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Client Alert

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United States District Court for the District of Columbia Overturns EPA Final Mining Guidance

On July 31, 2012, Judge Reggie Walton found final mining guidance issued by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) unlawful under the Clean Water Act (CWA), the Surface Mining Control and Reclamation Act (SMCRA) and the Administrative Procedure Act (APA). Accordingly, the agencies' guidance, "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" (July 21, 2011) (Final Guidance), was set aside. *National Mining Ass'n v. Jackson* (2012 WL 3090245)

Background

On April 1, 2010, the EPA and the Corps issued guidance creating new procedures and substantive requirements for reviewing mining-related CWA Section 402 and 404 permits, as well as permits issued under state SMCRA programs. The Guidance took effect immediately, even though the agency had not yet subjected it to any public notice or comment, and even though its new substantive requirements had not been peer reviewed in any meaningful way.

The National Mining Association (NMA), along with Kentucky and West Virginia, brought a legal challenge alleging — as a matter of both procedure and substance — that EPA had exceeded its authority under the CWA and SMCRA in adopting its new permit review process and forcing states to adhere to a new de facto numeric water quality standard for conductivity.

On October 6, 2011, the court granted the plaintiffs' motion for partial summary judgment, concluding that EPA had exceeded its authority under the CWA in adopting its new permit review process for Section 404 permits. *See Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011). But the ruling did little to stop EPA from shifting its permit comments and objections to other sections of the guidance, including the de facto conductivity standard, as a way to stymie coal permitting decisions.

On July 31, 2012, the court struck a second blow against EPA's efforts to intrude on state permitting decisions. Here's how the court addressed the question "What did Congress intend the SMCRA and the CWA to regulate, and what role does the EPA play in that regulation?"

- The Guidance is final agency action, ripe for review. The court was willing to look beyond the agencies' statements that the Guidance did not impose legally binding requirements to examine the practical effect, concluding the "EPA's own affidavits convey a 'comply-or-else attitude.' "
- EPA has no authority in the oversight or administration of the SMCRA regime. It is beyond EPA's purview to attempt to specify to the Office of Surface Mining or the state SMCRA agency what constitutes an "appropriate" best management practice.
- EPA does not have authority to apply the 404(b)(1) guidelines to Section 404 permits. EPA's authority is limited to developing the 404(b)(1) guidelines with the Corps, but it is the Corps that determines compliance with the guidelines.
- EPA does not have authority to establish limits or requirements in 402 permits once a state has an approved permitting program.

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- The Final Guidance impermissibly sets a conductivity criterion for water quality without undergoing notice and comment rulemaking.
- EPA's Section 402 regulations do not impose or mandate that reasonable potential analyses must be done prior to National Pollutant Discharge Elimination System (NPDES) permit issuance.
- EPA's presumption that, based on scientific studies regarding conductivity, it is likely that all discharges will lead to an excursion of water quality standards removes the reasonable potential determination from the state authority and is inconsistent with EPA's own regulation.

Conclusion

The government must decide by the end of September whether it will appeal the court's two rulings against EPA's permitting procedures and guidance. In the meantime, permittees may have several opportunities to use the court's rulings to their advantage. First, there are a number of Section 404 permits that remain in limbo because of EPA's unlawful actions. Permittees that remain interested in obtaining these permits may want to consider requesting that the Corps promptly issue them. Second, permittees may want to exercise caution in attending "coordination meetings" with multiple agencies regarding permits that are issued by either the Corps or the state permitting authorities. To do so may be to allow the agencies to disregard Judge Walton's important decision. Finally, permittees may want to think twice before agreeing to any of EPA's earlier demands regarding mining practices or conductivity limits that have now been vacated by the court.

About Our Environmental Practice

Drawing on the same resources and experience at the foundation of the firm's robust energy and utilities practice, the mining team at Hunton & Williams LLP helps industry clients identify and mount sophisticated responses to the many legal and regulatory challenges they face domestically and abroad. For more than 30 years, our regulatory lawyers and seasoned litigators have successfully represented domestic and international companies and industry associations, throughout North America, Latin America, Asia and Africa, engaged in the extraction and processing of a broad range of materials, including coal, phosphates, copper, zinc and other hard ores. A recent addition to our team, Karen Bennett, the former Vice President for Environmental Affairs at NMA, led the litigation in *NMA v. Jackson* on behalf of the industry association before joining Hunton & Williams.

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