

Clean Water Act Permitting  
For Coal Mining and *NMA v. Jackson*:  
The Battle Over Enhanced  
Procedures, New Water Quality  
Standards, And EPA's Role

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# TIMELINE

- Administration change prompts environmental regulatory changes
- Jan. 20, 2009 -- EPA relies on broad interpretation of regulatory authorities and one agency study to object to mining permits - Eastern coal focus
- Feb 2009 -- Fourth Circuit OVEC decision upholds Corps permitting review
- March 2009 -- Fear of prompt issuance of backlogged permits - CEQ issues moratorium on coal permits while EPA re-reviews 150 permits
- June 2009 --EPA, Corps, OSM issue MOA granting EPA new review and enforcement “responsibilities” in federal and state CWA programs; outlining ambitious agenda for change in coal regulatory programs; launch of EC Process
- April 2010 -- EPA unilaterally issues guidance, including conductivity limits

# BACKGROUND

## Coal Mine Permitting:

- Coal mining operations require both state and federal permits under CWA, SMCRA
- CWA Section 404 –Corps authorizes discharge of fill material to waters of the U.S.
  - EPA review and comment
  - Corps makes final determination (w/in 90 days per Corps regs unless exception)
  - EPA has limited veto authority

# BACKGROUND

## Coal Mine Permitting:

- CWA Section 402 - Primacy states issue NPDES permits, individual or general to cover point source discharges, including stormwater runoff
- CWA Section 401 - Primacy states certify that any federally issued permit (Section 404 in this case) will not violate state water quality standards

# BACKGROUND

## Section 303 Water Quality Standards:

- Congress established that states would maintain primary responsibility to develop WQ standards
- WQ standards consist of designating uses for a particular waterbody and setting criteria necessary to protect those uses
- WQ standards may be expressed as numeric limitations or narrative statements
- Permits include limits to meet water quality standards

# BACKGROUND

## 2009 OVEC Decision:

- Feb 13, 2009 decision ends long-running litigation and closes a number of litigation avenues used to challenge Corps permits for two decades
- Overwhelming support for Corps permit review (CWA and NEPA), upholding state 401 certification is binding, affirmed Corps reliance on SMCRA permit for hydrologic and cumulative impacts analysis, upheld Corps mitigation assessment methods and consideration of on-site SMCRA reclamation as mitigation

# BACKGROUND

- 2009 OVEC Decision:
  - Sparks fear among anti-coal constituencies that 150 backlogged permits will be unleashed
  - Prompts CEQ response; issuance of permit moratorium while EPA develops new permit review policies and authorities
    - formed basis for lawsuit by industry (NMA v. Jackson) and states

# AGENCY ACTIONS AT ISSUE

- Enhanced Review Procedure
  - creates criteria for “screening process” that determines whether permit undergoes entirely new regulatory track and timelines or whether proceeds under current regulations and review criteria
  - adds time and cost to application process
  - creates process where companies negotiate with EPA, not the Corps, and EPA, not the Corps, makes final determination on permit conditions

# AGENCY ACTIONS AT ISSUE

- EPA Detailed Guidance
  - puts EPA on the front end of the permit review process
  - creates de-facto water quality standard for conductivity
  - creates legal presumptions
    - 500 uS/cm = adverse impacts
    - projects with more than 1 mile of stream impacts = significant impacts
    - longstanding SMCRA required BMPs are not acceptable for mitigation
    - requires sequencing of fills

# NMA LITIGATION

- Filed in July 2009
- Challenged EC Process, MCIR Assessment, and Detailed Guidance - procedural and substantive claims
  - APA, CWA, NEPA, and SMCRA

# EARLY LITIGATION ACTION

- NMA sought a preliminary injunction to stop the EC Process and further implementation of the Guidance
- The government sought dismissal based on lack of jurisdiction
  - Final agency action, ripeness, standing

# ADDITIONAL LITIGATION FILED

- KY - two suits - industry, state coal association, and the state of Kentucky
- WV - one suit - state of West Virginia
- Challenging various aspects of EC Process and Guidance
- States focused on disruption to Section 402 permitting
- KY and WV cases consolidated in DC with NMA suit

# DISTRICT COURT RULING

## 768 F. SUPP. 2D 34 (D.D.C. 2011)

- Denies government motion to dismiss
- Denies NMA motion for preliminary injunction
  - not sufficient showing of irreparable harm
- Agency actions are final and ripe for review
- NMA is likely to prevail on the merits of both procedural and substantive claims

# EPA Issues “Final Guidance”

July 2011

- Contains exhaustive legal disclaimers, many of which attempt to moot the procedural and substantive claims filed against the Interim Guidance
- Attempts to insert EPA into mine design and the SMCRA regulatory scheme under the guise of CWA section 404 permitting

# EPA Issues “Final Guidance”

July 2011 (con’t.)

- Continues to emphasize a water quality criterion for conductivity
  - Disregards state efforts to implement narrative water quality standards
  - Emphasis has shifted from a specific number toward a range of numbers or even a *de facto* narrative criterion
- Requires pre-permit reasonable potential analyses
- Creates legal presumptions:
  - conductivity is an appropriate parameter to translate state narrative WQS
  - SMCRA permits should include specific BMPs such as sequencing of valley fills

# Court Rules on Legality of EC Process October 2011 (2011 WL 4600718)

- The EC Process is both unlawful under the Clean Water Act and APA
  - EPA unlawfully expanded its authority
  - The public did not have the ability to comment
- The Corps is the “principal player” in CWA 404 permitting
- There is a “ceiling” on EPA authority in Section 404
- Precedent informing Spruce 404 veto challenge

# Legal Challenges to the Final Guidance

- EPA's attempts to regulate mine design violate SMCRA and the CWA
  - Seeks to redefine the limits that Congress placed on both its CWA and SMCRA authorities
- EPA establishes an unlawful region-wide conductivity water quality criterion
- EPA has usurped state authority
  - Attempts to override how Kentucky and West Virginia interpret and apply their own water quality standards

# Legal Challenges to the Final Guidance (con't.)

- EPA's Final Guidance is arbitrary and capricious
  - No adequate explanation as to how EPA's conductivity benchmarks implement state narrative water quality standards or why EPA can ignore state-issued guidance on that subject
  - No rational basis for conductivity benchmarks in light of limitations on conductivity studies highlighted by EPA's own Science Advisory Board
  - No reasoned analysis for reversing its position on Kentucky's approach to reasonable potential analyses

# Congressional and EPA Activity

- Congressional oversight continues
  - GAO Report; EPA OIG Report
- EPA searching for other tools to accomplish policy goals
  - Use of ARNI designations
  - Large numbers of permit applications withdrawn or remain pending; no significant relief of the backlog
  - EPA HQ rejected Kentucky's and EPA Region 4's negotiated 402 permit template
  - EPA issued blanket objection to 19 proposed permits in Kentucky for lacking pre-permit RPAs and conductivity effluent limits
  - EPA recently objected to at least 1 proposed permit in WV on the basis of conductivity