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Judicial Limitation of the EPA's Oversight Authority in Clean Water Act Permitting of Mountaintop Mining Valley Fills

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NOTE

JUDICIAL LIMITATION OF THE EPA'S OVERSIGHT AUTHORITY IN CLEAN WATER ACT PERMITTING OF MOUNTAINTOP MINING VALLEY FILLS

*Christopher D. Eaton**

Mountaintop removal mining operations in the Appalachian region have expanded significantly in recent decades. The practice decimates the mountain ecosystems by leveling forests, filling headwater streams, and producing significant runoff of heavy metals, sediment, and other pollutants that impair the aquatic environment of entire watersheds. Yet environmental permitting of the practice is relatively limited. A recent trend in litigation aimed at halting mining operations has involved challenging permits that authorize the discharge of mining overburden into headwater streams pursuant to the Clean Water Act (CWA). The Army Corps of Engineers has assumed jurisdiction over such discharges under section 404 of the CWA, asserting that overburden is "fill material." Initial litigation on the matter challenged the Corps' assumption of jurisdiction, asserting instead that overburden is a "pollutant," the discharge of which is regulated by the Environmental Protection Agency (EPA) under section 402 of the CWA. After the courts upheld the Corps' interpretation that overburden is fill, the issue became the degree to which section 404 allows or requires the EPA to exercise environmental oversight of the Corps' permitting process. The EPA has recently attempted to increase its oversight role by establishing procedures to review permit applications before the Corps issues the permits and by retroactively "vetoing" existing permits that it has found result in irreparable environmental damage. Those actions have been subjected to challenges by the mining industry, which have produced court rulings constraining the EPA's oversight authority.

In this Note, I argue that Congress did not intend for mining overburden to fall within the purview of the Corps' section 404 jurisdiction, and that the cases affirming the Corps' assumption of such jurisdiction were wrongly decided. Assuming, however, that those cases will not be overturned, I argue that the EPA must be afforded the ability to exercise the oversight authority inherent in section

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404 to ensure that the Corps' permits for mountaintop removal mining valley fills do not result in undue environmental damage. I assert that the recent decisions in *National Mining Association v. Jackson and Mingo Logan Coal Co. v. EPA* improperly read limits into the EPA's oversight authority, and that the courts of appeals should overturn those decisions. Absent the EPA's second layer of environmental review of section 404 permitting, the fragile Appalachian landscape may be permanently destroyed as a consequence of mountaintop removal mining.

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INTRODUCTION

As coal deposits became more difficult to access using traditional mining methods, mine operators turned to mountaintop removal mining in the early 1990s.¹ Mountaintop removal mining involves dynamiting the tops off mountains to get to the coal deposits below, and depositing the mountaintop rubble into adjacent valleys.² This practice decimates Appalachian ecosystems.³ The impacts on the environment are numerous.

1. Sam Evans, *Voices From the Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 521, 523–24 (2010).

2. In fact, mining in central Appalachia moves more tons of earth per year than any other human activity or natural process anywhere else in the United States. Roger LeB.

The most visible impact is the destruction of extensive tracts of deciduous forests that once stood on Appalachia's rolling mountains.⁴ The complex topography of the Appalachian Mountains has created a diversity of habitats and forest types.⁵ These forests support "some of the highest biodiversity in North America."⁶ Yet that biodiversity is threatened by the destruction of forest habitat. In 2005, the EPA estimated that mountaintop mining would remove 6.8% of Appalachian forest habitat between 1992 and 2012.⁷

Much of the ecological value of Appalachian forests is derived from their interior (as opposed to edge) character.⁸ Appalachian forests are generally "spatially extensive with little disturbance imposed by other uses of the land."⁹ This allows the forests to limit nutrient pollution to aquatic systems, increase moisture in the surrounding atmosphere, and provide more habitat.¹⁰ Notably, "[t]he Appalachian Mountains . . . contain the only extensive region [in the world] of interior forest at middle latitudes."¹¹ Mountaintop mining destroys the interior nature of these forests by essentially creating donut holes at the mining sites.¹² It increases edge forest, which tends to allow for establishment of exotic species and to reduce habitat for shade-tolerant native plants.¹³

The rocky material removed during the mountaintop removal mining process has to go somewhere, so mining operators dump it into adjacent

Hooke, *Spatial Distribution of Human Geomorphic Activity in the United States: Comparison with Rivers*, 24 EARTH SURFACE PROCESSES & LANDFORMS 687, 690 fig.1(a) (1999).

3. See generally M.A. Palmer et al., *Mountaintop Mining Consequences*, 327 SCI. 148 (2010); MICHAEL SHNAYERSON, COAL RIVER (2008).

4. The terms Appalachia or Appalachian are general terms that may be used to refer to broad or specific regions in an area stretching from northern Georgia through Pennsylvania, and even as far north as Maine. As used in this Note, however, Appalachia and Appalachian refer to the coal mining regions of northeastern Tennessee, eastern Kentucky, West Virginia, and western Virginia.

5. William J. McShea et al., *Mesic Deciduous Forest as Patches of Small-Mammal Richness Within an Appalachian Mountain Forest*, 84 J. OF MAMMOLOGY 627, 628 (2003).

6. Palmer et al., *supra* note 3, at 148; see also, e.g., THE NATURE CONSERVANCY, RIVERS OF LIFE: CRITICAL WATERSHEDS FOR PROTECTING FRESHWATER BIODIVERSITY 25-27 (Lawrence L. Master et al. eds., 1998) (describing the Clinch River watershed in southwest Virginia and east Tennessee as "[t]he nation's leading hot spot of aquatic diversity").

7. U.S. ENVTL. PROT. AGENCY, MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 4 (2005) [hereinafter PEIS], available at <http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=20005XA6.PDF>.

8. J.D. Wickham et al., *The Effect of Appalachian Mountaintop Mining on Interior Forest*, 22 LANDSCAPE ECOL. 179, 180 (2007).

9. *Id.*

10. *Id.*

11. Kurt Riitters et al., *Global-Scale Patterns of Forest Fragmentation*, 4 ECOL. & SOC'Y 3 (2000).

12. See Wickham et al., *supra* note 8, at 180-81.

13. *Id.* at 186.

valleys, which typically contain headwater streams. Headwater streams “provide a refuge from predators and changes in temperature . . . and can be important spawning and nursery grounds” for aquatic biota.¹⁴ Appalachian streams, in particular, “are recognized as a biodiversity hot spot of global significance, particularly for endemic aquatic salamanders and mussels.”¹⁵ Like the forests, these streams are not merely “impaired” by mountaintop mining, but are completely eliminated. The EPA estimated that 1200 miles of streams were “directly impacted” by valley fills between 1992 and 2002, and that 724 miles of streams were completely covered by valley fills between 1985 and 2001.¹⁶

Filling of headwater streams has further reaching effects beyond the elimination of those stream segments; it cuts off important sources of nutrients to lower stream segments, harming aquatic organisms.¹⁷ Declines in downstream biodiversity have subsequently been linked to upstream valley fills.¹⁸ In addition to cutting off nutrients, valley fills deposit metals and other pollutants into the downstream flow.¹⁹ This depositional effect is exacerbated by the removal of forests on adjacent slopes; those forests would normally filter pollutants from runoff.²⁰ The deposited pollutants ultimately kill downstream aquatic and streamside vegetation.²¹ Runoff increases turbidity (suspended solids) in streams,²² which can suffocate aquatic biota and block sunlight from reaching aquatic plants.²³ Heavy metals can bioaccumulate (i.e., intensify in concentration as predators consume contaminated prey) in aquatic food webs and can kill or deform fish and birds that feed on contaminated prey.²⁴ Once surface mining impacts at least 5.4% of the area in a watershed, the entire aquatic ecosystem in that watershed is likely to become “biologically impaired.”²⁵

14. Emily S. Bernhardt & Margaret A. Palmer, *The Environmental Costs of Mountaintop Mining Valley Fill Operations for Aquatic Ecosystems of the Central Appalachians*, 1223 ANNALS N.Y. ACAD. SCI. 39, 41 (2011).

15. *Id.* at 39; see also THE NATURE CONSERVANCY, *supra* note 6, at 25.

16. PEIS, *supra* note 7, at 4.

17. Palmer et al., *supra* note 3, at 148.

18. *See id.*

19. *Id.*; see also Bernhardt & Palmer, *supra* note 14, at 46–48.

20. See Wickham et al., *supra* note 8, at 180.

21. See Palmer et al., *supra* note 3, at 148.

22. *See id.*

23. See generally R.J. Davies-Colley & D.G. Smith, *Turbidity, Suspended Sediment, and Water Clarity: A Review*, 37 J. AM. WATER RESOURCES ASS’N 1085 (2001).

24. *Id.*

25. Emily S. Bernhardt et al., *How Many Mountains Can We Mine? Assessing the Regional Degradation of Central Appalachian Rivers by Surface Coal Mining*, 46 ENVTL. SCI. & TECH. 8115, 8120 (2012). “Biologically impaired” as used by Bernhardt et al. is based on a set of biodiversity scores used by the West Virginia Department of Environmental Protection. *Id.* at 8119.

Even after mining operations have ended, recovery of stream ecosystems is slow or nonexistent.²⁶ The destruction of mountain streams is often justified on the grounds that mining operators will mitigate the effects by improving stream habitat in nearby regions or remediating impacted streams after mining operations cease.²⁷ However, anthropogenic habitat augmentation generally provides negligible benefits, and remediation produces streams that are significantly less productive and provide inadequate habitat compared to pre-mining ecosystems.²⁸ Once a landscape has been impacted by mountaintop removal mining, it may never return to its prior state.²⁹

Despite the catastrophic impacts of mountaintop removal mining on Appalachian forests and streams, environmental review of project permits is limited. Most permitting for mountaintop mining is done by state agencies that have assumed responsibility from the Federal Office of Surface Mining Reclamation and Enforcement to implement requirements of the Surface Mining Control and Reclamation Act (SMCRA).³⁰ Federal permitting is limited to regulation of discharges into navigable waters under the Clean Water Act (CWA). SMCRA requires mine operators to return the impacted lands to the "approximate original contour" (AOC) after mining is complete.³¹ However, because the rock blasted from the mountain "swells" 15 to 25 percent upon removal, excess fill material exists after returning the land to its AOC.³² Mining operators must either truck the fill offsite, which is prohibitively expensive, or dump it in adjacent valleys, which typically contain streams subject to CWA jurisdiction. Therefore, mining operations cannot proceed without being permitted to dump mining overburden in adjacent valleys, which has made this practice a target of groups seeking to block mountaintop removal mining. After failing to block valley fills under the buffer zone rule of SMCRA,³³ environmental groups turned their attacks in the early 2000s to CWA permits required for the fills.

26. Palmer et al., *supra* note 3, at 149.

27. See Evans, *supra* note 1, at 539.

28. Palmer et al., *supra* note 3, at 149.

29. See Bernhardt & Palmer, *supra* note 14, at 39 ("There is, to date, no evidence to suggest that the extensive chemical and hydrologic alterations of streams by [valley fills] can be offset or reversed by currently required reclamation and mitigation practices.").

30. See 30 U.S.C. §§ 1253, 1256 (2006).

31. *Id.* § 1265(b)(3).

32. Sara Clark, In Brief, *In the Shadow of the Fourth Circuit: Ohio Valley Environmental Coalition v. United States Army Corps of Engineers*, 35 *ECOLOGY L.Q.* 143, 143–44 (2008) (describing the process of blasting and expansion that results in overburden).

33. See *Bragg v. Robertson (Bragg I)*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), *vacated sub nom. Bragg v. W. Va. Coal Ass'n (Bragg II)*, 248 F.3d 275 (4th Cir. 2001). The buffer zone rule prohibits disruption of any area within 100 feet of a stream by mining operations, unless the permitting authority has made certain determinations that the activity will not adversely

The CWA makes it unlawful to discharge any pollutant into a navigable water of the United States “[e]xcept as in compliance” with the Act.³⁴ Discharges are governed by complementary permitting programs: under section 402, the Environmental Protection Agency (EPA) may issue permits for the discharge of pollutants into navigable waters, and under section 404, the Army Corps of Engineers (the “Corps”) may issue permits for the discharge of dredge or fill material into navigable waters. The text of the CWA, however, does not delineate a clear boundary between the agencies’ respective jurisdictions.

The Corps’ section 404 authority was originally added to the CWA by the House of Representatives in order to preserve the Corps’ existing role under the Rivers and Harbors Act of 1899 of ensuring that navigability was not impaired by discharges of fill or dredge material.³⁵ Despite the apparent limited nature of this grant, the Corps’ exercise of jurisdiction under the CWA has expanded to encompass waters that are not navigable in fact, such as wetlands and intermittent streams.³⁶ In addition, the CWA does not define what constitutes “dredge or fill material.”

Early litigation, therefore, dealt with whether the EPA or the Corps was the proper agency to regulate discharge of mining overburden into Appalachian headwater streams.³⁷ Mining operators sought fill permits from the Corps, rather than discharge permits from the EPA, a practice that was upheld by the Fourth Circuit in *Kentuckians for the Commonwealth v. Rivenburgh* (*Kentuckians II*).³⁸

After *Kentuckians II*, the issue remains as to what, if any, role the EPA plays in oversight of the Corps’ permitting.³⁹ Recognizing that the Corps’ section 404 role is limited, Congress provided for EPA oversight of the Corps’ permitting in that section.⁴⁰ The EPA is authorized to promulgate

affect the environment. See 30 C.F.R. § 816.57 (2012); see also W. VA. CODE R. § 38-2-5.2 (2001).

34. Clean Water Act (CWA) § 301, 33 U.S.C. § 1331 (2006).

35. See Sen. Consideration of the Rep. of the Conf. Comm., Oct. 4, 1972, Amendment of Fed. Water Pollution Control Act, 93d Cong., reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 177 (1973) [hereinafter Senate Consideration].

36. See *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (Scalia, J., plurality opinion).

37. See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh* (*Kentuckians I*), 204 F. Supp. 2d 927 (S.D. W.Va. 2002), rev’d, (*Kentuckians II*) 317 F.3d 425 (4th Cir. 2003).

38. 317 F.3d at 448.

39. Evans has argued that because *Kentuckians II* was wrongly decided, the EPA can and should use rulemaking to assert its authority over the discharge of mining overburden. Evans, *supra* note 1, at 543, 555. Although I do not disagree with Evans’ assessment, I assume in this Note that *Kentuckians II* remains good law until it is overturned, and that the EPA will not assume jurisdiction over discharges of mining overburden in the foreseeable future.

40. See Senate Consideration, *supra* note 35, at 177.

guidelines for the Corps to follow in issuing permits,⁴¹ to veto or limit permits approved by the Corps,⁴² and to enter into an agreement with the Corps to assure that delays in the issuance of section 404 permits are minimized.⁴³ Read broadly, these provisions give the EPA a significant role in limiting adverse environmental impacts of valley fills. However, recent court decisions have constrained the EPA's oversight authority in section 404 permitting.

In this Note, I examine the role of the EPA in regulating valley fills under the CWA. In Part I, I discuss the legislative history of section 404 and subsequent case law interpreting the extent to which that section applies to discharges of mining overburden. In Part II, I assess prior and prospective coordination between the EPA and the Corps in review of section 404 permits, and examine the recent *National Mining Association v. Jackson* cases (*National Mining I* and *II*),⁴⁴ which appear to limit this coordination. In Part III, I examine the EPA's authority under section 404(c) as a possible limit on the Corps' power, and the scope of the EPA's power in light of *Mingo Logan Coal Co. v. EPA*, as well as the potential outcome of the appeal of this case.⁴⁵ I conclude that the EPA has discretionary authority to serve an important oversight role in the Corps' section 404 permitting process to avoid excess environmental damage, but that the courts have erroneously limited the EPA's power delegated by Congress.

I. THE ORIGINS OF SECTION 404 AND THE SCOPE OF "FILL MATERIAL"

Section 404 is not a model of clear legislative drafting. It is often awkwardly worded and its relation to other sections of the CWA can be unclear.⁴⁶ This lack of clarity may be due, in part, to the fact that the section was in the House's version of the CWA, but not in the Senate's version. The House's section 404 was retained in the final law after the Conference Committee reconciled the two houses' versions of the CWA.

The definition of "fill material" has proven particularly problematic.⁴⁷ Nowhere does the CWA define dredge or fill material as used in section

41. CWA § 404(b), 33 U.S.C. § 1344(b) (2006).

42. CWA § 404(c).

43. CWA § 404(q).

44. 816 F. Supp. 2d 37 (D.D.C. 2011); Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245 (D.D.C. July 31, 2012).

45. 850 F. Supp. 2d 133 (D.D.C. 2012).

46. See, e.g., *id.* ("[The parentheticals in section 404(c)] are so poorly written that it is difficult to ascertain what it is that they are supposed to modify.").

47. For a thorough discussion of regulatory interpretation of "fill material" and the resulting legal and practical issues, see Evans, *supra* note 1, at 537-54.

404. However, the CWA defines “pollutant,” the discharge of which is regulated by the EPA, to include “dredged spoil, . . . rock, [and] sand,” the discharge of which are regulated under section 404.⁴⁸ Nonetheless, mining operators have asserted that mining overburden is fill material and have applied to the Corps rather than the EPA for discharge permits. Opponents of mountaintop mining, however, assert that valley fills are more akin to discharges of pollutants, and that the EPA is a more appropriate agency to examine potential environmental impacts.⁴⁹

Congress’ intent in adding section 404 provides some guide for defining the scope of the Corps’ jurisdiction under the CWA. In this Part, I first discuss the congressional intent in adding section 404 to the CWA. I then argue that cases addressing the applicability of section 404 to “fill material” have paid little attention to this intent. Finally, I argue that the narrowness of the holdings in those cases leaves room for future courts to limit the Corps’ section 404 authority to fall closer into line with Congress’ intent.

A. Congressional Intent

The Senate version of the CWA treated dredged spoil the same as any other pollutant and vested the EPA with jurisdiction over such discharges.⁵⁰ The Conference Committee substituted that provision with section 404 from the House bill.⁵¹

Section 404 had its origins in a letter from the American Association of Port Authorities (AAPA) to Congress.⁵² The AAPA was concerned that treating dredged spoil like any other pollutant would stifle dredging operations and “would inhibit the orderly development of [the] national port system.”⁵³ The letter asked that permitting of dredge projects “remain with the U.S. Army Corps of Engineers as it has historically.”⁵⁴

The Corps had administered a dredge and fill permit program under its authority from section 10 of the Rivers and Harbors Act.⁵⁵ Section 10 con-

48. CWA § 502(6).

49. See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

50. See Senate Consideration, *supra* note 35, at 177.

51. See *id.*

52. See *Bills Amending the Federal Water Pollution Control Act and Other Pending Legislation Relating to Water Pollution Control: Hearing Before the Senate Subcommittee on Air and Water Pollution of the Committee on Public Works*, 92d Cong. app. (1971) (letter from Paul A. Amundsen, Executive Director, AAPA).

53. *Id.*

54. *Id.*

55. 33 U.S.C. § 403 (2006); 33 C.F.R. § 209.120 (1972). The Rivers and Harbors Act provided separate authority for the Corps to regulate the discharge of “refuse” into navigable waters. 33 U.S.C. § 407 (2006). In enacting the CWA, Congress shifted authority over the “refuse” program to the EPA via section 402. S. REP. NO. 94-1236, at 138 (1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3776 [hereinafter SENATE REPORT].

cerns “[o]bstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.”⁵⁶ Specifically, that section states that “it shall not be lawful to excavate or fill . . . any navigable water of the United States, unless the work has been . . . authorized by the Secretary of the Army.”⁵⁷ The purpose of that statute was to assure that navigation would be free from obstruction caused by fill material, structures, or other barriers.⁵⁸

Responding to the AAPA’s request, Senator Ellender from Louisiana offered an amendment that “simply retains the authority of the Secretary of the Army to issue permits for the disposal of dredged materials . . . [which] is essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States.”⁵⁹ The proposed amendment failed because other senators expressed concern about the possible polluting effects of dredged spoil.⁶⁰

The House bill did, however, include a provision that met the AAPA’s concerns. With an eye towards section 10 of the Rivers and Harbors Act, the Conference Committee was hesitant to involve a second agency (the EPA) in the administration of the dredge and fill permit system.⁶¹ Accordingly, it adopted the House provision as section 404 in the final version of the CWA.

The legislative history makes it clear that the purpose of section 404 was to maintain the Corps’ role from the Rivers and Harbors Act in permitting discharges that may interfere with navigation. There is nothing in the legislative history to suggest that section 404 was intended to give the Corps jurisdiction over any and all discharges that have a filling effect. The statute itself suggests that section 404 is aimed primarily at fill that may obstruct navigation: section 404(b), for example, requires consideration of the “economic impact of the [disposal] site on *navigation and anchorage*.”⁶²

Even in preserving the Corps’ role, the Committee recognized that the Administrator of the EPA must still serve an important oversight function:

First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the “pollutant” dredge spoil without a permit or in violation of a permit would violate Section 301(a).

56. 33 U.S.C. § 403.

57. *Id.*

58. *See* 33 U.S.C. § 1 (2006).

59. 117 CONG. REC. 38,853 (1971).

60. *See* *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Kentuckians I)*, 204 F. Supp. 2d 927, 934 n.8 (S.D. W. Va. 2002).

61. *See* Senate Consideration, *supra* note 35, at 177.

62. CWA § 404(b), 33 U.S.C. § 1344(b) (2006) (emphasis added).

Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.

Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.⁶³

These statements imply a general oversight duty for the EPA in section 404. The Committee further stated that it did “not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site.”⁶⁴ The Committee instead decided that the EPA was the appropriate authority to oversee environmental impacts of fill discharges and therefore vested the EPA with veto authority over the Corps’ permit decisions.⁶⁵ It contemplated that permit applications would be “transmitted to the Administrator for review” and that “the Administrator [would] be expeditious in his determination” of whether the disposal would meet environmental standards.⁶⁶ Finally, the Committee expressed a goal for the Corps and the EPA to work together to “end the process of dumping dredged spoil in water.”⁶⁷

The legislative history overall demonstrates that Congress intended the EPA to be the primary regulator of environmental impacts from discharges of fill, while the Corps’ role was to specify locations of discharge that would not impair navigation. Congress also contemplated that the EPA would review all fill permits and have the ultimate decisionmaking authority for those applications that failed to meet environmental standards. Section 404 thus creates a limited carve-out in the CWA for the Corps that was derived from its previous authority under the Rivers and Harbors Act. The legislative history of the CWA indicates that the EPA’s administrative authority was intended by Congress to be limited only by those tasks specifically delegated to the Corps.

63. Senate Consideration, *supra* note 35, at 177.

64. *Id.*

65. *See id.*

66. *Id.*

67. *Id.*

B. Case Law: Mining Overburden as Fill Material

Notwithstanding congressional intent, the *text* of the CWA is unclear with regard to which agency is responsible for permitting discharges that have both pollutant and fill characteristics. The overlapping definitions of fill and pollutant in section 502(6) are especially problematic.⁶⁸ Mining overburden clearly meets the definition of “pollutant” in section 502(6), but it may also constitute “fill material” under section 404. The EPA has jurisdiction over discharges of mining overburden as a “pollutant.” The Corps only has jurisdiction over such discharges if mining overburden is also “fill material.”⁶⁹

The *Kentuckians* line of cases assessed whether the Corps has jurisdiction over mining overburden as fill material, ultimately holding that it does.⁷⁰ I argue that the Fourth Circuit’s decision failed to give effect to congressional intent, although it was arguably correct under the deferential *Chevron* standard.⁷¹ The Supreme Court in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* addressed the related issue of what happens when both agencies may have jurisdiction over the same discharge.⁷² It held that so long as the Corps issued a valid discharge permit, no EPA permit was required. Although the Court did not directly consider whether the Corps’ regulatory definition of “fill material” was correct on its face, it failed to consider the limited nature of Congress’ section 404 carve-out in acceding to the Corps’ jurisdiction over mining overburden. The case law

68. “The term ‘pollutant’ means *dredged spoil*, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, *rock, sand*, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” CWA § 502(6), 33 U.S.C. § 1362(6) (2006) (emphasis added).

69. The issue of what happens when both agencies may exercise jurisdiction over the same discharges was taken up in *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009), discussed *infra*.

70. *Kentuckians I*, 204 F. Supp. 2d 927 (S.D. W. Va. 2002).

71. The Supreme Court articulated the modern standard of judicial deference to agency interpretations of law in *Chevron USA, Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984):

[Step one:] First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. [Step two:] Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

72. 557 U.S. 261 (2009).

thus represents a tentative approval of the Corps' jurisdiction over discharges of mining overburden as "fill material," but the courts have not conclusively settled the matter.

1. The *Kentuckians* Cases

The Corps' acceptance of section 404 jurisdiction for valley fills was first challenged in *Bragg v. Robertson (Bragg I)*.⁷³ Rather than ruling on the CWA claims for relief, the district court enjoined mining activities under SMCRA.⁷⁴ The first court to explicitly rule on the propriety of using section 404 permits for valley fills was the District Court for the Southern District of West Virginia in *Kentuckians I*.⁷⁵

In that case, the Corps had issued a Nationwide Permit 21 (NWP 21)⁷⁶ to Martin County Coal Corporation in June 2000 for a mining project in Martin County, Kentucky.⁷⁷ The environmental organization plaintiff

73. 72 F. Supp. 2d 642 (S.D. W. Va. 1999).

74. *Id.* at 663. Count 17 of the plaintiffs' complaint alleged that the Corps would violate its authority under the CWA by issuing a Nationwide Permit 21 (NWP 21) for Hobet Mining to fill valleys at its Spruce Fork No. 1 mine. Second Amended Complaint for Declaratory and Injunctive Relief, *Bragg I*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999) (No. 2:98-0636), 1999 WL 33933888. Although the district court did not reach this claim, it did state that "[t]he Corps' § 404 authority to permit fills in the waters of the United States does not include authority to permit valley fills for coal mining waste disposal." *Bragg I*, 72 F. Supp. 2d at 657. The plaintiffs in a partial settlement of this case had surrendered their right to challenge the Corps' assertion that mining overburden was fill material, but the court analyzed the authority *sua sponte* in order to decide whether SMCRA was preempted by CWA regulations. *Id.* at 657 n.29. In the settlement, the government agreed to suspend use of NWP 21 until the EPA, Corps, Office of Surface Mining (OSM), and U.S. Fish and Wildlife Service (FWS) prepared an Environmental Impact Statement (EIS) on the use of NWP 21. See Settlement Agreement at 3-5, *Bragg I*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999) (No. 2:98-0636), 1998 WL 35251185. The Corps would consider section 404 permits on an individual basis until the EIS was completed. *Id.* at 4-5.

75. 204 F. Supp. 2d 927 (S.D. W. Va. 2002).

76. Under CWA § 404(e), the Corps may "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." The general permit in this case was issued by the Corps in 1996 on a nationwide basis for:

[a]ctivities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must include an OSM or state approved mitigation plan.

61 Fed. Reg. 65,874, 65,916 (Dec. 13, 1996).

77. *Kentuckians I*, 204 F. Supp. 2d at 930.

brought a facial challenge to the Corps' use of NWP 21 for valley fills, asserting that the Corps violated its own regulations and that the Corps' CWA jurisdiction did not extend to fill material whose purpose was for waste disposal.⁷⁸ The Corps' regulations at the time defined fill material as "any material used for the *primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody[.]" and specifically excluded "any pollutant discharged into the water primarily to dispose of waste."⁷⁹ The district court performed an analysis under *Chevron* step one to explain that Congress had clearly indicated via the plain text, statutory structure, and legislative history that fill material must have a constructive purpose to come within the scope of section 404.⁸⁰ The court found that the 1977 regulatory definition gave effect to Congress' intent, but that it required the Corps to find that a discharge had a constructive purpose prior to issuing a section 404 permit for that discharge.⁸¹ Because the Corps acknowledged that valley fills did not serve a constructive purpose, the court held that the Corps violated its own 1977 regulations.⁸²

Notably, the district court acknowledged that Congress had intended for section 404 to constitute only a limited grant of jurisdiction to the Corps.⁸³ It provided a thorough discussion of the legislative history, noting that section 404 was primarily intended to keep dredge permitting authority with the Corps.⁸⁴ The court held that the only permissible interpretation of section 404 in light of Congress' intent was one where the discharge of dredge or fill "involved maintenance, construction, work, and structures [in navigable waters], not disposal of pollutants or waste."⁸⁵

Shortly after this litigation began, the Corps issued a draft rule modifying its definition of fill material to include any material that "has *the effect* of replacing any portion of a water of the United States with dry land; or changing the bottom elevation of any portion of a water of the United States."⁸⁶ Although this regulation was not yet finalized, the district court

78. *Id.*

79. 33 C.F.R. § 323.2(e) (1977) (emphasis added).

80. *See Kentuckians I*, 204 F. Supp. 2d at 933–37.

81. *See id.* at 937–39.

82. *See id.* at 942–43.

83. *See id.* at 936.

84. *See id.* at 933–36.

85. *Id.* at 936.

86. Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,299 (proposed Apr. 20, 2000) (emphasis added). In addition, the final rule specifically stated that "[e]xamples of such fill material include, but are not limited to . . . overburden from mining or other excavation activities." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,142 (May 9, 2002) (to be codified at 33 C.F.R. § 323.2(e)).

held that an “effect-based” definition of fill material would expand the Corps’ authority beyond that conferred by the CWA, and therefore the proposed regulation would be invalid if issued as final.⁸⁷ Because the court found that neither the 1977 nor the 2002 regulations authorized the use of section 404 permits for valley fills, it enjoined the Huntington District office of the Corps “from issuing any further § 404 permits that have no primary purpose or use but the disposal of waste,” specifically prohibiting issuance of permits for mountaintop removal overburden valley fills.⁸⁸

On appeal, the Fourth Circuit in *Kentuckians II* struck down the district court’s ruling, holding that the injunction issued by the district court was “overbroad.”⁸⁹ Rather than ending its discussion with the procedural failure, the court went on to overturn the district court’s assessment of the Corps’ general authority under section 404.⁹⁰ The Fourth Circuit found that Congress had not, in fact, spoken directly to the issue of whether fill material must have a purpose.⁹¹ The circuit court dismissed the district court’s discussion of legislative history, finding instead that the legislative history was “inconclusive” as to the meaning of “fill material.”⁹² Noting that “fill material” was thus an ambiguous term, the circuit court proceeded to *Chevron* step two.⁹³ The court held that under *Chevron* step two, the Corps’ 1977 definition was a permissible construction of the ambiguous term, and the Corps had permissibly interpreted its own regulations in this case.⁹⁴

The Corps issued a final rule with its new definition of fill material in 2002, which expressly included overburden from mining operations.⁹⁵ The

87. *Kentuckians I*, 204 F. Supp. 2d at 945.

88. *Id.* at 946–47.

89. 317 F.3d 425, 430 (4th Cir. 2003). The Fourth Circuit found that the plaintiffs’ complaint sought an injunction only for the permit issued to Martin County Coal, whereas the district court had issued an injunction against all similar permits from the Corps’ Huntington office.

90. *Id.* at 448. Although he concurred in the judgment, Judge Luttig dissented as to this subsequent discussion of section 404 authority, stating, “the majority wades knee-deep, and without apparent hesitation, into the very issues that were improvidently decided by the District Court” *Id.* at 449.

91. *Id.* at 443–44.

92. *Id.* at 443. The circuit court stated that the scope of section 10 of the Rivers and Harbors Act was not clearly limited to discharge of fill that had a beneficial purpose. *Id.* at 442. Therefore, even if section 10 was the predecessor to CWA section 404, that section could not be relied on to prove that section 404 could not apply to non-beneficial fill. *Id.* In addition, the circuit court found that the district court’s analysis of the legislative history of the CWA was flawed because it focused only on references to dredged spoil; that history could not be used to clarify any ambiguity in the definition of fill. *Id.* at 443.

93. *Id.* at 444.

94. *Id.* at 448.

95. Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,142 (May 9, 2002) (to be codified at 33 C.F.R. § 323.2(e)).

court in *Kentuckians I* had stated that the “effects rule” is “fundamentally inconsistent with the CWA, its history, predecessor statutes, longstanding regulations, and companion statutes.”⁹⁶ In other words, the new rule would fail *Chevron* step one. The Fourth Circuit refused to discuss the effects rule, instead holding that “[b]ecause the district court reached beyond the issues presented to it in deciding [the effects rule] issue, we vacate its ruling declaring the New Rule to be inconsistent with § 404 of the Clean Water Act.”⁹⁷ The circuit court’s *Chevron* analysis of the 1977 regulation, however, strongly suggests that it would give the Corps deference in its promulgation of the effects rule.

As a matter of administrative law, the *Kentuckians II* decision was correct. The district court’s *Chevron* step one argument in *Kentuckians I*—that Congress intended section 404 to cover only fill with a purpose—was weak.⁹⁸ While the legislative history of section 404 deals primarily with dredge spoil that results from the dredging of navigation channels, there is nothing to clearly indicate that Congress intended to preclude non-constructive fill from falling under the definition of fill material. As previously noted, the statute itself provides no guidance as to what constitutes fill material. Under *Chevron*, the *Kentuckians II* majority was correct to defer to the Corps’ definition in the absence of an indication that Congress clearly spoke to this question.

However, the context in which section 404 was added and the legislative history generally suggests that the broad jurisdiction afforded to the Corps under the regulatory definition was not intended by Congress.⁹⁹ Congress granted broad authority to the EPA to “prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.”¹⁰⁰ The district court acknowledged, and the Fourth Circuit ignored, that Congress intended section 404 primarily to preserve the Corps’ role of preventing fill from obstructing navigation.¹⁰¹ There is nothing in the legislative history to indicate that Congress intended for the Corps to exercise jurisdiction over discharges of mining waste into headwater streams that are not navigable in fact. That type of discharge seems to be exactly the sort of “rock [and] sand”

96. *Kentuckians I*, 204 F. Supp. 2d 927, 945 (S.D. W. Va. 2002).

97. *Kentuckians II*, 317 F.3d at 438.

98. Evans has argued that Congress has clearly spoken to the definition of fill material, so that “its meaning is not ambiguous.” Evans, *supra* note 1, at 543. Although the legislative history strongly suggests that the definition of fill material is limited, the evidence is circumstantial at best; it lacks an express limitation on the scope of “fill material.”

99. *See id.*

100. CWA § 102, 33 U.S.C. § 1252 (2006).

101. *See* Senate Consideration, *supra* note 35, at 177.

that would fall under the section 502(6) definition of “pollutant”¹⁰² to be regulated by the EPA. The discharge of mining waste into headwater streams does not impede navigation and it has similar detrimental effects on stream ecosystems as a conventional pollutant.¹⁰³ The overall legislative intent of the CWA suggests that the EPA should have some role in regulating the discharge of mining overburden. The legislative history is not clear enough to support a finding under *Chevron* step one that Congress clearly intended the EPA to have jurisdiction over discharge of mining burden. However, the general legislative history should be taken into consideration by courts before they limit the EPA’s oversight power. The EPA’s broad grant of authority must be able to push back on the Corps’ jurisdiction to ensure comprehensive environmental review of section 404 permits.

2. *Coeur Alaska*

The Supreme Court took up a related question in 2009 in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*: Is a section 404 permit sufficient to authorize a gold mining operation to discharge a mixture of crushed rock, sand, and water (in other words, mining overburden/waste) into a navigable water, or is the operation also required to obtain a permit from the EPA for discharge of a “pollutant?”¹⁰⁴ The Court stated that if the Corps has authority to regulate the discharge (i.e., fill material), then the EPA does not.¹⁰⁵ The plaintiffs challenged the Corps’ authority to authorize the discharge of mining waste under the CWA.¹⁰⁶ The Court rejected that claim.¹⁰⁷ Although the Court did not directly consider the legality of the Corps’ regulatory definition of fill on its face, it accepted the Corps’ assertion that crushed rock from mining meets that definition.¹⁰⁸ Therefore, it held that the Corps has authority to issue permits for its discharge under section 404.¹⁰⁹

In so holding, the Court rejected the plaintiffs’ assertion that a discharge that could be subject to section 402 as a “pollutant” cannot also fall under the regulatory definition of fill.¹¹⁰ It pointed out that “§ 404 refers to all ‘fill material’ without qualification.”¹¹¹ In accepting the regulatory definition, the Court stated that “[t]he regulatory scheme discloses a defined, and

102. See *supra* note 68.

103. See generally Palmer et al., *supra* note 3.

104. See 557 U.S. 261, 265–66 (2009).

105. *Coeur Alaska*, 557 U.S. at 275.

106. See *id.* at 275–76.

107. See *id.* at 277.

108. *Id.* at 275.

109. *Id.* at 277.

110. *Id.* at 276–77.

111. *Coeur Alaska*, 557 U.S. at 276.

workable, line for determining whether the Corps or the EPA has the permit authority.”¹¹² The Court noted that a section 402 permit may, however, be required for discharges of pollutants that flow from fill into downstream waters.¹¹³

The *Coeur* decision essentially “holds” that mining tailings are fill material based on a cursory legal analysis. The Court did not utilize a *Chevron* analysis of the regulatory definition, as did the courts in the *Kentuckians* cases, nor did it cite either *Kentuckians* case. Although the Court left open the possibility that the regulatory definition may be “an unreasonable interpretation of § 404” as applied in other cases, it refused to set any limits on the definition.¹¹⁴ This approach is similar to that of the Fourth Circuit in *Kentuckians II*, where the court granted deference to the Corps’ 1977 regulatory definition under *Chevron* step two.

The Court missed an opportunity to clarify the meaning of “fill material” in the CWA. In holding that the case represented a reasonable application of the “fill material” regulatory definition to the facts at hand, the Court declined to rule on the propriety of the regulatory definition on its face. Like the Fourth Circuit in *Kentuckians II*, the Court did not discuss the context in which section 404 was added to the CWA. It did not, in fact, discuss legislative history at all. It simply agreed with the Corps’ application of the definition as an exercise of administrative convenience (i.e. avoiding a two-permit system). However, the application of the definition to the facts would be moot if the regulation itself were found to be impermissible.

C. Narrowing the Case Law to Give Effect to Congressional Intent

Following *Coeur*, it seems that any discharge that has a filling effect, including discharges of mining overburden, falls on the Corps’ side of the regulatory scheme.¹¹⁵ The extent of the Court’s holding is unclear, however, because it stated that “§ 404 does not limit its grant of power” only with respect to the specific facts at hand.¹¹⁶ The holding could be read narrowly to grant the Corps primary jurisdiction only over the discharge of mining tailings where the discharge is into a closed body of water, has only an

112. *Id.* at 277.

113. *See id.* at 287.

114. *Id.* at 276.

115. The Court went on to address whether the Corps must ensure that a discharge under section 404 also meet pollution effluent limitations under section 306. It held that Congress did not intend for section 306 to apply to section 404 permits, and the agencies were to be afforded deference in their determination not to apply section 306 standards to section 404 permits. *Id.* at 280–86.

116. *See id.* at 276; *see also* Evans, *supra* note 1, at 549 (noting that the Court indicated that there “is no reason to read its opinion as a tacit approval of the current regulatory state of affairs”).

“incidental filling effect,” is in the public interest, and does not contain toxic pollutants.¹¹⁷ Alternatively, it could be read more broadly to confer jurisdiction to the Corps for any discharge that has a filling effect.¹¹⁸ The ambiguity in the Court’s holding leaves an avenue open for lower courts to rule that the Corps does not have section 404 jurisdiction based on the facts of a particular case. In addition, the *Coeur* Court did not rule on the facial validity of the Corps’ regulatory definition of fill. There is still room for lower courts to evaluate whether the regulation is a valid construction of the CWA.

The *Kentuckians II* court did address the validity of the regulation on its face. However, that case dealt solely with the validity of the 1977 regulation. In addition, the decision is that of just one circuit, whereas mountaintop removal mining is also ongoing in states in the Sixth Circuit, which has yet to weigh in on this issue.¹¹⁹

The *Coeur* and *Kentuckians* rulings do not necessarily create precedent that would prevent a court from vacating the Corps’ regulatory definition. Considering the legislative context in which section 404 was inserted into the CWA, it is quite possible that a facial challenge to the regulatory definition would succeed. However, until such a challenge is successfully brought, the Corps’ current definition of “fill material”—that any discharge that has a filling effect is “fill material”—is law.

II. COORDINATION BETWEEN THE EPA AND THE CORPS UNDER SECTION 404

The case law makes it clear that section 404 gives the Corps jurisdiction over discharge of mining overburden for valley fills. However, that section also preserves a role for the EPA in the Corps’ permitting process. Section 404(b) directs the EPA Administrator to develop guidelines for use by the Corps in specifying disposal sites for individual permits (the “404(b)(1) Guidelines”).¹²⁰ Section 404(q) requires that the Corps “enter

117. See *Coeur Alaska*, 557 U.S. at 284–85 (providing reasons why the Court found the Corps’ interpretation reasonable in this case).

118. See Evans, *supra* note 1, at 547–49 (arguing that such a broad reading of the holding creates an “absurd result”).

119. As of 2005, mountaintop mining was ongoing in West Virginia, Kentucky, Tennessee, and Virginia. *Surface Mining Permits in Appalachia, ca. 2005*, APPALACHIAN VOICES, http://ilovemountains.org/images/FAQimages/Map_Permits.jpg (last visited July 25, 2012).

120. See CWA § 404(b), 33 U.S.C. § 1344(b) (2006). The EPA guidelines are established in 40 C.F.R. § 230 (2011). They set forth both procedural and substantive standards to be followed by the Corps in specifying disposal sites under both section 404(a) and section 404(e) (pertaining to general permits). Generally, the guidelines prohibit authorization of discharge of dredged or fill material “unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination

into agreements with the Administrator [of the EPA], the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies” to streamline the permitting process generally.¹²¹ The question remains whether these enumerated duties function as the outer limits of the EPA’s power, or whether they may be read in conjunction to grant the EPA a general duty of oversight in the section 404 process. This ambiguity has necessitated interagency agreements on dispute resolution and how to share authority.

The first agreement was entered into in 1992 and provided for vague coordination between the agencies.¹²² A subsequent agreement in 2009 and its associated guidance increased coordination, but both were subsequently struck down by the District Court for the District of Columbia in *National Mining I* and *II*.¹²³ In this Part, I describe these two agreements and the *National Mining* decisions. I then argue that the *National Mining* court improperly read statutory limitations into the EPA’s ability to supervise the Corps’ permitting regime through section 404’s coordination provisions.

A. 1992 Memorandum of Agreement

The Corps and the EPA entered into a dispute resolution agreement (MOA) pursuant to section 404(q) in August 1992.¹²⁴ Generally, the agreement stated that the Corps must “fully consider EPA’s comments” in making its permit determination, and it established a procedure for elevating sensitive section 404 permitting decisions from the regional to the national offices of the EPA and the Corps.¹²⁵ However, the agreement essentially functioned to limit the EPA’s authority in permitting decisions. Specifically, it asserted that “[t]he Army Corps of Engineers is *solely* responsible for making final permit decisions pursuant to . . . Section 404(a) . . . including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and . . . the Endangered Species Act.”¹²⁶ It further acknowledged the Corps’ authority to “issue [a] permit over the objections of the EPA Regional Administrator [and] to issue [a] permit without conditions recommended by the EPA Regional

with known and/or probable impacts of other activities affecting the ecosystems of concern.” 40 C.F.R. § 230.1(c).

121. CWA § 404(q).

122. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992) [hereinafter 1992 MOA], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/1992_MOA_404q.pdf.

123. 816 F. Supp. 2d 37 (D.D.C. 2011); Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245 (D.D.C. July 31, 2012).

124. 1992 MOA, *supra* note 122.

125. *Id.* at 2, 5–6.

126. *Id.* at 1 (emphasis added).

Administrator.”¹²⁷ Although the agreement established a procedure for the EPA to request elevation of section 404 decisionmaking from the regional to the national office, the 1992 MOA limited that authority only “to those cases that involve aquatic resources of national importance.”¹²⁸ It should be noted, however, that the EPA did reserve its “right to proceed with Section 404(c)” as a backstop against the final determination by the Corps.¹²⁹

B. 2009 Memorandum of Understanding

Section 404 permitting continued under this regime with little EPA involvement up until 2009. Recognizing the failed coordination among federal agencies in permitting mountaintop removal operations in Appalachia,¹³⁰ the Obama administration issued a Memorandum of Understanding (MOU) on June 11, 2009 to implement an “Interagency Action Plan on Appalachian Surface Coal Mining.”¹³¹ The 2009 MOU marked a drastic change from the approach under the 1992 MOA, as the EPA’s role in the section 404 process was expanded to the point of being arguably paramount to that of the Corps.

The Corps, the EPA, and Department of the Interior developed the Interagency Action Plan to “significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law.”¹³² The 2009 MOU contained four elements: interim actions, long-term regulatory actions, coordinated environmental reviews, and a commitment to public participation.¹³³

Interim actions by the Corps and the EPA included “modify[ing]” NWP 21 to “preclude its use to authorize the discharge of fill material into streams for surface coal mining activities,” developing guidance to strength-

127. *Id.* at 5.

128. *Id.* at 6. As of 2011, the EPA had only requested higher-level review for 11 permit applications, out of over one million applications filed since 1992. U.S. ENVTL. PROT. AGENCY, EPA CLEAN WATER ACT SECTION 404(Q) DISPUTE RESOLUTION PROCESS FACTSHEET, *available at* <http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf>.

129. 1992 MOA, *supra* note 122, at 9.

130. See Press Release, Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reforms (June 11, 2009), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_11_pdf_MTM_Release_6-11-09.pdf.

131. Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009) [hereinafter 2009 MOU], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf. The 2009 MOU stated that it applies to “mining techniques requiring permits under both [SMCRA] and Section 404 of the [CWA] in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.” *Id.* at 1 n.1.

132. *Id.* at 1–2.

133. *Id.* at 2.

en environmental review pursuant to the section 404(b)(1) Guidelines, and improving EPA review of discharges from valley fills under section 402.¹³⁴ Long-term regulatory goals included revising SMCRA regulations, eliminating the use of NWP 21 in connection with mountaintop removal mining, and revising how mountaintop removal mining activities are regulated under the CWA.¹³⁵ The 2009 MOU also established new interagency coordination procedures, known as Enhanced Coordination Procedures (ECPs), for pending section 404 permit applications.¹³⁶ The ECPs provided the EPA with primary environmental review (also known as Multi-Criteria Integrated Resource Assessment [MCIR]) of pending applications based on the 404(b)(1) Guidelines.¹³⁷ Those applications raising concern would be subject to additional review and coordination by the Corps and the EPA (known as Enhanced Coordination [EC]).¹³⁸ The Corps would be allowed to proceed immediately on those applications that did not raise concern.¹³⁹

The EPA issued its Final Guidance in July 2011 to strengthen the EPA's environmental review of section 404 permitting using the section 404(b)(1) Guidelines, and to improve section 402 reviews of discharges from valley fills.¹⁴⁰ With regard to section 404 review, the EPA Headquarters directed Regional Administrators in the Appalachian region to provide substantive comments to the Corps on whether a surface coal mining permit application complies with five critical provisions of the section 404(b)(1) Guidelines: (1) applicants have evaluated a full range of potential alternatives, (2) discharges will not cause or contribute to violations of water quality standards, (3) discharges will not result in significant degradation of the aquatic environment, (4) impacts to waters of the United States

134. *Id.* at 3.

135. *Id.* at 4.

136. 2009 MOU, *supra* note 131, at 4–5.

137. *Id.*

138. Memorandum from Lisa P. Jackson, Adm'r, EPA, and Terrence "Rock" Salt, Acting Assistant Sec'y (Civil Works), Dep't of the Army, to William C. Early, Acting Reg'l Adm'r, EPA Region III, et al., Enhanced Surface Coal Mining Pending Permit Coordination Procedures (June 11, 2009) [hereinafter ECP Memo], *available at* http://www.epa.gov/owow/wetlands/pdf/Final_MTM_Permit_Coordination_Procedures_6-11-09.pdf. The language of the 2009 Memo seems to portray the EPA as the ultimate gatekeeper with respect to section 404 permits with the Corps acting as the on-the-ground implementing agency.

139. *Id.* at 1.

140. See Memorandum from Nancy K. Stoner, Acting Assistant Adm'r for Water, and Cynthia Giles, Assistant Adm'r for Enforcement & Compliance Assurance, to Shawn Garvin, Reg'l Adm'r, EPA Region III, Gwendolyn Keyes Fleming, Reg'l Adm'r, EPA Region IV, and Susan Hedman, Reg'l Adm'r, EPA Region V, 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) [hereinafter Final Guidance], *available at* http://appvoices.org/images/uploads/2012/08/Final_Appalachian_Mining_Guidance_07211111.pdf.

have been fully minimized, and (5) unavoidable impacts to aquatic resources have been effectively mitigated via compensatory mitigation.¹⁴¹ The Final Guidance encouraged Regional Administrators to identify where applications do not comply with these provisions and recommend changes that would help bring the applications into compliance.¹⁴²

The 2009 MOU and the Final Guidance represented positive steps towards improving consideration of the environmental effects of valley fills. The environmental review of NWP 21 had been cursory at best, and, at worst, it completely ignored the environmental impact of valley fills.¹⁴³ Eliminating the use of NWP 21 for mountaintop removal mining in Appalachia would force a “harder look” at the effects of valley fills by requiring individual EIS reviews. In addition, as the *Bragg* cases made clear, it is difficult to reconcile the SMCRA regulations with the relatively lax environmental standards in section 404. If SMCRA is to continue to be relevant in regulating valley fills, its associated regulations must be squared with those under the CWA. Most importantly, the 2009 MOU would have given the EPA a clearer role in the review of fill permit applications. It ensured that the EPA would be apprised of possible environmental impacts of the operation so that it could utilize its expertise to determine whether the section 404(b)(1) Guidelines have been met and provide recommendations to the Corps to ensure that section 404 permits comply with the Guidelines.

C. Legal Challenge to Enhanced Coordination Procedures

Unhappy with the prospect of the EPA conducting the preliminary environmental review of its pending section 404 permit applications, the coal industry brought suit to enjoin use of the ECPs. The District Court for the District of Columbia in *National Mining I*¹⁴⁴ enjoined the use of the ECPs, holding that the EPA improperly exceeded its statutory role in the section 404 permitting regime and violated the Administrative Procedure Act (APA) by entering the plan without public notice and comments.¹⁴⁵ The court later also vacated the Final Guidance in *National Mining II*, holding that the EPA exceeded its authority under SMCRA and CWA sections 303, 402, and 404 in setting water quality guidelines.¹⁴⁶

141. *Id.* at 28. The Final Guidance also provided for EPA coordination with the states on section 402 permitting for coal mining operations. *Id.* at 11–26.

142. *Id.* at 31.

143. *See* *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 479 F. Supp. 2d 607, 662–63 (S.D. W. Va. 2007) *rev'd sub nom.* *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

144. 816 F. Supp. 2d 37 (D.D.C. 2011).

145. *Id.* at 49.

146. Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245, at *17 (D.D.C. 2012).

The court in *National Mining I* first addressed the argument that the EPA's role in the MCIR Assessment and the EC Process exceeds the EPA's statutory authority under the CWA.¹⁴⁷ The plaintiffs argued that under *Chevron* step one, the CWA plainly limits the EPA's role in the section 404 process to:

(1) developing the Section 404(b)(1) Guidelines with the Corps for the Corps to apply when designating disposal sites; and (2) exercising its authority under Section 404(c) to prohibit the Corps' decision to issue a permit for a particular disposal site, but only if [it] follows the specified statutory and regulatory procedures governing the exercise of [Section 404(c) veto] authority.¹⁴⁸

The Government countered that the ECPs fall within the agencies' "broad discretion to establish the procedures necessary to carry out their statutory functions."¹⁴⁹ Specifically, it pointed to section 404(q), which mandates coordination between the EPA and the Corps.¹⁵⁰ The court found that section 404 is not ambiguous under *Chevron* step one: "[W]hile it is true that the EPA does have some role to play in the Section 404 permitting process, *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."¹⁵¹ The court stated that the EPA only has authority to take five enumerated actions under section 404: "(1) work with the Corps to develop guidelines, [§ 404(b)(1)], (2) 'prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site' after notice and opportunity for public hearings and consultation with the Corps, [§ 404(c)], (3) work with states desiring to administer their own permitting programs for dredge and fill material, [§ 404(g)–(j)], (4) promulgate categories of discharge that shall not require permits under a state permitting program, [§ 404(l)], and (5) enter into agreements with the Corps to minimize 'duplication, needless paperwork, and delays in the issuance of permits,' [§ 404(q)]."¹⁵²

The court went on to state that any gaps in the section 404 permitting scheme were to be filled by the Corps as the permitting authority, and that "the EPA is to play a lesser, clearly defined supporting role."¹⁵³ Because it

147. 816 F. Supp. 2d at 42.

148. *National Mining I*, 816 F. Supp. 2d at 43 (internal quotations omitted).

149. *Id.* (internal quotations omitted).

150. *Id.*

151. *Id.* at 44 (emphasis added).

152. *Id.*

153. *Id.* at 44–45.

held that the EPA exceeded its authority under section 404, the court enjoined use of the ECPs.¹⁵⁴

The court's ruling, however, is contrary to the CWA and administrative law. First, the court incorrectly framed the inquiry under *Chevron* step one as whether the EPA's section 404 role is limited solely to those tasks expressly delegated to the EPA. The CWA grants broad authority to the EPA: "*Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.*"¹⁵⁵ Here, the Administrator had determined that coordination between the Corps and the EPA in determining whether a permit meets the section 404(b)(1) Guidelines was necessary to administer the CWA. The question in this case should thus be whether section 404 *expressly prohibits* the EPA from taking these necessary actions.

The court relied on language that "[t]he Secretary may issue permits"¹⁵⁶ as providing an express limitation on the Administrator's authority.¹⁵⁷ The court incorrectly interpreted this language to entirely limit the EPA's authority in section 404, subject to certain roles that have been expressly delegated to the EPA.¹⁵⁸ This interpretation is overly broad. Section 404(a) does expressly prohibit the EPA from issuing fill permits, but it does not go so far as to completely cut the EPA out of section 404. The remainder of the section is still administered by the EPA, subject to express delegations to the Corps. Nothing in section 404 expressly limits the EPA's general oversight role. Although section 404 delegates many tasks to the Corps, the delegations generally preserve a role for the EPA. This general oversight role can also be inferred from the legislative history discussed in Section I.A. *supra*. In addition, the Corps' specification of disposal sites under section 404(b) is "[s]ubject to [§ 404(c)],"¹⁵⁹ which involves EPA review.¹⁶⁰

154. *Id.* at 45. Alternatively, the court held that the ECPs must be set aside because they were promulgated without notice and comment, and did not fall into the APA exemption for "rules of agency organization, procedure, or practice." *Id.* at 45–49. "[P]rocedural rules are binding rules 'that do not themselves alter the rights or interests of parties.'" *Id.* at 45 (quoting *Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000)). The court stated that the ECPs essentially change the reviewing authority for the permits, thereby altering the rights and interests of the applicants. *National Mining I*, 816 F. Supp. 2d at 47. This characterization is incorrect. Despite the ECPs' effect of giving the EPA more of a role in the initial review process, the legal rights and interests of the applicants have not changed: the discharge must still comply with the section 404(b)(1) Guidelines, the Corps still makes the ultimate determination of whether the permit complies with the Guidelines, the Corps is still the issuing authority, and the EPA still retains its section 404(c) veto authority.

155. CWA § 201(d), 33 U.S.C. § 1251(d) (2006) (emphasis added).

156. CWA § 404(a).

157. *National Mining I*, 816 F. Supp. 2d at 44.

158. *See id.*

159. CWA § 404(b).

This implies that the Corps' review of permits necessarily requires EPA review of the applications.

Finally, section 404(q) essentially acknowledges the EPA's oversight role by mandating coordination between the Corps and the EPA to minimize delays in the issuance of permits.¹⁶¹ This section would be superfluous if the EPA did not have some role in section 404 permitting that could delay permit issuance. Section 404(q) does not expressly limit the contexts in which that coordination may occur. The generality of this provision leaves open the possibility that it applies to the Corps' permitting process, resulting in ambiguity. The court in *National Mining I* did not address the government's assertions that sections 404(b), (c), and (q) left room in the permitting process to be filled by EPA and Corps cooperation. The EPA must be involved with the Corps' permitting process in order to effectively ensure its section 404(b) Guidelines are being followed and to determine whether a section 404(c) veto is proper. Section 404(q) appears to provide the EPA with the general oversight authority necessary to remain apprised of issues in Corps permitting.

The *National Mining I* court was too quick to find clear congressional intent to limit the Administrator's grant of authority.¹⁶² Nothing in section 404 expressly limits this authority. In fact, the legislative history suggests that Congress contemplated that the EPA and Corps would coordinate with each other in review of permits.¹⁶³ A court less willing to infer congressional intent would assess whether the ECPs are based on a permissible construction of the statute under *Chevron* step two. The ECPs are not only compatible with the section 404 permitting scheme,¹⁶⁴ but actually function to streamline the process as encouraged by section 404(q). In particular, section 404(c) allows the EPA to object to specification of disposal sites by the Corps. This subsection necessarily requires the EPA to review permits

160. CWA § 404(c).

161. CWA § 404(q) ("[T]he Secretary [of the Army] shall enter into agreements with the Administrator [of the EPA] . . . to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section.").

162. The federal government apparently agrees with this assessment of the district court's decision, as it has indicated that it plans to appeal the case to the circuit court. See Alan Kovski, *Court Rules EPA Erred in Using Guidance To Impose Conductivity Test on Coal Mines*, BLOOMBERG BNA (Aug. 1, 2012), <http://www.bna.com/court-rules-epa-n12884910920/>.

163. Senator Muskie's discussion of section 404 indicated that the Corps was expected to transmit permit applications to the Administrator for review before the Corps took action on the application. See Senate Consideration, *supra* note 35, at 177.

164. The plaintiffs argued that the ECPs were not compatible with section 404 because any ambiguity in the statute had been clarified by the 1992 MOA. See *Nat'l Mining Ass'n v. Jackson (National Mining I)*, 816 F. Supp. 2d 37, 43 (D.D.C. 2011). The court did not reach this argument, but it must fail because the 1992 MOA has minimal precedential value as a guidance document. Agencies are entitled to issue new guidance documents that supersede previous documents. The 1992 MOA has no more legal authority than the 2009 MOU.

before they are issued. The ECPs provide an opportunity for the EPA to review permit applications before the Corps has specified disposal sites and to notify the Corps of limits of specification that it would accept. The Corps can then issue a permit it knows will be acceptable to the EPA and can avoid a situation where it must spend extra time revising a permit after an EPA veto.

The *National Mining II* court focused on the section 402 coordination procedures in the Final Guidance, but also vacated the section 404 environmental review procedures.¹⁶⁵ Regarding the latter procedures, the court summarily stated that “[u]nder the CWA, the EPA [does not] possess[] the authority to apply the 404(b)(1) Guidelines to Section 404 permits.”¹⁶⁶ The court did not provide further analysis of the EPA’s application of the 404(b)(1) Guidelines, but referred generally to *National Mining I* in support of its vacatur of the Final Guidance.¹⁶⁷

The section 404 review portion of the Final Guidance relied on the EPA’s authority under subsections 404(c) and 404(q).¹⁶⁸ It is not surprising that the *National Mining II* court was not persuaded by that justification for the EPA’s oversight considering that the same court rejected that argument in *National Mining I*. However, the EPA’s general guidelines in the Final Guidance did not involve the sort of formal process that was condemned in *National Mining I*. Instead, under the Guidance, the EPA would have offered comments to the Corps pursuant to the Corps’ own regulations that authorize the Corps to “seek the advice” of other federal agencies on “matters within the [other agency’s] special expertise.”¹⁶⁹ Based on the *National Mining* decisions, it is clear that that court is opposed to any sort of EPA involvement in the Corps’ permitting that is not expressly enumerated in the CWA.

Although the *National Mining* courts rejected the EPA’s invocation of sections 404(c) and (q) to determine its role in the review of pending fill applications, its ruling does not foreclose the use of those provisions going forward. After *National Mining II*, the EPA may still informally consult with the Corps on a permit application’s compliance with the 404(b)(1) Guidelines. EPA oversight is still permitted so long as it is not an announced, official policy. The effect of the *National Mining* cases, then, is a less transparent coordination process between the EPA and the Corps than

165. See Nat’l Mining Ass’n v. Jackson (*National Mining II*), Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245, at *12 (D.D.C. 2012).

166. *Id.*

167. See *id.* at *2 n.4.

168. See Final Guidance, *supra* note 140, at 27 (“Regions should be prepared and willing to assist the Corps by . . . exercising EPA’s authorities under Sections 404(c) and 404(q) of the CWA.”).

169. 33 C.F.R. § 325.2(a)(3) (2011).

existed under the ECPs and Final Guidance.¹⁷⁰ Although the EPA's comments will likely be in the administrative record of any Corps decision, permit applicants (and mining opponents) will not know the degree of EPA involvement in the permit review until after the Corps makes a decision. Clearly the mining applicants would prefer that the EPA not be involved in the permit review.¹⁷¹ Yet, however unclear the EPA's specific duties are under section 404, it is clear that the EPA must have some oversight role. Applicants would seem to benefit from the certainty of a designated process of EPA review, but the mining industry spurned that process in the course of bringing the *National Mining* suit.

The 1992 MOA functioned to limit the EPA's oversight of the Corps' permitting, requiring only that the Corps consider comments from the EPA. The 2009 MOU greatly expanded the EPA's oversight role and provided for enhanced coordination between the Corps and the EPA in evaluating section 404 permit applications as well as newly articulated ecological standards against which to evaluate the project. However, the validity of the 2009 MOU remains uncertain after much of the MOU was vacated in the *National Mining I* case. It is unclear to what extent the EPA will oversee the Corps' permitting pending the outcome of an appeal of the *National Mining* cases.

III. SCOPE OF EPA AUTHORITY UNDER SECTION 404(C)

Section 404(c) essentially provides the EPA with another way to limit the Corps' section 404 jurisdiction by giving the agency veto power over the Corps' permits. Specifically, subsection (c) states:

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (includ-

170. Granted, the ECPs applied only to pending permit applications and were not necessarily proposed for use with future applications, but they may have been applied to new applications had they proven to be a successful method of evaluating pending applications.

171. The mining industry asserted that the new process would add "unreasonable delays" to approval of permits and could result in denials of permits based on the new criteria in the MCIR. Complaint for Declaratory and Injunctive Relief at 37-38, *Nat'l Mining Ass'n v. Jackson (National Mining I)*, 816 F. Supp. 2d 37 (D.D.C. 2011) (No. 1:10-cv-01220), 2010 WL 2910972.

ing spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.¹⁷²

The EPA has been reluctant to invoke this provision, using it only thirteen times in its history.¹⁷³ There have been several attempts by environmental groups to compel the EPA to use its veto power, some of which have been successful.¹⁷⁴ Other suits have sought to enjoin the EPA's use of its veto power.¹⁷⁵ However, the subsection is "so poorly written"¹⁷⁶ that courts have struggled to ascertain the exact authority the provision confers.¹⁷⁷ Courts have defined the provision's authority inconsistently, leaving the scope of the EPA's section 404(c) power an open question. I argue that section 404(c)'s grant of power to the EPA is broad and has been improperly limited by some courts. The broad grant of power provides the EPA with a general duty to consider whether each permit application should be vetoed and the authority to veto a permit either before or after it is issued.

A. Attempts to Compel EPA Veto

Cases dealing with efforts to compel the EPA to veto a Corps section 404 permit are instructive on the authority conferred by section 404(c) because such cases turn on whether subsection (c) compels a nondiscretionary duty of oversight on the EPA. The citizen suit provision of the CWA allows suits against the EPA only "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is *not*

172. CWA § 404(c), 33 U.S.C. 1344(c) (2006). The EPA has promulgated regulations that establish the procedure by which the EPA will exercise its section 404(c) authority. *See* 40 C.F.R. § 231. For a good example of the EPA's process in issuing a section 404(c) veto, *see* Bd. of Miss. Levee Comm'rs v. E.P.A., 785 F. Supp. 2d 592, 600–04 (N.D. Miss. 2011).

173. *See* U.S. ENVTL. PROT. AGENCY, EPA CLEAN WATER ACT SECTION 404(C) FACT SHEET, available at <http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf>.

174. *See, e.g.*, Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs (*P.E.A.C.H. II*), 87 F.3d 1242 (11th Cir. 1996) *aff'g* (*P.E.A.C.H. I*) 915 F. Supp. 378, 381 (N.D. Ga. 1995); Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313 (4th Cir. 1988); Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 1 (D.D.C. 2007); City of Olmsted Falls v. EPA, 266 F. Supp. 2d 718 (N.D. Ohio 2003), *aff'd* 435 F.3d 632 (6th Cir. 2006).

175. *See, e.g.*, James City Cnty, Va. v. EPA (*James City IV*), 12 F.3d 1330 (4th Cir. 1993); Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133 (D.D.C. 2012); City of Alma v. United States, 744 F. Supp. 1546 (S.D. Ga. 1990).

176. *Mingo Logan*, 850 F. Supp. 2d at 140.

177. *See, e.g., id.*

discretionary with the Administrator.”¹⁷⁸ Therefore, if the EPA's duties under section 404(c) are discretionary, the agency cannot be sued under the citizen suit provision for its failure to veto a permit under section 404(c). The circuits have split on this question. Although deciding the question of section 404(c) discretion differently, the courts' opinions consistently suggest that the EPA has a general oversight duty in the Corps' permit decisions.

The District Court for the Northern District of Georgia in *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers* (“*P.E.A.C.H. I*”) held that the EPA's section 404(c) duty is discretionary and the agency could therefore not be sued under the CWA's citizen suit provision.¹⁷⁹ The plaintiffs in that case brought suit under the CWA's citizen suit provision, alleging *inter alia* that the EPA violated the CWA in failing to veto a Corps' wetland fill permit.¹⁸⁰ The district court dismissed the claim on the grounds that CWA section 505 (the citizen suit provision) does not waive sovereign immunity for challenges to the EPA's nondiscretionary duties.¹⁸¹ It pointed to the plain language of section 404(c) as evidence of the discretionary nature of the EPA's duty: “The use of the term ‘authorize’ (as opposed to ‘shall’) suggests a discretionary function.”¹⁸² The Eleventh Circuit agreed on appeal, holding in *P.E.A.C.H. II* that “by statute, the Administrator is authorized rather than mandated to overrule the Corps[,]” and therefore cannot be sued under the CWA for failure to exercise this authority.¹⁸³

The District Court for the Northern District of Ohio followed the *P.E.A.C.H.* holdings in *Olmsted Falls II*.¹⁸⁴ The plaintiffs in that case invoked the judicial review provision of the APA, rather than the CWA citizen suit provision, to challenge the EPA's failure to veto a Corps permit under section 404(c).¹⁸⁵ The court cited *P.E.A.C.H. II* and noted that the conclusion in that case was buttressed by the discretionary nature of the EPA's regulations outlining its section 404(c) procedure.¹⁸⁶ The plaintiffs

178. CWA § 505(a), 33 U.S.C. § 1365(a) (2006).

179. 915 F. Supp. at 381.

180. *See id.*

181. *Id.* The court also foreclosed the possibility of review under the APA. *Id.* (“While the APA does indeed provide an extensive judicial review procedure, it expressly states that such procedure applies ‘except to the extent that . . . agency action is committed to agency discretion by law.’ 5 U.S.C. § 701(a)(2).”).

182. *Id.*

183. *P.E.A.C.H. II*, 87 F.3d 1242, 1249 (11th Cir. 1996).

184. *City of Olmsted Falls v. EPA (Olmsted Falls II)*, 266 F. Supp. 2d 718, 723 (N.D. Ohio 2003).

185. *Id.* at 721. The plaintiffs had earlier brought suit under the CWA's citizen suit provision, but that claim was dismissed for the plaintiffs' failure to provide the EPA with 60 days' notice of suit as required by that provision. *City of Olmsted Falls v. EPA (Olmsted Falls I)*, 233 F. Supp. 2d 890, 896–97 (N.D. Ohio 2002).

186. *Olmsted Falls II*, 266 F. Supp. 2d at 723.

had also argued that the publication of section 404(b)(1) Guidelines created a nondiscretionary duty for the EPA to ensure that the Corps abides by the Guidelines in issuing permits.¹⁸⁷ The court rejected this argument, finding that the Guidelines only create a duty for the Corps to comply.¹⁸⁸

The Fourth Circuit conversely has held that the EPA has a mandatory duty under section 404(c) to consider Corps' permits for possible veto.¹⁸⁹ The court of appeals in *National Wildlife Federation v. Hanson* interpreted section 505(a)(2) to "allow citizens to sue the Administrator and join the Corps when the Corps abdicates its responsibility to make reasoned wetlands determinations and the Administrator fails to exercise the duty of oversight imposed by [§ 404(c)]."¹⁹⁰ Although the court was ruling on whether the Corps could be joined in a section 505(a)(2) suit, the statement has been interpreted by district courts in the circuit to mean that the EPA's section 404(c) oversight duty is nondiscretionary.¹⁹¹ In *Tidwell*, the plaintiffs brought suit against the EPA and the Corps pursuant to section 505(a)(2) and the APA for failing to require a section 404 permit.¹⁹² The court stated that "under the ruling in *Hanson*, the EPA has a non-discretionary duty to regulate dredged or fill material under [CWA § 404,]" and may thus be sued under the CWA's citizen suit provision.¹⁹³ Because the plaintiffs had "an adequate remedy under the citizen suit of the CWA[,]" the court ruled that they could not also proceed under the APA.¹⁹⁴

Another district court in *South Carolina Coastal Conservation League* examined the *Tidwell* and *Hanson* cases and came to the same conclusion: that section 404(c) imposes a nondiscretionary duty on the EPA.¹⁹⁵ That court expressly disagreed with the holdings in *P.E.A.C.H. II* and *Olmsted Falls II*.¹⁹⁶ Instead, the court read *Hanson* broadly to suggest that the EPA's nondiscretionary duty could extend to "every time the Corps grants a Section 404

187. *Id.*

188. *Id.* The *National Mining II* court came to a similar conclusion in vacating the EPA's Final Guidance. *Nat'l Mining Ass'n v. Jackson (National Mining II)*, Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 WL 3090245, at *12 (D.D.C. 2012).

189. *See, e.g., Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988).

190. *Id.* (emphasis added).

191. *See, e.g., S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, No. 2:07-3802, 2008 WL 4280376, at *8 (D.S.C. Sept. 11, 2008); *Env'tl. Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1354 (E.D.N.C. 1992).

192. 837 F. Supp. at 1347-48.

193. *Id.* at 1354.

194. *Id.* at 1357 (applying 5 U.S.C. § 704, which allows suit under the APA for "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court" (emphasis added)).

195. 2008 WL 4280376, at *8.

196. *Id.* at *5.

permit.”¹⁹⁷ Again, the court held that the plaintiff could not sustain an APA suit where the CWA provided an adequate remedy.¹⁹⁸

Conversely, the District Court for the District of Columbia held in *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers* that plaintiffs could bring suit against the EPA for its failure to veto a permit under the APA, but not under the CWA's citizen suit provision.¹⁹⁹ The plaintiffs in *Mattaponi* argued in their section 505(a)(2) claim, that “under § 404(c), EPA has a general implied nondiscretionary duty to oversee the permitting process, and, [that] its decision not to veto evinced a failure to perform that duty.”²⁰⁰ The court cited the *P.E.A.C.H.* and *Olmsted Falls II* cases in holding that the EPA did not have a nondiscretionary duty to veto the permit.²⁰¹ The court did not expressly reject that section 404(c) imposes a general duty for the EPA to oversee the Corps' permitting process, but stated that the plaintiffs had provided no evidence that the EPA breached such duty.²⁰² However, the court found that the APA's exclusion of suits against “decisions committed to agency discretion by law” is to be read narrowly.²⁰³ It then held that the EPA's decision not to veto the Corps' permit is not the sort of decision that is committed to agency discretion, but instead amounted to an action reviewable under the APA's arbitrary and capricious standard.²⁰⁴

Although these cases deal with whether the EPA is amenable to suit, their holdings are based on the level of duty conferred on the EPA by section 404(c). The cases deal with two different duties of the EPA: (1) the duty to veto a Corps permit if it fails to meet section 404(c) standards; and (2) a general duty conferred by section 404(c) to oversee the permit process and ensure that the Corps properly applies the section 404(b)(1) Guidelines.

Notwithstanding the Fourth Circuit cases, the EPA's veto power is clearly discretionary. It is difficult to argue with the statutory interpretation in the *P.E.A.C.H.* and *Olmsted Falls II* cases. The word “authorized” clearly indicates a discretionary duty.²⁰⁵ None of the other courts identified language mandating EPA veto action. The *Hanson* court seemed only to read a general duty into section 404(c) without mentioning specific actions the

197. *Id.* at *7–8 (rejecting the EPA's attempt to narrow *Hanson* to its facts).

198. *Id.* at *8.

199. 515 F. Supp. 2d 1, 3 (D.D.C. 2007).

200. *Id.* at 5.

201. *Mattaponi*, 515 F. Supp. 2d at 4–5.

202. *Id.* at 5.

203. *See id.* at 7.

204. *See id.* at 7–9.

205. *Cf. Heckler v. Chaney*, 470 U.S. 821, 835–36 (1985) (interpreting “authorized” to “commit complete discretion” to the agency head).

EPA was required to take.²⁰⁶ Even if the Fourth Circuit in *Hanson* was correct in inferring a general duty, the district courts improperly extended that duty to constitute a nondiscretionary EPA duty to decide whether to veto any permit issued by the Corps. The district court in *Mattaponi* correctly decided that the section 404(c) duty was discretionary under the CWA citizen suit provision. However, it is strange that that court simultaneously held that the same duty was not committed to agency discretion under the APA. The court justified its decision on the different standards for how narrowly “discretion” applies in CWA section 505(a)(2) and APA section 701(a)(2). This distinction may be technically correct but leads to the counterintuitive result in *Mattaponi*. Based on this precedent, the availability of judicial review of the EPA’s section 404(c) action (or inaction) is unclear.

However, these decisions are not necessarily incompatible with the concept of a general oversight duty of the EPA under section 404(c). The Fourth Circuit cases did not mandate that the EPA actually veto the Corps’ permits, only that the EPA has a nondiscretionary duty to consider whether the permits should be vetoed. Likewise, the *P.E.A.C.H.* and *Olmsted Falls II* cases did not state that the EPA has no duty to review the Corps’ permits, only that its decision not to veto the permits is discretionary. The *Hanson* court’s suggestion that the EPA has a duty to oversee the Corps’ permitting process, therefore, seems to be an accurate description of the law. The *Mattaponi* court made clear that the EPA has standards by which to assess the Corps’ decisions, and the agency should apply those standards.

This line of cases seems to provide the EPA with justification to be involved in the Corps’ permit review in some sense. The case law supports the EPA’s guidance for review of mountaintop removal valley fill applications going forward. If, however, the EPA does not exercise this sort of review in Appalachia, plaintiffs will likely get judicial review because most mountaintop removal permits are executed in the Fourth Circuit, which follows *Hanson* and its progeny.

B. Challenge to EPA’s Use of Veto Power

As stated *supra*, the EPA has only exercised its veto power thirteen times.²⁰⁷ The EPA has issued just two vetoes since 1989,²⁰⁸ and both of those have been challenged in court.²⁰⁹ Challenges to the EPA’s use of its

206. See *Nat’l Wildlife Fed’n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988) (referencing the Administrator’s failure “to exercise the duty of oversight imposed by [CWA § 404(c)]”).

207. U.S. ENVTL. PROT. AGENCY, *supra* note 173.

208. *Id.*

209. *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 134 (D.D.C. 2012) (challenged on grounds that the EPA exceeded its section 404(c) authority); *Bd. of Miss. Levee*

veto power have centered on either the EPA's substantive decision²¹⁰ or the scope of the agency's veto power.²¹¹

1. Substantive Challenges

Section 404(c) provides standards to be considered by the Administrator in making the veto determination: "whenever he determines . . . that the discharge of [fill] 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."²¹² Substantive challenges to a veto generally assert that the Administrator acted arbitrarily and capriciously in the way in which he considered these standards.

In the *James City* series of cases, the plaintiff asserted that the EPA violated section 404(c)'s substantive standards by vetoing a Corps permit based on unsubstantiated evidence and on improper standards.²¹³ The dispute centered on a proposed fill-based dam to create a reservoir.²¹⁴ The county had applied to the Corps for a section 404 permit, which the Corps announced it would grant in a Record of Decision.²¹⁵ The EPA, however, vetoed the Corps' decision just four months after it was announced (but before the permit was issued).²¹⁶ The EPA stated that the dam would have an "unacceptable adverse effect" because there were "practicable, less environmentally damaging alternatives" available to the county.²¹⁷ The district court overturned the EPA's veto, holding that the EPA's alternatives finding was not supported by the evidence.²¹⁸ The Fourth Circuit affirmed in part, holding that the EPA's decision was unsupported by "substantial evidence," while also remanding the case to the EPA for reconsideration.²¹⁹ The EPA again vetoed the permit on the grounds that the adverse environmental effect would be unacceptable.²²⁰ The district court held that the EPA's

Comm'rs v. EPA, 785 F. Supp. 2d 592, 600–04 (N.D. Miss. 2011) (challenged on grounds that project was immune from section 404(c) power because its EIS had been submitted to Congress pursuant to section 404(r)).

210. See, e.g., *James City Cnty. v. EPA (James City I)*, 758 F. Supp. 348, 353 (E.D. Va. 1990); *City of Alma v. United States*, 744 F. Supp. 1546, 1563 (S.D. Ga. 1990).

211. See, e.g., *Mingo Logan*, 850 F. Supp. 2d at 134.

212. CWA § 404(c), 33 U.S.C. § 1344(c) (2006).

213. See *James City I*, 758 F. Supp. 348, 351–52, *aff'd in part & remanded*, (*James City II*) 955 F.2d 254 (4th Cir. 1992), *rev'd*, (*James City III*) No. 89-156, 1992 WL 315199 (E.D. Va. Aug. 5, 1992), *rev'd*, (*James City IV*), 12 F.3d 1330 (4th Cir. 1993).

214. *James City I*, 758 F. Supp. at 349.

215. *Id.* at 350.

216. *Id.*

217. *Id.* at 351.

218. *Id.* at 353.

219. *James City II*, 955 F.2d 254, 260–61 (4th Cir. 1992).

220. See *James City III*, No. 89-156, 1992 WL 315199, at *1–2 (E.D. Va. Aug. 5, 1992).

second veto was contrary to law because the agency failed to consider necessary factors (i.e., the county's need for water) and its environmental determination was unsubstantiated by the evidence.²²¹ The Fourth Circuit overturned the district court's ruling, holding that Congress clearly intended for the EPA to give primary consideration to environmental effects in its veto decision.²²² The court also held that the EPA's finding was supported by substantial evidence.²²³

The *James City* line of cases demonstrates a typical approach to judicial review of agency decisionmaking. All four cases considered whether the EPA had based its decision on substantial evidence under APA section 706(2)(E). Although the analysis in those cases presents a good example of the sort of evidence reviewed in the section 404(c) veto process, it sheds little light on the scope of the EPA's decisionmaking power in that process. *James City III* and *James City IV* addressed the scope of factors that the EPA may consider in making its decision. The circuit court made clear that the EPA is entitled to broad deference in weighing relevant factors to make its section 404(c) decision.²²⁴ The Fourth Circuit also explained its view of the partitioning of roles in section 404:

Congress obviously intended the Corps of Engineers in the initial permitting process to consider the total range of factors bearing on the necessity or desirability of building a dam in the Nation's waters, including whether the project was in the public interest Ultimately, however, recognizing the EPA's expertise and concentrated concern with environmental matters, Congress gave the final decision whether to permit a project to that agency. Its authority to veto to protect the environment is practically unadorned.²²⁵

In other words, the EPA has the last word in analyzing the environmental impacts of a section 404 permit. Based on these cases, an EPA section 404(c) action should be upheld so long as it is based on environmental considerations and supported by substantial evidence as required by APA section 706(2)(E).

221. *Id.*

222. *James City IV*, 12 F.3d 1330, 1335–36 (4th Cir. 1993).

223. *Id.* at 1339.

224. *See id.* at 1336 (“This broad grant of power to the EPA focuses only on the agency's assigned function of assuring pure water and is consistent with the missions assigned to it throughout the Clean Water Act.”).

225. *Id.* at 1335–36.

2. Challenge to Scope of Power

In contrast to substantive challenges, the recent *Mingo Logan* case involves a challenge to the scope of the EPA's power to invoke its section 404(c) authority; namely whether that authority disappears once the Corps issues a permit.²²⁶ As part of the Obama Administration's shift to greater EPA involvement in mountaintop removal permitting, the EPA reviewed a section 404 permit that the Corps had issued to the Mingo Logan Coal Company in January 2007 for valley fills associated with its Spruce No. 1 coal mine.²²⁷ The EPA issued its final decision to withdraw the specification of two stream disposal sites from the permit in January 2011, nearly four years after the Corps' permit was issued.²²⁸ Mingo Logan brought suit under the APA, alleging, *inter alia*, that the EPA's section 404(c) authority was not so broad as to give it the power to withdraw the specification of a disposal site after the permit had been issued.²²⁹

The court held that the EPA exceeded its authority as explicitly delegated by Congress, and, in the alternative, that the EPA's interpretation of section 404(c) was not reasonable.²³⁰ In analyzing the EPA's assertion of

226. *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012).

227. See U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA, at 21 (Jan. 13, 2011) [hereinafter SPRUCE DETERMINATION], available at http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-1_Mine_Final_Determination_011311_signed.pdf. Note that Spruce No. 1 mine was the same mine at issue in the *Bragg* cases in note 74 *supra*. The EPA's renewed concern over the Spruce No. 1 mine was based on the expanse of ecologically-important headwater streams that would be buried as a result of the mining. SPRUCE DETERMINATION, *supra* note 227, at 7 (noting that impacts of the projects would include "the direct burial of 6.6 miles of high quality stream habitat, including all wildlife in this watershed that utilize these streams for all or part of their life cycles").

228. SPRUCE DETERMINATION, *supra* note 227, at 99. The legal history of the Spruce No. 1 mine is lengthy. The Corps originally permitted its associated valley fills via a NWP 21 permit, which was challenged in *Bragg I* and subsequently revoked. See *supra* note 74. Mingo Logan then applied for an individual section 404 permit from the Corps. The Corps conducted an environmental review of the project that culminated in the issuance of a final EIS in September 2006. Although the EPA expressed numerous concerns about the project throughout the review, it did not ultimately veto the permit when the Corps issued it in 2007. However, two years later, the EPA asked the Corps to "use its discretionary authority provided by 33 CFR 325.7 to suspend, revoke, or modify the permit" based on "recent data and analyses [that] had revealed downstream water quality impacts that were not adequately addressed by the permit." The Corps rejected the EPA's request, so the EPA acted under its section 404(c) authority to withdraw the specified disposal sites in 2011. See *Mingo Logan*, 850 F. Supp. 2d at 135–37.

229. See *Mingo Logan*, 850 F. Supp. 2d at 134. Because the suit was brought in the D.C. District, the court's precedent in *Mattaponi* allowed suit against the EPA for abuse of its section 404(c) power under the APA. See *generally* *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1 (D.D.C. 2007).

230. *Mingo Logan*, 850 F. Supp. 2d at 134.

jurisdiction under *Chevron* step one, the court examined whether Congress had clearly granted the EPA the power to “exercise a post-permit veto.”²³¹ The court held that the statutory language “does not expressly authorize [the EPA] to exercise the power it purported to exercise here,”²³² and that the statutory structure and legislative history indicate that “Congress anticipated that EPA would act before a permit was issued,” not after.²³³ Therefore, the court held, the EPA’s action “could be deemed to be unlawful at the first step of the *Chevron* analysis.”²³⁴ The court went on to hold that even if the statute was ambiguous, the EPA’s interpretation of its authority was not reasonable under *Chevron* step two. It first decided that the EPA was not entitled to complete deference because section 404 is primarily administered by the Corps.²³⁵ The court went on to reason that allowing revocation of a permit would be “illogical and impractical” and that the EPA’s own regulations and its 1992 MOA with the Corps indicate that the EPA’s exercise of its veto authority would occur before a permit was issued.²³⁶ The court thus overturned the EPA’s veto and held that the EPA lacks the power to revoke a section 404 permit once it has been issued by the Corps.²³⁷

While the EPA’s new comprehensive review procedures would theoretically avoid the issuance of permits that the EPA will later find cause to

231. *Id.* at 139.

232. *Id.* at 142.

233. *Id.* at 147. The court also went on to reject cases presented by the EPA in support of the agency’s position as “not controlling or persuasive.” *Id.*

234. *Id.* at 148.

235. *Id.* at 149 (citing *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246 (D.C. Cir. 2003)) The court explained that:

[W]hen more than one agency is tasked with administering the statute, the determination of how much deference the court owes any one of those agencies is not so straightforward. In *Collins v. National Transp. Safety Board*, 351 F.3d 1246 (D.C. Cir. 2003), the D.C. Circuit set out three different types of shared enforcement schemes:

- For generic statutes like the APA, FOIA, and FACA, the broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative questions de novo;
- For statutes like the FDIA, where the agencies have specialized enforcement responsibilities but their authority potentially overlaps—thus creating risks of inconsistency or uncertainty—de novo review may also be necessary;
- For statutes where expert enforcement agencies have mutually exclusive authority over separate sets of regulated persons, the above concerns do not work against application of *Chevron* deference.

Mingo Logan, 850 F. Supp. 2d at 148–49.

236. *Id.* at 152–53.

237. *Id.* at 153.

revoke, the *Mingo Logan* case severely restricts the EPA's section 404 power. The holding prevents the EPA from revoking a permit after it has been issued for any reason, even if the EPA finds that the fill operation is having a significantly greater detrimental effect on the environment than anticipated. However, the rationale behind the holding in this case may have even further-reaching effects. The court made clear that it interpreted section 404 to give ultimate authority to the Corps, stating that the EPA could not take action that would run contrary to the "exclusive permitting authority accorded the Corps in section 404(a)."²³⁸ Further, it interpreted the legislative history to indicate an "understanding that EPA's responsibilities were to be limited to those specifically assigned."²³⁹

The court's rationale was similar to that in *National Mining I* and is flawed for many of the same reasons. For one, it seemed to put the burden on the EPA to show that Congress clearly indicated that it may exercise its veto power after issuance of a permit.²⁴⁰ After explicitly stating that "the text [of § 404(c)] is ambiguous[,] "²⁴¹ the court relied on flimsy evidence to clarify the ambiguity.

The court claimed that the combination of section 404(a) (granting the Corps power to issue permits), section 404(p) (compliance with a section 404(a) permit establishes compliance with the CWA), and section 404(q) (the EPA and the Corps should coordinate to reduce delays in permitting) indicate a clear congressional intent to preclude post-permit vetoes.²⁴² The court stated that sections 404(a) and 404(p) indicate that a Corps permit is intended to be final and provide assurance that proposed discharges will not later be challenged.²⁴³ In addition, it averred that the objective in section 404(q) to avoid delays in permitting suggests that the permitting process should not be disrupted, especially after a permit has been issued.²⁴⁴

The court then found that a single sentence in the legislative history was sufficient to support this congressional intent in the absence of any statements clearly supporting the EPA position: "[P]rior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies."²⁴⁵

238. *Id.* at 144.

239. *Id.* at 146.

240. *Mingo Logan*, 850 F. Supp. 2d at 142 ("There is no question that the sole provision relied upon by EPA does not expressly authorize it to exercise the power it purported to exercise here, so the case cannot be resolved in EPA's favor on *Chevron I* grounds.").

241. *Id.* at 142.

242. *Id.* at 143–44.

243. *Id.* at 143.

244. *Id.* at 144.

245. *Id.* at 144 (quoting Senate Consideration, *supra* note 35, at 177).

The evidence cited by the court in no way indicates a *clear* congressional intent to limit the EPA's veto authority to pre-permit issuance. The language in 404(c) is ambiguous. The court brushed aside the EPA's assertion that the phrase "whenever he determines" implies that the Administrator may exercise the veto at any time.²⁴⁶ Even if this phrase does not clearly indicate that the Administrator may issue a post-permit veto, it at least suggests that he *may* have this power. The court struggled with the import of the parenthetical "including the withdrawal of specification" phrase, ultimately deciding that the phrase could simply give the EPA authority to withdraw specification of disposal sites that had been made before enactment of the CWA but before those permits had been issued.²⁴⁷ While this reading could be correct, the phrase is not unambiguous. It is equally likely that the phrase allows the Administrator to withdraw a specification after a permit has been issued. Where a phrase is capable of multiple meanings, courts are reluctant to find that Congress has clearly spoken to the issue.²⁴⁸

The court's assertion that sections 404(a) and 404(p) provide a finality that clearly precludes the EPA from issuing a post-permit veto is unfounded. The Corps' own regulations provide that it may amend or revoke a permit after it has been issued, although section 404 does not explicitly confer that authority.²⁴⁹ Although this withdrawal of authority would have the same nullifying effect as the EPA post-permit veto on the "finality" of a section 404 permit, it has been upheld in court.²⁵⁰ The *Mingo Logan* court provided no rationale for why the EPA's post-permit withdrawal is any more egregious than a post-permit withdrawal by the Corps. The "finality" that the court claimed was clearly intended by Congress is not present in the statute. At most, the question of finality is ambiguous. Without sufficiently demonstrating clear congressional intent, the court demonstrated another example of the "pliable" application of *Chevron* step one complained of by some commenters.²⁵¹

The ambiguity in section 404(c) should have led the court to *Chevron* step two, where it would apply the highly deferential "permissible construction" standard. The court did begin a move towards this analysis as an alternate rationale for its holding, but stopped short of granting the EPA

246. See *Mingo Logan*, 850 F. Supp. 2d at 140–41.

247. See *id.* at 140 n.6.

248. See, e.g., *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 708 (D.C. Cir. 2008).

249. 33 C.F.R. § 325.7 (2012).

250. See, e.g., *Boll v. Safe Harbor Marina, Ltd.*, 114 Fed. App'x 467, 468 (3d Cir. 2004).

251. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 817–22 (2010); Matthew C. Stephenson and Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597 (2009).

deference.²⁵² In what was perhaps the most surprising conclusion of the case, the court held that the EPA is entitled to little, if any, deference in its interpretation of section 404(c) because the section is primarily administered by the Corps.²⁵³ This holding would strictly limit any EPA interpretation of section 404(c) to only those interpretations that are clearly and unambiguously conveyed by the text of the statute.

The court's holding here is inappropriate, given that the CWA states that it is to be administered by the Administrator of the EPA, "[e]xcept as otherwise expressly provided."²⁵⁴ Section 404 does not "expressly provide" that the Secretary of the Army administer that entire section, much less section 404(c). The court suggested that the requirement that the Administrator "consult" with the Secretary of the Army before vetoing a permit means that the provision is jointly administered.²⁵⁵ Again, this rationale is flawed. The provision requires no action on the part of the Secretary, so he is not tasked with administering the provision in any way. Even if section 404 is considered to be jointly administered, the concern with granting deference in such a situation would be that the agencies would issue conflicting interpretations of the statute, creating uncertainty among regulated parties.²⁵⁶ Because section 404(c) involves only actions taken by the EPA, the EPA's own interpretation is the only one that would have an effect on regulated entities.²⁵⁷ The court did not give sufficient reason for the EPA not to receive deference in its interpretation of this provision.

Even with limited deference, the EPA's interpretation was not unreasonable. The text of section 404(c) is ambiguous and does not limit the timeframe in which the EPA could issue a veto. In addition, the EPA's ability to withdraw a permit does not "sow a lack of certainty" any more than the Corps' ability to do so.²⁵⁸ The court also asserted that the EPA's interpretation was unreasonable because it was not explained in the 1992 MOA or other regulations.²⁵⁹ While such lack of notice does not necessarily

252. See *Mingo Logan*, 850 F. Supp. 2d, at 148–51.

253. *Id.* at 148–49.

254. See CWA § 101(d), 33 U.S.C. § 1251(d) (2006).

255. See *Mingo Logan*, 850 F. Supp. 2d at 149.

256. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 895 (2001).

257. For example, if the Corps' interpretation was that the EPA could issue a post-permit veto, but the EPA believed it could not do so, regulated entities would never experience such a veto. Conversely, if the EPA believed it could issue a post-permit veto and the Corps held the opposite view, the Corps could not prevent the EPA from notifying permit holders that a specification on their permit had been revoked.

258. *Mingo Logan*, 850 F. Supp. 2d at 152.

259. See *id.* at 152–53.

make the EPA's interpretation unreasonable,²⁶⁰ it would be advisable for the EPA to explain its post-permit section 404(c) procedures in either a guidance document or its official regulations.

The Justice Department has appealed the case to the District of Columbia Circuit Court of Appeals.²⁶¹ The circuit court will likely begin by conducting a *Chevron* step one analysis. It could agree with the district court and find that Congress clearly indicated that the EPA may not veto a permit after it has been issued. Alternatively, the court could overturn the district court's decision by finding that Congress clearly indicated that the EPA may veto a permit after it has been issued. Finally, in what I have argued is the correct approach, the court can find that Congress has not spoken clearly to that question and would then proceed to a *Chevron* step two analysis. The circuit court could adopt the district court's step two analysis and hold that the EPA's interpretation is unreasonable. More correctly, the court can and should afford the EPA's interpretation more deference than did the district court and hold that the EPA's interpretation is reasonable.

The district court in *Mingo Logan* failed to give sufficient deference to the EPA under *Chevron* step two, especially considering the ambiguity in section 404. Under the deferential standard, the EPA has authority to withdraw a permit's specification of disposal sites even after the permit has been issued. If the district court's ruling stands, the EPA's ability to interpret its role in section 404 and participate in the section 404 permitting process will be strictly limited.

CONCLUSION

Despite the initial intent for the Corps' role to be a continuation of its duties in the Rivers and Harbors Act, the Corps has gradually extended its jurisdiction under section 404 to issue permits for discharges of pollutants that marginally qualify as fill material into waters that are not used for navigation. It is doubtful that Congress intended the Corps' jurisdiction to

260. Agencies are permitted to invoke interpretations of law for the first time at an adjudication without providing prior notice. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (“Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.”).

261. See Initial Brief of Defendant-Appellant United States Environmental Protection Agency at 1, *Mingo Logan Coal Co., Inc. v. EPA* (2012) (No. 12-5150), 2012 WL 2933683 at *1 (stating the question for review as “[d]oes § 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), authorize EPA to withdraw specification of navigable waters as disposal sites for fill material after the Corps issues a § 404(a) permit for disposal in those sites?”).

extend so broadly into a sphere that at least the Senate believed would be run by the EPA.²⁶²

The Fourth Circuit's decision in *Kentuckians II* failed to adequately consider congressional intent in upholding the Corps' "effects-based" definition of "fill material." Even if Congress had not spoken clearly as to whether fill lacking a constructive purpose could be "fill material" under section 404, the legislative history is clear that the Corps' definition of "fill material" was not a reasonable construction of the statute.

The Supreme Court failed to clarify the statutory definition of "fill material" in *Coeur*. The Court accepted the Corps' regulatory definition at face value without inquiring whether it comported with the statute. In doing so, the Court issued a decision that provides tacit approval of that regulatory definition. The result of *Kentuckians II* and *Coeur* is that the weight of the case law supports the Corps' acceptance of jurisdiction over permitting valley fills associated with mountaintop removal mining. Other commentators have argued that, because those cases were wrongly decided, the EPA should retake jurisdiction over such fills from the Corps. In this Note, I assume that the EPA will not do so, especially considering the present political environment that is so hostile towards the EPA. Instead, I have examined the scope of oversight that the EPA may exercise over the Corps' section 404 permitting process.

Only recently has the EPA pushed back on the Corps' jurisdiction via the EPA's oversight authority. The courts, however, have improperly limited the EPA's power under section 404. The provision that was intended to be a carve-out in the CWA for the Corps to exercise limited jurisdiction has now been interpreted to give the Corps broad authority, with only limited carve-outs for the EPA's involvement. The government has correctly decided to appeal the decisions in *Mingo Logan* and *National Mining* that limited the EPA's oversight power. Should the circuit court overturn those decisions, the EPA will be able to exercise the oversight authority and duty to the fullest extent intended by Congress. The broad scope of EPA oversight is necessary to compensate for the degree of agency capture that has occurred between the mountaintop removal mining industry and the Corps.²⁶³

The regulatory and legal history of the use of section 404 to regulate mining overburden demonstrates the problems that come with poor legislative drafting, especially at the Conference Committee level where section 404 was integrated into the Senate bill. Many of the new processes for EPA

262. The Senate's version of the CWA did not include any provisions for the Corps to issue discharge permits. Under that version, the EPA was to be the sole agency overseeing the discharge permit system. See S. REP. NO. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668.

263. See Evans, *supra* note 1, at 551-54 (describing the Corps' susceptibility to influence from the mining industry).

oversight initially seemed to provide some solution to the use of section 404 to regulate mining overburden; yet the fate of those processes now lies with the Court of Appeals for the District of Columbia Circuit. Assuming the circuit court reinstates those processes, their efficacy will still be contingent on future presidential administrations' allowance of the EPA's oversight of the Corps' permitting.

Considering the biodiversity and ecological sensitivity of Appalachia's mountain ecosystems, rigorous environmental review of mountaintop removal mining operations is necessary. The Corps has failed in that duty to date, and the EPA has not provided a necessary check on the process. Increasing the EPA's role will provide for the proper consideration of the environmental impacts of mountaintop removal mining that is necessary before Appalachia's forest and aquatic ecosystems are irreversibly destroyed.