DYNAMITE, DISASTER AND DISAPPEARING OPTIONS: HOW THE EPA IS LOSING THE BATTLE AGAINST DESTRUCTIVE MOUNTAINTOP REMOVAL COAL MINING PRACTICES

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INRODUCTION

In a 2007 campaign speech, Barack Obama told a group of environmentalists that the United States must “find more environmentally sound ways of mining coal, than simply blowing the tops off mountains.”1 Later that year, in front of a crowd of Kentuckians, the presidential hopeful denounced surface mining, particularly the practice of mountaintop removal mining, as “an environmental disaster” in which the nation’s insatiable hunger for fossil fuels was gradually laying ruin to the Appalachian Mountains.2 Soon after taking office, President Obama sought to roll back last-minute changes former President George W. Bush had made to stream buffer requirements included in mining permits, which had essentially excused coal companies from maintaining one hundred-foot buffers to protect nearby waterways from environmental harm if doing so was determined to be too difficult.3 Thus began an effort by the Obama

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3 Siobhan Huges, Obama Seeks to Reverse Mountaintop-Mining Rule, WALL ST. J. (Apr. 29, 2009), http://online.wsj.com/article/SB124086632887760691.html. While the stream buffer rule is outside the scope of the present discussion, a brief summary follows here. Interior Secretary Salazar sought to voluntarily vacate the Bush rule after being sued by environmental groups contending that it did not adequately address potential impacts to endangered species, but the D.C. District Court in Nat’l Parks Conservation Ass’n v. Salazar, 660 F. Supp. 2d 3, 3, 5 (D.D.C. 2009), denied that motion, holding that voluntarily vacating the rule would violate the Administrative Procedures Act. The Department of the Interior’s Office of Surface Mining has since engaged in rulemaking to change the rule and, as of April 2010, was taking comments on an Environmental Impact Statement related to the new rule. See Building a Stream Protection Rule, OFF. OF SURFACE MINING RECLAMATION AND ENFORCEMENT, http://www.osmre.gov/topic/StreamProtection/StreamProtectionOverview.shtml (last updated July 13, 2010). One of the pledges the Interior Department had made in the EPA/Army Corps of Engineers/Interior Department Interdepartmental Memorandum of Understanding was that it would promulgate new stream buffer zone rules. Since the MOU was essentially invalidated by National Mining Association, it is unclear where that decision leaves the stream buffer zone issue. At present, the Office of Surface Mining has not yet released a final rule, but the rulemaking process has been extremely contentious. See Manuel Quinones, Coal Industry, States Blast Obama Administration’s Stream Proposal, N.Y. TIMES (Sept. 27, 2011), http://www.ny
Administration to make more stringent regulation of mountaintop mining a “high priority” issue for agencies like the United States Environmental Protection Agency (EPA). The EPA has since pledged to devote substantial attention to this important issue, particularly as emerging science has more deeply probed—and more comprehensively accounted for—the real environmental impacts of large-scale mountaintop mining operations on water quality, headwater streams, aquatic habitats, and human health and welfare.

Yet the EPA’s efforts to regulate potentially harmful surface mining projects more strictly have been stymied by political opposition, inter-agency cooperation problems, and unfavorable judicial decisions. In an October 2011 decision, the United States District Court for the District of Columbia held that the EPA had overstepped its Clean Water Act (CWA) authority by intruding on the United States Army Corps of Engineers’ (Corps) CWA § 404 permitting processes in mountaintop removal mining cases. Industry proponents, including the Governor of West Virginia, hailed the decision as the first step to “rein in” the EPA’s so-called assault on coal mining, particularly on the mountaintop removal process. While, the decision may actually
do little to limit the EPA’s power to block harmful mountaintop removal mining proposals under the CWA, or to hamper the agency’s efforts to integrate environmental justice and ecological considerations into the mining permit approval process, it will severely restrict the agency’s options for regulating the practice almost exclusively to the “veto power” provided by the CWA’s § 404 (c).

Further, the EPA’s CWA § 404 (c) veto authority may be in jeopardy after the same court in March 2012 overturned the EPA’s veto of a permit issued by the Corps to the Mingo Logan Coal Company for Spruce Mine No. 1. The Corps processes an estimated 80,000 CWA § 404 permit actions annually, but the EPA has only exercised its veto power under CWA § 404(c) thirteen times since being given the power in the 1972 amendments to the Clean Water Act. Of those thirteen instances, only one has involved a surface mining case: the January 2011 veto of the Spruce No. 1 Surface Mine, at issue in Mingo Logan Coal Company Inc v. U.S. EPA. The Mingo Logan decision overturned the veto, after the judge ruled that the EPA had overstepped its CWA statutory authority in revoking the permit. In Mingo Logan, the United States District Court for the District of Columbia went much further to limit the EPA’s power under CWA § 404(c), stating in effect that the EPA had no authority whatsoever over a CWA § 404 dredge and fill permit itself, only a limited power to veto a CWA § 404 permit-holder’s selection of specific sites on which to deposit fill material. This power was also held to be limited to the period prior to a Corps’ decision to issue the permit; any EPA determination that a deposit site was unsuitable is only effective prior to issuance of

which remains intent on rewarding a core constituency that doesn’t want any coal mining, no matter the cost to West Virginia or our nation.

Id. 12 Ward, supra note 11.
13 33 U.S.C. § 1344(c).
16 Id.; see also Mingo Logan, 850 F. Supp. 2d 133.
17 Mingo Logan, 850 F. Supp. 2d 133, 137.
18 Id.
19 Id. at 139.
the permit,20 eliminating any continuing EPA authority over a CWA § 404 permit—which can remain valid for decades—once it is approved by the Corps.21 While it is possible the Mingo Logan decision will be overturned on appeal, the decision, if it were to stand, will severely limit EPA’s authority and input on CWA § 404 permits, as well as the EPA’s ability to meet its Clean Water Act obligations in mountaintop mining cases.

As scientific understanding of the impacts of mountaintop removal coal mining has improved, EPA has shown a much greater willingness to view mountaintop mining projects as posing the same untenable threats to water, compelling them to act in order to fulfill their CWA obligations.22 The EPA’s veto of the Spruce No. 1 Surface Mine was seen as a decisive step in the right direction by environmental groups,23 and a flagrant overreaching by industry and its supporters.24 Infuriated, coal-state politicians blasted the decision as an attack on the coal industry which would have a chilling effect on United States economic growth and job creation.25 The Spruce Mine veto provided fodder months later when House Republicans introduced and fast-tracked a bill publicly dubbed the “Rein in

20 Id. at 139–40.
21 Id. at 134.
22 See infra Parts I, III.
the EPA Act,” which would have stripped the EPA of much of its authority under the Clean Water Act and given that authority to the states.  

Recent Republican candidates for president made it clear that eliminating the EPA altogether, defunding the EPA, or at least restricting the EPA’s authority was a priority in their 2012 platforms, based on the perception that environmental regulation in general, and the EPA’s history of environmental regulation of areas such as coal mining specifically, is bad for business. Increasingly intense political pressure from these groups may partially account for the growing difficulty the EPA has experienced in attempting to regulate mountaintop mining projects.  

Part I of this paper details the process of mountaintop removal mining and the emerging scientific information and community experience which demonstrate the real-life impacts of surface mining practices: the basis for EPA’s increasing interest in more stringent controls on mountaintop mining practices. Part II of this paper sets out the historical and modern regulatory schemes for surface mining projects, including a discussion of CWA jurisprudence over the question of “fill” versus “waste” materials, as well as a discussion of the permits required for mountaintop removal mining operations. Part III details EPA’s recent attempts to work within the existing regulatory scheme to adopt cooperative, interagency coordination processes with the Corps and the Department of the Interior to better integrate environmental considerations into each agency’s handling of mountaintop removal proposals. Part IV of this paper describes the recent invalidation of these interagency coordination measures as ultra vires action on the part of the EPA. Part V includes a discussion of EPA’s only remaining statutory recourse for regulating mountaintop removal mining: the CWA § 404(c) veto power, as well as the March 2012 Mingo Logan decision, overturning an EPA exercise of this veto power. Finally, the conclusion returns to the impasse faced by EPA in attempting to meet its environmental protection mandates within an extremely
restrictive regulatory scheme and proposes potential options for resolving this impasse.

I. MOUNTAINTOP REMOVAL MINING: PRACTICES, PROBLEMS, AND THE NEED FOR EPA REGULATION

The EPA defines mountaintop removal mining by explaining how the practice harms the environment. The process involves “a form of surface coal mining in which explosives are used to access coal seams, generating large volumes of waste that bury adjacent streams.”29 The agency further notes that while mountaintop mining’s “scale and efficiency [have] enabled the mining of once-inaccessible coal seams, this mining practice often stresses the natural environment and impacts the health and welfare of surrounding human communities.”30 In removing essentially the entire top portion of a mountain to access seams of coal inside, this mining process generates a substantial amount of unwanted rock, or “spoil.”31 That spoil is piled in nearby valleys and collected near the mining site in what is called a “valley fill.”32 The process of blowing apart the mountain creates expansion, yielding a greater volume of spoil than the volume of solid rock that had existed in the pre-mining state.33 Federal law requires that mountaintop-mining operations attempt to restore the general contour of the mountain after the coal extraction is complete.34 However, much of the fill cannot simply be piled atop the former mountain, because of structural stability concerns.35 Thus, once the coal has been removed, much of the fill is graded

34 Id.
35 See Ohio Valley Envtl. Coal, 556 F.3d at 186.
over the area where the mountain once stood, and new vegetation is planted there, but a large portion of the spoil remains in valley fill areas where it was placed during mining. Many mountain sites begin as forest habitat, but, because of the nature of the fill material, revegetation primarily yields grassland habitat, which is generally not predicted to return to a forest-like habitat for at least thirty years after mining operations cease.

As spoil is piled in valley fills, the material accumulates and eventually chokes off mountain streams, including headwaters, which provide crucial habitats to many aquatic species and often serve as the source of clean drinking water for downstream communities. The EPA estimates that more than 724 miles of Appalachian streams were destroyed by surface mining activities between 1985 and 2001, while another 1,200 miles of headwater streams were affected. In particular, scientists have found significant impacts to the health of aquatic ecosystems and creatures, including macroinvertebrates—particularly types of mayflies and stoneflies and salamanders, resulting from mountaintop mining activities. Impacts on these types of creatures have rippling effects on other types of mammal, fish, and bird species that rely on them as a source of food. The burial of headwaters and smaller streams through the valley fill and

36 Mountaintop Mining/Valley Fill Process, supra note 31.
37 Id.
43 PALMER & BERNHARDT, supra note 38, at 2.
spoil disposal processes represents just one of the numerous environmental concerns related to the mountaintop removal process. There are also concerns regarding the spoliation of habitat types on the mountains themselves and in the valleys used as fills, as well as the introduction of heavy metals, contaminants, and increased minerals into waterways nearby.\textsuperscript{44} A study of mountaintop mining impacts on bird populations concluded that “populations of forest birds may be adversely affected by the loss and fragmentation of mature forest habitat.”\textsuperscript{45}

In addition to the impact on aquatic systems and wildlife, human communities living near mountaintop mining sites have also lodged a number of social, recreational, economic, and heritage complaints related to this type of mining practice.\textsuperscript{46} Nearby communities must contend with the blasting noise, as well as the sounds, sights, and smells of heavy machinery working at the site, and the dust, landslides, and flooding problems created by drastically changing the topography of surrounding landscapes.\textsuperscript{47} At least one study posits a correlation between mountaintop removal mining practices and higher rates of birth defects; even after socioeconomic factors—which the study’s authors note still play an admittedly large part—are taken out of the picture, Appalachian regions where mountaintop removal mining is prevalent show an increased incidence of birth defects.\textsuperscript{48}

While mountaintop removal mining has been going on in Appalachia since the 1960s, it has become significantly more prevalent over the past twenty years, particularly as increasingly strict air emissions regulations in the 1990s increased the demand for the type of low-sulfur coal typically found in

\textsuperscript{44} \textit{Mid-Atlantic Mountaintop Mining}, EPA, \url{http://www.epa.gov/region3/mtn_top/index.htm} (last updated Sept. 1, 2011).

\textsuperscript{45} \textsc{Petra Bohall Wood et al.}, \textsc{Mountaintop Removal Mining/Valley Fill Environmental Impact Statement Technical Study}, app. E, Terrestrial Study Category (2001), \url{http://www.epa.gov/region3/mtn/bottom/pdf/appendices/e/vertebrate/vertebrate.pdf}.

\textsuperscript{46} \textit{Mid-Atlantic Mountaintop Mining}, supra note 44.

\textsuperscript{47} \textit{What is Mountain Top Removal Mining?}, \textsc{Mountain Justice}, \url{http://mountainjustice.org/facts/steps.php} (last visited Oct. 21, 2012).

Appalachia.\textsuperscript{49} The practice also grew exponentially under President George W. Bush, due in large part to the Administration’s redefinition of “fill material” which exempted “mine overburden” from regulation under the CWA § 402, ensuring that the material was regulated exclusively under CWA § 404.\textsuperscript{50} So long as coal remains one of the cheapest forms of energy production, and more stringent air or greenhouse gas emissions caps are not placed on coal-burning power plants and factories, the demand for domestic coal will likely remain high, and the movement to extract that coal through mountaintop mining—which industry argues is the cheapest mining method available—will remain strong.

For EPA Administrator Lisa Jackson, the agency’s recent involvement in mountaintop removal cases is not a sign that EPA is looking to get into the mining business.\textsuperscript{51} Rather, the EPA’s increased involvement with mountaintop mining has come as a result of the agency’s increased concern about the impact of the practice on water quality.\textsuperscript{52} Of particular concern to the agency is the valley fill process.\textsuperscript{53} The process of burying nearby streams not only impacts those stream habitats, but downstream water quality as well, implicating both environmental and human health concerns.\textsuperscript{54} “We fight for clean water under the Clean Water Act,” Jackson told reporters at a press club luncheon in March 2010.\textsuperscript{55} “[O]ur role is limited to ensuring that [mountaintop mining] projects, if they are approved, do not have a detrimental impact on clean water.”\textsuperscript{56}

The CWA places significant responsibility on the EPA to protect the integrity of the nation’s waters, including non-navigable tributaries and wetland resources.\textsuperscript{57} In the

\textsuperscript{50} See discussion infra Part II.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
mountaintop-mining context, the EPA’s responsibilities include “preserving the long-term chemical, physical, and biological integrity of Appalachian watersheds, and maintaining safe, clean, and abundant water for Appalachian communities.”

Where evidence exists that a CWA § 404 permit will “have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas,” the CWA § 404 (c) gives the EPA the authority to veto that permit. It is worth noting that the EPA, if it fails to meet its CWA obligations, can be (and often is) sued by citizen groups seeking more stringent enforcement of the law.

The EPA is also bound by Executive Order (“E.O.”) 12898, originally made by former President Bill Clinton in 1994 and “reinvigorat[ed]” by President Obama in 2011. Not only does E.O. 12898 require that federal agencies consider the impacts of their decisions on poor and minority communities, particularly where such decisions would contribute to cumulative environmental insults in certain areas, the order also compels agencies to increase opportunities for public participation in federal decision-making, giving potentially impacted people better access to the lawmaking process before major decisions are made. This gives the EPA an additional responsibility “to identify and address the disproportionately high and adverse human health or environmental effects of [agency] actions on minority and low-income populations,” as well as to “provide...

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58 Id.
59 33 U.S.C. § 1344(c); see also discussion infra Part V.
60 Such groups may challenge the EPA via a “citizen suit” under the CWA, or by bringing a challenge to the issuance of a specific permit or agency approval. The Clean Water Act § 505 provision allowing for citizen suits can be found at 33 U.S.C. § 1365. Sec. e.g., Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Engrs, No. 3:11–0149, 2012 WL 3245426 (S.D. W. Va. Aug. 10, 2012) (challenging the Army Corps’ issuance of CWA § 404 permits to the Highland Mining Company for surface mines in Logan County, West Virginia).
minority and low-income communities access to public information and public participation.”

Since the publication of E.O. 12898, the EPA has established an Office of Environmental Justice to oversee the agency’s implementation of the order and to provide internal guidance and public information on environmental justice issues. Each of the EPA’s regional offices, as well as its headquarters, has an appointed environmental justice coordinator to help achieve the agency’s compliance with E.O. 12898.

In the context of mountaintop removal mining, the EPA has repeatedly noted that low-income and minority communities in Appalachia must have adequate opportunity to participate in the permitting process under E.O. 12898. When mining projects are proposed, the EPA has directed its regional offices to engage in a codified “public interest review” process, and to analyze and provide comment to the Corps on such issues as “the potential for disproportionately high and adverse human health or environmental effects on low-income and minority populations, including impacts to water supplies and fisheries, from issuance of a permit for surface coal mining activities in waters of the U.S.”

II. HISTORIC AND MODERN REGULATORY SCHEME: SURFACE MINING AND CLEAN WATER

While introducing the Clean Water Act legislation in 1972, Senator Edmund Muskie stated that he and the Committee charged with developing the law “expect[ed] the [EPA] Administrator and the Secretary [of the Army Corps] to move expeditiously to end the process of dumping dredged spoil in water-to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States[.]” Yet the bill, once passed by both houses, contained

65 Id.
68 See, e.g., Stoner & Giles Memo, supra note 57.
70 Stoner & Giles Memo, supra note 57, at 39.
substantially different views of the roles the EPA and Corps would play with regard to dredging issues. While the Senate bill “treated the disposal of dredged spoil like any other pollutant,” the House bill “established a different set of criteria to determine the environmental effects of dredged spoil disposal,” and empowered the Corps, rather than the EPA, to oversee all dredging permits under CWA § 404. When the final version of the bill was codified, the House version was adopted, and the Corps authority over CWA § 404 permits was memorialized.

Since the passage of the CWA, one of the major difficulties posed by surface mining projects is that it is sometimes unclear under what body of law the mining activities must fall, since there are diverse types of activities in play—building roads, constructing sediment ponds, blasting, actual mining, excavation, and creation of valley fills. Specifically, there is the question of whether the dumping of unwanted, mined material involves discharge of fill material governed by the CWA § 404 permitting process, which is overseen by the Army Corps of Engineers, or the discharge of a pollutant requiring a National Pollutant Discharge Program (NPDES) permit under CWA § 402, which would fall under the jurisdiction of the EPA. This distinction is problematic because the rules for the discharge of fill material are

Committee, S. 2770, 93d Cong., 1st Sess., (1972)) (emphasis added).

72 Mingo Logan, 850 F. Supp. 2d at 145–46.
73 Id. at 146.
74 Id. (citing Nat’l Mining Ass’n v. Jackson, 816 F. Supp. 2d 37, 44 (D.D.C. 2011)).
75 Generally, surface mines are also required to obtain permits under the Surface Mining Control and Reclamation Act (SMCRA), over which the Department of Interior retains administrative and enforcement authority. 30 U.S.C. §§ 1201–1328 (2006). See brief discussion infra Part II. SMCRA contains some environmental provisions, see 30 U.S.C. §§ 1202, 1256, 1266, which are generally enforced under the Department of Interior’s supervision, with some consultation and limited involvement from the EPA. Some states have been delegated the authority to oversee SMCRA permitting, including the associated environmental review, which has caused some problems with the EPA, especially in coal-friendly states. For example, the National Mining case involved some SMCRA issues which fall outside the scope of the present discussion. See Nat’l Mining III, infra note 142.
76 Kory R. Watson, Comment, Fill Material Pollution Under the Clean Water Act: A Need for Legislative Change, 35 S. I.l.l. U. L. J. 335, 336 (2011) (noting that “a legal grey area exists regarding materials that could be considered both pollution and fill,” making the question of whether mine waste slurry—a combination of primarily “solid rock with small percentages of mercury and phosphorus” which may be harmful to the environment—is a fill material or a pollutant).
far less environmentally rigorous than the rules governing the discharge of pollutants under the Clean Water Act.\textsuperscript{77} Thus, a discharge that would be strictly regulated by the EPA under the NPDES scheme is not similarly regulated by the Corps if that discharge is made under a CWA § 404 permit.\textsuperscript{78} This problem could be why Congress saw fit to include the § 404 (c) veto power in the statute, although, as discussed \textit{infra}, the EPA has not, until recently, relied heavily on use of the environmental veto to prevent CWA § 404 permits from being issued.

In the original version of the Clean Water Act, as well as in subsequent amendments made to the Act in 1977, the scope of the CWA § 404 permitting program was quite narrow.\textsuperscript{79} This section was intended as an exception to the new National Pollutant Discharge Elimination System (NPDES) codified in CWA § 402, in deference to powers to regulate shipping channels already held by the Corps under the Rivers and Harbors Appropriation Act.\textsuperscript{80} The CWA § 404 was meant to exempt from the rigorous CWA § 402 regulations any "discharges of dredge or fill material that ‘will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.’"\textsuperscript{81} Largely because of this environmentally focused definition of activities requiring a CWA § 404 permit, the Corps, for twenty-five years, reportedly deferred to the EPA first to determine whether a CWA § 402 permit was required before agreeing to issue a CWA § 404 permit.\textsuperscript{82} In order to ensure that CWA § 404 permits were not issued for activities more fairly considered disposal of waste materials that should be covered by CWA § 402, "the Corps concluded that the initial determination of whether a permit should be granted for these

\textsuperscript{77} Many environmental groups have charged that the Army Corps and other state permitting agencies are more concerned with protecting the interests of coal companies and bending the rules to protect miners from having to comply with environmental regulations. See, \textit{e.g.}, Joe Lovett, Exec. Dir., Appalachian Ctr. for the Econ. & Env’t., \textit{Statement to the House Committee on Government and Regulatory Reform, Subcommittee on Regulatory Affairs}, \textit{(July 14, 2011)}, \textit{available at} http://democrats.oversight.house.gov/images/stories/SUBCOS/714%20coal/Lovett%20Testimony.pdf; see also Judge, \textit{supra} note 2.

\textsuperscript{78} Watson, \textit{supra} note 76, at 343–44 (citing Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 277–93 (2009)).

\textsuperscript{79} Nathaniel Browand, \textit{Note, Shifting the Boundary Between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material}, 31 B.C. EnvTL. AFF. L. REV. 617, 619–23 (2004).

\textsuperscript{80} \textit{Id.} at 619–20.

\textsuperscript{81} \textit{Id.} at 622 (quoting 33 U.S.C. § 1344(e) (2000)).

\textsuperscript{82} \textit{Id.} at 625–26.
types of discharges should be made by EPA under Section 402,” and that “action on a Section 404 application in this area would not be taken until EPA reached a Section 402 permit decision.”83 This system remained more or less the same until 2002.84

Under the Clean Water Act’s original definitions, discharges which were meant “primarily to dispose of waste” fell under CWA § 402 regulation by the EPA, even if a CWA § 404 permit was also required.85 However, in a 2002 effort to relax burdens on coal mining operations,86 the Bush Administration promulgated new definitions of “fill material” to explicitly include “min[ing] overburden,”87 meaning that an applicant seeking to dispose solely of mining overburden was simply required to obtain only a CWA § 404 permit, not a CWA § 402 permit, since that activity was newly exempted from the NPDES requirements.88 Commentators have argued that this new fill definition has had the practical effect of eliminating EPA’s authority to regulate valley fills and “preclud[ing] EPA from adopting effluent limitations for pollutants [generated by] activities that satisfy [this] definition of fill material.”89 Further, “the new definition enables the Corps to permit activities under section 404 that may have been within the purview of the NPDES program.”90 Environmental groups have unsuccessfully challenged these changes, and they remain in place today.91 One of the principal complaints is that this new definition draws an arbitrary and politically motivated line between “discharge of a pollutant” under NPDES and “fill material” under CWA § 404 in order to exempt a particular type of activity, regardless of its impacts to water quality.92 Thus, the EPA is barred from regulating the valley fill process as a discharge of a pollutant into navigable waters.93

83 Id. at 625.
84 Id. at 627.
86 Id. at 955–56.
87 Id. at 943–44 (quoting Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003)).
88 See 33 C.F.R. § 323.2(e)(1)–(2) (2011).
89 Browand, supra note 79, at 646.
90 Id. at 647.
92 CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 31411, CONTROVERSIES OVER REDEFINING “FILL MATERIAL” UNDER THE CLEAN WATER ACT 7–8 (2009).
waters, even though it involves so great a volume of mine spoil that it eradicates entire waterways, simply because the material being discarded is from a coal mining operation, rather than any other type of excavation activity which would be subject to CWA § 402.

This conflict over how surface mining should be regulated under the Clean Water Act has been reflected in the courts, which have seen circuit splits,\(^93\) as well as changes over time in some circuits’ positions on how the practice should be regulated. For example, in a 1989 decision, the Fourth Circuit upheld the EPA’s authority to regulate valley fills and mining spoil as discharge of a waste material properly regulated under CWA § 402.\(^94\) The court in that case noted that “the primary purpose of the activity [was] to dispose of waste or spoil ... not to create dry land ... as contemplated by the Army’s definition [of fill material],” and therefore that “disposal of waste is specifically excluded from being fill material because the disposal of waste is regulated by EPA under Section 402.”\(^95\) Contemporary court cases have moved away from this view, holding instead that such activities belong under CWA § 404.\(^96\) Yet, in recent years, the Fourth Circuit has systematically overturned numerous mountaintop mining decisions from lower courts that favored environmental groups, arguing that the EPA did not have any authority to regulate these activities.\(^97\)

Environmental groups have also challenged the Corps CWA § 404 process more generally, lodging a number of complaints based in the National Environmental Policy Act, the Administrative Procedures Act, and the Clean Water Act itself.\(^98\) One complaint involved a claim that the Corps regularly avoided preparing Environmental Impact Statements on CWA § 404 permit actions by issuing a Finding of No Significant Impact (FONSI).\(^99\) Members of the Ohio Valley Environmental Coalition

\(^95\) Id. [internal quotations omitted].
\(^96\) Id. at 635.
\(^97\) Clark, supra note 33, at 144–45.
claimed that the Corps had limited the scope of its environmental assessment solely to streambed impacts, that it had relied on mitigation measures that were neither based in nor supported by science, and that the Corps ignored evidence of the negative environmental impacts of mining practices, choosing to approve permits anyway.\textsuperscript{100} In other cases, groups have challenged the Corps’ former use of the Nationwide 21 permitting system to issue national permits to mining companies without requiring a site-by-site analysis.\textsuperscript{101} There has also been some question about the Corps’ adherence to E.O. 12989,\textsuperscript{102} since the Corps has tended to consider only the impacts to jurisdictional streams and waters, not the impacts of CWA § 404 mining permits to upland areas or nearby communities, or the overall cumulative effects of mining projects on low-income or minority communities, essentially ignoring the commands of NEPA and the Executive Order.\textsuperscript{103}

The CWA § 404 statute mentions EPA in two instances—referring to EPA guidance and EPA’s CWA § 404(c) veto power, which will be discussed in Part V, below. In CWA § 404(b)(1), the Corps was directed to rely on EPA guidance when considering the impacts of projects for which it was contemplating issuance of a permit.\textsuperscript{104} The existing guidance for CWA § 404 permits provides that the Corps must evaluate: whether wildlife is impacted by the project, whether the project causes degradation of United States waters, whether there are practical alternatives to the disposal, and whether the applicant has taken appropriate steps to minimize impact to water quality and the environment.\textsuperscript{105} However, the CWA § 404(b)(1) requirement provides no real mechanism for enforcement in the event EPA feels the guidance has not been adequately complied with. Thus, even if EPA disagrees with the Corps’ finding on whether the project will cause degradation of United States waters, or whether practical alternatives have been considered, the Corps’ judgment would likely be upheld, as it has been historically when challenged by environmental groups.

The United States Department of the Interior’s Office of

\textsuperscript{100} Oh Grove Valley Envtl. Coal., 556 F.3d at 187–88.

\textsuperscript{101} See Allison Subacz, Mountaintop Removal: Case Studies and Legislative Update of the Permitting Process, 4 APPALACHIAN NAT. RESOURCES L.J. 49 (2010). For a brief discussion on the Nationwide Permitting program, see \textit{infra} Part III.

\textsuperscript{102} See discussion \textit{supra} Part I.

\textsuperscript{103} See generally Forman, \textit{supra} note 93.


\textsuperscript{105} 40 C.F.R. § 230.10 (2011).
Surface Mining also maintains authority to regulate mountaintop mining practices under the Surface Mining Control and Reclamation Act (SMCRA), although the actual SMCRA permits are given by individual states and, in some cases, Indian tribes. While the Department of the Interior is not necessarily known for its role in environmental protection, the agency entered into a 2009 Memorandum of Understanding with the EPA and the Army Corps to reduce the harmful environmental impacts of surface coal mining in six states in central Appalachia—Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. The Office of Surface Mining characterizes its role as oversight of state coal mining regulation, with an eye toward environmental protection and the reclamation of land once mining is completed. In the MOU, the office agreed to issue guidance to help clarify stream buffer zone issues and to review and reevaluate its oversight of state permitting programs under SMCRA. While most of its activities are outside the scope of this paper, it is worth noting that, in 2002, the Office of Surface Mining was responsible for helping to create the Appalachian Coal Country Team, a community outreach organization designed to help teach and encourage environmental stewardship in poor, rural Appalachian communities impacted by environmental degradation related to surface coal mining and mountaintop removal.

III. EPA EFFORTS TO REGULATE MOUNTAINTOP MINING WITHIN THE EXISTING REGULATORY SCHEME

Given increasingly strict restraints on the EPA’s authority to regulate mining activities, even when they result in impairment of water quality or other damage to the environment, the Agency determined that a new cooperative approach to permit review was merited. As the Obama Administration moved into

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107 See Interagency MOU, supra note 30, at 1–2.
108 See Regulating Coal Mines, supra note 106.
109 Interagency MOU, supra note 30, at 3.
111 Memorandum from Lisa P. Jackson, Adm’r, U.S. Env’tl. Prot. Agency, and Terrence “Rock” Silt, Acting Assistant Sec’y, Dep’t of the Army, to William C. Early, Acting Reg’l Adm’r, EPA Region III et al. (June 11, 2009) [hereinafter
the White House, more than one hundred surface mining permit applications were pending with the Corps.\textsuperscript{112} To determine whether these surface mining projects would pose unacceptable risks to water quality and the environment, the EPA, the Department of the Interior, and the Corps came up with a new, cooperative inter-agency consulting process.\textsuperscript{113} In a June 2009 memorandum outlining this “Enhanced Coordination Process” (ECP) between the three agencies, 108 surface mining permits were listed as pending at that time and were deemed to require further environmental scrutiny before action could be taken.\textsuperscript{114} Of those 108 permits, the EPA selected seventy-nine permits which required additional review, to be undertaken according to an enhanced coordination process outlined in an Interagency Memorandum of Understanding (Interagency MOU), signed by the EPA, the Corps, and the Interior Department.\textsuperscript{115} Since that time, according to the EPA, forty of the seventy-seven remaining applicants have withdrawn their applications; twenty-three are “awaiting the start of [the] ECP sixty-day review”; three are at a particular stage in the ECP review; and eight have been issued permits by the Corps.\textsuperscript{116} The issuance of CWA § 404 permits under the Obama Administration has reportedly “slowed to a trickle” as a result of the enhanced scrutiny exercised by the EPA since 2009.\textsuperscript{117}

The thrust of the Interagency MOU and Enhanced Coordination Process is that the agencies agreed to engage in a back-and-forth exchange regarding environmental concerns raised by the EPA in the permitting process, which the Corps agreed to consider before taking action on the permits.\textsuperscript{118} As the

\textsuperscript{112} Jackson & Salt Memo, \textit{ supra} note 111.

\textsuperscript{113} Jackson & Salt Memo, \textit{ supra} note 111.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.}


\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} [Press Release, EPA, EPA Releases Preliminary Results for Surface Coal Mining Permit Reviews (Sept. 11, 2009) available at http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4dd4aaa0b85257359003f5348/b746876025d4d9a38525762e0056be1b?OpenDocument; see also Interagency MOU, \textit{ supra} note 30, at 2.

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\textsuperscript{128} [OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 12-P-0083, CONGRESSIONALLY REQUESTED INFORMATION ON THE STATUS AND LENGTH OF REVIEW FOR APPALACHIAN SURFACE MINING PERMIT APPLICATIONS 19 (2011).


\textsuperscript{130} \textit{Id.}
EPA’s environmental concerns were addressed, applications would be moved through the coordinated process, until all agencies were ready to either sign off on or deny the permit. If the Corps planned to issue a permit before all of EPA’s concerns were resolved, the Corps committed to providing written notice to the EPA detailing “how the District is responding to” EPA concerns. While the enhanced coordination process was meant primarily to deal with the backlog of mining permit applications still pending when President Obama took office, the agencies have indicated such coordination is intended to be the norm.

At the time the Interagency MOU was signed in June 2009, the Obama Administration touted the agreement and the new review processes it required as an “unprecedented [step] to reduce environmental impacts of mountaintop coal mining.” In addition to reviewing pending permit applications, the Obama Administration pledged to take longer-term steps to “tighten the regulation of mountaintop coal mining,” as well as to require more stringent environmental reviews and greater public transparency and participation prior to the issuance of mining permits. Interior Secretary Ken Salazar was quoted as saying that the agreement was “a firm departure from the previous Administration’s approach to mountaintop coal mining, which failed to protect our communities, water, and wildlife in Appalachia.” All three agencies vowed to rectify these failures by better integrating comprehensive environmental reviews into their permitting processes, improving coordination between agencies prior to approving permits, and taking steps to encourage greater public access to and input in the permitting and review processes.

Since signing the MOU, the Army Corps of Engineers has

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119 Id.
121 Interagency MOU, supra note 30, at 2; see also discussion supra Part IV.
123 Id.
124 Id.
125 Id.
suspended the Nationwide Permit 21, a fast-track permitting program that granted blanket permits to mining companies looking to discharge fill material into waters of the United States.\footnote{Press Release, PR Newswire, U.S. Dep’t of the Army, Army Corps of Engineers Announces Decision to Suspend Nationwide Permit 21 in the Appalachian Region (June 17, 2010) available at http://www.prnewswire.com/news-releases/army-corps-of-engineers-announces-decision-to-suspendnationwidepermit-21-in-the-appalachian-region-96567554.html. The suspension of this program was formalized the following year. See Suspension of Nationwide Permit 21, 75 Fed. Reg. 34711 (June 18, 2010).} Mining companies will now be required to obtain individual permits for each of their projects,\footnote{Id.} subjecting their proposals to the environmental review process with greater public input.\footnote{Id; see also Sue Sturgis, Obama Administration Ends Fast-Tracking of Mountaintop Removal Mining Permits, INST. FOR S. STUD. (June 18, 2010), http://www.southernstudies.org/2010/06/obama-administration-ends-fast-tracking-of-mountaintop-removal-mining-permits.html.} The Corps is also in the process of reviewing all of its permitting programs in order to ease regulations on minor activities with little environmental impact, while still providing a more thorough review of major projects with potentially far-reaching effects.\footnote{See USACE’s Plan for Retrospective Review Under E.O. 13563, 76 Fed. Reg. 70927 (proposed Nov. 16, 2011) (to be codified at 33 C.F.R. pts. 320–332, 334) (announcing Corps’ plans to retrospectively review its Clean Water Act § 404 permitting processes to determine whether some provisions may be eliminated or streamlined to reduce burdens on parties pursuing “minor activities in water of the U.S.”); see also EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24479 (May 2, 2011) (providing notice about joint EPA/Corps guidance documents identifying waters protected by the Clean Water Act, in response to Supreme Court decisions in Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs., 531 U.S. 159 (2001) and Rapanos v. U.S., 547 U.S. 715 (2006)). These decisions required that the EPA and the Corps clarify the types of habitat they will consider “waters of the U.S.” for the purposes of Clean Water Act regulation. Such clarification is relevant here in that it will help define which mining activities will fall under the Clean Water Act and will require a permit either from the Corps under § 404 or the EPA under § 402.} The EPA has also released two lengthy guidance documents outlining the agency’s plans to put its commitments in the Interagency MOU into practice.\footnote{See Memo from the EPA, supra note 4; Stoner & Giles Memo, supra note 57.} In the MOU, the EPA committed to develop guidance to “strengthen the environmental review of proposed surface coal mining projects in Appalachia” by reviewing CWA § 404 permitting processes, as well as those used in the issuance of § 402 National Pollutant Discharge Elimination
System permits and state § 401 water quality certifications.\footnote{See Interagency MOU, supra note 30, at 3.} The EPA subsequently released an Interim Detailed Guidance Memorandum in April 2010\footnote{Memo from the EPA, supra note 4.} and a Final Detailed Guidance Memorandum in July 2011,\footnote{Stoner & Giles Memo, supra note 57.} both outlining how the agency plans to improve its review of surface coal mining projects under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order (E.O. 12898).\footnote{Exec. Order No. 12898, 76 Fed. Reg. 66,087 (Oct. 25, 2011) ("reinvigorated" by President Obama in 2010); Exec. Order No. 12898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) (made by President Bill Clinton in 1994).} In its guidance documents, the EPA discusses at length the emerging science suggesting the relationship between certain stream pollutants generated by mountaintop mining operations and impacts on aquatic ecosystems.\footnote{See Stoner & Giles Memo, supra note 57, at i.} In particular, EPA advocates for the use of conductivity as an indicator of ecological health within mining permits themselves,\footnote{Id. at 5.} suggesting that permit conditions should include regular conductivity monitoring which would also trigger remedial action if levels reached the point where they were contributing to significant deterioration in water quality.\footnote{Id. at 39.}

**IV. NATIONAL MINING ASSOCIATION V. JACKSON**

On July 20, 2010, the National Mining Association filed suit challenging the EPA’s involvement with surface mining permits, which the association felt exceeded the EPA’s statutory authority under the Clean Water Act, as well as the EPA’s guidance documents and memoranda related to the issue, which the association asserted were instances of impermissible “guidance-as-rulemaking” that failed to comply with Administrative Procedures Act (APA) requirements.\footnote{Nat’l Mining Ass’n v. Jackson, 816 F. Supp. 2d 37, 39 (D.D.C. 2011) [hereinafter Nat’l Mining II].} The court denied National Mining’s request for an injunction to prevent the EPA from continuing to rely on these documents, but also denied the EPA’s motion to dismiss the complaint.\footnote{Nat’l Mining Ass’n v. Jackson, 768 F. Supp. 2d 34, 38 (D.D.C. 2011) [hereinafter Nat’l Mining I].} The case was consolidated
with four other similar challenges pending in United States District courts in West Virginia and Kentucky.\textsuperscript{140} The parties in \textit{National Mining} agreed to a bifurcated process: the first case dealt with plaintiffs’ objections based on EPA’s involvement with Corps’ processes, including the Interagency MOU and Enhanced Coordination Procedures.\textsuperscript{141} The second case, heard in July 2012,\textsuperscript{142} challenges EPA’s Guidance Documents as lawmaking in excess of EPA’s authority, which did not comply with the APA, among other things.\textsuperscript{143} The court divided the first case into two questions of law—first, whether the EPA’s role described in the Multi-Criteria Integrated Resource Assessment and Enhanced Coordination Process exceeded the agency’s statutory authority under the Clean Water Act, and second, whether the agency’s use of those documents constituted rulemaking, rather than simple administrative guidance, in violation of the APA.\textsuperscript{144}

On the first issue, the EPA argued that by statute the CWA § 404 permitting program involves more than one agency, and agencies have traditionally enjoyed the freedom to “establish whatever coordination procedures those agencies may deem are necessary” to implement the program.\textsuperscript{145} Thus, the EPA argued that the Multi-Criteria Integrated Resource Assessment and Enhanced Coordination Process represented the EPA’s and the Corps’ efforts to establish coordination procedures to be used in implementing the CWA § 404 permitting program.\textsuperscript{146} The court rejected this argument and concluded that the EPA had exceeded its authority, since Congress clearly delegated CWA § 404 permit authority to the Corps, reserving to the EPA only a limited role.\textsuperscript{147} The EPA’s express powers under CWA § 404(c) include the power to essentially veto any § 404 permit, which arguably gives considerable and potentially unlimited authority to the EPA in § 404 permitting decisions. The court held that Congress had delegated to the EPA only “discrete functions” in § 404, signaling that Congress wanted the EPA “to play a lesser, clearly defined

\textsuperscript{140} \textit{Nat'l Mining II}, 816 F. Supp. 2d at 39.
\textsuperscript{141} \textit{Id}; see also discussion \textit{supra} Part III.
\textsuperscript{142} \textit{Nat'l Mining Ass'n v. Jackson}, 880 F. Supp. 2d 119 (D.D.C. 2012) [hereinafter \textit{Nat'l Mining III}].
\textsuperscript{143} \textit{Nat'l Mining II}, 816 F. Supp. 2d at 45.
\textsuperscript{144} \textit{Id}. at 42.
\textsuperscript{145} \textit{Id}. at 43.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} \textit{Id}. at 45.
supporting role.” Because the coordination processes agreed on by the Corps and the EPA expanded the EPA’s role from one which could be fairly considered supporting, the court held that the Enhanced Coordination Process and Multi-Criteria Resource Assessment exceeded EPA’s statutory authority under the Clean Water Act.

On the second issue, National Mining asserted that the Multi-Criteria Resource Assessment “effectively amended the established permitting regime under [CWA § 404] and hence, was subject to the APA’s notice and comment procedures,” which the plaintiff argued the EPA had failed to meet. Further, National Mining argued that the assessment tool had a “present, binding effect” on permit applicants, and that the Enhanced Coordination Process also reflected “an obvious change in the permitting process,” making both documents legislative rules which should have adhered to the APA requirements. One of the principal reasons the court agreed with National Mining was that the Multi-Criteria Integrated Resource Assessment eliminated the need for the Corps to apply guidelines for evaluating CWA § 404 permit applications, since the tool allowed the EPA to establish those guidelines. The court held that this was a “substantive, rather than a procedural, change to the permitting framework.” Further, the court held that, had the EPA and the Corps not signed an agreement to participate in the Enhanced Coordination Process, “‘there would not [have been] an adequate legislative basis for’ the EPA to conduct the [Multi-Criteria Integrated Resource Assessment]” or to get involved in holding back 108 permits for further investigation. For those reasons, the court held that the Multi-Criteria Resource Integrated Assessment and the Enhanced Coordination Process were legislative in nature and should have been subjected to the rigors of the APA. The court thus concluded that the EPA had “implemented a change in the permitting process” and that it had done so in a manner that exceeded its statutory authority in violation of the APA.

148 Id.
149 Id. at 45.
150 Id. at 45–46.
151 Id.
152 Id. at 47.
153 Id.
154 Id. at 49.
155 Id.
156 Id.
Dismissing the decision as essentially “procedural,” the EPA pointed out that the National Mining decision did nothing to actually limit its real authority to regulate mining permits under § 404 (c). Long before the National Mining decision was issued, the EPA had published the guidance in the Federal Register, received 60,000 comments on the Interim Guidance document—the document challenged in the second, yet-to-be-heard portion of the National Mining case—responded to those comments on its website, and integrated those responses into a Final Guidance document published in July 2011. The Final Guidance was overturned in the National Mining III case, decided in July 2012, as an overstep of the EPA’s CWA authority.

V. THE VETO POWER – CWA § 404 (C) AND THE EPA

Without the ability to carefully review water quality and environmental issues within the Corps’ surface mine permitting processes, the EPA is left with only one option if it wishes to regulate mountaintop mining at all: exercise its veto power under CWA § 404 (c). The EPA already used this veto power to revoke a mountaintop mining project permit in January 2011, when it halted the Mingo-Logan Coal Company’s proposed Spruce No. 1 Surface Mine in Logan County, West Virginia. Similar action


161 See Stoner & Giles Memo, supra note 57.


163 Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV, 76 Fed. Reg. 3126 (Jan. 19, 2011); see also Spruce No. 1 Surface
may also strip the Big Branch Surface Mine in Pike County, Kentucky of its § 404 permit; the EPA has been considering a veto of that permit since 2009.\textsuperscript{164} Judging by two memoranda released in April 2010\textsuperscript{165} and July 2011\textsuperscript{166} providing detailed guidance on EPA’s review of Appalachian Surface Coal Mining Operations, as well as the agency’s pledge to challenge the National Mining and Mingo Logan decisions, the EPA does not plan to back down from the strong position it has taken against “destructive and unsustainable” mountaintop mining projects.\textsuperscript{167}

While Congress delegated to the Army Corps of Engineers the power to grant or deny permits for dredged or fill material, it reserved for the EPA the right to deny or restrict the use of certain areas as fill disposal sites due to environmental concerns.\textsuperscript{168} While this power is outlined in a short paragraph of the statute, it gives the EPA significant authority to block permits if the Agency determines the proposed disposal will harm a wide variety of ecological and human interests.\textsuperscript{169} The text of the statute provides:

\begin{quote}
The Administrator is authorized to prohibit the 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 . . . as a disposal site, whenever he determines . . . 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.\textsuperscript{170}
\end{quote}

To set the process in motion, the EPA Administrator must notify the Secretary of the Corps of the EPA’s intent to pursue the veto action.\textsuperscript{171} If the EPA is still concerned that the proposed

\textsuperscript{165} Memo from the EPA, supra note 4.
\textsuperscript{166} See Stoner & Giles Memo, supra note 57.
\textsuperscript{167} Sheppard, supra note 23.
\textsuperscript{168} 33 U.S.C. § 1344(c) (2006).
\textsuperscript{169} Clean Water Act Section 404(c) “Veto Authority”, supra note 15; see also EPA Clean Water Act Section 404(c): “Veto Authority”, supra note 163.
\textsuperscript{170} 33 U.S.C. § 1344(c).
\textsuperscript{171} Id.; see also Clean Water Act Section 404(c) “Veto Authority”, supra
project will have adverse impacts, the EPA must publish a “Notice of Proposed Determination” in the Federal Register and then “begin[] the process of exploring whether unacceptable adverse effects will occur.” If the EPA decides whether to withdraw its concerns or make a “Recommended Determination” that the permit should not be issued. If a Recommended Determination is issued, the Corps and the applicant are given fifteen days to take corrective action to address the EPA’s concerns. If the EPA remains concerned about the project after this period expires, a “Final Determination” is issued, effectively vetoing the project.

Such concerns were raised in the Mingo Logan case, prompting the EPA to exercise its veto authority under CWA § 404(c) to revoke its prior approval of the company’s discharge sites for the Spruce Mine. In January 2007, the Corps had issued Mingo Logan a CWA § 404 permit to discharge approximately 19,333 cubic yards of mining spoil in 39,518 feet of nearby streams. The streams of particular concern to the EPA were the Pigeonroost and Oldhouse Branches, which made up approximately 88 percent of the total stream impacts. Shortly after the permit was issued, a citizen’s group challenged the permit, requesting, among other things, a temporary restraining order or injunction preventing Mingo Logan from discharging the mining spoil in nearby waters. In September 2009, the EPA approached the Corps about suspending, revoking, or modifying the Spruce Mine permit, based on new information about downstream environmental impacts. After the Corps declined

note 15.

172 CLEAN WATER ACT SECTION 404(C) “VETO AUTHORITY”, supra note 15.
173 Id.
174 Id.
175 Id.
178 Mingo Logan, 850 F. Supp. 2d at 137.
180 EPA Motion to Dismiss, supra note 177, at 10.
to revoke the Spruce Mine permit, the EPA provided notice that it intended to review the permit’s designated disposal areas and to potentially “prohibit, deny, restrict, or withdraw” approval of the specified disposal areas.\footnote{181} After failing to come to some agreement with the company on the disposal sites, the EPA published a Proposed Determination stating that it planned to “[p]rohibit, [r]estrict, or [d]eny” the use of the designated waterways as disposal sites.\footnote{182}

Mingo Logan Coal challenged this proposed determination on a number of grounds, including \textit{ultra vires}, an argument with which the District Court judge agreed.\footnote{183} In a scathing decision issued March 23, 2012, District Judge Amy Berman Jackson blasted the EPA’s actions in the Spruce Mine case as an unreasonable post-permit veto and characterized the EPA’s assertion that the CWA § 404(c) gave it the authority to veto an already-issued permit as “a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute.”\footnote{184} The D.C. court held that, under the CWA § 404 scheme, the EPA only had the authority to “step in and veto the use of certain disposal sites at the start [of the permitting process,] thereby blocking the issuance of permits for those sites[,]” but that the EPA lacked the authority to actually veto a permit or to veto use of disposal sites after the permit had been issued.\footnote{185} Further, the Court held that CWA § 404(c) “does not give EPA any role in connection with permits[]” for discharging mining spoil.\footnote{186} Rejecting the EPA’s argument that the statute and its regulations gave it the authority to revisit discharge site approval after issuance of the permit, the Court essentially held that the Corps retains nearly complete authority over the CWA § 404 permitting process, which the court felt was unambiguously expressed by the statute.\footnote{187} Thus, the attempt by the EPA to modify or revoke the Spruce Mine permit’s designated disposal sites after the permit had been issued was beyond the agency’s statutory authority and therefore invalid.\footnote{188}

Despite these successful challenges to its authority, the EPA

\begin{footnotes}
\item\footnote{181}{Id.}
\item\footnote{182}{Id.}
\item\footnote{183}{Mingo Logan, 850 F. Supp. 2d at 134.}
\item\footnote{184}{Id. at 139.}
\item\footnote{185}{Id. at 140.}
\item\footnote{186}{Id. at 141.}
\item\footnote{187}{Id. at 150–53.}
\item\footnote{188}{Id. at 134, 150–53.}
\end{footnotes}
continues to review mountaintop mining projects and permits.\textsuperscript{189} Presently, the EPA is in the process of considering whether to veto a CWA § 404 permit for the Big Branch Surface Mine in Pike County, Kentucky; EPA review of that permit has been ongoing since 2009.\textsuperscript{190} A mountaintop mining project planned by Arch Coal for the New Hill West Mine in Monongalia County, West Virginia, is mired in a legal battle because the EPA wants specific conductivity conditions integrated into the permit before it is issued.\textsuperscript{191} While this fight is not about a CWA § 404 permit, it is a good example of the kind of scientific alterations the EPA is hoping to make to these types of permits, in this case by requiring that the continuation of mining operations is dependent on the activities’ impacts to water quality.\textsuperscript{192}

The CWA § 404(c) veto power was first used in 1981 to prevent the City of North Miami, Florida, from using municipal solid waste as fill material to convert a landfill into a golf and country club.\textsuperscript{193} The Administrator vetoed the permit because of concerns about the impact to “shellfish and fishery areas, wildlife, and recreational areas,” that would arise from dumping millions of cubic yards of trash into a wetland area.\textsuperscript{194} The veto power was used ten more times between 1984 and 1990 against projects that ranged from a shopping mall and several water supply impoundments to a duck hunting/aquaculture impoundment and a waste storage/recycling plant.\textsuperscript{195} Following two vetoes in 1990, the EPA did not veto a single project for nearly twenty years, until 2008 when it vetoed the Yazoo Backwater Area Pumps Project proposed for Issaquena County, Mississippi.\textsuperscript{196} The Yazoo project involved construction of a pumping station which would move water in and out of some of the “richest wetlands and aquatic resource[]” areas in the country.\textsuperscript{197} All of these projects

\textsuperscript{190} \textit{Big Branch Surface Mine}, supra note 164.
\textsuperscript{192} \textit{Id}.
\textsuperscript{193} Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act, 46 Fed. Reg. 10203 (Feb. 2, 1981).
\textsuperscript{194} \textit{Id}.
\textsuperscript{195} CWA SECTION 404(C) “VETO AUTHORITY”, \textit{supra} note 15.
\textsuperscript{196} \textit{Id}.
\textsuperscript{197} Final Determination of the Assistant Administrator for Water Pursuant to
had received the approval of the Corps, but were determined by the EPA to pose too significant a threat to the types of aquatic resources the Clean Water Act mandates that the EPA work to protect.\footnote{Mingo Logan Coal Co. v. U.S. Envtl. Prot. Agency, 850 F. Supp. 2d 133, 136 (D.D.C. 2012).}

CONCLUSION

The EPA’s ability to redress its concerns about substantial impacts of mountaintop mining practices on human health and the environment is more constrained than ever before. The existing regulatory scheme for surface mining projects—developed over the past four decades through agency guidance, sometimes-conflicting judicial decisions, and politically motivated changes to the law—effectively prohibits the EPA from playing a meaningful role in mining permit assessments from an early stage, when environmental concerns could be raised and effective mitigation measures could be designed to address potential impacts before the Corps agrees to issue a CWA § 404 permit. Instead, the current scheme largely excludes the EPA. If there are environmental concerns, the EPA must rely on late-in-the-game threats to use, or actual use of, the veto power, which will either add years of additional studies and negotiations to the permitting process, or else completely invalidate negotiations between mine companies and the Corps.

Further, the EPA’s veto power may be greatly limited by the \textit{Mingo Logan} decision, which, if upheld, would leave the EPA with a very short, very limited window to object to environmental impacts caused when surface mining spoil is dumped in waterways and streams. The CWA § 404 permit in the \textit{Mingo Logan} case was issued in 2007; the permit allowed the coal company to dump mining spoil in nearby waterways until 2031.\footnote{Id.} Despite the EPA’s claim that new information on negative environmental impacts rendered Mingo Logan’s mitigation plans inadequate, the \textit{Mingo Logan} decision will allow surface mining to continue at the site for nearly 20 more years.\footnote{Clean Water Act Section 404(c) “Veto Authority,” \textit{supra} note 195.} As a more general matter, the Court’s act of barring the EPA from having

\footnote{Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, 73 Fed. Reg. 54,398 (Sept. 19, 2008).}

\footnote{\textit{Id.}}
any authority once such permits are issued—regardless of the environmental destruction such permits may allow—would dramatically exempt mountaintop removal coal mining from nearly all federal environmental oversight in the future. Such a result is untenable, and would surely prove disastrous for our nation’s waterways.

Since 2009, the EPA has relied on emerging science and President Clinton’s executive order on Environmental Justice to rigorously review permits for mountaintop removal mining, and to determine when its veto authority under CWA § 404 (c) should be used to block a permit. The documents invalidated in the National Mining decision outlined a reasonable coordination process between the EPA and the Army Corps of Engineers, which would have allowed environmental concerns to be raised early in the permitting process, while the Corps was still considering whether to grant the CWA § 404 permit. Even if the National Mining decision is upheld, these environmental concerns will not go away; the EPA will simply be precluded from pressing for their consideration during the Army Corps’ permitting process, forcing the agency to wait until the permit is at the approval stage before it can exercise CWA § 404(c) veto power. While the National Mining decisions were hailed as relaxing burdensome environmental regulations for job-creating mining projects, the invalidation of the EPA/Corps coordination process may lead to more protracted permitting processes for projects which raise red flags at the EPA, but gain approval from the Corps. Further, since the CWA § 404(c) veto process is complex, the EPA’s use of it may actually mean more work and more delays for mining companies. Of course, the Mingo Logan decision further calls into question the EPA’s authority to exercise its CWA § 404(c) veto power at all.

Parties involved in this issue have reached an impasse. The EPA has determined that more needs to be done to regulate mountaintop mining because of the risks it poses to human


health and the environment, as well as its impact on poor Appalachian communities. To fulfill its mandates to protect the environment and further environmental justice, the EPA must continue to be involved in monitoring and, in some cases, preventing harmful impacts to water quality, human health, and the environment caused by mountaintop mining. However, decisions such as National Mining and Mingo Logan suggest that at least some courts are unwilling to concede that the EPA has anything more than extremely limited authority over surface mining, even where mining activities may drastically impact United States waters. If nothing is done to clarify EPA’s authority over this issue, the CWA § 404(c) veto power will continue to be the only real method of enforcement available to the EPA in this area. And if Mingo Logan stands, the EPA could be nearly powerless to address its concerns, particularly once a permit was issued.

Clarification of the EPA’s role might be possible. In theory, legislative action to clarify how the EPA and the Corps should work together on this issue would be the best solution because it would give the agencies, industry, and the courts a clear direction and more concrete boundaries. Alternatively, appellate courts could help to clarify the proper relationship between the EPA and the Corps—or between environmental protection and business interests—by comprehensively engaging on appeal those issues, which were pervasive in the National Mining and Mingo Logan decisions. Both the National Mining and Mingo Logan decisions could be overturned by the D.C. Circuit on appeal, or potentially by the United States Supreme Court, in the likely event that the D.C. Circuit’s decisions are unfavorable for either the EPA or the mining industry. But while courts in recent cases have acknowledged that guidance is needed on “[h]ow best to strike a balance between, on the one hand, the need to preserve the verdant landscapes and natural resources of Appalachia and, on the other hand, the economic role that coal mining plays in the region,” they have urged that it is not the proper role of the courts to strike such a balance.203 Under that view, responsibility for striking such a balance should fall to Congress. However, we face a Congress unwilling to give the EPA any additional power and, in some circumstances, fighting to cripple or defund the EPA entirely. Thus, legislative action seems unlikely.

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The issues raised in these cases could be recast as a proper exercise of the Corps’ authority to cooperate and consult with the EPA on water quality issues raised by mountaintop mining; a relationship clearly contemplated in the text of CWA § 404. The Corps was also a signatory to the Interagency MOU. Congress clearly intended some role for the EPA by including it in the CWA § 404 provisions. The CWA statutes call on the EPA to provide environmental guidance to the Corps, something provided for in the Interagency MOU. If the Corps agrees to work with the EPA on scientific/environmental issues about which the EPA has greater expertise, one could argue the Corps was simply exercising its broad CWA § 404 authority by bringing in the EPA for assistance. Public policy also favors the cooperation between these two agencies on complex issues such as mountaintop mining, especially where such cooperation could further the interests of efficiency by addressing environmental concerns early in the permitting process, thereby fulfilling both agencies’ missions. If the Corps resumed its former policy of deferring to the EPA on water-related environmental issues, it could more comprehensively and meaningfully engage the EPA early on in the CWA § 404 permitting process, addressing and mitigating the EPA’s concerns long before a permit is issued.

More decisive action on the part of the Executive Branch may also help, perhaps in the form of an executive order. Alternatively, the EPA could attempt, through a new rulemaking, to roll back the statutory amendments made by the Bush Administration that allowed the definition of fill material to include mining overburden, once again requiring that surface mining operations consult with the states or the EPA on whether a CWA § 402 permit is required for the project, in addition to the Corps’ CWA § 404 permit. This action would likely be challenged by the industry, so the EPA’s actions would need to pass the deference test under the *Chevron* doctrine in order to survive that challenge. Under *Chevron*, the EPA would have to show that Congress did not speak directly to the matter by giving a clear definition of fill material when it passed the Clean Water Act. Since decades of litigation have involved the question of how to define “fill material,” this step will likely be easy for the EPA to pass. In the second step of the *Chevron* test—

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204 Interagency MOU, *supra* note 30.
whether the agency’s action was reasonable—the EPA would have both voluminous scientific evidence and history on its side in showing reasonableness, since the new definition of “fill material” did not exist until the Bush Administration’s 2002 changes. Thus, such a change by the EPA would most likely be entitled to *Chevron* deference.

Without any help from Congress, the President, or the courts, the EPA is left with one option: exercise of the increasingly limited CWA § 404(c) veto power. Since use of this power raises concerns about costs, inefficiency, and uncertainty—and since it may be further constrained by the *Mingo Logan* decision—it would behoove all parties involved to come up with a better solution to protect the nation’s waters. The Clean Water Act, and principles of environmental justice demand it.