

## CLIENT ALERT

### Federal Court Rejects EPA Overreaching Into Clean Water Act Section 404 Permitting in Victory for Crowell & Moring Client National Mining Association

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On Oct. 6, 2011, Judge Reggie B. Walton of the U.S. District Court for the District of Columbia ruled in favor of the National Mining Association ("NMA") and the State of West Virginia and set aside a series of actions by the U.S. Environmental Protection Agency ("EPA") intended to expand its authority under Section 404 of the Clean Water Act.

Specifically, the court declared unlawful the Enhanced Coordination Process ("EC Process") established by EPA and the U.S. Army Corps of Engineers ("Corps") to purportedly facilitate the review of permit applications under Section 404 of the Clean Water Act for coal mining operations, but which actually brought coal mining permitting in Appalachia to a virtual halt. *See National Mining Association et. al. v. Jackson et. al.*, 816 F.Supp.2d 37 (D.D.C. 2011). The decision has implications for Section 404 and administrative law that reach beyond coal mining permitting, as explained further below.

#### Background on the EC Process

EPA and the Corps established the EC Process in June 2009. The first step of the EC Process involved a screening procedure, whereby EPA reviewed a large number of permit applications and determined which would be subject to further enhanced coordination. EPA had never before screened permit applications in this manner under Section 404. Once permits were earmarked for the EC Process, they were supposed to be subject to a 60-day coordination period. There was, however, no requirement for EPA and the Corps to initiate that coordination period in a timely manner, and indeed, many permits were trapped awaiting such initiation.

NMA and the State of West Virginia argued that the EC Process resulted in widespread delays in the review and processing of dozens of Section 404 permits for coal-mining companies. They further argued that the EC Process imposed new procedural and substantive requirements that departed from the codified Section 404 process, and that the agencies launched the EC Process without following notice-and-comment procedures.

#### The Federal Court's Rejection of the EC Process

Upon considering the summary judgment briefing and oral argument (with Crowell & Moring partner [Kirsten Nathanson](#) arguing for NMA), Judge Walton ruled that the EC Process and its screening procedure were unlawful and should be set aside.

Judge Walton's sweeping decision – in which he ruled for NMA and the State of West Virginia on all claims – is an important victory not just for coal mining companies subject to the EC Process, but for all entities that must obtain Clean Water Act Section 404 permits. The decision affirms, as a matter of unambiguous statutory interpretation, that the Corps is "the principal player in the [404] permitting process" and that EPA is not free to expand its role in the 404 process beyond those that are specifically provided by Congress. The decision provides regulatory certainty that the Corps' longstanding, codified regulations will govern the review and processing of Section 404 permits, rather than alternate procedures that reallocate the division of authority in Section 404.

This decision also validates the basic administrative law requirement that agencies must provide notice and an opportunity for comment before subjecting regulated entities to new legal requirements. EPA argued that the EC Process and the screening procedure were mere "policy statements" or "procedural rules" that are not subject to the Administrative Procedure Act's notice-and-comment requirements. Judge Walton rejected EPA's position, holding that EPA had created new procedural and substantive legal requirements, which should have been promulgated through notice and comment. This decision provides another arrow in the quiver for entities seeking to challenge agency "guidance" documents as unlawfully promulgated legislative rules in disguise.

To read a complete copy of the decision, [click here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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