army has delegated its authority to the Corps, which may issue Section 404 permits after undertaking a public interest analysis.

17. The Corps’ jurisdiction under Section 404 is limited to the filling of navigable waters. Coal mining activities beyond the filling of such waters are not within the Corps’ control or responsibility, and upland environmental effects from those activities are regulated under SMCRA.

18. The Corps’ procedures for issuing a Section 404 permit are codified at 33 C.F.R. Part 325.

19. The Corps’ regulations, 33 C.F.R. § 325.1(d) and (e), include requirements regarding what must be contained in a Section 404 permit application and give the district engineer sole authority to request additional information deemed essential to make a public interest determination, including environmental data and a determination of compliance with the guidelines developed pursuant to Section 404(b)(1).

20. Those regulations also specify that the district engineer must review the Section 404 permit application for completeness and, within 15 days of receiving a Section 404 permit application, the district engineer must determine whether the application is complete and issue a public notice pursuant to the regulations. 33 C.F.R. § 325.2(a)(2). 33 C.F.R. § 325.2(a)(3) authorizes the district engineer to delay processing of an application only if an applicant makes a request for a reasonable delay, and the delay normally would not exceed 30 days.

21. The Corps' regulations, 33 C.F.R. § 325.2(a)(4), make clear that the district engineer is responsible for following environmental procedures and documentation required by NEPA and evaluating the need for a public hearing.

22. Finally, 33 C.F.R. § 325.2(a)(6) expressly provides that the district engineer will determine, based on the record and applicable regulations, whether or not a Section 404 permit should be issued.

23. Pursuant to 33 C.F.R. § 325.3, public notice of the permit serves the purposes of advising all interested parties of the proposed activity for which a permit is sought and soliciting comments and information necessary to evaluate the probable impact on the public interest.

Interested parties that may offer comments include federal agencies such as EPA. The regulations specify that the comment period shall extend for a reasonable period of time within which interested parties may express their views, but generally should not be more than 30 days.

24. District engineers generally must decide on all applications no later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or by procedures required by law, (ii) the case must be referred to a higher authority, (iii) the comment period is extended, (iv) the applicant does not provide timely submittal of information or comments, (v) processing is suspended at the request of the applicant, or (vi) information needed to process the application cannot reasonably be obtained within the 60-day period. 33 C.F.R. § 325.2(d)(3).

25. District engineers have authority to add conditions to permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions must be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. 33 C.F.R. § 325.4(a).

b. EPA's Role

26. The CWA allocates two primary responsibilities to EPA in the Section 404 process. First, EPA has statutory authority to develop environmental guidelines (*i.e.*, the “404(b)(1) Guidelines”) in conjunction with the Corps. 33 U.S.C. § 1344(b)(1). Second, the CWA confers EPA authority, under specified procedures, to prevent the Corps from authorizing certain disposal sites under limited circumstances. 33 U.S.C. § 1344(c).

27. As required by the CWA, EPA has promulgated 404(b)(1) Guidelines, which are codified at 40 C.F.R. Part 230 and guide the Corps’ review of the environmental effects of the proposed disposal sites. For example, pursuant to 40 C.F.R. § 230.10(a), no Section 404 permit shall be issued if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, under 40 C.F.R. § 230.10(b), no permit shall be issued if it (i) causes or contributes to any water quality standard violations, (ii) violates any applicable toxic effluent standard or prohibition under Section 307 of the CWA, (iii) jeopardizes the continued existence of a listed species, or (iv) violates any requirement necessary to protect a marine sanctuary pursuant to law. Furthermore, pursuant to 40 C.F.R. § 230.10(c), no permit shall be issued which will cause or contribute to significant degradation of the waters of the United States, and pursuant to 40 C.F.R. § 230.10(d), no permit shall be issued unless appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem.

28. The 404(b)(1) Guidelines also provide 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 Administrator under the Administrative Procedure Act* (5 U.S.C. § 551 *et seq.*).” 40 C.F.R. § 230.2(c) (emphasis added).

29. As described above, the authority to apply the 404(b)(1) Guidelines to specific disposal sites for the dredged or fill material rests solely with the Corps. 33 U.S.C. § 1344(a), (b). EPA has the ability to comment on the Corps’ application of the 404(b)(1) Guidelines to particular permit applications during the interagency review period required for each permit.

30. In addition to requiring 404(b)(1) Guidelines development, under Section 404(c), Congress granted EPA limited authority to prevent the Corps from authorizing certain disposal sites in limited circumstances, if the EPA Administrator determines, after notice and an opportunity for public hearing, that certain unacceptable environmental effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas would result. 33 U.S.C. § 1344(c).

31. Section 404(c) does not grant EPA authority to exercise unlimited enforcement of compliance with the 404(b)(1) Guidelines. As reflected in EPA’s own regulations, “[t]he Administrator is authorized to prohibit or otherwise restrict a [dredged or fill material] site whenever he determines that the discharge of dredged or fill material is having or will have an ‘unacceptable adverse impact’ on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” 40 C.F.R. § 230.1(a). “In evaluating the unacceptability of such impacts, consideration should be given to the *relevant* portions of the 404(b)(1) Guidelines,” *e.g.* those portions that relate to impacts to municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. 40 C.F.R. § 231.2(e) (emphasis added).

32. The Section 404(c) process occurs subsequent to an agency coordination and dispute resolution process set forth in detailed interagency agreements executed pursuant to Section 404(q). See <http://www.epa.gov/owow/wetlands/regs/dispmoa.html>.

2. Section 303 Water Quality Standards Development

33. The CWA explicitly acknowledges the Congressional policy to “recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce and eliminate pollution.” CWA Section 101(b), 33 U.S.C. § 1251(b). This policy is effectuated, in part, in Section 303 of the CWA, which allocates primary authority for development of water quality standards to the states.

34. Under Section 303(c), states perform the function of establishing, reviewing, and revising water quality standards. 33 U.S.C. § 1313(c). EPA echoes this statutory provision in its regulations, prescribing that, “[s]tates . . . are responsible for reviewing, establishing, and revising water quality standards.” 40 C.F.R. § 131.4.

35. A water quality standard defines the water quality goals of a water body by designating uses for a particular body of water and setting criteria necessary to protect those uses. 40 C.F.R. § 131.2. Such standards can be expressed as specific numeric limitations or as general narrative statements. For narrative statements, states must develop a mechanism for translating or interpreting them into numeric permit limits. 40 C.F.R. § 122.44(d)(1)(vi). Any competing federal interpretation does not defeat the state’s interpretation, assuming the state’s interpretation is supported by substantial evidence.

36. Similar to Section 404, Congress specifically delineated a limited role for EPA in the water quality standard process. First, EPA may develop and publish criteria for water quality that accurately reflect “the latest scientific knowledge.” 33 U.S.C. § 1314(a). Such criteria are not binding on the states nor are they independently enforceable. States are free to adopt,

modify, or reject EPA's published criteria, provided they have a sound scientific rationale. *See* 40 C.F.R. § 131.11. Second, when states establish, review, or revise their water quality standards, EPA's role is to review and approve or disapprove of state-adopted water quality standards. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.5. If EPA determines that a state's standards are not consistent with the CWA, then EPA must inform the state within 90 days of the state's submission of the standard to EPA. If the state does not adequately respond to EPA's notice and implement necessary changes within 90 days of EPA's notice, EPA must promulgate federal standards. 33 U.S.C. § 1313(c)(3)-(4); 40 C.F.R. §§ 131.5, 131.21. Water quality standards are applicable (*e.g.* can be used in permitting decisions) only when EPA has either approved the state's standards or disapproved the state's standards and promulgated, through formal notice and comment, federal standards. 40 C.F.R. § 131.21.

37. EPA may also promulgate water quality standards on its own only for particular waters, *i.e.*, "for the navigable waters involved," and only where the Administrator makes a determination "that a revised or new standard is necessary to meet the requirements of [the CWA]." EPA can act unilaterally only if it "prepare[s] and publish[es] proposed regulations" and "promulgate[s]" the particular standard. 33 U.S.C. § 1313(c)(4).

38. When EPA establishes water quality standards in the place of a state, it is "subject to the same policies, procedures, analyses, and public participation requirements established for States" in EPA's regulations. *See* 40 C.F.R. § 131.22(b). Among other things, federally promulgated numeric water quality criteria must be based on "sound scientific rationale." *Id.* § 131.11(b)(1).

3. Section 402 Permitting and Water Quality Standards

39. Congress established the second CWA permitting program at Section 402, known as the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342. The NPDES

permitting system focuses on wastewater discharges to receiving waters, and governs such discharges through the establishment of technology-based limits placed on the constituent make-up of a wastewater discharge. 33 U.S.C. § 1311(b)(2).

40. Conforming to the statute's goal of allocating the "primary responsibilities" for water pollution control to the states, 33 U.S.C. § 1251(b), the CWA establishes a system of cooperative federalism, whereby states assume primary administration and enforcement of the NPDES permitting program. 33 U.S.C. § 1342(b). Once EPA approves a proposed state permitting program, EPA must suspend its own program. 33 U.S.C. § 1342(c)(1). Under such delegated permitting programs, states have exclusive authority to implement the NPDES program within their boundaries, and again, EPA has only limited authority to review state action. Specifically, EPA retains authority, in specified circumstances, to object to a particular NPDES permit that authorizes discharges to waters within the statute's jurisdiction. 33 U.S.C. § 1342(d); 40 C.F.R. § 123.44. If the state does not respond adequately to EPA's objection within specified timeframes, EPA may assume the authority to issue the permit. 33 U.S.C. § 1342(d)(4). If EPA does not object to a permit based on statutory or regulatory grounds and within the specified procedures and timeframes, the state may proceed in accordance with its delegated authority and issue the permit.

41. When application of a technology-based limit to a particular discharge will not assure compliance with any applicable water quality standards established for the particular receiving stream, the permitting authority must develop permit limitations that would work to maintain such water quality. 33 U.S.C. § 1312; 40 C.F.R. § 122.44(d). The permitting authority, usually a state agency, determines whether the proposed discharge will cause, or have the reasonable

potential to cause, or contribute to an in-stream excursion above a numeric or narrative criteria within an applicable water quality standard. 40 C.F.R. § 122.44(d).

4. Section 401 Certification

42. For federally permitted activities, Section 401 of the CWA requires certification from the state that proposed discharges are in compliance with applicable state water quality standards. 33 U.S.C. § 1341(a). In states with delegated NPDES programs, this state water quality certification process is built in to the permit issuance process. States issue such certifications for Section 404 permits issued by the Corps. EPA lacks authority under the CWA to reject unilaterally a state Section 401 certification for state-issued NPDES permits or Section 404 permits from the Corps. EPA may review and comment on a state Section 401 certification or seek judicial review.

B. National Environmental Policy Act

43. Congress enacted NEPA to establish a process by which federal agencies must consider the potential environmental consequences of their actions. 42 U.S.C. § 4231 *et seq.* NEPA is a procedural, not substantive, statute, and therefore agency actions with adverse environmental consequences can be compliant with NEPA so long as the agency properly considered those effects.

44. NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Where it is not readily determined that an EIS is required, an agency may prepare an Environmental Assessment (“EA”) that documents the findings and analysis of environmental impacts. The agency may choose either to proceed with the preparation of an EIS or, alternatively, to make a Finding of No Significant Impact (“FONSI”). 40 C.F.R. §§ 1501.4, 1508.9.

45. Even where an EA determines that a proposed action would ordinarily have a significant effect on the environment, an agency can, in lieu of preparing an EIS, require mitigating measures to reduce the environmental impact of the proposed action below the level of significance that would otherwise trigger an EIS.

46. In general, NEPA applies to the issuance of permits pursuant to Section 404 of the CWA. In evaluating CWA Section 404 permit applications, the Corps must “address the impacts of the specific activity requiring a [404] permit and those portions of the entire project over which the [Corps] district engineer has sufficient control and responsibility to warrant Federal review.” 33 C.F.R. pt. 325, App. B, § 7(b)(1).

C. Surface Mining Control and Reclamation Act of 1977

47. SMCRA was enacted on August 3, 1977, to regulate the environmental and related impacts of surface coal mining operations and the surface effects of underground mining operations. A principal purpose of SMCRA is to “assure that the coal supply essential to the Nation’s energy requirements, and to its economic well-being is provided” and to “strike a balance between the protection of the environment and agricultural productivity and the Nation’s need for coal as an essential source of energy.” 30 U.S.C. § 1202(f).

48. Like the CWA, SMCRA is anchored in cooperative federalism principles and a recognition that “the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States.” 30 U.S.C. § 1201(f); *see also* 30 U.S.C. § 1253. After a state’s SMCRA program has been approved, all those wishing to engage in coal mining operations in the state must obtain a SMCRA permit from the state regulatory authority. 30 U.S.C. § 1256(a).

49. A SMCRA permit must incorporate and implement extensive environmental performance standards. 30 U.S.C. § 1265. Such standards contemplate and regulate disposal of excess spoil

material and other aspects of mine design. 30 U.S.C. § 1265(b)(22). A SMCRA permitted operation must transport and place excess spoil material “in a controlled manner” and in a way that assures “mass stability” and prevents “mass movement.” *Id.* § 1265(b)(22)(A). Further, Congress contemplated that such disposal would occur in water courses – if a disposal area contains “springs, natural water courses or wet weather seeps,” lateral drains must be constructed “from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.” *Id.* § 1265(b)(22)(D). These provisions are implemented by the various states pursuant to their authority under SMCRA.

D. Administrative Procedure Act

50. If NMA’s members suffer a “legal wrong because of agency action” and are “adversely affected or aggrieved” by EPA’s and the Corps’ actions, the APA affords judicial review of these agency actions. 5 U.S.C. §§ 702, 704.

51. The APA also provides the applicable process a Federal agency must follow when it proposes and adopts final rules and regulations. 5 U.S.C. § 553; *id.* § 551(4)-(5). When EPA and the Corps arbitrarily issued substantive revisions to the Section 404 permitting process without following the required APA procedures, they violated the APA.

FACTUAL BACKGROUND

52. In January 2009, in a marked departure from prior, longstanding EPA practice and a harbinger of the agency actions challenged in this Complaint, EPA initiated an extra-regulatory review process for CWA Section 404 permits that had no basis in the Corps’ or EPA’s codified procedures. EPA issued a series of letters to the Corps recommending denial of certain CWA Section 404 permit applications for coal mining operations. In each of these cases, the Corps was poised to imminently issue the permits, and EPA had already either commented or waived its opportunity to comment during the interagency comment process, long-expired by January

2009. Undaunted by the fact that the opportunity for comment, as provided by regulation, had passed, EPA's January 2009 letters contained newly articulated positions questioning the legality of the permits at issue. Specifically, EPA raised concerns about conductivity levels in water quality, citing for the first time (even though it was readily available to EPA during the interagency review process) a 2008 study (Pond et al.) that analyzed the relationship between conductivity as a measure of water quality and aquatic life use.

53. On February 13, 2009, the U.S. Court of Appeals for the Fourth Circuit decided *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, 556 F.3d 177 (4th Cir. 2009), which ended long-running litigation by various citizen advocacy organizations against the Corps and various coal companies challenging four proposed CWA Section 404 permits for coal mining operations. The Fourth Circuit upheld the Corps' permit review procedures and analysis on all fronts (including (a) affirming the Corps' exclusion of upland areas from CWA and NEPA review, (b) ruling that a state's CWA Section 401 certification is binding on the Corps and confirms compliance with all EPA-approved state water quality standards, (c) affirming the Corps' practice of utilizing cumulative and hydrological impacts analyses performed pursuant to SMCRA to avoid regulatory overlap, (d) upholding the Corps' use of available assessment tools and best professional judgment in mitigation determinations, and (e) upholding the Corps' use of off-site stream mitigation measures), thus clearing the way for prompt release of the backlog and processing of long-pending Section 404 permit applications. The decision provided a path forward not only for the permits challenged in the case, but also for numerous other Section 404 permit applications pending with the Corps that had been stalled awaiting the Fourth Circuit's decision.

54. Reacting in part to the Fourth Circuit's decision, on March 23, 2009, EPA sent two more letters to the Corps expressing concerns regarding two coal mining projects in West Virginia and Kentucky. The press statement accompanying the release of the letters indicated Administrator Jackson had "directed the agency to review other mining permit requests" and indicated the need for EPA to be "actively involved" in review of permits anticipated to be forthcoming after the Fourth Circuit decision. Similar letters followed in April 2009 with EPA objecting to at least four proposed coal mining projects in Virginia, West Virginia, and Kentucky. An EPA spokesperson stated on April 9, 2009 that EPA "could not rule out that more permits would soon be reviewed."

55. On June 4, 2009, U.S. Representative Shelley Moore Capito and eleven other U.S. Representatives wrote to Administrator Jackson seeking action on more than 200 permit applications for coal mining that were being delayed by a "new process" of EPA review.

A. June 11, 2009 Memorandum of Understanding

56. On June 11, 2009, EPA, the Corps, and the Department of Interior released a Memorandum of Understanding on Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (the "MOU"). A key component of the MOU was to formalize the extra-regulatory review process of CWA Section 404 permits that EPA had previously commenced in January 2009.

57. The MOU stated that the agencies will begin immediately to implement the EC Process for the CWA review of Section 404 permit applications for Appalachian surface coal mining activities, including those pending permit applications submitted prior to execution of the MOU.

58. An initial list of 108 pending Section 404 permit applications for proposed coal mines was provided by the Corps and published at the same time as the MOU. The agencies stated that those 108 permits would be evaluated for further coordination under the EC Process.

59. The Corps had already issued public notice for all of the permit applications now subject to the EC Process, and the official comment period for those permit applications had expired a year earlier. Thus, the EC Process had the effect of revisiting and/or restarting the interagency review process for hundreds of pending permit applications.

60. Under the MOU, the EC Process will apply to Section 404 permit applications in six states and three EPA regions in the eastern United States.

61. Since the release of the MOU and announcement of the EC Process, the Corps permit backlog had grown to more than 235 permits by July 30, 2009, and several companies have since withdrawn their Section 404 permit applications.

B. June 11, 2009 EC Process Memoranda

62. In conjunction with the release of the MOU, EPA also issued formal details on the EC Process, which were immediately effective and imposed substantive changes to the Section 404 permitting process. See http://www.epa.gov/owow/wetlands/pdf/Final_MTM_Permit_Coordination_Procedures_6-11-09.pdf; and http://www.epa.gov/owow/wetlands/pdf/Final_EPA_MTM_letter_to_Army_6-11-09.pdf. Such details included those considerations that would be used by EPA to screen and identify pending permit applications that would be subject to the EC Process.

1. New Screening Process for Section 404 Permit Applications

63. EPA's first step in the EC Process is to screen all pending Section 404 permit applications and decide which will proceed for review by the Corps under existing permit processing procedures, codified in 33 C.F.R. Part 325, and which will instead be subject to the EC Process.

64. Such screening occurs pursuant to a special method, the Multi-Criteria Integrated Resource Assessment (the "MCIR Assessment"). The stated goal of the MCIR Assessment is to

develop a threshold of acceptable mining impacts and to create a list of permits that EPA determines do not meet that threshold and, therefore, require the use of the EC Process, whereas only those permits that do meet EPA's newly established threshold will proceed through the Corps' lawful regulatory process governed by regulations at 33 C.F.R. Part 325. The Corps was not involved in developing the components of the MCIR Assessment.

65. EPA's development and use of the MCIR Assessment for evaluating Section 404 permit applications and identifying them for application of EC Process is not embodied or otherwise provided for in any properly promulgated regulation, nor has it been subjected to public notice and comment.

66. On September 11, 2009, EPA announced that it utilized the MCIR Assessment to identify 79 coal-related Section 404 permits currently pending with the Corps and was proposing to submit those 79 permit applications to the EC Process, rather than the 33 C.F.R. Part 325 process. The permits were associated with coal mining projects proposed within six states: Ohio, Pennsylvania, Tennessee, Virginia, Kentucky, and West Virginia. EPA published the list of 79 permit applications on its website for a 14-day review period.

http://www.epa.gov/owow/wetlands/pdf/ECP_Factsheet_09-11-09.pdf.

67. On September 30, 2009, EPA announced in a letter to the Corps that all 79 proposed, pending projects previously identified using the MCIR Assessment would be subject to the EC Process. EPA directed that "each Corps District will notify the appropriate EPA Region in writing when a permit application is ready to begin the 60-day coordination period."

68. As of September 16, 2011, of the 79 pending projects identified in 2009 for the EC Process, 18 were still awaiting the start of the 60-day EC Process, 50 permit applications have been withdrawn, only eight permits have been issued, EPA had issued recommendation letters to

the Corps on two permits after the 60-day EC Process, and just one was undergoing EC Process review.

2. The EC Process

69. Once triggered after the MCIR Assessment, the EC Process adds significant additional time to the Corps regulatory review. The EC Process involves discussions among EPA, the Corps, the permit applicant, and other potentially relevant agencies. While EPA describes a 60-day EC Process, as written, the 60-day period actually does not begin until the Corps initiates the EC Process, and there is no binding requirement for the Corps to do so in a timely fashion, in direct contrast to the permitting processing timelines set forth in Section 404(a) and (q), 33 U.S.C. § 1344(a), (q).

70. In fact, EPA has instructed the Corps that the 60-day period for EC Process discussions does not commence until *after* the Corps, EPA, and permit applicant have held multiple negotiation sessions, which effectively could delay initiation of the EC Process indefinitely. Thus, the EC Process adds a *minimum* 60 days (and potentially many months) of review to the existing review process entirely outside of, and in addition to, the procedures and timelines codified in 33 C.F.R. Part 325.

71. During the EC Process period, EPA will attempt to “resolve” environmental concerns raised by the permit application by, for example, proposing revisions to proposed discharges, special conditions, or mitigation requirements.

72. At the end of the EC Process period, if issues identified by EPA are resolved in individual permit applications, those permits may move forward to the Corps for processing and incorporation of new permit terms or conditions dictated by EPA during the EC Process. If EPA’s concerns remain unresolved at the close of the EC Process period, EPA may then initiate Section 404(c) procedures. In short, the EC Process provides EPA with an extra-regulatory

vehicle to impose its will on coal mining permits and avoid the spotlight and administrative burden of the statutory Section 404(c) process.

73. Neither EPA nor the Corps proposed to revise the existing codified procedures for review of Section 404 permits at 33 C.F.R. Part 325, and EPA has not proposed to amend its existing 404(b)(1) Guidelines as part of formalizing the EC Process.

C. EPA's Detailed Guidance

74. On April 1, 2010, EPA released the Interim Detailed Guidance as one of a series of documents to provide “detailed guidance” to EPA Regions 3, 4, and 5 for those Regions’ review of all surface coal mining operations under the CWA, NEPA, and the Environmental Justice Executive Order. The Interim Detailed Guidance and all related documents were made available on EPA’s website.² Although EPA issued the Interim Detailed Guidance for public comment, 75 Fed. Reg. 18500, it also nevertheless stated that the Interim Detailed Guidance was effective immediately. “We expect you to begin using this interim final guidance immediately in your review of Appalachian surface coal mining activities.” Interim Detailed Guidance at 2.

75. During the pendency of litigation challenging the Interim Detailed Guidance, EPA issued the Final Detailed Guidance on July 21, 2011 after an eight-month public comment period. The Final Detailed Guidance and related documents can be found on EPA’s website at http://water.epa.gov/lawsregs/guidance/wetlands/upload/Final_Appalachian_Mining_Guidance_072111.pdf. The Final Detailed Guidance announces that it “replace[d] EPA’s interim final guidance issued on April 1, 2010, and [EPA] Regions [3, 4, and 5] should begin consulting it immediately.” The Final Detailed Guidance once again purports merely to “clarify the roles and expectations of the [EPA] in coordinating with our Federal and State partners to assure more

² Since the issuance of the Final Detailed Guidance, EPA has removed the Interim Detailed Guidance and related materials from its website.

consistent, effective, and timely EPA review of Appalachian surface coal mining operations with respect to provisions of the [CWA], [NEPA], and the Environmental Justice Executive Order.” Final Detailed Guidance at 1. The Final Detailed Guidance addresses CWA permitting under Sections 402 and 404, along with NEPA review of Section 404 permits, and operational practices covered by SMCRA permitting.

1. Section 402 Permits

76. In the Final Detailed Guidance, EPA proclaimed 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,” thus implicitly requiring water quality-based effluent limits in most surface mining permits. Final Detailed Guidance at 11. Such a blanket statement about the need for water quality-based limits ignores (a) the role of the delegated state regulatory authority under Section 402, and (b) the existing protections under the CWA and its implementing regulations. Because all of the states subject to the Final Detailed Guidance have delegated authority to issue Section 402 NPDES permits, the states, not EPA, have the duty to determine whether any proposed discharges will cause, or have the reasonable potential to cause, or contribute to an in-stream excursion above a numeric or narrative criteria within an applicable water quality standard. 40 C.F.R. § 122.44(d).

77. The states make the “reasonable potential” determination on a case-by-case basis using site-specific data and information. EPA’s blanket presumption ignores the fact that states cannot approve any discharge which would cause or contribute to an excursion in excess of a water quality standard. *See* 40 C.F.R. § 122.4(i); 40 C.F.R. § 122.44(d).

78. Under existing regulations, in writing a permit based on narrative water quality standards, states are to “[e]stablish effluent limits using a calculated numeric water quality criterion for the pollutant which the [state] demonstrates will attain and maintain applicable narrative water

quality criteria and will fully protect the designated use.” 40 C.F.R. § 122.44(d)(1)(vi)(A).

States are free to use state criteria, policies, regulations, or other relevant information in establishing these permit limits. *Id.* Under the CWA, states are responsible for interpreting their own narrative water quality standards and deriving effluent limits from those standards.

79. Nonetheless, in discussing how states should derive NPDES permit effluent limits from applicable narrative water quality standards, EPA indicated that a conductivity level of 300 $\mu\text{S}/\text{cm}$ “would generally be an appropriate numeric interpretation [of state narrative standards] used to derive” a water quality-based effluent limit. Final Detailed Guidance at 18. According to EPA, two reports cited in the Final Detailed Guidance indicate that “substantial and increasing aquatic life impacts occur as conductivity increases beyond 300 $\mu\text{S}/\text{cm}$.” *Id.* at 16.

80. EPA’s guidance broadly instructs all six Appalachian states to “work to assure that discharges from surface coal mining operations are generally not above 300-500 $\mu\text{S}/\text{cm}$,” *id.* at 18, even though EPA’s own Scientific Advisory Board (“SAB”) cautioned that: (a) use of the conductivity benchmark “for assessing effects on aquatic ecosystems should be limited to ecoregions 68, 69, and 70 in the States of West Virginia and Kentucky (the study region in which it was derived or validated) until validation can be performed;” (b) “[e]ven within the study region, site-specific factors may affect the appropriateness of the benchmark in a particular case;” and (c) “EPA Regions should not use this benchmark in connection with ephemeral streams . . . until additional validation can be performed.” *Id.* at 5.

81. The Final Detailed Guidance presumes that the specific conductivity levels therein are appropriate numeric interpretations of state narrative water quality standards, but under the CWA, such interpretations are to be made by the states in the first instance. Tellingly, the only state (Ohio) that has promulgated a numeric water quality criterion for conductivity adopted a

level of 2400 $\mu\text{S}/\text{cm}$, a number that far exceeds the levels set forth in the Final Detailed Guidance. *See id.* at Appendix 3. Moreover, only one of the remaining five states' (Kentucky) narrative water quality standards even mentions conductivity. *See id.* The Final Detailed Guidance suggests, as it must, that states are free to implement their narrative standards through numeric effluent limits for parameters other than conductivity. *See id.* at 19. In practice, however, EPA continues to object to proposed permits based on the absence of effluent limits for conductivity just as it did when it was implementing the Interim Detailed Guidance.

82. On information and belief, the conductivity levels set forth in the Final Detailed Guidance (300-500 $\mu\text{S}/\text{cm}$) are, for many streams in the Appalachian region, lower than naturally-occurring background. Moreover, on information and belief, the effect of discharges with these levels of electrical conductivity varies greatly among the many surface waters in the regions subject to the Final Detailed Guidance.

83. On information and belief, EPA is utilizing the Final Detailed Guidance to cause indefinite delays in the Section 402 permit process for coal mining operations.

2. Section 404 Permits

84. With respect to EPA's review of proposed authorizations from the Corps for Section 404 permits, the Final Detailed Guidance contains a series of directives for the EPA Regions to follow. EPA's discussion focused on the following aspects of the 404(b)(1) Guidelines: (a) demonstration of no practicable alternative to the proposed discharge site; (b) if no practicable alternative exists, all appropriate and practicable steps must be taken to minimize potential adverse impacts; (c) determination of direct, secondary, and cumulative impacts on streams, wetlands, and other aquatic resources; and (d) whether compensatory mitigation may be required for remaining aquatic impacts. *See* Final Detailed Guidance at 28.

85. First, the Final Detailed Guidance declares that “[p]eer-reviewed science . . . demonstrates that construction of larger and more numerous mine waste fills (e.g., valley fills, mine-through operations, slurry ponds, etc.) in waters of the U.S. is associated with greater direct, indirect, and cumulative adverse environmental and water quality impacts to streams receiving such discharges.” *Id.* at 29. Hence, “[i]ncreased use of modern, cost-effective, and efficient mining practices . . . are likely to be more generally consistent with the Guidelines by reducing impacts to streams and their watersheds.” *Id.* at 29-30. Even though upland environmental considerations and mine design are regulated by OSM and the states under SMCRA, and the Corps lacks jurisdiction under CWA section 404 to address such matters, EPA attempts to fold such considerations into the Section 404 process using the Final Detailed Guidance.

86. Just as with review of water quality impacts in the Section 402 permit process, EPA instructs the Regions to protect against elevated conductivity by recommending permit conditions based on the 300-500 $\mu\text{S}/\text{cm}$ conductivity benchmarks “when reviewing mining proposals for compliance with [the 404(b)(1) Guidelines].” *Id.* at 33. EPA further suggests the incorporation of “permit requirements that protect against increases in conductivity from new mining and, where appropriate, reduce conductivity sources in the watershed from previous mining.” *See id.* at 33-34.

87. EPA has provided no basis to conclude that these conductivity levels will harm the uses protected by the various narrative water quality standards promulgated by the states. In some instances, natural background may be higher than these levels. In other cases, because of the chemistry of a particular stream, the data accumulated in the draft report would have no application.

88. The Final Detailed Guidance also imposes several *de facto* amendments to the 404(b)(1) Guidelines and interpretive Corps guidance, including (a) requiring watershed scale (HUC 12) cumulative impact analysis as an element of the factual determinations required by the 404(b)(1) Guidelines; and (b) presuming that no Section 404 mitigation credit should be given for sediment, groin, or other water control ditches required for mining projects under SMCRA and CWA Section “without a sound, science-based showing that they will successfully mitigate for lost stream structure and function.” *Id.* at 34, 38.

3. Operational Practices Regulated Under SMCRA

89. Although the Final Detailed Guidance is, on its face, limited to addressing EPA’s review of coal mining operations under the CWA, NEPA, and the Environmental Justice Executive Order, EPA has created a new role for itself within the SMCRA permitting process by urging its Regional employees to “work closely with the Corps, OSM, State SMCRA agencies, and mine operators to promote the incorporation of [certain] improved practices at the initial stages of mine design to increase consistency between SMCRA and CWA permits.” Final Detailed Guidance at 30. In particular, the Final Detailed Guidance sets forth best management practices that EPA Regional employees are to encourage OSM or the State SMCRA agencies to incorporate into the applicable SMCRA permit. *Id.* at 36.

90. The best management practices that EPA proffers in the Final Detailed Guidance are part of the SMCRA permitting process administered and enforced by OSM and primacy states. EPA rejects many of the industry’s proposed best management practices associated with the design of mining operations as “unproven in their effectiveness to protect water quality and to prevent significant degradation.” *Id.* at 34. In the alternative, EPA suggests that multiple fills on a project should be “sequenced,” such that the permit applicant must demonstrate compliance with

water quality standards at each valley fill before construction of subsequent valley fills may commence. *Id.* at 34-35.

91. Other best management practices issues addressed in the Final Detailed Guidance include, but are not limited to, the following: (a) “leaving high ratio (overburden to coal extraction) areas along the center of ridges;” (b) “use of mining methods and generate less excess spoil, including deep mining, highwall miner, or auger;” (c) “ensur[ing] that soils and rock on the mine site have been tested for concentrations of acid-, selenium-, sulfate-, carbonate-, or heavy metals-bearing or soluble strata that are likely to lead to environmental concerns;” and (d) “[w]here valley fills are necessary to accommodate disposal of excess spoil, overburden should be configured to maximize disposal as far up the valley as feasible from an engineering perspective.” *Id.* at Appendix 4 and at 36.

4. NEPA Review of Section 404 Permits

92. The Final Detailed Guidance also addresses issues related to NEPA analyses performed by the Corps in conjunction with Section 404 permit decisions. *Id.* at 41-43. EPA repeats earlier assertions that cumulative impact analyses should be on a specified watershed scale (such as HUC 12), and that available information suggests lack of demonstrated success for using sediment, groin, or other water control ditches as effective mitigation measures to support a FONSI. The Final Detailed Guidance also directs EPA Regional employees to “regularly coordinate with the Corps and OSM to provide their views on whether mitigation commitments are being implemented.” *Id.* at 43.

93. In addition to stating that “smaller projects should be reviewed to determine whether potential impacts warrant preparation of an EIS,” the Final Detailed Guidance recommends scrutinizing “the potential for significant impacts for those proposed projects that involve more than one mile of stream loss or more than one valley fill.” The Detailed Guidance is quick to

point out that while “the decision to prepare an EIS rests with the Corps and OSM, under EPA’s Clean Air Act Section 309 authority, EPA must ‘refer’ to CEQ matters that the Administrator finds ‘are unsatisfactory from the standpoint of public health or welfare or environmental quality.’” *Id.* at 43 n. 41.

* * *

94. EPA is applying the Final Detailed Guidance, its various presumptions, and the conductivity standard to pending coal mining permit applications. Implementation of the Final Detailed Guidance is yielding unreasonable delay and significant financial harm for many NMA members.

CLAIMS FOR RELIEF

COUNT I

The EC Process constitutes a legislative rule that was not properly promulgated under the APA

95. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 94 of this Complaint, as though fully set forth below.

96. The EC Process constrains EPA’s and the Corps’ decision-making process in a way that substantially affects agency decisions. In addition, the EC Process amounts to a substantive revision of the 33 C.F.R. Part 325 regulations. Therefore, the EC Process is a substantive and legislative rule and should not have been issued absent compliance with the notice-and-comment rulemaking requirements of APA § 553.

97. Accordingly, Defendants have violated APA § 553 through the issuance of the EC Process, which is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and issued without observance of procedure required by law.

COUNT II

The MCIR Assessment constitutes a legislative rule that was not properly promulgated under the APA

98. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 97 of this Complaint, as though fully set forth below.

99. EPA's use of the MCIR Assessment model effectively curtails the agency's discretion and has present binding effect. Therefore, the MCIR Assessment is a substantive and legislative rule and should not have been issued absent compliance with the notice-and-comment rulemaking requirements of APA § 553.

100. Accordingly, Defendants have violated APA § 553 through the issuance of the MCIR Assessment, which is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and issued without observance of procedure required by law.

COUNT III

The EC Process is contrary to the Clean Water Act

101. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 100 of this Complaint, as though fully set forth below.

102. CWA Section 404(a) grants authority to the Corps to issue permits for the discharge of dredged and fill material. 33 U.S.C. § 1344(a). In addition, the Corps' regulations specify that an applicant has a right to a "full public interest review and independent decision by the division or division engineer." 30 C.F.R. § 325.2(e)(3) ("the applicant's rights to . . . an independent decision by the district of division engineer must be strictly observed").

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

104. The EC Process authorizes EPA to supplant the Corps at the beginning of the Section 404 permitting process and control a new permit review process that falls wholly outside the codified

regulatory process. Accordingly, the EC Process violates the CWA's delegation of authority to the Corps as the permitting authority and disrupts the division of authority Congress crafted between the Corps and EPA in Section 404 permitting decisions. 33 U.S.C. § 1344(a)-(b). Further, the EC Process violates 30 C.F.R. § 325.2(e)'s guarantee of an independent Corps permitting decision.

105. In addition, the EC Process is unlawful in that it violates the CWA's directive to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section," in addition to thwarting Congress's directive for a permitting decision within 90 days after the permit is published for public notice and comment (which must occur within 15 days after an application is complete, 33 U.S.C. § 1344(a)). 33 U.S.C. § 1344(q).

106. For the above reasons, the EC Process is unlawful and should be set aside pursuant to 5 U.S.C. § 706(2).

COUNT IV

The MCIR Assessment is contrary to the Clean Water Act

107. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 106 of this Complaint, as though fully set forth below.

108. CWA Section 404(b)(1) directs EPA to develop guidelines for the specification of disposal sites for dredged and fill material, and such guidelines are to be applied by the Corps in evaluating permit applications. 33 U.S.C. § 1344(b). Outside of the Section 404(c) process and the Section 404(a) public notice and comment process, EPA lacks statutory authority to apply the 404(b)(1) Guidelines during the Section 404 permitting process.

109. EPA contends that the MCIR Assessment is based upon the 404(b)(1) Guidelines, and EPA has used the MCIR Assessment to screen and identify Section 404 permit applications for

the EC Process. By utilizing the MCIR Assessment to apply the 404(b)(1) Guidelines and direct the regulatory process for Section 404 permit applications, EPA is exceeding its statutory authority under the CWA. Authority to apply the 404(b)(1) Guidelines at the onset of the Section 404 permitting process rests solely with the Corps. Accordingly, the MCIR Assessment is contrary to law and should be set aside pursuant to 5 U.S.C. § 706(2).

COUNT V

The Final Detailed Guidance is contrary to the Clean Water Act

Unlawful Exercise of Section 404 Authority

110. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 109 of this Complaint, as though fully set forth below.

111. Under Section 404 of the CWA, the Corps only has control and responsibility over the filling of navigable waters, and upland activities beyond the filling of those waters is not within the Corps' jurisdiction. EPA's authority under Section 404 is circumscribed by the Corps' jurisdiction.

112. Despite these limitations on EPA's authority, in the Final Detailed Guidance, EPA attempts to inject a number of upland environmental considerations relating to mine design and operations that are beyond the scope of the Corps' jurisdiction into the Section 404 permitting process. *See* Final Detailed Guidance at 36 and Appendix 4. These same considerations were utilized in the EC Process and MCIR Assessment that this Court has declared unlawful and set aside.

113. Accordingly, the Final Detailed Guidance is contrary to law and should be set aside pursuant to 5 U.S.C. § 706(2).

Violation of Cooperative Federalism

114. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 113 of this Complaint, as though fully set forth below.

115. The CWA recognizes, preserves, and protects the “primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b). Congress barred any interpretation of the Act’s provisions that would “impair [] or in any manner affect[] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States,” unless “expressly provided” by statute. *Id.* § 1370(2).

116. Accordingly, states are responsible under the CWA for adopting, interpreting, and implementing their own water quality standards.

117. Despite Congress’ clear recognition of state primacy over the interpretation and implementation of water quality standards, the Final Detailed Guidance calls for the interpretation of narrative state water quality standards to require a focus on conductivity. *See* Final Detailed Guidance at 16-18. But, most of the relevant water quality standards in the six Appalachian states that are subject to the Final Detailed Guidance do not even mention conductivity, let alone require use of such an overbroad parameter to set specific effluent limits – such as the 300-500 $\mu\text{S}/\text{cm}$ range that EPA repeatedly references in its guidance – in CWA permits. *See id.* at Appendix 3.

118. Since the issuance of the Final Detailed Guidance, EPA has objected to permits based on the lack of conductivity limits. EPA’s attempts to dictate how states interpret and implement their own narrative water quality standards are unlawful.

Unlawful Development of Water Quality Standard

119. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 118 of this Complaint, as though fully set forth below.

120. In construing the statute and its own regulation (40 C.F.R. § 131.4), EPA has consistently taken the position that it does not perform a federal rulemaking to establish water quality standards and that, except under specified circumstances for particular waters, *only* the states perform the functions necessary to establish the standards.

121. Yet, in its Detailed Guidance, EPA has pronounced that states should “work to assure that discharges from surface coal mining operations are generally not above 300-500 $\mu\text{S}/\text{cm}$.” Final Detailed Guidance at 18. Although EPA has retreated from some of the language in its Interim Detailed Guidance, it has continued to object to the issuance of proposed permits based on, among other things, the absence of conductivity limits within the ranges set forth in the Final Detailed Guidance.

122. Thus, EPA’s 300-500 $\mu\text{S}/\text{cm}$ “benchmark” amounts to a water quality standard that the Agency is imposing on the states and permittees. Unilateral imposition of its own water quality standard is contrary both to the CWA and to EPA’s regulatory interpretation of the statute. Moreover, the water quality standard is not based on sound scientific rationale.

123. Because the water quality standard is unlawful, EPA lacks authority to direct regulatory authorities to implement the standard through Section 402 or 404 permits.

Unlawful Conflict with Regulations Codified Pursuant to Section 404(b)(1)

124. The Corps is required by statute to apply the 404(b)(1) Guidelines (codified at 40 C.F.R. Part 230) during its review of CWA Section 404 permit applications. *See* 33 U.S.C. § 1344(b)(1).

125. The Corps’ jurisdiction under Section 404 is limited to the filling of navigable waters, and the Corps lacks control and responsibility over upland environmental effects.

126. Yet, in the Final Detailed Guidance, EPA attempts to expand the scope of the 404(b)(1) Guidelines to allow for evaluation and consideration of upland environmental matters such as,

for example, prescribing valley fill placement and design (Final Detailed Guidance at 36 and Appendix 4), the testing of mine sites (*id.* at 36), and post-mine land use and approximate original contour requirements (*id.* at Appendix 4). EPA's prior attempt to expand the 404(b)(1) Guidelines in this manner in the MCIR Assessment has been set aside by the Court.

127. Moreover, the 404(b)(1) Guidelines contain provisions governing mitigation for activities authorized by permits issued by the Corps pursuant to Section 404. *See* 40 C.F.R. Part 230, Subparts H and J. The Corps also has issued lawful guidance interpreting its regulations.

128. The Final Detailed Guidance (at 38) addresses mitigation issues in a way that conflicts with these codified regulations and existing guidance. For example, EPA states that "sediment, groin, and other water control ditches required for mining projects under SMCRA . . . [should] not receive Section 404 compensation credit without a sound, science-based showing that they will successfully mitigate for lost stream structure and function." Final Detailed Guidance at 38. EPA also directs that biological monitoring "should be conducted before construction, during construction, and post-construction," *id.*, and it has carved out a new role for itself in overseeing the implementation of mitigation commitments. *See id.* at 43.

129. Accordingly, the Detailed Guidance is unlawful and should be set aside pursuant to 5 U.S.C. § 706(2).

COUNT VI

The conductivity levels are arbitrary and capricious under the APA

130. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 129 of this Complaint, as though fully set forth below.

131. The Final Detailed Guidance provides that "substantial and increasing aquatic life impacts occur as conductivity increases beyond 300 $\mu\text{S}/\text{cm}$ " and that "substantial aquatic life

effects have already occurred when conductivity levels reach 500 $\mu\text{S}/\text{cm}$.” Final Detailed Guidance at 16. The guidance then presumes that a conductivity level of 300 $\mu\text{S}/\text{cm}$ would generally be an appropriate numeric interpretation of state narrative water quality standards and thus, “states [should] work to assure that discharges from surface coal mining operations are generally not above 300-500 $\mu\text{S}/\text{cm}$.” *Id.* at 18.

132. Although EPA acknowledges that these conductivity levels might not be appropriate for all waters in the six Appalachian states, the Final Detailed Guidance nevertheless presumes that the 300-500 $\mu\text{S}/\text{cm}$ levels are appropriate CWA permit limits, and site-specific information is required to justify different conductivity limits in permits or the use of parameters other than conductivity to implement state narrative water quality standards. *See id.* at 16, 18-19.

133. EPA can claim no basis for applying these numeric limits to a very large number of unnamed streams across six states with varying natural constituents, differing flows, and varying chemistry. Indeed, EPA’s own SAB cautioned against the use of the 300 $\mu\text{S}/\text{cm}$ limit in areas outside of ecoregions 68, 69, and 70 in the States of West Virginia and Kentucky. *See id.* at 5. The SAB further concluded that use of that limit is not appropriate for ephemeral streams that flow only in response to rainfall or runoff. *See id.*

134. Since the issuance of the Final Detailed Guidance, EPA has applied, and demanded adherence to, the 300-500 $\mu\text{S}/\text{cm}$ conductivity levels in its review of CWA permit applications.

135. EPA has created impermissible and irrational administrative presumptions through the conductivity standard, in that there is no “sound or rational connection between the proved and inferred facts.” *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100 (D.C. Cir. 1998).

136. EPA also arbitrarily failed to explain various departures from its own guidance on the development of water quality criteria when it established the conductivity levels in the Final Detailed Guidance.

137. For these reasons, the conductivity standard is unlawful and should be set aside under 5 U.S.C. § 706(2).

COUNT VII

The Final Detailed Guidance is contrary to the National Environmental Policy Act

138. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 137 of this Complaint, as though fully set forth below.

139. The Corps is the lead agency in preparing NEPA documents related to Section 404 permits for coal mining operations. EPA's only role is to comment and, if an EIS is prepared, to review the EIS for sufficiency. Thus, EPA is not empowered to decide by "guidance" what may be a "significant" impact requiring preparation of an EIS or what does not constitute acceptable mitigation to support a FONSI.

140. Under longstanding practices and regulations, the Corps decides, based upon conditions of each mine, whether particular efforts constitute mitigation that will permit it to issue a FONSI. Nonetheless, EPA announces in its Final Detailed Guidance that sediment, groin, or other water control ditches should "not be relied upon as the sole basis for supporting a FONSI." Detailed Guidance at 42. EPA further asserts that "mitigation measures that rely on establishing or re-establishing streams . . . have less certainty of successfully offsetting impacts" and hence, it cautions against using such measures to support a FONSI. EPA even directs its Regional employees to "regularly coordinate with the Corps and OSM to provide their views on whether mitigation commitments are being implemented" – something that is not contemplated under existing regulations. *Id.* at 43.

141. EPA purports to establish NEPA procedures applicable to coal mining in the Detailed Guidance. Yet, such “procedures shall be adopted only *after* an opportunity for public review and after review by the Council [on Environmental Quality] for conformity with [NEPA] and [40 C.F.R. § § Part 1500 – 1599].” 40 C.F.R. § 1507.3. EPA provides no record of having submitted the procedures for review by CEQ.

142. Nor may EPA suggest that this is only a suggestion without consequences. In the paragraph following its opinions about what constitutes to “significant” impact from yet-to-be-announced mines, while acknowledging that it is the Corps who decides whether to prepare EISs, the Agency asserts that it has authority to find NEPA compliance “unsatisfactory” and the Detailed Guidance recounts EPA’s ability to “refer” matters to the Council on Environmental Quality. Detailed Guidance at 30.

143. Accordingly, the Detailed Guidance violates NEPA and should be set aside under 5 U.S.C. § 706(2).

COUNT VII

The Final Detailed Guidance is Contrary to the Surface Mining Control and Reclamation Act

144. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 143 of this Complaint, as though fully set forth below.

145. SMCRA’s structure of cooperative federalism grants “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” to those states with regulatory programs approved by OSM, 30 U.S.C. § 1253(a), subject to the continuing validity of various federal laws, including the CWA. 30 U.S.C. § 1292.

146. The recitation of best management practices, particularly those relating to mine design, in the Final Detailed Guidance, along with EPA’s rejection of existing practices as “unproven in

their effectiveness,” (Final Detailed Guidance at 34) have no basis in any of the federal laws listed in 30 U.S.C. § 1292. Specifically, they are not lawful amendments to the 404(b)(1) Guidelines under the CWA, nor are they cognizable under any other federal law.

147. Therefore, EPA’s rejection of existing mining management practices and preference for additional practices (Detailed Guidance at 34-36 and Appendix 4) that have never been evaluated by OSM or primacy states invade and disrupt the primary regulatory authority Congress granted to OSM and primacy states under SMCRA.

148. Specifically, EPA establishes a permitting scheme that “sequences” multiple valley fills on a project (Detailed Guidance at 34-35). Requiring authorization for only one valley fill at a time is *ultra vires* under SMCRA and beyond the scope of EPA’s delegated authority under any federal law. EPA’s permitting authorization scheme is within the sole jurisdiction of OSM and primacy states, and indeed, such issues are currently under consideration by OSM in a pending SMCRA rulemaking regarding stream protection. EPA has no jurisdiction or authority to predetermine OSM’s regulatory decisions.

COUNT IX

The EC Process, MCIR Assessment, and Final Detailed Guidance are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations

149. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 148 of this Complaint, as though fully set forth below.

150. To the extent not specifically alleged above, the EC Process, MCIR Assessment, and the Final Detailed Guidance are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitation in violation of 5 U.S.C. § 706, for numerous reasons, including: (a) conflict with existing codified regulations and/or unlawful or unreasonable interpretations of codified regulations, including 33 C.F.R. Part

325 and 40 C.F.R. Part 230; (b) articulation of impermissible presumptions that lack a reasonably articulated basis, *e.g.*, presumption that the 300-500 $\mu\text{S}/\text{cm}$ conductivity levels are appropriate numeric interpretations of state narrative water quality standards, presumption that certain mitigation measures are not adequate to support a FONSI or concurrent construction of valley fills; (c) lacking substantial scientific evidentiary support for the application of the conductivity standard to all Appalachian waters and other findings on the impacts of surface coal mining operations; and (d) creating unreasonable delay in the review and processing of Section 404 permits for NMA's members.

COUNT X

The EC Process, MCIR Assessment, and Final Detailed Guidance are *ultra vires*.

151. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 150 of this Complaint, as though fully set forth below.

152. The EC Process, MCIR Assessment, and Final Detailed Guidance are in excess of delegated statutory authority under the CWA and other federal law and therefore are *ultra vires*, for multiple reasons, including *inter alia*, that EPA lacks authority to (a) direct the course of the Section 404 permit review process through the application of the 404(b)(1) Guidelines; (b) impose unreasonable delays on the Section 404 permit review process; (c) undermine the independent decision-making of the Corps, the statutory permitting authority; (d) develop and apply a water quality standard outside of the CWA Section 303 process; (e) develop and impose presumptions that affect NEPA and other statutory review; and (f) apply and enforce the 404(b)(1) Guidelines outside of the interagency comment or Section 404(c) process.

Accordingly, and irrespective of federal court jurisdiction under any other statute, the EC Process, MCIR Assessment, and Final Detailed Guidance are unlawful and should be set aside as *ultra vires*.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff NMA respectfully requests this Court enter judgment in its favor, and:

1. Declare that EPA and the Corps violated the APA in issuing and implementing the EC Process without following APA procedures;
2. Declare that EPA violated the APA in issuing and implementing the MCIR Assessment without following APA procedures;
3. Declare that the EC Process, MCIR Assessment, and Final Detailed Guidance are contrary to federal law, including the Clean Water Act, NEPA, and SMCRA, or are otherwise arbitrary, capricious, an abuse of discretion, in excess of statutory jurisdiction, authority, or limitations, or *ultra vires*;
4. Declare that EPA has exceeded its statutory role in the Section 404 permitting process, and is imposing unreasonable delay on the Section 404 permitting process, through the issuance and implementation of the EC Process, MCIR Assessment, and Final Detailed Guidance;
5. Declare that EPA is imposing unreasonable delay on the Section 402 permitting process through the issuance of the Final Detailed Guidance;
6. Vacate the EC Process, MCIR Assessment, and Final Detailed Guidance;
7. Enjoin and restrain Defendants, their agents, employees, successors, and all persons acting in concert or participating with them from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the EC Process, MCIR Assessment, and Final Detailed Guidance and the unlawful substantive standards set forth therein;
8. Order the Corps to process all pending Section 404 permit applications pursuant to the codified regulatory process and timelines; and

9. Grant Plaintiff such other relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted,

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Dated: October 14, 2011