In recent years, the Environmental Protection Agency (EPA) has employed an increasingly expansive view of its regulatory authority under Section 404 of the Clean Water Act (CWA). In implementing this expansion, however, EPA frequently has avoided notice and comment rulemaking under the Administrative Procedure Act (APA) and has instead attempted to implement new requirements and give itself more power through the adoption of “guidance” and through novel interpretations of existing statutory provisions. These expansions of regulatory authority have the potential to significantly impact natural resources industries by delaying or even halting the permitting process. Even for projects that are not directly impacted by EPA action, the agency’s attempts to increase its authority under the CWA without passing new rules under APA procedures are likely to result in increased regulatory uncertainty.

Although federal agencies may permissibly issue guidance that does not effect binding changes in the law without undergoing notice-and-comment procedures required under the APA, binding legislative rules must comply with the notice-and-comment requirements. An agency cannot escape the procedural requirements of notice-and-comment rulemaking by merely labeling a substantive change as “guidance.” But it appears that is precisely what EPA is attempting to do in the CWA arena.

This commentary provides four case study examples of recent actions by EPA to expand the scope of its jurisdiction and authority under Section 404 of the CWA in violation of both the provisions of the CWA itself and the provisions of the APA that require that agencies enacting new laws or regulations provide notice to interested parties and allow persons to participate in the process of adopting the new regulation. First, we discuss the EPA’s recent attempt to retroactively apply its Section 404(c) veto authority to a permit that had already been approved by the Army Corps of Engineers (Corps) and which was in operation. Second, we analyze EPA’s threatened use of a preemptive veto under Section 404(c) of the CWA to prevent the issuance of a hypothetical permit for which no application has even been submitted. Third, we analyze EPA’s attempted use of “guidance” for the review of Appalachian surface coal mining operations in order to expand its authority and to impose significant new substantive obligations on permit applicants. Finally, we examine EPA’s increasing use of the “Aquatic Resources of National Importance” designation as a means to delay and oppose Section 404 permits. Each of these examples offers lessons for industry in predicting, and when necessary, opposing, EPA’s efforts to expand the scope of its CWA powers.

We begin, however, with a brief overview of the CWA, with focus on the history and statutory and regulatory framework of Section 404 permitting under the Act.

1 See 5 U.S.C. § 553(b); U.S. Telecom Ass’n v. FCC, 400 F.3d 29 (D.C. Cir. 2005); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).
I. THE CLEAN WATER ACT

Congress enacted the Federal Water Pollution Control Act (WPCA) in 1948 in order to "recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution . . . and to provide Federal technical services to State and interstate agencies . . . in the formulation and execution of their stream pollution abatement programs." The WPCA was the first major U.S. law to address water pollution. Growing public awareness and concern for controlling water pollution led to sweeping amendments in 1972. As amended in 1972, the law became commonly known as the Clean Water Act (CWA).

The 1972 amendments established the basic structure for regulating pollutant discharges into the waters of the United States; gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry; made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions; funded the construction of sewage treatment plants under the construction grants program; and recognized the need for planning to address the critical problems posed by nonpoint source pollution. The CWA today contains two permitting schemes to address discharges into navigable waters—National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the CWA and Fill Material Permits under Section 404.

Section 301 of the CWA provides that the discharge of any pollutant by any person is unlawful unless the entity is in compliance with a limited number of other sections of the Act. Section 402 authorizes the issuance of NPDES permits, which are issued either by EPA or by a state authorized to issue such permits. An NPDES permit is required for discharge of pollutants which are defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." Section 404 of the Clean Water Act requires a permit for the "discharge of dredged or fill material into the navigable waters," Section 404 authorizes the U.S. Army Corps of Engineers (the Corps) under Section 404(a), or an approved state under Section 404(h) to issue permits

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6 33 U.S.C. § 1342(b).
8 33 U.S.C. § 1344(a).
for discharges of dredged or fill material at specified sites in waters of the United States. To issue a Section 404 permit, the Corps must ensure that a number of regulatory requirements are met. A dredge or fill action (1) must not “cause or contribute to significant degradation of the waters of the United States,”\textsuperscript{11} (2) must not cause or contribute to a water quality violation,\textsuperscript{12} and (3) must be in the public interest.\textsuperscript{13} Furthermore, in order to issue a permit under section 404, the Corps must first specify a disposal site for the discharges of fill material.\textsuperscript{14} These disposal sites are determined by applying guidelines adopted pursuant to Section 404(b)(1) of the CWA.\textsuperscript{15} The Corps is also responsible for enforcing compliance with permit terms,\textsuperscript{16} and has the authority to modify, suspend, or revoke a permit after issuance.\textsuperscript{17} Once the Corps has issued a permit, the permit holder may lawfully discharge the fill material as specified under the permit.

Although the Corps is the lead agency in permitting discharges of dredged or fill material, EPA also has a statutorily defined role in fill permitting under the CWA. The EPA is responsible for promulgating, in coordination with the Corps, the guidelines for the specification of disposal sites under section 404(b)(1).\textsuperscript{18} The Corps has sole authority to issue Section 404 permits,\textsuperscript{19} but in doing so must apply guidelines that it develops in conjunction with the EPA. As required by the CWA,\textsuperscript{20} the EPA and the Corps have promulgated 404(b)(1) guidelines, which are codified at 40 C.F.R. Part 230 (2010), to guide the Corps’ review of the environmental effects of proposed disposal sites. The 404(b)(1) guidelines provide that “[n]o modifications to the basic application, meaning, or intent of these guidelines will be made without rulemaking by the Administrator [of the EPA] under the Administrative Procedure Act.”\textsuperscript{21}

The 404(b)(1) guidelines aim to fulfill the goal of the CWA through “control of discharges of dredged or fill material,”\textsuperscript{22} and apply “to the specification of disposal sites for discharges of dredged or fill material into waters of the United States.”\textsuperscript{23} These guidelines prohibit “discharge of dredged or fill material” where “there is a practicable alternative to the proposed discharge.”

\textsuperscript{11} See 40 C.F.R. § 230.10(c).
\textsuperscript{12} See id. at § 230.10(b)(1).
\textsuperscript{13} See 33 C.F.R. § 320.4(a).
\textsuperscript{14} 33 U.S.C. § 1344(a)-(b).
\textsuperscript{15} 33 U.S.C. § 1344(b)(1).
\textsuperscript{16} 33 U.S.C. § 1344(s).
\textsuperscript{17} 33 C.F.R. § 325.7.
\textsuperscript{18} 33 U.S.C. § 1344(b)(1); 33 C.F.R. Pt. 230.
\textsuperscript{19} 33 U.S.C. § 1344(a).
\textsuperscript{20} 33 U.S.C. 1344(b).
\textsuperscript{21} 40 C.F.R. § 230.2(c).
\textsuperscript{22} 40 C.F.R. § 230.1.
\textsuperscript{23} 40 C.F.R. § 230.2.
which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.\textsuperscript{24} “An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”\textsuperscript{25} When the activity associated with a discharge is not water dependant, “practicable alternatives that do not involve special aquatic sites are presumed to be available.”\textsuperscript{26} Additionally, discharge or dredging of fill material is prohibited if it “[c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard.”\textsuperscript{27} Furthermore, except in certain circumstances, “no discharge of dredge or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.”\textsuperscript{28}

In addition to giving the EPA the responsibility to develop the section 404(b)(1) guidelines in coordination with the Corps, Section 404(c) of the CWA accords the EPA the authority to prevent authorization of certain disposal sites.\textsuperscript{29} The relevant text of Section 404(c), which has been parsed in detail during recent litigation over the scope of EPA’s powers, provides that:

\begin{quote}
The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.\textsuperscript{30}
\end{quote}

Thus, to exercise its authority to prevent the Corps from authorizing a particular dumpsite, commonly known as the 404(c) veto authority, the EPA must determine, after notice and an opportunity for public hearing, that certain unacceptable environmental effects would occur if the disposal site were approved.\textsuperscript{31} Section 404(c) requires the EPA to “set forth in writing and make

\textsuperscript{24} 40 C.F.R. § 230.10(a).
\textsuperscript{25} 40 C.F.R. § 230.10(a)(2).
\textsuperscript{26} 40 C.F.R. § 230.10(a)(3).
\textsuperscript{27} 40 C.F.R. § 230.10(b)(1).
\textsuperscript{28} 40 C.F.R. § 230.10(c).
\textsuperscript{29} 33 U.S.C. § 1344(c).
\textsuperscript{30} 33 U.S.C. § 1344(c).
\textsuperscript{31} 33 U.S.C. § 1344(c).
public [its] findings and [its] reasons for making any determination under this subsection.32 The circumstances under which it is appropriate for EPA to act under Section 404(c) have been the subject of debate and litigation, as discussed in more detail below.

In light of the coordinated authorities of EPA and the Corps, section 404(q) of the CWA directs the Corps to enter into an agreement with the EPA to assure that, “to the maximum extent practicable,” a decision on a pending application for a Section 404 permit will be made within 90 days of the publication of the notice for that application.33 In August 1992, the Corps signed a Memorandum of Agreement with the EPA as required by section 404(q) of the CWA, which makes clear that “the Corps is responsible for reviewing and evaluating information concerning all permit applications.”34 The 404(q) Memorandum acknowledges “that the EPA has an important role” in the Corps’ Section 404 permitting process and envisions that the EPA will provide comments to the Corps, but also clarifies that the EPA’s comments will be provided to the Corps within the time frames established in the agreement itself and the applicable regulations.35 The 404(q) Memorandum also notes that the Corps may request additional comments from the EPA or discuss issues with the EPA after the close of the comment period.36 Additionally, the 404(q) Memorandum clarifies that it in no way alters the Corps’ “authority to decide whether a particular individual permit should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines, or the [EPA’s] authority under Section 404(c) of the Clean Water Act.”37 Further, the 404(q) Memorandum provides for the “elevation,” i.e., additional review, of individual permit decisions. The “final decision on the need to elevate a specific individual permit case” rests “solely” with the Assistant Secretary of the Army for Civil Works.38 Finally, the 404(q) Memorandum states that it shall “be effective

32 33 U.S.C. § 1344(c).

33 33 U.S.C. § 1344(q). Section 404(q) provides: Not later than the one-hundred-eightieth day after the date of enactment of this subsection, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice of such application is published under subsection (a) of this section.

34 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (August 11, 1992).

35 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army at 2 (August 11, 1992). It is also worth noting that the Memorandum of Agreement provides that EPA is only to provide comments within EPA’s area of expertise and authority on the impacts of activities being evaluated by the Corps and appropriate and practical measures to mitigate adverse impacts.

36 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army at 2, 4-5 (August 11, 1992).

37 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army at 2 (August 11, 1992).

38 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army at 6-10 (August 11, 1992).
immediately upon the date of the last signature and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice."39

II. EPA’S EXPANSION OF ITS AUTHORITY UNDER THE CLEAN WATER ACT

Although EPA’s respective authority under the CWA was formerly understood to be clearly articulated under the CWA, section 404(b)(1) guidelines, and the 1992 Memorandum of Agreement, EPA nonetheless has made numerous attempts in recent years to significantly expand the scope of its authority, in apparent contradiction to these authorities. Further, despite the unambiguous requirement that substantive rules comply with the notice-and-comment requirements of the APA, EPA has made a number of attempts to effect substantive changes to its authority without engaging in the required procedures. This Section examines four recent examples of EPA’s trending power grabs in the area of CWA Section 404 permitting.

A. Retroactive Veto Under Section 404(c): Mingo Logan Coal Co. v. EPA

The first example of EPA’s recent efforts to expand its regulatory authority under the CWA is EPA’s attempt to make retroactive use of its CWA section 404(c) authority to veto a permit that had been issued by the Corps several years prior to EPA’s action.

On January 22, 2007, the Corps issued a section 404 permit for the Spruce No. 1 Mine to Mingo Logan Coal Company after nearly ten years of study, including the preparation of an environmental impact statement.40 Dozens of state and federal regulators, including the EPA, were involved in reviewing the project before the permit holder was granted authorization to proceed.41 The permit issued by the Corps authorized Mingo Logan to discharge fill material from its Spruce No. 1 mining operations into nearby streams, including the Pigeonroost and Oldhouse Branches and their tributaries.42 Nearly three years after the final permit was issued, EPA published a Final Determination purporting to withdraw the specification of more than 80 percent of the total discharge area authorized by the permit. EPA’s action in withdrawing specification of discharge sites after the permit had already been issued was unprecedented in the history of the CWA.43

Mingo Logan Coal Company brought suit in district court for the District of Columbia, seeking a declaration that EPA lacked the authority to modify or revoke its section 404 permit, that EPA’s attempts to modify that permit was unlawful, and that the permit remained in full effect as issued by the Corps.44 Additionally, Mingo Logan asked the court to vacate EPA’s

39 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army at 3 (August 11, 1992).
41 See id. at *2-3.
42 Id. at *3.
43 See id. at *1.
44 Id.
Final Determination on the basis that it exceeded the agency’s statutory authority under the CWA. On March 23, 2012, Judge Amy Berman Jackson of the United States District Court for the District of Columbia issued an opinion in Mingo Logan Coal Co., Inc. v. U.S. EPA that thoroughly rejected EPA’s efforts to nullify Mingo Logan’s section 404 permit. As stated by the Court, “EPA’s position is that section 404(c) grants it plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps – the only permitting agency identified in the statute – and to do so at any time.” The Court rejected EPA’s assertion of authority, finding that “This is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute. It is not conferred by section 404(c), and is contrary to the language, structure, and legislative history of section 404 as a whole.”

In both substance and tone, this decision stands as a firm judicial rebuke of EPA’s efforts to expand the scope of its authority under the CWA. The focus of Judge Jackson’s ruling was on the text of the relevant CWA provisions. According to EPA, Section 404(c) grants it authority to withdraw the specification of a disposal site “whenever” it sees fit, including after a permit has been issued on the basis of that specification. But as Judge Jackson pointed out, this interpretation does not fit with the rest of the statute. EPA’s actions were particularly inconsistent with CWA Section 404(p), which “expressly provides that discharges made pursuant to a permit are lawful.” The court accordingly rejected EPA’s reading of Section 404(c)’s “veto” provision as inconsistent with the CWA.

Even though Judge Jackson’s interpretation of the CWA was enough to rule in favor of the plaintiff, her opinion went on to examine the reasonableness of EPA’s claim that Section 404(c) gives it the authority to withdraw a specification after a permit issues. The court described EPA’s absolutist position as “illogical and impractical” because “[i]t posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration.” In addition, the court observed that EPA’s expansive view of Section 404(c) would “sow a lack of certainty into a system that was expressly intended to provide finality.” This uncertainty motivated a number of amici to submit briefs explaining that “lenders and investors would be less willing to extend credit and capital if every project involving waterways could be subject to an open-ended risk of cancellation.” Judge Jackson found that the danger of such economic harm bolstered the unreasonableness of EPA’s position.

45 Id.
46 Id. at *5.
47 Id. at *5.
48 Id. at *8.
49 Id. at *10.
50 Id. at *17.
51 Id.
52 Id. (citing Brief of Amicus Curiae The National Stone, Sand and Gravel Association in Supp. of Pl. Mingo Logan Coal Co., Inc. [Dkt. # 51] at 5–13; Brief of Amici Curiae the Chamber of Commerce of the United States et al. in Support of Pl. [Dkt. # 50] at 7–14).
Judge Jackson’s rejection of EPA’s attempt to veto an already-issued Section 404 permit is significant, first and foremost, because it emphasizes the importance of finality for CWA permit holders. Once a permit issues, the holder’s sole responsibility is compliance with its terms. The decision is also noteworthy, however, in its broader criticism of EPA. Judge Jackson described EPA’s attempt to increase its Section 404(c) powers as “stunning,” and repeatedly criticized the agency’s expansive reading of its statutory authority.

EPA filed notice of appeal on May 11, 2012 to the D.C. Circuit Court of Appeals. In EPA’s statement of issues on appeal, EPA frames the question to be addressed by the court on appeal as “whether Section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), authorizes the United States Environmental Protection Agency to withdraw the specification of a site that is specified for disposal of fill material under a Section 404(a) permit.” In its appellate brief, EPA continues to argue that its authority under Section 404(c) is plenary, and that it can in fact withdraw the specification of a disposal site at any time, regardless of whether a permit has already been issued on the basis of that specification.

Briefing in the appeal of the Section 404(c) veto case will be completed this fall. Argument is expected late this year or early next year, with a decision likely to follow in mid-2013.

B. Preemptive Veto Under Section 404(c): Pebble Mine

Despite Judge Jackson’s strong language and decision in *Mingo Logan Coal Company, Inc. v. United States Environmental Protection Agency*, EPA has continued its efforts to expand its authority under the CWA. In recent months, the EPA has indicated that it has the authority to preemptively veto a permit for a potential mining project in Southwest Alaska before an application has even been submitted.

On March 28, 2012, the Natural Resources Defense Council (“NRDC”) petitioned EPA to preemptively veto a CWA Section 404 permit prior to submission of a permit application. The petition asked EPA to invoke its CWA Section 404(c) authority to prohibit the disposal of fill in watersheds near Bristol Bay, Alaska. The petition is aimed specifically at the Pebble Mine project and alleges that the project is irreconcilable with the health and integrity of the fishery, drinking water, wildlife, and recreational resources of the Bristol Bay watershed, and that EPA has the statutory authority to protect those resources by exercising its veto authority prior to submission of a section 404 permit application. NRDC claims, in its petition, that the CWA’s text explicitly provides EPA with authority to prohibit, deny, or restrict the use of an area as a disposal site for dredged or fill material in order to avoid unacceptable environmental degradation.

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55 Brief on Behalf of the Natural Resources Defense Council in Support of Petitions to the U.S. Environmental Protection Agency for Action Regarding the Proposed Pebble Mine Under Section 404(c) of the Federal Water Pollution Control Act (March 28, 2012).

56 *Id.* at 1.
EPA has never before attempted to exercise its 404(c) authority before a permit application is even submitted. Further, EPA does not have any procedures in place for responding to such a request. EPA nevertheless responded to the petition by initiating a study of the Bristol Bay area. In May 2012, EPA released an External Review Draft of a report titled “An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska,” which is a comprehensive analysis of a “hypothetical” large-scale mine in the Bristol Bay area.\footnote{External Review Draft, EPA 910-R-12-004a, An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska (May 2012), available at \url{http://www.epa.gov/ncea/pdfs/bristolbay/bristol_bay_assessment_erd_2012_vol1.pdf}.} The report was made available as a Draft on May 18, 2012, with a sixty-day comment period.\footnote{See 77 Fed. Reg. 31353 (Notice of public comment period) (May 25, 2012). The public comment period on the assessment closed on July 23, 2012.} EPA has indicated that it intends to use the final report as a basis for future decision-making, including whether to exercise its CWA section 404(c) veto authority to prohibit mining the Pebble deposit.\footnote{See External Review Draft at 1-2 (describing, as a driver for EPA’s decision to conduct the Assessment, the receipt of request for EPA to “restrict large-scale mining activities in the Bristol Bay watershed using its authorities under the Clean Water Act.”).} Although the Bristol Bay Watershed Assessment does not itself make any recommendations relating to section 404(c) of the CWA, EPA has reserved the right to preemptively veto the Pebble Mine project before Pebble Limited Partnership would even apply for a permit.

A number of interested parties have submitted comments on the Report, including the Pebble Limited Partnership and the State of Alaska, through its Attorney General and Senator Lisa Murkowski. Alaska’s Attorney General, Michael Geraghty has requested that EPA cease its work on the Bristol Bay Watershed Assessment and refrain from exercising its section 404(c) authority until a section 404 permit application has been submitted and other applicable regulatory reviews have been commenced.\footnote{See Letters from Attorney General, Michael C. Geraghty, to EPA Region X Regional Administrator, Dennis McLerran (March 9, 2012, April 17, 2012).} In his April 17, 2012 letter to EPA Regional Administrator Dennis J. McLerran, Mr. Geraghty pointed out that “EPA’s authority under the CWA is not plenary,” citing \textit{Mingo Logan Coal Company v. U.S. Environmental Protection Agency}.\footnote{See Letter from Attorney General, Michael C. Geraghty, to EPA Region X Regional Administrator, Dennis McLerran (April 17, 2012).} Mr. Geraghty also pointed out in his letter, that in enacting the CWA, Senator Muskie, a primary sponsor of the Act, recognized that a dredge and fill regime already existed:

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Thus, the Conferees agreed that the Administrator . . . should have a veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.

The decision is not duplicative or cumbersome because the permit application transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator to be
\end{quote}
expeditious in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such a site. (Emphasis added).62

In addition to receiving objections from the State of Alaska, EPA has received a number of comments from the Pebble Limited Partnership, the entity whose potential project EPA has threatened to preemptively veto. In a July 23, 2012 submission, the Pebble Limited Partnership outlined various legal arguments supporting the conclusion that EPA was without authority to preemptively veto a potential project. Specifically, the comment asserts: (1) that EPA’s Bristol Bay Assessment ignores EPA guidance and would not support a permit veto; (2) that the use of a pre-permit veto by EPA would preempt a complete NEPA analysis; (3) that the application of a veto would unlawfully nullify the federal legislation under which the Pebble land was conveyed to the State of Alaska; (4) that section 404(c) cannot properly be invoked in the absence of a permit application; and (5) that the Bristol Bay Assessment would not support a pre-permit veto even if EPA had the authority to issue one.63 Also on July 23, 2012, the Pebble Limited Partnership provided extensive technical comments on the EPA’s “Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska.”64

Given the unprecedented nature of the threatened action by EPA—to preemptively veto a permit—and the various questions raised with respect to the completeness and accuracy of the report, the questions surrounding EPA’s actions are a long way from being answered. But if EPA decides that it will exercise the preemptive veto authority that it apparently believes it has, that action to to preempt development in the Bristol Bay area would more than likely be challenged.


For the next example of EPA’s recent attempts to expand its authority under the CWA, we turn to EPA’s issuance of memoranda and guidance documents for the review of Appalachian Surface Coal Mining Operations which effectively expanded EPA’s authority and jurisdiction and imposed significant new substantive obligations on permit applicants.

On June 11, 2009, the EPA, the Corps, and the Department of the Interior signed a Memorandum of Understanding (MOU) on Implementing the Interagency Plan on Appalachian Surface Coal Mining.65 The June 11, 2009 MOU represented the announcement of “a set of


65 Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009).
short-term actions to be implemented in 2009 to existing policy and guidance, and a longer term process for gathering public input, assessing the effectiveness of current policy, and developing regulatory actions.” 66 One element of the plan was “coordinated environmental reviews of pending permit applications under the Clean Water Act.” 67 Concurrently with the June 11, 2009 MOU, the Corps and EPA issued two separate memoranda outlining the details of an “Enhanced Coordination Process” (EC Process) to apply to certain CWA Section 404 permit applications for surface coal mining activities in six Appalachian states. 68 Under these memoranda, the EC Process begins with EPA applying a Multi-Criteria Integrated Resource Assessment (MCIR Assessment), under which EPA applies the 404(b)(1) guidelines and directs the Corps regarding which permit applications must go through the EC Process for further review and coordination. 69 The Corps was not involved in developing the MCIR Assessment, despite its statutory role as the permitting authority under Section 404. If the EPA determines, using the MCIR Assessment, that further review is necessary, the pending permit application is subjected to the EC Process, which imposes separate and distinct burdens not anticipated under the CWA or the Corps’ implementing regulations.

Less than one year later, on April 1, 2010, EPA issued interim final guidance titled “Improving EPA Review of Appalachian Surface Coal Mining Operations Under the CWA, National Environmental Policy Act, and the Environmental Justice Executive Order,” to be effective immediately. 70 The interim final guidance changed the regulatory requirements for review of coal mining permits in six Appalachian states, setting benchmarks purportedly designed to prevent significant and irreversible damage to Appalachian watersheds from mining activity. EPA announced at the same time that the agency would take public comments on the guidance through December 10, 2010. 71

The National Mining Association (NMA) filed suit on July 20, 2010 in District Court for the District of Columbia, seeking declaratory and injunctive relief challenging the June 11, 2009 EC Process memoranda and the April 1, 2010 Interim Detailed Guidance Memorandum. In January 2011, the Court denied the NMA’s motion for a preliminary injunction and denied the federal defendants’ motion to dismiss the NMA’s complaint. 72 After that ruling, the case was consolidated with four cases pending in United States District Courts in West Virginia and Kentucky.

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66 Id. at 2.

67 Id.


69 Nat’l Mining Ass’n, 816 F.Supp. 2d at 41.


72 Nat’l Mining Ass’n, 816 F.Supp. 2d at 56.
On October 6, 2011, the court granted the plaintiffs' motion for partial summary judgment on the EC Process challenges. Specifically, NMA had asserted first, that the EC Process and MCIR Assessment violated the CWA because they amount to actions in excess of the agency's statutory authority, and second, that the agency's use of these procedures without engaging in notice-and-comment rulemaking violated the APA. The district court agreed with these claims, granting plaintiffs' motion for partial summary judgment. In doing so, Judge Walton concluded that "With the adoption of the MCIR Assessment and the EC Process, the EPA has expanded its role in the issuance of Section 404 permits and has thus exceeded the statutory authority afforded to it by the Clean Water Act."  

With respect to the question of whether EPA's issuance of the MCIR Assessment and the EC Process without notice-and-comment violated the APA, the court noted that "Although federal agencies ordinarily must provide the public with notice of a proposed rule and the opportunity to submit comments on it, the APA makes an exception for ... 'rules of agency organization, procedure, or practice.'" The EPA alleged that the MCIR Assessment and EC Process were procedural rules because, although the rules called for "additional scrutiny" for a specific group of permit applications, the procedures set forth were sufficiently flexible to allow the agency to retain its discretion. The Court, however, did not accept the government's arguments, concluding that the MCIR Assessment and EC Process would effectively amend the Section 404 permitting process by conferring additional reviewing authority on the EPA—authority that the statute reserves for the Corps. "Legislative rules are agency pronouncements that have the force and effect of law, whereas procedural rules are binding rules that do not themselves alter the rights or interests of parties." 

After resolution of plaintiffs' claims relating to the MCIR Assessment and EC process, the claims related to EPA's interim guidance remained. Before final briefing and resolution on the merits of those claims, however, EPA issued a Final Guidance on July 21, 2011, which superseded the Interim Guidance. Plaintiffs filed a motion for partial summary judgment on December 22, 2011, arguing (1) that the Final Guidance seeks to regulate aspects of mining in violation of the Surface Mining Control and Reclamation Act and the CWA; (2) that the Final Guidance violates section 303 of the CWA by imposing a region wide water quality standard which usurps the states' CWA authority; and (3) that the Final Guidance is arbitrary and capricious because EPA fails to provide a rational explanation for its pronouncement regarding

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73 Id. at 49.
74 Id. at 45.
75 Id.
76 Id. (internal citations and quotation marks omitted).
77 Id. at 46.
78 Id. at 49 (internal citations and quotation marks omitted).
the necessity for CWA permits to include conductivity limits and pre-permit reasonable potential analysis. Plaintiffs also allege that “[b]y utilizing the Interim Guidance as a legislative rule before it received notice and comment from the public or the regulated community, EPA violated the Administrative Procedure Act (“APA”). See 5 U.S.C. §706. While EPA has now received notice and comment, and its guidance document is now a Final Guidance, EPA has not taken the required steps to make the Final Guidance a federal regulation, and this, too, violates the APA.”

On July 31, 2012, Judge Walton issued an Order granting Plaintiffs’ motion for partial summary judgment, denying EPA’s motion for partial summary judgment and ordering that EPA’s final guidance be set aside as unlawful agency action. The Court agreed with Plaintiffs that the EPA had “impermissibly interjected itself into the [Surface Mining Control and Reclamation Act] permitting process with the issuance of the Final Guidance” and that EPA had overstepped the authority granted under the CWA. It is unlikely, however, that this decision marks the end of EPA’s efforts to increase regulation of surface coal mining in Appalachia. No appeal has yet been filed, but the deadline for seeking appellate review has not yet expired.

D. EPA’s Expansion of Aquatic Resources of National Importance

One final example of EPA’s latest efforts to expand the scope of its authority under the CWA is EPA’s recent increased use of the “Aquatic Resource of National Importance” (ARNI) designation in order to delay or oppose projects. Recently, EPA has begun to invoke the ARNI designation with increasing frequency in comment letters on proposed section 404 permits as a means to delay or block permits for development projects.

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83 For example, in Florida, the EPA recently requested elevated review of a phosphate mining permit for a proposed project on the Peace River Watershed after labeling the wetlands and riverine resources within the project area an ARNI. See Letter from Thomas C. Welborn, Chief of Wetlands, Coastal and Oceans Branch, EPA to Colonel Alfred A. Pantano, Jr. District Engineer, Jacksonville Corps of Engineers (Jan. 15, 2010). The EPA designated the Peace River Watershed Region a priority watershed, and noted the region’s wetlands and tributaries provide freshwater input upstream to the Charlotte Harbor National Estuary (CHNE), an estuary of national significance. Based on these combined designations, as well as the fact that people rely on the watershed for drinking water, the EPA labeled the wetlands an ARNI and determined the proposed project would result in unacceptable impacts to the ARNI. As another example, EPA requested elevated review of a permit for a phosphate mining operation in North Carolina because the permit would result in unacceptable impacts to an ARNI. See Letter from Michael H. Shapiro, Acting Assistant Administrator, EPA to the Honorable John Paul Woodley, Jr., Assistant Secretary of the Army (Civil Works) (April 3, 2009). Other recent examples of EPA’s use of the ARNI designation can be found on EPA’s website at http://water.epa.gov/lawsregs/guidance/wetlands/404q.cfm.
On August 11, 1992, EPA and the Corps entered into a Memorandum of Agreement, which terminated a previous 1985 agreement. The purpose of the new Memorandum of Agreement was to “minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits.” The 1992 Memorandum of Agreement established new procedures for the elevation of section 404 permits to the Assistant Secretary of the Army for Civil Works for additional review in cases where there was a dispute between the Corps and EPA. Under these procedures, after the elevation and review process is complete, if the Corps decided to proceed with issuance of a permit over EPA’s objections, EPA could then initiate a CWA section 404(c) veto action. In order for a permit to be elevated pursuant to the 1992 Memorandum of Agreement, it must involve an ARNI. Specifically, the 1992 Memorandum of Agreement provides “The elevation of specific individual permit cases will be limited to those cases that involve aquatic resources of national importance.” The Agreement does not define the term ARNI and the only other document providing any guidance on the definition is EPA’s dispute resolution document, in which EPA lists several factors relevant to determining whether a particular resource qualifies as an ARNI. Specifically, EPA’s dispute resolution document provides that “[f]actors used in identifying ARNIs include: economic importance of the aquatic resource, rarity or uniqueness, and/or importance of the aquatic resource to the protection, maintenance, or enhancement of the quality of the Nation’s waters. Past 404(q) elevations have identified the Chesapeake Bay, vernal pools, bottomland hardwoods, sub-alpine fens, bogs, and coastal marshes as ARNIs.”

EPA’s increasing use of the ARNI designation is concerning because there is no notice and comment process or procedure to challenge such a designation. Additionally, EPA has attempted to apply the ARNI designation at various stages during the 404 permit application process, which can lead to significant delays.

III. CONCLUSION

The trends in EPA’s interpretation of its CWA Section 404 authority are disturbingly clear. The agency has been actively reaching out, trying to develop new tools for regulating the mining industry under Section 404. To this point, most of EPA’s efforts have been focused on surface coal mining in Appalachia. But the principles that EPA is attempting to establish have far broader application. As the ongoing efforts to fight EPA in court have demonstrated, the best response to attempts to increase EPA influence over Section 404 permitting is to be vigilant, monitoring EPA’s efforts to expand its power without the use of new rules, and when it becomes necessary, to take legal action.

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84 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992).
85 Id.
86 Id.
88 Id.