

# The Canary in the Coal Mine: Federal Environmental Regulatory Action Against Eastern U.S. Mining as a Harbinger for Natural Resources in the West

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# Overview

- ▶ Federal agency use of informal guidance to implement changes in policy and regulatory interpretation
- ▶ Growing use of conductivity to implement narrative water quality standards
- ▶ Reach of EPA's "veto" authority under Clean Water Act ("CWA") Section 404(c)
- ▶ Emergence of selenium as a water quality constituent

# Use of Informal Guidance

- ▶ Increased reliance on substantive “guidance” documents and other informal agency actions
- ▶ May not be subject to Administrative Procedure Act notice-and-comment requirements
  - Does the “guidance” impose binding changes in the law?
- ▶ Potentially insulated from judicial review
  - Is the “guidance” a legislative rule in disguise?

# Informal Guidance Case Study: *NMA v. Jackson* (D.D.C.)

- ▶ Enhanced Coordination Process
  - Set forth in two agency memoranda without notice and comment
  - Applied to certain CWA Section 404 permit applications for Appalachian surface coal mining pending as of March 31, 2009
  - Invalidated by court order (Oct. 2011) as contrary to the plain language of CWA Section 404
  - Impacts linger despite invalidation

# Informal Guidance Case Study: *NMA v. Jackson* (D.D.C.)

- ▶ Interim Appalachian Surface Coal Mining Guidance
  - Subject to notice and comment, but was in effect throughout the comment period
  - Applied to six Appalachian states
    - Set forth EPA's views on compliance with the CWA, National Environmental Policy Act, and Environmental Justice Executive Order
    - Among other things, appeared to establish a region-wide water quality criterion for electrical conductivity
  - In denying the government's motion to dismiss (Jan. 2011), the court found that EPA was applying this "guidance" as a binding rule

# Informal Guidance Case Study: *NMA v. Jackson* (D.D.C.)

- ▶ Final Appalachian Surface Coal Mining Guidance
  - Covers the same subject matter as the Interim Guidance
  - Contains lengthy disclaimers throughout the document regarding legal significance and binding effect
  - Summary judgment hearing held on July 13, 2012
    - The court considered evidence (declarations) concerning EPA's application of the "guidance" as a binding rule in evaluating EPA's jurisdictional challenges
    - The court also heard argument over whether the "guidance" is contrary to the requirements of the CWA and the Surface Mining Control and Reclamation Act

# Conductivity

- ▶ Defined by EPA as “a measure of the ability of water to pass an electrical current”
- ▶ Affected by the major charged ions in dissolved waters
- ▶ EPA’s recent Appalachian surface coal mining guidance sets forth conductivity “benchmarks” of 300–500  $\mu\text{S}/\text{cm}$

# Conductivity

- ▶ EPA's "benchmarks" are based primarily on two studies:
  - EPA's *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams* (2011)
  - Pond, et al.'s "Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family- and Genus-level Macroinvertebrate Bioassessment Tools" (2008)

# Conductivity

- ▶ EPA's Final Guidance takes the view that conductivity "benchmarks" are an appropriate means to implement state narrative water quality standards
- ▶ Applicable water quality standards in most Appalachian states, however, do not even mention conductivity
  - Kentucky has a narrative conductivity criterion
  - Ohio has a numeric criterion of 2400  $\mu\text{S}/\text{cm}$
  - West Virginia has passed legislation and issued guidance rejecting the use of conductivity benchmarks as a means to interpret its narrative water quality criterion

# Conductivity

- ▶ Impact of EPA's "benchmarks"
  - EPA insists they are non-binding recommendations
  - Two states (WV and KY) have proffered evidence in *NMA v. Jackson* describing how EPA has inflexibly insisted upon numeric conductivity limits in CWA permits for Appalachian surface coal mines
  - Increased ENGO litigation
    - Citizen suit litigation arising out of alleged mine discharges
    - Appeals of state point source permitting decisions

# Conductivity

- ▶ Potential implications beyond Appalachian surface coal mining

# CWA Section 404(c) Authority

- ▶ CWA Section 404 permits are required for many mining operations nationwide
- ▶ Section 404(c) authorizes EPA “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site” for dredged or fill material when it determines “that the discharge of such materials into such area will have an unacceptable adverse impact on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas.”

# CWA Section 404(c) Authority

- ▶ EPA has only exercised its Section 404(c) “veto” authority in 13 instances in the nearly 40-year history of that provision
- ▶ Many questions remain unanswered regarding the scope of this “veto” authority
  - What are the temporal limits on EPA’s exercise of this authority?
  - Must EPA take into account proposed mitigation measures in evaluating whether there will be an “unacceptable adverse effect”?

# 404(c) Case Study: *Mingo Logan Coal Co. v. EPA* (D.D.C.)

## ▶ Background

- Jan. 2007 – the Corps issued an individual Section 404 permit for the Spruce No. 1 Mine in WV
- Sept. 2009 – EPA requested the Corps to suspend, revoke, or modify the permit due to alleged downstream water quality impacts; the Corps rejected EPA’s request
- Mar. 2010 – EPA published notice of a proposed determination to withdraw the specification of several disposal sites in the permit
- Jan. 2011 – EPA issued its final “veto” determination
- Feb 2011 – Mingo Logan challenged EPA’s “veto” in federal court in the District of Columbia

# 404(c) Case Study: *Mingo Logan Coal Co. v. EPA* (D.D.C.)

## ▶ Key legal disputes

- Does the term “specification” pertain only to the process of identifying disposal sites for future permits or does it also include sites specified in previously issued permits?
- Does a post-permit “veto” infringe on a state’s primary authority to regulate state water quality?
- Does a post-permit “veto” interfere with the Corps’ exclusive authority to revoke or modify Section 404 permits?

# 404(c) Case Study: *Mingo Logan Coal Co. v. EPA* (D.D.C.)

## ▶ Key legal disputes

- Would allowing a post-permit “veto” undermine the regulatory certainty provided by the CWA permitting regime?
- Would allowing post-permit “vetoes” limit financial investments and cause economic harm? Are such considerations even relevant to determining the scope of EPA’s regulatory authority?

# 404(c) Case Study: *Mingo Logan Coal Co. v. EPA* (D.D.C.)

## ▶ Key holdings

- The text, legislative history, and implementing regulations of CWA Section 404 clearly do not authorize EPA to withdraw specifications of disposal sites in duly issued permits
- Allowing EPA to withdraw specifications would:
  - “[U]ndermine an existing permit”
  - Eliminate a permit holder’s ability to rely on the permit for compliance with the statute
- Even under a *Chevron* step 2 analysis, EPA’s interpretation of Section 404 to allow a post-permit “veto” is unreasonable and unpersuasive

# CWA Section 404(c) Authority

- ▶ Potential implications for future projects

# Selenium

- ▶ Mining nationwide has seen more active regulation and litigation concerning selenium in CWA Section 402 permits
- ▶ Selenium is naturally occurring element
  - Essential to life in small concentrations
  - Proven to be toxic to wildlife in higher concentrations
- ▶ Surface mining brings selenium-bearing materials to the surface – this can lead to elevated selenium levels in surface waters

# Selenium

## ▶ Regulatory background

- EPA has issued CWA Section 304 criteria for selenium to assist state regulators in establishing state water quality standards
- State regulators have established effluent limits for selenium in Section 402 permits
- A 2005 programmatic EIS and a 2011 EPA report concerning mountaintop mining and valley fills in Appalachia concluded that such activities lead to elevated selenium concentrations known to cause toxic effects
  - The 2011 study also noted that further study and research is warranted

# Selenium

- ▶ ENGO litigation to enforce selenium limits
  - Generally targets NPDES permits modified to include selenium limits or newly issued permits with selenium limits
    - These permits typically give operators lead time before the limits go into effect
  - Lawsuits tend to seek enforcement of a permit's selenium limits, penalties, and injunctive relief
  - Lawsuits often create tension with state efforts to address selenium pollution

# Selenium

- ▶ ENGO litigation to enforce selenium limits
  - Often resolved through consent decrees that provide for:
    - Civil penalties
    - Requirements for treatment systems
    - Increased monitoring and reporting
    - Phase-in periods for operators to meet selenium limits
  - ENGOs diligently monitor consent decree compliance

# Selenium

- ▶ Limited federal involvement to enforce compliance with selenium limits for Appalachian surface coal mines
- ▶ Emphasis on fostering a consistent state-led approach

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