UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON

GORMAN COMPANY, LLC , KYCOGA COMPANY, LLC, BLACK GOLD SALES, INC., KENTUCKY UNION COMPANY AND HAZARD COAL CORPORATION	)	
PLAINTIFFS,	)	**CIVIL ACTION NO._____**
v.	)	
LISA JACKSON, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, JOHN MCHUGH, LT. GENERAL ROBERT L. VAN ANTWERP, and UNITED STATES ARMY CORPS OF ENGINEER	)	
DEFENDANTS.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case concerns the April 1 Guidance Memorandum issued by the U.S. Environmental Protection Agency ("EPA"), 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" (the "Detailed Guidance"). Plaintiffs Gorman Company, LLC, Kycoga Company, LLC, Black Gold Sales, Inc., Kentucky Union Company, and Hazard Coal Corporation, (collectively, "Plaintiffs") own land containing significant coal reserves that they lease to mining operators, and thus, have incurred, and stand to further incur, significant and irreversible harm as a result of the implementation and enforcement of the Detailed Guidance. Specifically, the implementation and enforcement of the

requirements contained in that document have imposed insurmountable technical and economic burdens on the coal mining industry, effectively shutting down surface coal mining (and possibly significant underground coal mining) throughout much of Central Appalachia, including the areas in which Plaintiffs own mineral interests. This action constitutes an unlawful regulatory action that is inconsistent with EPA's statutory authorities, and imposes an unconstitutional taking of the property of Plaintiffs. Indeed, to date, Plaintiffs have suffered damages of three billion dollars ($3,000,000,000.00) in the diminution in value of their property as a result of being singled out by Defendants through an unconstitutional regulatory taking.

2. This civil action seeks declaratory and injunctive relief against Defendants EPA, 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, Lieutenant General Robert L. Van Antwerp, in his official capacity as Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers, and the United States Army Corps of Engineers ("Corps") (collectively, "Defendants")and challenges a series of EPA and Corps actions that have unlawfully obstructed Clean Water Act permitting processes for coal mining. Plaintiffs bring 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 April 1, 2010 Detailed Guidance Memorandum ("Detailed Guidance") (75 Fed. Reg. 18500, http://www.epa.gov/owow/wetlands/guidance/pdf/appalachian_mtntop_mining detaled.pdf) 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 Plaintiffs.

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 notions 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 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.com/wpdyn/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 Detailed Guidance has never been promulgated under the APA and CWA.

4. Plaintiffs seek an order from this Court holding unlawful, enjoining implementation of, and vacating both the EC Process and the 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) creating an illegal presumption in the application of National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331, *et seq.*, to coal mines; and

(vi) invading the exclusive regulatory authority Congress granted to OSM and the primacy states in SMCRA, 30 U.S.C. § 1201, *et seq.* Plaintiffs ask 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 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 Detailed Guidance be left to stand and their implementation continues on its current course, Plaintiffs 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, *et seq.*, 42 U.S.C. § 4331, *et seq*.

7. Venue is proper in this Court under 28 U.S.C. § 1391 in that the real property at issue in this action which has been affected by Defendants' actions is located here and Plaintiffs reside herein.

PARTIES

8. Plaintiff Gorman Company, LLC is a Kentucky limited liability company with its principal place of business located in Hazard, Kentucky.

9. Plaintiff Kycoga Company, LLC is a Kentucky limited liability company with its principal place of business located in Hazard, Kentucky.

10. Plaintiff Black Gold Sales, Inc. is a Kentucky corporation with its principal place of business located in Hazard, Kentucky.

11. Plaintiff Kentucky Union Company is a Kentucky corporation with its principal place of business located in Hazard, Kentucky.

12. Plaintiff Hazard Coal Corporation is a Kentucky corporation with its principal place of business located in Hazard, Kentucky.

13. 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.

14. Defendant Lisa Jackson is the Administrator of EPA and is being 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.

15. Defendant United State 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.

16. Defendant John McHugh is the Secretary of the Army and is being 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.

17. Defendant Lieutenant General Robert L. Van Antwerp is the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. The Office of the Chief of

Engineers is located in the Corps's headquarters in Washington, D.C. Defendant Van Antwerp is charged with the supervision and management of all Corps decisions and actions, and is being sued in his official capacity.

LEGAL FRAMEWORK

18. 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), 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 Detailed Guidance.

A. Clean Water Act

19. 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

20. 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 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.

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

22. 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).

23. 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.

24. 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.

25. 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.

26. Pursuant to 33 C.F.R. § 3253, 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.

27. 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).

28. 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

29. 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. *See* 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. *See* 33 U.S.C. § 1344(c).

30. 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(e), 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.

31. 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).

32. 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.

33. 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. *See* 33 U.S.C. § 1344(c).

34. 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). Yet, EPA construes Section 404(e) to mean that EPA can unilaterally, at any time, withdraw a Section 404 permit that has been or will be issued by the Corps. EPA invokes this flawed interpretation to impose its policy preferences in proposed Section 404 permits while avoiding the strictures and publicity of the Section 404(c) process.

35. 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

36. 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.

37. Under Section 303(c), states perform the function of establishing, reviewing, and revising water quality standards. 33 U.S.C. § 1313(e). 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.

38. 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. *See* 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. *See* 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.

39. 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. 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. *See* 33 U.S.C. § 1313(e); 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. *See* 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. *See* 40 C.F.R. § 131.21.

40. 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 publishe[s] proposed regulations" and "promulgate[s]" the particular standard. *See* 33 U.S.C. § 1313(c)(4).

3. Section 402 Permitting and Water Quality Standards.

41. Congress established the second CWA permitting program at Section 402, known as the National Pollutant Discharge Elimination System ("NPDES"). *See* 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 makeup of a wastewater discharge. 33 U.S.C. § 1311(b)(2).

42. 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. *See* 33 U.S.C. § 1342(b). Once EPA approves a proposed state permitting program, EPA must suspend its own program. *See* 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. *See* 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. *See* 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.

43. 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. *See* 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. *See* 40 C.F.R. § 122.44(d).

4. Section 401 Certification

44. 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. *See* 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 review or overturn 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

45. Congress enacted NEPA to establish a process by which federal agencies must consider the potential environmental consequences of their actions. *See* 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 NBPA so long as the agency properly considered those effects.

46. 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"). *See* 40 C.F.R. §§ 1501.4, 1508.9.

47. 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 MS, require mitigating measures to reduce the environmental impact of the proposed action below the level of significance that would otherwise trigger an EIS.

48. 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. <u>Surface Mining Control and Reclamation Act of 1977</u>

49. 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).

50. 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. *See* 30 U.S.C. § 1256(a).

51. A SMCRA permit must incorporate and implement extensive environmental performance standards. *See* 30 U.S.C. § 1265. Such standards contemplate and regulate disposal of excess spoil material. *See* 30 U.S.C. § 1265(0(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.* at § 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.* at § 1265(b)(22)(D). These provisions are implemented by the various states pursuant to their authority under SMCRA.

D. Administrative Procedure Act

52. If Plaintiffs 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. *See* 5 U.S.C. §§ 702, 704.

53. The APA also provides the applicable process a Federal agency must follow when it proposes and adopts final rules and regulations. *See* 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

54. 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.

55. 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.

56. 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."

57. 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. <u>June 11, 2009 Memorandum of Understanding</u>

58. 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.

59. 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.

60. 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.

61. 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.

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

63. 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. <u>June 11, 2009 EC Process Memoranda</u>

64. 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_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

65. 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

Case 1:113-cv-01220-RBW Document 1 Filed 07/20/10 Page 21 of 42 processing procedures, codified in 33 C.F.R. Part 325, and which will instead be subject to the EC Process.

66. 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.

67. 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.

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

69. 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."

70. As of July 19, 2010, of the 79 pending projects identified in 2009 for the EC Process, 36 are still awaiting the start of the 60-day EC Process, 36 permit applications have been withdrawn, only five permits have been issued, and just two are under current review.

2. The EC Process

71. 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).

72. 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.

73. 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.

74. 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.

75. 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. April 1, 2010 Detailed Guidance

76. On April 1, 2010, EPA released the 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 Detailed Guidance and all related documents are found at http://www.epa.gov/owow/wetlands/guidance/mining.html#memo20100401. While EPA issued the Detailed Guidance for public comment, 75 Fed. Reg. 18500, it also nevertheless stated that the Detailed Guidance is effective immediately. "We expect you to begin using this interim final guidance immediately in your review of Appalachian surface coal mining activities." Detailed Guidance at 2. The 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

77. In the Detailed Guidance, EPA proclaimed that it "expects that in many, if not most, cases the available science will demonstrate that there is a reasonable potential for these [surface coal mining) discharges to cause or contribute to an excursion above numeric or narrative water quality standards, thus making water quality-based effluent limits necessary." Detailed Guidance at 8. Such a blanket statement about the need for water quality-based limits ignores (i) the role of the delegated state regulatory authority under Section 402 and (ii) the existing protections under the CWA and its implementing regulations. Because all the states subject to the Detailed Guidance have delegated authority to issue Section 402 NPDBS 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. *See* 40 C.F.R. § 122.44(d).

78. The states make the "reasonable potential" determination on a case-by-case basis using site specific data and information, EPA's blanket presumption ignored 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).

79. 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. *See id.*

80. Nonetheless, in discussing how states should derive NPDES permit effluent limits from applicable narrative water quality standards, EPA directed its Regions to a draft, not-yet-peer reviewed, EPA report entitled, "A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams," which purports to recognize "stream-life impacts associated with conductivity." Detailed Guidance at 11. EPA's draft report on conductivity concluded "that genus-level impacts to the biological community occur at conductivity levels of 300 µS/cm." Detailed Guidance at 12. EPA stated that it has been working on developing scientific information "to support new numeric water quality values for conductivity." Detailed Guidance at 7.

81. Even though (i) EPA's draft report on conductivity has not yet been subjected to external peer review by the Science Advisory Board, (ii) EPA expressly provides that the report is to be used "solely for the purpose of pre-dissemination peer review" and that the report is not

an EPA "determination or policy," and (iii) the Detailed Guidance makes no attempt to interpret particular states' existing narrative water quality standards or the uses to which these criteria apply, the Detailed Guidance directs that the study "should be considered by Appalachian states . . . in implementing state narrative water quality standards in NPDES permits, and by Regions in . . . review of these permits," Detailed Guidance at 12.

82. Further, EPA established a presumption that "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. If water quality modeling suggests that in-stream levels will exceed 500 µS/cm, EPA believes that a reasonable potential likely exists to cause or contribute to an excursion above applicable water quality standards . . . . Similarly, if water quality monitoring suggests that in-stream levels will exceed 300 µS/cm but will be below 500 µS/cm, EPA should work with the permitting authority to ensure that the permit includes conditions that protect against conductivity levels exceeding 500 µS/cm . . . . As noted above, as a general matter, EPA expects that in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse impacts to water quality." Detailed Guidance at 12. On information and belief, these levels are, for many streams in the Appalachian region, lower than naturally-occurring background. Moreover, the draft report contains express limitations that make these levels wholly inappropriate to apply "as a general matter." Rather, 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 Detailed Guidance.

83. EPA next expressed its expectation for states in their review of surface coal Mining NPDES permit applications, and specifically the analysis of compliance with narrative water quality standards that incorporate the newly expressed conductivity standard: "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 water quality standards, EPA may object to the permit in accordance with the provisions of 40 C.F.R. Section 123.44(c)." Detailed Guidance at 13.

84. EPA is now utilizing the Detailed Guidance to cause indefinite delays in the Section 402 permit process for coal mining operations. EPA is informing state permitting authorities that the permit application materials submitted to EPA are "incomplete," without further guidance on the alleged deficiency, and that EPA's period to review and object to the proposed permit does not commence until the state submits complete information. In so doing, permits are held in indefinite abeyance while the state works to determine what information is missing from the permit application package.

85. The Detailed Guidance further concludes that state-issued general permits for NPDES discharges from surface coal mining activities "will often be inadequate," and suggests that EPA Regional offices may demand that "permitting authorities should require individual permits in all instances." Detailed Guidance at 15 (emphasis added). Yet, these general permits were properly promulgated as part of the state programs, and EPA cites no authority or basis to rescind its approval of these general permits.

2. Section 404 Permits

86. With respect to EPA review of proposed authorizations from the Corps for Section 404 permits, the Detailed Guidance contains a series of directives for the Regions to follow. First, EPA emphasized its "role and responsibility for ensuring that water quality standards are not exceeded because of discharges regulated under Section 404 from Appalachian surface coal mining operations." Detailed Guidance at 18. That "responsibility" even extends to "ensuring that neither numeric nor narrative water quality standards are exceeded due to discharges of fill material even if a state has issued a water quality certification under Section 401 of the CWA," Detailed Guidance at 18 (emphasis added). "Regions should convey their conclusions with respect to possible exceedances of water quality standards to the Corps and, if appropriate changes to the permit are not made in response to these water quality concerns, may proceed under the 404(q) MOA and/or 404(c)." Detailed Guidance at 19.

87. Just as with review of water quality impacts in the Section 402 permit process, EPA instructs the Regions to utilize the draft, not-yet-peer-reviewed report on conductivity "when examining whether a draft 404 permit is likely to result in significant degradation of waters of the U.S. . . . EPA anticipates that the conductivity impacts of projects with predicted conductivity levels below 300 µS/cm generally will not cause a water quality standard violation or significant degradation of the aquatic ecosystem. On the other hand, EPA expects that in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse impacts that could rise to the level of significant degradation of the aquatic ecosystem." Detailed Guidance at 22. "Projects projected to increase conductivity levels above 300 µS/cm should include permit conditions requiring adaptive remedial action to prevent conductivity levels from rising to levels that may contribute to water quality degradation." *Id.*

88. 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 is 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. EPA also ignores the fact that water quality standards have no place in a Section 404 permit for coal mining where the ultimate discharge from any fill areas is regulated by a Section 402 permit.

89. The 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) denying Section 404 mitigation credit for sediment, groin, or other water control ditches required for mining projects under SMCRA and CWA Section 402 (despite the Fourth Circuit's ruling to the contrary).

3. Operational Practices Regulated Under SMCRA

90. EPA next proffers a series of best management practices that EPA "expects" will help reduce or eliminate any increases to conductivity levels to meet narrative water quality standards. Such practices are part of the SMCRA permitting process administered and enforced by OSM and primacy states. In the Detailed Guidance, 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 prevent significant degradation." Detailed Guidance at 24. 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.

Detailed Guidance at 24-25.

91. Other best management practices issues addressed in the Detailed Guidance include: (a) a presumption that high-ratio mining operations "generally do not represent the least environmentally damaging alternative," and (b) a direction that "[p]rojects should also incorporate environmentally effective limits on the linear extent of stream impacts per ton of excess spoil produced through a robust alternatives analysis." Detailed Guidance at 26.

4. NEPA Review of Section 404 Permits

92. Finally, the Detailed Guidance also addresses issues related to NEPA analyses performed by the Corps in conjunction with Section 404 permit decisions. Detailed Guidance at 29-30. EPA repeats earlier assertions that cumulative impact analyses should be on a watershed scale, and that mitigation for sediment, groin, or other water control ditches is inappropriate and should not be used as a basis for supporting a FONSI. In addition, EPA proffers a presumption "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," thus requiring an EIS. The Detailed Guidance is quick to point out that while "the decision to prepare an EIS rests with the Corps and GSM, 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.' Detailed Guidance at 30.

93. Concurrent with the Detailed Guidance, EPA released a Guidance Summary Memorandum to Regions 3, 4, and 5 that made EPA's expectations clear with respect to Appalachian surface coal mining: "[W]e expect 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

questions about their compliance with CWA requirements and may require permit objection under 402 or elevation and possible veto under 404." Guidance Summary at 4. Administrator Jackson stated during the press conference releasing the Detailed Guidance that, "You're talking about no, or very few, valley fills that are going to meet this standard." *See* http://www.washingtonpost.com/wp_dyn/content/article/2010/04/01/AR2010040102312.html.

94. While seeking public comment on the Detailed Guidance and submitting the non-peer-reviewed conductivity study to the Science Advisory Board for review, EPA is applying the Detailed Guidance, its various presumptions, and the conductivity standard to pending coal mining permit applications as part of the EC Process. Implementation of the Detailed Guidance is yielding further unreasonable delay and severe irreparable harm for Plaintiffs.

CLAIMS FOR RELIEF

COUNT I

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

95. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs 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. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs 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 Detailed Guidance constitutes a legislative rule that was not properly promulgated under the APA

101. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

102. The Detailed Guidance is immediately effective, constrains the agency's discretion, and has a substantial effect on agency decisions. Further, the Detailed Guidance amounts to a substantive revision and unlawful amendment of the 404(b)(1) Guidelines, codified at 40 C.F.R. Part 230, water quality standards regulations, codified at 40 C.F.R. Part 131, and permitting regulations applicable to the states, codified at 40 C.F.R. Parts 122, 125. Therefore, the Detailed Guidance is a substantive and legislative rule and should not have been issued absent compliance with the notice-and-comment rulemaking requirements of APA § 553.

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

COUNT IV

The EC Process is contrary to the Clean Water Act

104. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

105. CWA Section 404(a) grants-authority to the Corps to issue permits for the discharge of dredged and fill material. *See* 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").

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

107. 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. *See* 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.

108. 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).

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

COUNT V

The MCIR Assessment is contrary to the Clean Water Act

110. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

111. 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. *See* 33 U.S.C. § 1344(b). Outside of the Section 404(e) 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.

112. 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 VI

The Detailed Guidance is contrary to the Clean Water Act
Unlawful Development of Water Quality Standard

113. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

114. The Clean Water Act allocates authority for development of water quality standards to the states. Under Section 303(e) of the statute, states perform the function of establishing, reviewing and revising water quality standards. *See* 33 U.S.C. § 1313(c).

115. EPA echoed the statutory provision in its regulation prescribing that, "[s]tates … are responsible for reviewing, establishing, and revising water quality standards." 40 C.F.R. § 131.4. In construing the statute and its own regulation, 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.

116. Yet, in its Detailed Guidance, EPA has pronounced that "in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse impacts to water quality," Detailed Guidance at 12, and directed the EPA Regions to "work with the permitting authority to ensure that the permit includes conditions that protect against conductivity levels exceeding 500 µS/cm." *Id.* EPA has gone so far as to direct its Regional offices to "object to issuance of [a] proposed permit" if it does not satisfy the requirements of the Act "as noted" in the Detailed Guidance. Detailed Guidance at 8.

117. Thus, EPA's 500 µS/cm 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 Clean Water Act and to EPA's regulatory interpretation of the statute.

118. 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)

119. The Corps and EPA issued joint regulations, codified at 40 C.F.R. Part 230, Subparts H and J, governing mitigation for activities authorized by permits issued by the Corps pursuant to Section 404. In addition, the Corps has issued lawful guidance interpreting its regulations.

120. The Detailed Guidance (at 23-24) addresses mitigation issues in a way that conflicts with codified regulations and existing guidance, *e.g.* EPA states that "No Section 404 compensation credit should be given for sediment, groin, or other water control ditches required for mining projects."

121. In addition, the Detailed Guidance seeks to impose water quality based effluent limits in Section 404 permits, which is inconsistent with the 404(b)(1) Guidelines as applied to coal mining activity that controls any effluent discharges from Section 404 fill areas through sediment ponds that discharge pursuant to Section 402 permits. EPA lacks authority to demand, and the Corps lacks authority to impose, such water quality limits in Section 404 permits for coal mining.

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

COUNT VII

The conductivity water quality standard is arbitrary and capricious under the APA in that it is based upon unlawful presumptions

123. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

124. The Detailed Guidance assumes that "in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse impacts to water quality," and that such levels are likely caused or contributed to by surface coal mining operations where such levels appear in Appalachian streams. Detailed Guidance at 12-13. EPA relies on scientific literature that has not yet been peer reviewed as the basis for these presumptions and on a study that it has specifically disclaimed as not constituting an EPA determination or policy.

125. The Detailed Guidance dictates that EPA utilize these presumptions to require from state regulators reasonable potential analyses and the development of permit conditions that enforce the conductivity standard unless the state has site-specific data that supports an alternative approach. Detailed Guidance at 11-12.

126. Since the issuance of the Detailed Guidance, EPA is applying, and demanding adherence to, the conductivity standard in its review of Section 404 permit applications.

127. EPA makes no attempt to cite specific state narrative water quality standards that it claims will be violated at these levels. Because it has not even identified the narrative standards at issue, the Agency has no record that would link its levels to these unspecified narrative water quality standards. Finally, 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.

128. 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." *See Sec 'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100 (D.C. Cir, 1998). Accordingly, the conductivity standard is unlawful and should be set aside under 5 U.S.C. § 706(2).

COUNT VIII

The Detailed Guidance is contrary to the National Environmental Policy Act

129. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

130. To determine whether a matter is sufficiently "significant" that it requires an EIS, an agency must assess the environmental impacts by their "context" and "intensity." *See* 40 C.F.R. § 1508.27. The regulatory scheme prescribes this assessment on a case-by-case basis.

131. 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.

132. EPA nonetheless directs 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." Detailed Guidance at 30. This presumption is well outside NEPA regulations and beyond EPA's authority.

133. Similarly, 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. Yet, EPA announces in its Detailed Guidance that "no mitigation credit should be given for sediment, groin, or other water control ditches." Detailed Guidance at 24. In addition, EPA asserts that "mitigation measures that rely on establishing or re-establishing streams, rather than rehabilitating or enhancing existing streams, . . . should generally not be used to support a FONSI." *Id*. at 30.

134. 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 [40C.F.R. § § Part 1500 — 1599]." 40 C.F.R. § 1507.3. The procedures in the Detailed Guidance were adopted without prior public review and EPA provides no record of having submitted the procedures for review by CEQ.

135. Nor may EPA suggest that this is only a suggestion without consequences. In the paragraph following its opinions about what constitutes a "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.

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

COUNT IX

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

137. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

138. 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. *See* 30 U.S.C. § 1292.

139. The recitation of best management practices in the Detailed Guidance, along with EPA's rejection of existing practices as "unproven in their effectiveness," (Detailed Guidance at 24) 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.

140. Therefore, EPA's rejection of existing mining management practices and preference for additional practices (Detailed Guidance at 24-27) that have never been evaluated by OSM or primacy states, nor subject to public notice and comment prior to implementation, invade and disrupt the primary regulatory authority Congress granted to OSM and primacy states under SMCRA.

141. Specifically, EPA establishes a permitting scheme that "sequences" multiple valley fills on a project (Detailed Guidance at 24-25). 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 X

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

142. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

143. To the extent not specifically alleged above, the EC Process, MCIR Assessment, and the 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 high-ratio mining operations do not represent the least damaging alternative; presumption that general permits are inadequate; and presumption that an EIS is required for projects that involve more than one mile of stream loss or more than one valley fill; (c) expressing authority to overrule CWA Section 401 state water quality certifications; (d) lacking substantial scientific evidentiary support for the conductivity standard and other findings on the impacts of surface coal mining operations; and (e) creating unreasonable delay in the review and processing of Section 404 permits.

COUNT XI

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

144. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

145. The EC Process, MCIR Assessment, and 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 Detailed Guidance are unlawful and should be set aside as *ultra*

vires.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment in their favor and against Defendants on Counts I through XI and grant the following declaratory, injunctive and other relief:

a. Declare that EPA and the Corps violated the APA in issuing and implementing the EC Process without following APA procedures;

b. Declare that EPA violated the APA in issuing and implementing the MCIR Assessment and the Detailed Guidance without following APA procedures;

c. Declare that the EC Process, MCIR Assessment, and 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*;

d. 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 Detailed Guidance;

e. Declare that EPA is imposing unreasonable delay on the Section 402 permitting process through the issuance of the Detailed Guidance;

f. Vacate the EC Process, MCIR Assessment, and Detailed Guidance;

g. 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 Detailed Guidance;

h. Order the Corps to process all pending Section 404 permit applications pursuant to the codified regulatory process and timelines;

i. Award Plaintiffs their attorney's fees and costs reasonably incurred and expended in the necessary prosecution of this Complaint; and

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

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL COUNTS SO TRIABLE.

Respectfully submitted,

/s/ F. William Hardt, III
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