ORAL ARGUMENT NOT YET SCHEDULED

Nos. 12-5310, 12-5311

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL MINING ASSOCIATION, *et al.*,
***Plaintiffs-Appellees*,**

Commonwealth of Kentucky and City of Pikeville, Kentucky
***Intervenor Plaintiffs-Appellees*,**

v.

BOB PERCIASEPE, Acting Administrator of the United States Environmental Protection Agency, *et al.*,
***Defendants-Appellants*,**

Sierra Club, *et al.*,
***Intervenor Defendants-Appellants*.**

On Appeal from the U.S. District Court for the District of Columbia
Case No: 1:10-cv-01220-RBW (Hon. Reggie B. Walton)

Brief of *Amici Curiae* American Farm Bureau Federation, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Council of Coal Lessors, Inc., Pacific Legal Foundation, and Utility Water Act Group

In Support of Intervenor-Plaintiffs-Appellees, Plaintiffs-Appellees, and Affirmance of the U.S. District Court for the District of Columbia

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Dated: July 22, 2013

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Appellants in 12-5310 are Bob Perciasepe, Acting Administrator of the U.S. Environmental Protection Agency ("EPA"); EPA; John M. McHugh, Secretary of the U.S. Army; Thomas P. Bostick, Commander of the U.S. Army Corps of Engineers ("the Corps"); and the Corps. ***Appellants*** in 12-5311 are Coal River Mountain Watch; Kentuckians for the Commonwealth; Ohio Valley Environmental Coalition; Sierra Club; Southern Appalachian Mountain Stewards; Statewide Organizing for Community Empowerment; and West Virginia Highlands Conservancy.

Appellees in these consolidated cases are National Mining Association ("NMA"); Randy C. Huffman, Cabinet Secretary of the West Virginia Department of Environmental Protection; State of West Virginia; Kentucky Coal Association ("KCA"); Gorman Company, LLC; Kycoga Company, LLC; Black Gold Sales, Inc.; and Kentucky Union Company.

Intervenor-Appellees in these consolidated cases are Commonwealth of Kentucky; and City of Pikeville, Kentucky.

Proposed Amici Curiae in these consolidated cases are American Farm Bureau Federation, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Home Builders, National

Association of Manufacturers, National Cattlemen's Beef Association, National Council of Coal Lessors, Inc., Pacific Legal Foundation and Utility Water Act Group (collectively, "*amici*"). *Amici* are not aware of any other parties or amici at this time.

Rulings Under Review

Based on the Appellants' Statement of Issues in their briefs, these appeals seek review of the October 6, 2011 Order and Memorandum Opinion, and the July 31, 2012 Order and Memorandum Opinion of Judge Reggie B. Walton of the U.S. District Court for the District of Columbia in *National Mining Association, et al v. Jackson, et al.*, Case No. 1:10-cv-01220-RBW (consolidated with Nos. 11-cv-295; 11-cv-446; and 11-cv-447) [ECF Nos.. 95-96, 166-167], and the final judgment of that court entered on July 31, 2012.[1]

Related Cases

The cases under review in this consolidated appeal have not previously been before this or any other court of appeals. All lawsuits challenging the final agency actions at issue in this case were transferred to the U.S. District Court for the

[1] Appellants did not identify the January 14, 2011 Order and Memorandum Opinion in their briefs. That decision denied the Federal Defendants' motion to dismiss and held that the challenged agency actions were justiciable. The decision also denied Plaintiffs' motion for a preliminary injunction.

District of Columbia and consolidated with the lead case (No. 1:10-cv-01220, filed by NMA) before Judge Walton.[2]

[2] Plaintiff-Appellees Randy C. Huffman, Cabinet Secretary of the West Virginia Department of Environmental Protection, and State of West Virginia originally sued in the U.S. District Court for the Southern District of West Virginia. *See Huffman v. EPA*, No. 10-cv-1189 (S.D. W.Va.). Plaintiff-Appellee Kentucky Coal Association sued in the U.S. District Court for the Eastern District of Kentucky, and Intervenor-Plaintiff-Appellees Commonwealth of Kentucky and City of Pikeville intervened in that lawsuit. *See Ky. Coal Ass'n v. EPA*, No. 10-cv-125 (E.D. Ky.). Plaintiff-Appellees Gorman Company, LLC; Hazard Coal Corporation; Kycoga Company, LLC; Black Gold Sales, Inc.; and Kentucky Union Company also sued in the U.S. District Court for the Eastern District of Kentucky. *See Gorman Co., LLC v. EPA*, No. 10-cv-228 (E.D. Ky.).

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, we, the undersigned counsel of record for the *Amici Curiae* American Farm Bureau Federation, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Council of Coal Lessors, Inc., Pacific Legal Foundation and Utility Water Act Group (collectively, "*amici*"), certify that, to the best of our knowledge and belief, none of the *amici* has a parent company, and no publicly-held company has a 10 percent or greater ownership interest (including stock or partnership shares) in any *amici*. *Amici* are "trade associations" within the meaning of Circuit Rule 26.1(b).

These representations are made to assist the members of the Court in identifying the need for recusal.

July 22, 2013

Respectfully submitted,

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FEDERAL REGISTER

MISCELLANEOUS

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Agency	United States Environmental Protection Agency
APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
CWA	Clean Water Act
EC Process	Enhanced Coordination Process
EPA	United States Environmental Protection Agency
FEMA	Federal Emergency Management Agency
MCIR Assessment	Multi-Criteria Integrated Resource Assessment
OMB	Office of Management and Budget
RFA	Regulatory Flexibility Act
SMCRA	Surface Mining Control and Reclamation Act
TNW	Traditional Navigable Water

INTRODUCTION

I. This Case Raises Issues of Fundamental National Importance.

At the heart of this case is a basic tenet of administrative law: An administrative agency may not change an existing rule (or adopt a new rule) without complying with the Administrative Procedure Act ("APA"). But that is precisely what happened here.

In 2009, the U.S. Environmental Protection Agency ("EPA" or the "Agency") announced the creation of a new system of review for certain Clean Water Act ("CWA") Section 404 permits through a series of memoranda and letters. *See* Multi-Criteria Integrated Resource Assessment ("MCIR Assessment") and Enhanced Coordination Process ("EC Process").[1] This new system was superimposed on the Agency's existing regulations and permitting scheme and

[1] 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), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf; Letter from Lisa Jackson, Adm'r, EPA, to Terrence Salt, Acting Ass't Sec'y (Civil Works), Dep't of the Army (June 11, 2009), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_07_11_wetlands_pdf_Final_EPA_MTM_letter_to_Army_6-11-09.pdf; Memorandum from Lisa Jackson, Adm'r, EPA, & Terrence Salt, Acting Ass't Sec'y (Civil Works), Dep't of the Army, to EPA Reg'l Adm'rs & U.S. Army Corps of Engineers Dist. Commanders, "Enhanced Surface Coal Mining Pending Permit Coordination Procedures" (June 11, 2009), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_11_pdf_Final_MTM_Permit_Coordination_Procedures_6-11-09.pdf.

without complying with the notice-and-comment rulemaking provisions of the APA. The district court rightly struck down the Agency's unlawful approach as violative of the CWA and the APA. *Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011).

But EPA did not stop there. Instead, it issued lengthy guidance – first in "interim" form in April 2010 and then in "final" form in July 2011 – that again made substantive changes to the CWA regulatory program for an entire sector of permittees.[2] Though the Agency attempted to wrap the Guidance in boilerplate caveats disclaiming any binding effect, the Guidance in fact had immediate and binding effect. Among other things, it announced new substantive standards for permitting under CWA Sections 402 and 404, including a numeric standard for conductivity, and interposed EPA between the states and permit applicants as the primary and dominant permitting authority (even though all of the states at issue

[2] Memorandum from Peter Silva, Assistant Adm'r for Water, EPA, & Cynthia Giles, Assistant Adm'r for Enforcement & Compliance Assurance, EPA, to EPA Reg'l Adm'rs for EPA Regions 3, 4 & 5, "Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" (Apr. 1, 2010), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf; Memorandum from Nancy K. Stoner to Regions 3, 4, and 5, "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 "Guidance").

had received, and had been properly implementing, delegation from EPA to serve as the primary permitting authorities). Thus, under the label of guidance, the Agency unlawfully granted itself new statutory authority and altered existing regulations on water quality standards and CWA Section 402 and 404 permits. The district court held that the Guidance constituted final agency action subject to the APA and set it aside for violating the APA and exceeding EPA's authority under the CWA and the Surface Mining Control and Reclamation Act ("SMCRA"). *Nat'l Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119 (D.D.C. 2012).

This Court's holding will have national implications. *Amici* urge the Court to affirm the district court decisions and put the agencies on notice that they cannot avoid the requirements of the APA simply by titling substantive and binding changes to their regulatory programs as "guidance." Indeed, EPA's choice to proceed here by guidance, instead of APA rulemaking, is not an isolated event. In recent years, EPA (and other federal agencies) have attempted to use guidance to make significant changes to their regulatory programs. Set forth below are a few illustrative examples of substantive changes agencies have made, or plan to make, to their regulatory programs through guidance. These guidance documents have a significant impact on *amici*'s members' day-to-day business operations and should have properly been undertaken in compliance with the APA:

- "Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States," (Dec.

2, 2008) ("*Rapanos* Guidance")[3]: Despite having been criticized by the Supreme Court for not undertaking a rulemaking to clarify the scope of federal CWA jurisdiction, EPA and the U.S. Army Corps of Engineers ("Corps") issued guidance purporting to provide clarity and consistency regarding the agencies' interpretation of CWA jurisdiction. However, the *Rapanos* Guidance was nothing more than a means for narrowing the *Rapanos* decision and devising new interpretations of key terms that allows the agencies to assert very broad CWA jurisdiction. The *Rapanos* Guidance was adopted without complying with the APA and without input from the public, and the agencies have been using it in the field since 2008 to expand their jurisdictional reach.

- "Draft Guidance on Identifying Waters Protected by the Clean Water Act," EPA-HQ-OW-2011-0409-0002 ("Draft CWA Guidance"); *see also* 76 Fed. Reg. 24,479 (May 2, 2011): Three years after the *Rapanos* Guidance and under a new administration, in May 2011, EPA and the Corps proposed new draft guidance to replace the existing *Rapanos* Guidance. The agencies themselves state that they expect that, under this new guidance, "the extent of waters over which the agencies assert jurisdiction under the CWA will increase." Draft CWA Guidance at 3. The Draft CWA Guidance has been before the Office of Management and Budget ("OMB") for review for over one year, but not yet finalized. The Draft CWA Guidance, like the earlier *Rapanos* Guidance, was prepared without complying with the APA.

- Santa Cruz Traditional Navigable Water ("TNW") determination: In two decisions issued by EPA and the Corps, the agencies declared that two reaches of the Santa Cruz River in Arizona are TNWs, which has the effect of extending the agencies' jurisdiction over desert washes, arroyos, and other drainage features within the river's watershed.[4] Despite the

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[3] *Available at* http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx.

[4] *See* Col. Thomas H. Magness, U.S. Army Dist. Commander, "Memorandum for the Record: Determination of Two Reaches of the Santa Cruz River as Traditional Navigable Waters (TNW)" (May 23, 2008), *available at* http://www.spl.usace.army.mil/portals/17/Docs/Regulatory/JD/TNW/SantaCruzRiver_TNW_MFR.pdf; Letter from Benjamin Grumbles, Assistant Adm'r, EPA, to John Paul Woodley, Jr., Assistant Sec'y of the Army (Civil Works), Dep't of the

TNW determination's regulatory impact on landowners, it was issued without complying with the APA's requirements for rulemaking. The agencies did not provide notice to the public, nor did the agencies give interested persons, including *amici* and their members, an opportunity to comment.

- Federal Emergency Management Agency ("FEMA") Procedure Memorandum 64 – Compliance with the Endangered Species Act (ESA) for Letters of Map Change (Aug. 18, 2010)[5]: Procedure Memorandum 64 directly alters the process by which *amici*'s members submit requests to FEMA for certain necessary map revisions. In areas where an endangered species exists or an area is designated as critical habitat, FEMA, through this guidance, states that landowners must first demonstrate compliance with the ESA before seeking FEMA's review of their request. This alters the regulatory regime and should have been adopted through notice-and-comment procedures rather than by guidance.

There is no question that regulatory agencies have become more brazen in their use of "guidance" in an attempt to avoid complying with the APA and to avoid judicial review when regulating the public. *Amici* file this brief in support of Intervenor Plaintiffs-Appellees and Plaintiffs-Appellees and urge the Court to affirm the district court's decisions.

Army, at 2 (Dec. 3, 2008) (affirming the Corps's TNW Determination and instructing EPA Region 9 to "begin immediately to implement this decision"), *available at* http://www.spl.usace.army.mil/portals/17/Docs/Regulatory/JD/TNW/SantaCruzRiver_TNW_EPALetter.pdf.

[5] *Available at* www.fema.gov/library/viewRecord.do?id=4312.

II. *Amici* Represent a Wide Array of Industries with Direct Interests in the Outcome of the Case.

As described in the accompanying motion for leave to file this brief, *amici* represent a broad cross-section of the nation's agriculture, energy, infrastructure, construction, home building, and business sectors that are vital to a thriving national economy and provide much-needed products, services, and jobs across the country.[6] *Amici*'s members perform activities specific to their sectors of the economy pursuant to a variety of CWA permits, including those issued pursuant to Sections 402 and 404.

American Farm Bureau Federation ("AFBF"), a not-for-profit, voluntary general farm organization, was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 6.1 million member families.

[6] Counsel for *amici* contacted the parties to this appeal to ascertain their position in regard to the motion. FED. R. APP. P. 29(a). Plaintiff-Appellees, Intervenor Plaintiffs-Appellees, and Federal Defendant-Appellants consent to the motion. Counsel for Environmental Intervenor Defendants-Appellants stated that they object to the participation of the proposed *amici curiae*, based on reasons of efficiency and fairness, but to avoid unnecessary delay they do not plan to file an opposition brief. *Amici* state that this brief has been authored in whole by their counsel and no party, counsel for any party, or other person, aside from *amici curiae*, their members, and their counsel, have contributed any money towards preparation or submission of this brief.

The American Petroleum Institute is a nationwide, non-profit trade association that represents over 500 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including appeals concerning the CWA. *See* http://www.chamberlitigation.com/cases/issue/energy-environment/clean-water-act-cwa.

The National Association of Home Builders represents over 140,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

The National Cattlemen's Beef Association is the national trade association representing U.S. cattle producers, with more than 28,000 individual members and sixty-four state affiliate, breed and industry organization members.

The National Council of Coal Lessors, Inc. is a national trade association of companies, individuals and trusts that own and lease coal reserves and coal infrastructure assets to coal mining companies.

The Pacific Legal Foundation ("PLF") is a nonprofit foundation that has litigated important matters affecting the public interest for more than forty years.[7] PLF advocates the concept of limited government and a balanced approach to environmental regulation.

The Utility Water Act Group ("UWAG") is an unincorporated group of electric utilities and trade associations of electric utilities. UWAG and its trade association members' utility members generate and deliver the vast majority of electricity used by residential, business, and government customers throughout the country.

[7] In accordance with Circuit Rule 29(d), counsel for the *amici curiae* have coordinated and *amicus curiae* PLF joined this *amici curiae* brief.

Amici and their members have long-standing interests in ensuring that regulatory agencies act within the scope of their authority and follow the law, including the procedural requirements of the APA, when changing their regulations or adopting new requirements. Allowing regulatory agencies to use guidance to change the rules of the road, in the manner EPA did here, is exactly what the APA was designed to prevent. Congress recognized that regulatory agencies would be influenced by and expected to help implement policy shifts as partisan administrations came and went. Knowing this, Congress established, in the APA, procedures designed to protect regulated entities from abrupt and arbitrary regulatory change. Rulemaking that fails to comply with the APA denies *amici's* members the notice required to adjust business practices and the ability to provide critical input for agency consideration before an agency makes a change that directly and significantly affects *amici's* members.

ARGUMENT

I. EPA May Not Adopt New Regulatory Requirements Through Guidance.

When an agency changes its existing regulations or creates new regulatory obligations, the law is clear that it may not proceed by guidance. The APA demands that binding pronouncements and amendments to pre-existing rules be adopted in accordance with the procedures set forth in the APA. The guidance documents at issue here significantly changed the CWA regulatory program, and,

therefore, must, as the district court properly held, be adopted pursuant to the APA. *Nat'l Mining Ass'n*, 880 F. Supp. 2d at 132-33.

A. When an Agency Revises its Regulations or Makes Binding Pronouncements, it Must Follow the APA.

The APA mandates that specific, binding pronouncements and amendments to pre-existing rules be promulgated pursuant to notice-and-comment rulemaking. *See* 5 U.S.C. § 553. The APA's various procedural requirements generally include a notice of proposed rulemaking published in the *Federal Register* to provide an explanation of the proposed rule, the data supporting it, and an opportunity for interested persons to submit written data, views, or arguments. *Id.* § 553(b)-(c). An agency is required to consider the comments it receives and publish a final rule together with a statement of basis and purpose explaining the rationale for its decision. *Id.* § 553(c). As explained by the courts, the agency's explanation must set forth the facts and data supporting its decision and must meet the test of "reasoned decisionmaking." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency must provide adequate basis and explanation for its decision or it will be set aside).

Finally, rules are subject to judicial review and thus protect against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court will scrutinize the record developed by the agencies to determine whether they acted within their

lawful discretion and reached appropriate decisions based on the relevant evidence. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

The D.C. Circuit has made clear that substantive amendments to, or new interpretations of, pre-existing regulations can be accomplished only through the APA's specified notice-and-comment rulemaking process because "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). *See also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("[A]n agency may not escape … notice and comment requirements … by labeling a major substantive legal addition to a rule a mere interpretation."); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.").

The APA draws a distinction between legislative rules, which are subject to notice-and-comment rulemaking requirements, and interpretive rules or guidance, which are not subject to notice-and-comment rulemaking requirements. *See* 5 U.S.C. § 553(b)(3)(A). Thus, legislative rules, which do not merely interpret existing law or propose policies, but which establish new policies that an agency

treats as binding, must comply with the APA, regardless of how they are labeled. *See, e.g., Natural Res. Def. Council v. EPA*, 643 F.3d 311, 313 (D.C. Cir. 2011) (vacating guidance that allowed states to propose alternatives to statutorily required fees for ozone non-attainment areas as legislative rule that required notice-and-comment); *Appalachian Power Co.*, 208 F.3d at 1028 (striking down emissions monitoring guidance because it amounted to a legislative rule that required APA compliance); *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) (striking EPA letters creating a new legal norm, which amounted to a legislative rule, for failure to comply with the APA); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994) (finding Minerals Management Service procedure paper to be a new substantive rule effecting a change in regulatory method used to determine oil and gas royalties and instructing agency not to apply the rule unless it first complied with the APA); *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010) (setting aside Corps guidance that amounted to a new legislative rule improperly extending the Corps's CWA jurisdiction for failure to comply with the APA). For the reasons explained below, and in the district court's opinion, the Guidance, MCIR Assessment, and EC Process are legislative rules that should have been adopted in accordance with the APA's notice-and-comment rulemaking procedures and other applicable regulatory and statutory requirements.

B. Strong Policy Reasons Support Adherence to the APA's Rulemaking Procedures.

EPA's decision to proceed here by guidance, rather than rulemaking, deprives it of valuable information from regulated parties and reduces the quality of the Agency's decision. It also subjects American business to abrupt and unpredictable regulatory changes – which, by undermining stability and certainty, stymies the future investments necessary to sustain stable and reliable growth of the national economy.

Regulating by guidance means that agencies develop regulatory policy without the insight, data, and information provided by the regulated public. If an agency chooses to proceed by guidance, it may adopt (as it did here) a standard that has not been subject to independent peer review and that does not conform to EPA's standard methodology for developing water quality standards.

Rulemaking, by contrast, requires agencies to provide a statement of basis and purpose and to identify the data that support the decisions the agencies have reached. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 430 (D.C. Cir. 1980). Agencies are, furthermore, required to articulate a connection between those facts and the conclusions they have reached to the public. *Burlington Truck Lines*, 371 U.S. at 168. Hence, an important element of rulemaking is what follows *after* agencies receive comments from the public, which provides the agencies with the benefit of

stakeholders' experience and expertise and a thorough understanding of the practical implications of alternative policy choices. The APA's obligation that agencies must consider and respond to these comments is intended to yield final regulations that are rational, workable, and avoid unintended consequences. By contrast, the guidance-formulation process is completely opaque to regulated industry, with no requirement that agencies consider and respond to input from the regulated parties – if, indeed, such input is even requested.

C. Other Statutory and Regulatory Requirements Also Apply When Agencies Change Their Rules.

In addition to the APA's requirements, there are a number of other statutory and regulatory requirements, including Executive Orders, that agencies must follow when adopting new rules or making substantive changes to existing ones. *See Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (Executive Orders issued pursuant to statutory authority have the force and effect of law). *Amici* set forth several of those requirements, for illustrative purposes, but there are undoubtedly others that equally apply and also require appropriate compliance. EPA complied with none of these requirements when it proceeded with "guidance" rather than rulemaking here.

First, the Guidance should have been adopted in compliance with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612. The RFA was developed in recognition of the economic importance of small businesses, and it

attempts to ensure that regulations are promulgated with these entities in mind. Thus, the RFA requires agencies to analyze the impact a rule may have on small business, and, if that impact is substantial, the agency must seek a less burdensome alternative. *Id.* § 604(a)(4). Agencies must publish initial and final regulatory flexibility analyses, with time for notice-and-comments. None of these requirements were met through issuance of the Guidance.

Second, the agencies must follow Executive Order No. 12,866, "Regulatory Planning and Review" ("E.O. 12,866"), 58 Fed. Reg. 51,735 (Oct. 4, 1993), which requires an agency to "avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." *Id.* § 1(b)(10). An agency also has the duty to tailor its regulations and guidance documents "to impose the least burden on society, including individuals, businesses of differing sizes, and other entities. . ., consistent with obtaining regulatory objectives, taking into account, among other things, . . . the costs of cumulative regulations." *Id.* § 1(b)(11). Lastly, E.O. 12,866 requires that the public be provided "meaningful participation" in the regulatory process. *Id.* § 6(a)(1). Where appropriate, agencies must seek involvement of those who will either benefit or be burdened by the proposed regulation. *Id.* EPA sought no public participation prior to adopting the Guidance, choosing instead to announce these regulatory changes and burdens in a press statement, even though EPA

recognized the tremendous negative potential impacts and economic burdens the Guidance would have and proclaimed that "'no, or very few, valley . . . fills are going to meet this standard.'"[8] Indeed, the only public participation EPA provided here occurred after-the-fact.

Third, Executive Order 13,132, "Federalism" ("E.O. 13,132"), establishes requirements for policies that have "federalism implications," defined as agency regulations or other policy statements or actions with substantial direct effects on the states, their relationship with the national government, or the distribution of power and responsibilities among the various levels of government. 64 Fed. Reg. 43,255 (Aug. 10, 1999), § 1(a). The purpose of E.O. 13,132 is to ensure that, in formulating and implementing policies with federalism implications, agencies are guided by certain fundamental principles. For example, the federal government must be deferential to states when taking action affecting the state's policymaking discretion and must carefully assess the need for action limiting state discretion and limit state discretion only where national activity is appropriate in light of a problem of national significance. With respect to federal statutes and regulations administered by states, states are to be granted the maximum administrative

[8] David A. Fahrenthold, *Environmental regulations to curtail mountaintop mining* , Wash. Post, Apr. 2, 2010, *available at* http://washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040102312.html (quoting then EPA Administrator Lisa P. Jackson).

discretion possible and encouraged to develop state policies to achieve program objectives. Finally, the federal government must consult with state and local officials regarding the need for national standards.[9] *Id*. §§ 2-3. EPA did none of those things here, as explained in West Virginia's and the Commonwealth of Kentucky's brief.

In sum, there are a number of regulatory and statutory requirements, in addition to the rulemaking requirements of the APA, that must be followed when EPA changes its regulations or adopts new standards. It is of critical importance to *amici* and their members that EPA and other federal agencies comply with the APA and other applicable regulatory and statutory requirements when addressing issues that implicate the nation's economy and have broad application.

II. The Guidance, MCIR Assessment, and EC Process Are Final Agency Action Binding Upon Permit Applicants and the States Alike and Violate the APA, CWA and SMCRA.

The district court concluded that the Guidance was final agency action because it marked the consummation of EPA's decision making process and was an action "by which rights or obligations have been determined, or from which

[9] In addition, E.O. 13,132 requires agencies to: (1) provide a federalism summary impact statement in the preamble to the regulation that summarizes the extent of the agency's consultation with state and local officials, the nature of state and local concerns and the agency's position supporting the need to issue the regulation, and the extent to which state and local concerns have been met, *id*. § 6(b)(2)(B), 6(c)(2); and (2) provide any written communications submitted to the agency by state and local officials to the Director of the OMB, *id*. § 6(b)(2)(C), 6(c)(3).

legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted); *Nat'l Mining Ass'n*, 880 F. Supp. 2d at 129.

The court also found it clear that the Guidance was binding. Looking past the usual government "boiler-plate" claims that the Guidance did not impose legally binding requirements or any obligations on private parties, the court examined "'the practical effect of [the] ostensibly non-binding'" guidance. *Nat'l Mining Ass'n*, 880 F. Supp. 2d at 130 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005)). And upon review of the Guidance and the post-implementation evidence, the court found that the Guidance "caused EPA field offices and the state permitting authorities to believe that permits should and will be denied if its 'suggestions' and 'recommendations' are not satisfied." *Id.* at 130. Thus, because the Guidance "has had the practical effect of changing the obligations of the state permitting authorities . . . [it is] a de facto legislative rule" that should have undergone notice-and-comment rulemaking and was set aside by the court. *Id.* at 132. The court further held that, through the Guidance, EPA "overstepped its statutory authority under the CWA and the SMCRA, and infringed on the authority afforded state regulators by those statutes." *Id.* at 142.

Similarly, in an earlier opinion, the court concluded that the MCIR Assessment and EC Process were legislative rules: "[C]reation of the MCIR

Assessment removed the task of applying the 404(b)(1) guidelines to pending permits from the Corps and bestowed it upon the EPA signif[ying] a substantive, rather than a procedural, change to the permitting framework." *Nat'l Mining Ass'n*, 816 F. Supp. 2d at 47. Thus, changes to the MCIR Assessment and EC Process could only be made through notice-and-comment rulemaking. *Id.* at 49.

There are several aspects of the Guidance, MCIR Assessment, and EC Process that highlight why the Agency should have complied with the APA and followed notice-and-comment rulemaking instead of proceeding by guidance. First, the Guidance set conductivity benchmarks that "were being treated as binding by the EPA's regional offices," and thus, through guidance, EPA impermissibly set a conductivity criterion for water quality, which overstepped EPA's authority under Section 303 of the CWA. *Nat'l Mining Ass'n*, 880 F. Supp. 2d at 138. Second, the MCIR Assessment and EC Process unlawfully conferred additional reviewing authority on EPA and altered the Section 404 permitting timeframes, which "effectively amended" the CWA and its implementing regulations and thus could only lawfully be done in accordance with notice-and-comment rulemaking. *Nat'l Mining Ass'n*, 816 F. Supp. 2d at 49.

A. EPA May Not Force De Facto Water Quality Standards into Section 402 Permits Without Satisfying the Requirements of Section 303 of the CWA.

Upon adoption by EPA, the Guidance became "effective immediately." The Guidance dictated the use of an EPA draft report, which presumes that "in-stream conductivity levels above 500 µS/cm are likely to be associated with adverse stream impacts."[10] Relying on this draft report, the Guidance stated that CWA Section 402 and Section 404 permits should include permit conditions that prevent conductivity levels from exceeding 500 µS/cm. Thus, through the Guidance, and without the benefit of any advance public comment on the policy or the underlying science that purportedly supported the new policy, EPA created a new region-wide water quality standard for conductivity without satisfying the requirements of Section 303 of the CWA.[11] *See* 33 U.S.C. § 1313(c)(3)-(4).

Such action is contrary to the CWA. The CWA expressly limits EPA's authority with respect to water quality standards.[12] *Id.* EPA's limited role includes

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[10] EPA's draft report is entitled, "A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams," (Mar. 2010) (External Review Draft), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=220171.

[11] Section 303 requires states to establish water quality standards for waterbodies within their boundaries, 33 U.S.C. § 1313(a), and reflects Congress's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution[.]" 33 U.S.C. § 1251(b).

[12] A water quality standard defines the water quality goals of a water body by designating uses for a particular waterbody and setting criteria necessary to protect those uses. 33 U.S.C. § 1313(c)(2)(A). States are free to express such criteria as "constituent concentrations, levels, or narrative statements." 40 C.F.R. § 131.3(b). Criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a).

review of any new or revised state water quality standards adopted by a state to determine whether such standards satisfy the CWA's requirements. *Id.* § 1313(c)(3). EPA may only "step in and promulgate water quality standards itself" if it has determined that a state's proposed new or revised water quality standard "does not measure up to CWA requirements and the state refuses to accept EPA-proposed revisions to the standard" or if a state does not act to propose such a standard and EPA determines that it is necessary. *Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. § 1313(c)(3)-(4)) (emphasis omitted).

But neither of those situations occurred here. Instead, EPA first created and then applied its own ad hoc standard through guidance. This is unlawful. The district court correctly held that EPA's Guidance and the ad hoc water quality limit for conductivity it set violated the APA because, through the Guidance, EPA effectively amended the existing CWA regulations without following the APA's notice-and-comment rulemaking procedures and failed to articulate any rational explanation for the imposition of the new conductivity standards.

In this way, the Guidance is similar to the guidance challenged in *Appalachian Power Co.*, 208 F.3d at 1015, where this Court noted that the challenged guidance created obligations on the part of the state regulators and those they regulate: "the entire Guidance, from beginning to end . . . reads like a

ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their 'marching orders,' and EPA expects the States to fall in line . . . ." *Id.* at 1023. The *Appalachian Power* Court found EPA's guidance to violate the APA. Similarly, *amici* urge this Court to affirm the district court's holding that this Guidance violates the APA.

B. EPA May Not Change the Regulatory Timelines and Framework of the Section 404 Permitting Process Through Guidance.

CWA Section 404 allows for the "discharge of dredged or fill material into the navigable waters at specific disposal sites." 33 U.S.C. § 1344(a). Only the Corps has statutory authority to issue permits pursuant to Section 404. *Id.;* 33 C.F.R. § 325.2(a)(3). EPA, on the other hand, has two specifically delineated roles with regard to Section 404 permits. First, EPA must develop guidelines "for the Corps to follow in determining whether to permit a discharge of fill material." *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009). In deciding whether to issue a CWA Section 404 permit, the Corps applies the 404(b)(1) Guidelines. 33 U.S.C. § 1344(b); 40 C.F.R. pt. 230. EPA's second specifically delineated role under CWA Section 404 is that it has authority, under specific procedures, to prevent the Corps from authorizing certain disposal sites. 33 U.S.C. § 1344(c).

Section 404(q) directs the Corps to coordinate with the appropriate federal agencies to assure that, "to the maximum extent practicable," a decision on a

pending application for a Section 404 permit will be made within 90 days of the publication of the notice for that application. 33 U.S.C. § 1344(q). The Corps and EPA signed a Memorandum of Agreement in August, 1992, making clear that "the Corps is responsible for requesting and evaluating information concerning all permit applications," and while EPA "has an important role" in the Corps's Section 404 permitting process, any comments EPA submits on a permit should be provided within the time frames established by the agreement and applicable regulations.[13] The 404(q) Memorandum also provides for "elevation" of individual permit decisions and confirms that the final decision on the need to elevate a specific permit rests "solely" with the Assistant Secretary of the Army for Civil Works. *Id.* at 6-7.

In this case, through the MCIR Assessment and EC Process, EPA altered the Section 404 permitting process by setting forth a series of directives for EPA regional employees regarding the Corps's proposed Section 404 permits for a certain sector. The EC Process enhanced EPA's "role and responsibility" under the CWA and diverted certain, EPA-selected permittees already in the permitting pipeline from the Corps's ordinary review process to a new process that EPA

[13] Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army at 1, 2 (Aug. 11, 1992), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm ("404q Memorandum").

would lead.[14] Upon being diverted, those applicants faced an ad hoc review contrary to CWA Section 404, the Corps's regulations, and the 404(q) Memorandum and were forced to negotiate additional permit limits and conditions with EPA or face indefinite delay.

The MCIR Assessment and EC Process are inconsistent with the CWA Section 404 regulatory program. The CWA statutorily provides that the Corps is the sole issuer of Section 404 permits. Congress carefully defined and limited EPA's role under the CWA, and the MCIR Assessment unlawfully violates Congress's statutory division of authority by expanding EPA's authority under Section 404. Despite the clear limitations on EPA's authority, EPA established, through guidance, a new evaluation process for a certain group of Section 404 permit applications, in which EPA acts as the sole decisionmaker. This is contrary to the CWA, the 404(b)(1) Guidelines, the 404(q) Memorandum, and the Corps's implementing regulations.

As such, through the MCIR Assessment and the EC Process, EPA has unlawfully revised agency regulations without following the APA's notice-and-

[14] On September 11, 2009, EPA stated that it had diverted all 79 of the then-pending Section 404 permit applications with valley fills from the Corps's 33 C.F.R. part 325 review process to the EC process. "Appalachian Surface Coal Mining Initial List Resulting from Enhanced Coordination Procedures," *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_09_11_wetlands_pdf_ECP_Factsheet_09-11-09.pdf.

comment rulemaking procedures. *Amici* urge the Court to uphold the district court's decisions finding these guidance documents to be legislative rules subject to the APA.

CONCLUSION

As the U.S. Court of Appeals for the Eighth Circuit recently noted, "[n]otice and comment procedures secure the values of government transparency and public participation…." *Iowa League of Cities*, 711 F.3d at 873. To secure those values here, and for the reasons set forth above and in the Intervenor Plaintiffs-Appellees' Brief and the Plaintiffs-Appellees' Brief, *amici* respectfully request that the Court confirm that substantive changes to existing regulations, such as those made in the Guidance, MCIR Assessment, and EC Process, must comply with the APA's notice-and-comment procedures. *Amici* urge the court to uphold the district court's decisions.

July 22, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing Brief of *Amici Curiae* American Farm Bureau Federation, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Council of Coal Lessors, Inc., Pacific Legal Foundation and Utility Water Act Group in Support of Intervenor Plaintiffs-Appellees, Plaintiffs-Appellees and Affirmance of the U.S. District Court for the District of Columbia contains 5,835 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2010 word processing program in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 22nd day of July, 2013, I served a copy of the foregoing Brief of *Amici Curiae* American Farm Bureau Federation, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Council of Coal Lessors, Inc., Pacific Legal Foundation, and Utility Water Act Group in Support of Intervenor Plaintiffs-Appellees, Plaintiffs-Appellees and Affirmance of the U.S. District Court for the District of Columbia electronically through the Court's CM/ECF system upon all counsel of record registered in CM/ECF.

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