Has EPA's "War on Coal" Stalled?

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Over the last four years, the Obama Administration has taken active steps to reduce America's dependence on coal for electricity generation. The U.S. Environmental Protection Agency (EPA) has directly targeted electric generating facilities with regulations regarding mercury emissions, greenhouse gas standards, requirements for cooling water intake structures, and disposal requirements for coal combustion byproducts. These regulations alone have the potential to either drive up the price of coal-fired generation or force the closure of numerous coal-fired electric generating units across the country.

EPA's "war on coal," however, has been a multi-faceted endeavor that runs deeper than the direct regulation of coal-fired electric generating facilities. Since 2009, EPA has taken aggressive steps to regulate the coal mining process itself including restrictions (implemented largely through guidance) on Clean Water Act (CWA) permitting for surface coal mines, an attempt to revoke the 2008 Stream Buffer Zone rule issued by the Office of Surface Mining Reclamation and Enforcement (OSM) under the Bush Administration, and at least one overt attempt to veto a previously issued dredge and fill permit issued by the U.S. Army Corps of Engineers (Corps) to a coal mining operation. Moreover, EPA's efforts have been backstopped by the Corps' sweeping revisions to Nationwide Permit 21 (NWP 21) and OSM's proposal to develop a new stream protection rule.

Despite these steps, EPA has experienced pushback by the courts. In August 2009, the U.S. District Court for the District of Columbia (D.C. District Court) in *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3 (D.D.C. 2009), denied the Department of the Interior (DOI), OSM, and EPA's motion to vacate the 2008 Stream Buffer Zone rule. On March 23, 2012, the D.C. District Court in *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d (D.D.C. 2012), determined that EPA exceeded its authority under Section 404(c) of the CWA when it attempted to modify a Section 404 dredge and fill permit that had allowed the discharge of fill to several water bodies in Logan County, West Virginia. In October 2011, the D.C. District Court in *Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011), struck down EPA's Enhanced Coordination Process (EC Process) memoranda for the review of Section 404 permits. And in July 2012, the D.C. District Court in *Nat'l Mining Ass'n v. Jackson*, Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245 (D.D.C. July 31, 2012), invalidated EPA guidance for surface mining projects in Appalachia.

These four cases ultimately demonstrate the pitfalls EPA faces when it takes actions that exceed its authority under the CWA or the Administrative Procedure Act (APA) in order to achieve its policy goals. Moreover, these decisions suggest that EPA's aggressive war on coal mining has suffered setbacks and, at least for the time being, appears to have stalled.

Less than six months after President Obama took office, EPA set the tone for its war on coal by signing a Memorandum of Understanding (MOU) along with DOI and the Corps on June 11, 2009, apparently aimed at halting mountaintop mining operations. The MOU established an Interagency Action Plan that was specifically designed to reduce the effects of surface mining in the Appalachian region through various coordinated efforts of the signatories. The MOU set forth a series of short-term interim actions, designed to minimize environmental harm, that were to be completed before the end of 2009. For EPA and the Corps, several of the notable short-term actions included the modification of NWP 21, the development of guidance on reviewing surface mining projects in Appalachia under Section 404(b)(1) of the CWA, and increased oversight for the review of permits authorizing valley fills under Section 402 of the CWA. The MOU also set out short-term actions for DOI that included a contingent plan to issue guidance on the 1983 stream buffer zone provisions if the 2008 Stream Buffer Zone Rule was vacated, and the reevaluation of DOI's oversight role for state activities under the Surface Mining Reclamation Act (SMCRA). In addition, the MOU specified long-term regulatory actions for the management of surface mining in Appalachia. At a minimum, the agencies were to consider revisions to current SMCRA regulations, the prohibition on the use of NWP 21 in Appalachia, and revisions to the process by which surface mining is reviewed and regulated under the CWA.

With this framework on the table, EPA did not hesitate to act. In fact, simultaneously with the signing of the MOU, EPA issued its EC Process and the Multi-Criteria Resource (MCIR) Assessment. The EC Process established a review process for pending CWA Section 404 permits related to surface coal mining in Appalachia. The EC Process memorandum stated that it would apply only to permits "for which the Corps has issued a public notice or coordinated with EPA through the NWP coordination process by March 31, 2009," and, according to a list attached to the EC Process, there were 108 such permits. Specifically, the EC Process set forth a coordination scheme by which EPA could review the permits on the list and flag any such permits it might have concerns about for further review between the Corps and EPA. The MCIR Assessment, on the other hand, set forth the factors EPA would take into account when initially reviewing any of the 108 permits on the list attached to the EC Process. Subsections (a) through (d) of 40 C.F.R. § 230.10 provided the basis for those factors. With this agenda in place, EPA announced on September 11, 2009, that, due to likely water quality impacts, it had identified seventy-nine proposed permits for further review under the EC Process.

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In accordance with the MOU, EPA subsequently issued an interim guidance memorandum on April 1, 2010, entitled *Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order* (2010 Interim Guidance Memorandum). The 2010 Interim Guidance Memorandum included such topics as water quality based effluent limits in National Pollutant Discharge Elimination System permits issued under Section 402 of the CWA and coordinated reviews of Section 404 permits between the Corps and EPA. For example, strict conductivity recommendations for both Section 404 and 402 permits were set forth in the draft guidance. Moreover, the guidance included requirements for Section 404 permits on monitoring water quality and biological parameters, mitigation of mining and environmental impacts, and the protection of water quality and environmental integrity. While EPA stated that guidance was to be effective immediately, a public comment period on the guidance remained open until December 1, 2010. EPA issued a final version of the guidance document on July 21, 2011 (2011 Final Guidance Memorandum) that incorporated input from more than 60,000 comments on the 2010 Interim Guidance Memorandum.

Industry Challenges EPA's Actions

It was not long before EPA's actions were challenged. On July 20, 2010, the National Mining Association (NMA) filed suit against EPA and the Corps for declaratory and injunctive relief over the implementation of the EC Process, the MCIR Assessment, and the 2010 Interim Guidance Memorandum. *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 40 (D.D.C. 2011). The complaint was brought pursuant to Section 702 of the APA, Section 1251 of the CWA, and Section 1201 of SMCRA. The plaintiff alleged that both documents "unlawfully changed the established permitting process." *Id.* at 40. While the court ultimately denied the plaintiff's motion for injunctive relief, the court indicated that it was likely the plaintiff would succeed on the merits. *Id.* at 50–51.

The foreshadowing seen in the opinion denying the NMA's motion for preliminary injunction proved to be correct. The case brought by the NMA was consolidated with several other similar cases, and a bifurcated briefing schedule was entered that set separate deadlines for briefing on the EC Process and on the 2010 Interim Guidance Memorandum. In regard to the EC Process, on October 6, 2011, Judge Reggie Walton granted the plaintiffs' motion for summary judgment, finding that (1) EPA exceeded its statutory authority under the CWA, and (2) the MCIR Assessment and the EC Process were "legislative rules." *Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37, 49 (D.D.C. 2011).

The first issue before the court was whether the MCIR Assessment and the EC Process violated the CWA by amounting to actions that exceeded EPA's statutory authority. The plaintiffs argued that the CWA limits EPA's role in the Section 404 permitting process, while the defendants argued that the EC Process and the MCIR Assessment both are within EPA's discretion under the CWA and within EPA's "broad discretion to establish the procedures necessary to carry out their statutory function." *Id.* at 43. Using the two-step *Chevron* framework, the court looked to the language of Section 404 of the CWA, which "explicitly establishes the Secretary of the Army, acting through the Corps, as the permitting authority." *Id.* at 44. And while the court found that other subsections of Section 404 "delineate discrete roles" for the EPA Administrator, it concluded that "the carving out of limited circumstances for EPA involvement in the issuance of Section 404 permits appears to be a statutory ceiling on that involvement." *Id.* Ultimately, the court concluded that EPA exceeded its authority under the CWA because the "adoption of the MCIR Assessment and the EC Process" expanded EPA's role in the issuance of Section 404 permits. *Id.* at 45.

The second issue before the court was whether the APA was violated due to EPA's utilization of the MCIR Assessment and the EC Process without conducting notice and comment procedures. The plaintiffs argued that MCIR Assessment "effectively amended the established permitting regime" under Section 404 of the CWA and that the EC Process "imposes unequivocal requirements and reflects an obvious change in the permitting process." *Id.* at 45. The federal defendants argued that the MCIR Assessment and the EC Process instead were procedural rules that did not "alter any rights and obligations," and fell within the discretion afforded agencies when adopting "procedures and methods of inquiry necessary to carry out their statutory obligations." *Id.* at 46.

The court concluded that EPA exceeded its authority under the CWA because the "adoption of the MCIR Assessment and the EC Process" expanded EPA's role in the issuance of Section 404 permits.

Ultimately, the court disagreed with the defendants and found that MCIR Assessment and the EC Process were legislative rules. First, the court reasoned that without the MCIR Assessment and EC Process "'there would not be an adequate legislative basis for' the EPA to conduct the MCIR Assessment or subject the pending permit applications to the additional scrutiny of the EC Process." *Id.* at 49 (quoting *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). Second, the court found that the MCIR Assessment and EC Process "effectively amend" the Section 404 permitting process by conferring on EPA additional reviewing authority that is reserved for the Corps under the CWA. *Id.*

Soon thereafter, the D.C. District Court turned its attention to the 2011 Final Guidance Memorandum, which was issued on July 21, 2011, replacing the 2010 Interim Guidance Memorandum. The issue was whether EPA exceeded its statutory authority under the CWA and SMCRA with the issuance of the 2011 Final Guidance Memorandum. *Nat'l Mining Ass'n v. Jackson*, Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245, at *11 (D.D.C. July 31, 2012). The plaintiffs

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argued that the final guidance unlawfully established (1) a process by which EPA would "work with" SMCRA permitting authorities, (2) "region wide water quality criterion for conductivity," and (3) a requirement that "draft permits contain pre-issuance reasonable potential analysis." *Id.* at *12–13. The court agreed with the plaintiffs, finding that EPA exceeded its statutory authority with the issuance of the 2011 Final Guidance Memorandum. *Id.* at 14. With regard to SMCRA, the court reasoned that EPA could not "justify its incursion into the SMCRA permitting scheme" by relying on permitting authority that it does not have under the CWA. *Id.* at *13. As to the CWA issues, the court reasoned that the "Final Guidance impermissibly sets a conductivity criterion for water quality" in violation of Section 303 of the CWA, and there is no support in the CWA or 40 C.F.R. § 122.44(d)(1) for the requirement in the 2011 Final Guidance Memorandum that "permitting authorities should not defer reasonable potential analyses until after permit issuance." *Id.* at *14.

The D.C. District Court's opinions, however, will face challenges in the Court of Appeals for the District of Columbia Circuit. EPA filed a notice of appeal on September 27, 2012, indicating its intent to challenge the D.C. District Court's opinions from October 2011 and July 2012. The environmental groups that intervened in the case filed a notice of appeal on September 28, 2012.

EPA Attempts to Vacate the 2008 Stream Buffer Zone Rule

Just prior to EPA's issuance of the MOU and the EC Process in June 2009, EPA, OSM and DOI attempted to vacate the Stream Buffer Zone Rule that was issued on December 12, 2008, by OSM under the Bush Administration. *See* 73 Fed. Reg. 75,814 (Dec. 12, 2008). In January 2009, the National Parks Conservation Association brought suit against EPA, OSM, and DOI over the issuance of the 2008 Stream Buffer Zone Rule and over "EPA's written determination concurring in the promulgation" of the rule. *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 3 (D.D.C. 2009). However, only three months after the Obama Administration came into office, Secretary Salazar determined that the OSM had erred in failing to properly consult with the U.S. Fish and Wildlife Service regarding potential effects of the Stream Buffer Zone Rule on threatened and endangered species. Based on this finding, EPA, OSM, and DOI moved in April 2009 to remand and vacate the Steam Buffer Zone Rule and dismiss the suit. *Id.* at 4.

The D.C. District Court rejected the agencies' attempt to vacate the Bush-era Stream Buffer Zone Rule. The federal defendants argued that the court should use its "equitable authority to remand, as well as vacate, the [Stream Buffer Zone] Rule because Secretary Salazar has confessed serious legal deficiencies in the rulemaking and vacatur will not result in disruptive consequences." *Id.* On the other hand, the NMA, which intervened in the case, argued that the federal defendants unlawfully bypassed the APA's procedures for repealing an agency rule. The court agreed with the NMA. Moreover, the court found that "granting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits." *Id.* at 5 (citing *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001). Thus, while the 2008 Stream Buffer Zone Rule remains in effect, OSM has taken action to revise the rule.

Three months after the Obama Administration came into office, Secretary Salazar determined that the OSM had erred in failing to properly consult with the U.S. Fish and Wildlife Service regarding potential effects of the Stream Buffer Zone Rule on threatened and endangered species.

As called for by the MOU, DOI was to issue guidance on the 1983 stream buffer zone provisions if the 2008 Stream Buffer Zone Rule was vacated. This plan changed, however, when the D.C. District Court denied the motion to vacate the 2008 Stream Buffer Zone Rule. Following the court's denial, a settlement was entered in March 2010 that required OSM to issue a final rule by June 29, 2012. On November 30, 2009, OSM issued an advanced notice of proposed rulemaking in an effort to gather "public input into how the 2008 rule should be revised to better protect streams and implement the MOU." 74 Fed. Reg. 62,664, 62,665 (Nov. 30, 2009) (providing ten possible revisions to the Stream Buffer Zone Rule). In April 2010, OSM issued a Federal Register notice seeking comments in regard to the scope of an environmental impact statement (EIS) to be prepared in conjunction with the revisions to the Stream Buffer Zone Rule. 75 Fed. Reg. 22,723 (April 30, 2010). A supplemental notice related to the EIS scoping process was issued in June 2010. 75 Fed. Reg. 34,666, 34,667 (June 18, 2010). To date, OSM has taken no further action on its new stream protection rule.

Court Denies EPA's Attempt to Revoke a Previously Issued 404 Permit

In January 2007, the Corps issued a permit to Mingo Logan Coal Company Inc. (Mingo Logan), pursuant to Section 404 of the CWA, authorizing Mingo Logan "to discharge fill material from its Spruce No. 1 coal mine into nearby streams, including the Pigeonroost and Oldhouse Branches and their tributaries." *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 133–34 (D.D.C. 2012). The Section 404 permit also required Mingo Logan to conduct various post-project stream restoration and compensatory mitigation efforts. Notably, the Section 404 permit was silent on EPA's ability to modify or revoke the permit or to withdraw the specification of a discharge site; the permit, however, did expressly state: "This

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office [of the Corps] may reevaluate its decision on this permit at any time the circumstances warrant." *Id.* at 137.

On September 3, 2009, EPA sent a letter to the local Corps office, "requesting that it use its discretionary authority provided by 33 CFR 325.7 to suspend, revoke, or modify" the Section 404 permit issued to Mingo Logan. *Id.* (internal quotation marks omitted). EPA based its request on "new information and circumstances that had arisen since the issuance of the permit." *Id.* The Corps rejected EPA's request.

On March 26, 2010, EPA published a notice that proposed to "withdraw or restrict the specification of Seng Camp Creek, Oldhouse Branch, Pigeonroost Branch, and certain of their tributaries, as disposal sites for fill material." *Id.* In September 2010, EPA published its "Recommended Determination" to withdraw the specification of Pigeonroost Branch, Oldhouse Branch and their tributaries as disposal sites, and issued a Final Determination on January 13, 2011. These branches accounted for about 88 percent of the total discharge area that was authorized by the Section 404 permit issued in 2007.

On February 28, 2011, Mingo Logan filed an amended complaint that challenged EPA's Final Determination. The question before the court was whether EPA exceeded its authority under Section 404(c) of the CWA when it withdrew the specification of disposal sites after the Corps had already issued a permit authorizing the discharge of spoil at those sites. Ultimately, the court held that EPA exceeded its authority.

In reaching this decision, the court evaluated EPA's interpretation of Section 404(c) using the two-step analysis set forth in *Chevron*. Here, EPA took the position 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." *Id.* at 139. Under the first step of *Chevron*, the court found that "EPA's position is inconsistent with the statute as a whole, and that its action could be deemed to be unlawful at the first step of the *Chevron* analysis." *Id.* at 148. However, the court acknowledged "that there is some language in section 404(c) itself that could be considered to be sufficiently ambiguous to require the Court to go on to the second step" of *Chevron*. *Id.* In analyzing Section 404(c), the court found that it "vests the full authority to issue permits for discharges into navigable waters with the Corps." *Id.* at 139. In addition, Section 404 as a whole "does not confer authority on EPA to invalidate an existing permit," *id.* at 142, and "nothing in the legislative history of the amendments [to the CWA] . . . show[s] an intent by Congress to confer permit revocation authority on the Administrator of EPA." *Id.* at 147.

Under the second step of *Chevron*, the court determined that it could not find EPA's interpretation of Section 404(c) to be reasonable. While EPA was afforded some level of deference in its interpretation, the court found that EPA's interpretation of Section 404(c)—that it allows "post permit revocation without limitation"—is "illogical and impractical." *Id.* at 151–52. Thus, finding EPA's interpretation of Section 404(c) to be unreasonable, the court vacated the Final Determination. *Id.* at 153.

EPA has challenged the D.C. District Court's opinion, however. A notice of appeal was filed on May 11, 2012, and the D.C. Circuit entered a scheduling order for initial submissions on May 15, 2012. Briefing is underway and it is likely that a decision will be rendered by the D.C. Circuit sometime in 2013.

Corps Issues Strict General Permit

In addition to EPA's efforts to curtail coal mining operations, the Corps has drastically revised Nationwide Permit 21 (NWP 21), which is a general permit that authorizes certain dredge and fill activities associated with coal mining. In February 2011, the Corps issued a notice that solicited comments on the possible reissuance of NWP 21 and provided three options for review and comment: (1) The Corps would not reissue NWP 21; (2) reissuance of NWP 21 but with restrictions that includes a half-acre limit for losses of non-tidal water, a limit of 300 linear feet for stream bed losses, and a prohibition on valley fills; or (3) reissuance with the same modifications as Option 2 but no prohibition on valley fills. *See* 76 Fed. Reg. 9174 (Feb. 16, 2011).

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A year later, the Corps issued a final notice in which it selected Option 2 for the reissuance of NWP 21. *See* 77 Fed. Reg. 10,184 (Feb. 21, 2012). However, the Corps provided additional modifications that would allow, in certain circumstances, the reauthorization of activities that were previously authorized under the 2007 NWP 21. In addition to the numerical limits on stream impacts, district engineers "may require compensatory mitigation to offset the losses of waters of the United States and ensure the adverse effects on the aquatic environment are minimal, individually and cumulatively." *Id.* Not surprisingly, the Corps anticipates that these new limits will result in the need for more new projects to obtain individual permits.

Outlook and Status of EPA's "War on Coal"

It appears EPA's war on coal mining has stalled to some extent. The EC Process, the MCIR Assessment, and the 2011 Final Guidance Memorandum were struck down by the D.C. District Court. Moreover, the attempt by EPA, OSM, and DOI to vacate the 2008 Stream Buffer Zone Rule was held to be unlawful, as was EPA's attempt to veto a previously issued Section 404 permit. OSM has also been unable to finalize a new stream protection rule in compliance with the March 2010 settlement.

Despite these general setbacks in regulating coal production, EPA's war on coal may prove to be more successful with the direct regulation of electric generating units. While the Cross State Air Pollution Rule has been struck down,

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the implications of the Mercury and Air Toxics Standards (MATS) and EPA's Greenhouse Gas standards for new sources may prove to be the most significant. Although it is currently being challenged in court, the implementation of the MATS rule alone could force the closure of many coal-fired electric generating facilities, which in turn would reduce the demand for coal and ultimately curtail coal mining operations. Thus, even though EPA's direct war on coal mining has stalled, the strict regulation of emissions sources may achieve the same intended result.

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