# Environmental Update:
# Keeping the Issues Straight in the Mining Industry

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The following outline highlights the numerous recent federal regulatory developments and judicial decisions in environmental law that impact natural resources industries. While the past year has witnessed an extraordinary number of significant developments, this detailed update will focus on the key initiatives of the current administration and non-governmental organizations, the evolving interplay between federal and State environmental programs, and the influence of current and projected energy policy upon natural resources development – from the permitting stage to use and export.

## I. ADMINISTRATIVE AGENCIES' EXPANSION OF THE CLEAN WATER ACT

### A. "Waters of the United States"

#### 1. EPA's Proposed Guidance Regarding the Scope of CWA Jurisdiction

The U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") (jointly, the "Agencies") are in the process of issuing a guidance that would expand the scope of their jurisdiction under the Clean Water Act ("CWA"). On May 2, 2011, the Corps and EPA issued their "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011) ("Draft Guidance"), which purports to describe how the Agencies will identify waters subject to jurisdiction under the CWA and implement the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), and *Rapanos v. United States*, 547 U.S. 715 (2006), cases that are now eleven and six years old, respectively.

The Clean Water Act regulates the discharge of pollutants into "navigable waters," which the statute defines to mean "the waters of the United States." The Draft Guidance expands the scope of waters subject to CWA jurisdiction by expanding the definition of "waters of the United States" to include most ephemeral waters; agricultural, roadside, and irrigation ditches; and many other non-aquatic land features. Under the Draft Guidance, the Agencies are purporting to regulate, and thus require permits for, all linear features that contain "standing water" regardless

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of the frequency or the duration of the "flow." Never in the history of the CWA has federal regulation defined ditches and other upland drainage features as "waters of the United States." This broad view of the scope of federal authority would encompass many natural landscape features not readily recognizable as "waters."

Significantly, the Draft Guidance applies to the entire suite of CWA programs − section 303 water quality standards, section 311 oil spill prevention control and countermeasures, section 401 water quality certifications, the section 402 NPDES program, and the section 404 dredge and fill permit program. An expanded definition of "waters of the United States" will therefore have profound implications for our nation's agriculture, construction, energy, housing, manufacturing, mining, real estate, and other sectors. A determination that an area is a "water of the United States" immediately subjects that area to a number of legally binding requirements. Enlarging the universe of what is considered jurisdictional under the CWA, and thus what areas are subject to the myriad of programs, permits, and limitations associated with such designation, will clearly have a broad and substantial impact on regulated entities and the public. The Agencies' proposed expansion of the federal regulatory footprint of the entire CWA will blur the distinction between regulating water and regulating land use and have significant economic implications across the nation's entire economy.

For example, with more waters regulated by the federal government, more entities will be subject to the CWA permitting programs under sections 402 and 404. CWA § 404 requires a permit for projects and activities that involve the discharge of dredged or fill material into the navigable waters, reaching a broad scope of projects, including mine tailings and waste rock placement; pipeline and electric transmission and distribution lines; residential and commercial development; renewable energy projects like wind, solar, and biomass; transportation infrastructure, including roads and rail; and agriculture. Under the Draft Guidance, virtually all waters could be jurisdictional under the CWA and, as a result, even more projects and activities will require section 404 permits. The section 404 permit process is lengthy and costly, often requiring the use of consultants and lawyers. Failure to obtain permits can result in enforcement actions and potential civil or criminal penalties of up to $37,500 per day. Such an expansion of the CWA's jurisdictional reach will add delays and costs to an already overburdened Corps regulatory program.

In addition, under CWA § 402, dischargers must obtain a National Pollutant Discharge Elimination System ("NPDES") permit for any point-source discharge into "navigable waters." With the proposed expansion of the scope of navigable waters to include waters such as remote waters and ditches that were not previously governed by the CWA, many more activities will become classified as discharges that are required to have NPDES permits. As the number of NPDES permits that must be issued increases, the cost of issuing, monitoring, and enforcing these permits will fall predominantly on the States in most cases.

The Agencies published the Draft Guidance for public comment and received approximately 230,000 comments from groups representing a wide range of interests, including environmental groups; industry groups from the construction, housing, mining, agriculture, and energy sectors; and State and local officials, represented by organizations such as the National League of Cities and the National Association of Counties. The majority of commenters, industry and environmentalist alike, urged the Agencies to undertake a rulemaking to address the definition of

"waters of the United States" in the context of the *SWANCC* and *Rapanos* decisions rather than proceed via guidance. Indeed, in *Rapanos*, the Supreme Court itself urged the Agencies to conduct a rulemaking to clarify the scope of their CWA jurisdiction. But the Agencies are proceeding as they have done in the past − by issuing yet more guidance.

On February 21, 2012, the Agencies sent a revised version of the Draft Guidance to the Office of Management and Budget ("OMB") for review. Whenever the final guidance is issued, it is expected to follow closely the substance of the Draft Guidance and to be immediately effective.

In April, Chairman John Mica (R-Fla.) and Ranking Member Nick Rahall (D-W.Va.) of the House Transportation and Infrastructure Committee, Chairman Frank Lucas (R-Okla.) and Ranking Member Collin Peterson (D-Minn.) of the House Agriculture Committee, and Chairman Bob Gibbs (R-Ohio) of the Water Resources and Environment Subcommittee introduced H.R. 4965, legislation that would prevent the Agencies from issuing their final guidance or using it as a substantial basis for any rule. Similarly, Sen. John Barrasso and others sponsored the "Preserve Waters of the U.S. Act" (S.2245). Both pieces of legislation are aimed at preventing the Agencies' proposed expansion of waters subject to federal jurisdiction.

Moreover, the fiscal year 2013 Energy and Water Development Act (H.R. 5325) contains a provision introduced by Rep. Dennis Rehberg (R-Mont.) that would defund implementation of the guidance project. An amendment offered by Rep. Jim Moran (D-Va.) that would have stricken the provision barring the new water guidance failed on June 1st.

Lastly, in February Sen. Rand Paul introduced a bill entitled the "Defense of Environment and Property Act of 2012" (S.2122) "to clarify the definition of navigable waters." The bill would amend the CWA to redefine "navigable waters" in line with the Scalia plurality opinion in *Rapanos*. Specifically, the legislation authorizes federal regulation of (1) navigable-in-fact waters (*e.g.*, waters that actually support a boat) and (2) relatively permanent water bodies commonly known as streams, oceans, rivers, and lakes connected to navigable-in-fact waters. Excluded from regulation are waters that lack a continuous surface water connection to navigable waters, including intermittent or ephemeral streams, and the "significant nexus" test is prohibited. The bill also includes a provision to compensate property owners for regulatory takings (diminished property values) associated with application of the CWA. Rep. Thomas Rooney introduced a parallel bill in the House in March (H.R. 4304).

### 2. EPA Issues Mining Guidance − Rewrites Corps' Permit Review Regulations by Guidance and Prompts Legal Challenge

The National Mining Association ("NMA") filed a complaint seeking declaratory and injunctive relief on July 20, 2010, in the U.S. District Court for the District of Columbia, challenging EPA's and Corps' enhanced coordination process and EPA's detailed guidance on the issuance of Clean Water Act permits for surface coal mining operations in Appalachia. The June 2009 Enhanced Coordination ("EC") Process created an alternate CWA permitting pathway for surface coal mining projects in Appalachia, generally enhancing EPA's role under the statute. Once a permit is designated for the EC Process, there is no requirement for the coordination period to be commenced in a timely manner, in contrast to the Corps' regulations. The April 2010 Guidance applied to all surface coal mining projects in six Appalachian States. Among

other things, it set forth a *de facto* water quality standard for specific conductivity, instructing EPA regional employees to insist on the inclusion of permit limits that are designed to ensure that conductivity remains below a specific level (500 micro Siemens per centimeter). EPA also suggested that coal mining projects that involve more than one valley fill or more than one mile of stream loss are likely to result in significant environmental impacts and require an environmental impact statement under the National Environmental Policy Act ("NEPA").

NMA challenged the EC Process and Guidance as legislative rules issued in violation of the Administrative Procedure Act for lack of notice and comment. The government filed a motion to dismiss, arguing that the pronouncements are not final agency action, are not ripe for review, and are all non-binding policy statements not requiring notice and comment. The government also challenged NMA's standing to contest the EC Process. In January 2011, the court denied the government's motion to dismiss, reasoning that the guidance is final and ripe for review because it is being applied in a binding manner. *See Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 56 (D.D.C. 2011).

NMA also raised a number of statutory claims under the CWA and NEPA, arguing that the Corps and/or EPA exceeded their statutory authority because the EC Process violates the statutory division of authority between the two agencies under CWA § 404, and because the pronouncements impermissibly enhanced EPA's authority under those statutes.

While the court denied NMA's motion for a preliminary injunction in January 2011, reasoning that NMA was unable to show irreparable harm to its members, the court granted partial summary judgment to NMA in October 2011. Under a bifurcated briefing schedule with respect to the challenged EPA actions (*i.e.*, the EC Process and the Detailed Guidance), the court granted NMA's motion for partial summary judgment with respect to the EC Process. 816 F. Supp. 2d 37. The court reasoned that EPA has a limited role to play in the CWA § 404 permitting process and the Corps is the principal player. The adoption of the EC Process expanded EPA's role beyond that envisioned by Congress, thus exceeding the statutory authority conferred upon EPA by the CWA. The court also found that the EC Process is a legislative rule not exempt from the APA's notice and comment rulemaking requirements.

EPA issued Final Guidance on July 21, 2011, which superseded the Interim Guidance. NMA amended its complaint to allege claims challenging the Final Guidance, and those claims remain pending. Ms. Nathanson will provide more information on this case.

### 3. EPA's Attempted Expansion of CWA § 404 Veto Authority

#### a. Post-Permit

In March, the U.S. District Court for the District of Columbia granted the plaintiff's motion for summary judgment in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, No. 10-0541 (ABJ), 2012 WL 975880 (D.D.C. Mar. 23, 2012). In a precedent-setting opinion, the court held that EPA exceeded its authority under section 404(c) of the Clean Water Act when it attempted to "veto" Mingo Logan's existing section 404 permit by withdrawing the specification of certain areas as disposal sites, after the Corps had previously issued the permit with no prior EPA objection to the permit application. This case was the first time that EPA invoked CWA

§ 404(c) to modify or revoke a permit that had been duly issued by the Corps. Had EPA's action stood, all section 404 permits would be perpetually subject to unilateral EPA veto even after issuance, and regardless of whether the Corps decides to take any action to suspend, modify, or revoke the permit in accordance with the balancing of multiple criteria listed in the Corps' regulations.

In 2007, after a 10-year permitting process, in which EPA participated fully, the Corps issued Mingo Logan a section 404 permit for the Spruce No. 1 mountaintop coal mine in Logan County, West Virginia, authorizing Mingo Logan to discharge dredged or fill material into stream segments. Almost two years after the Corps issued the section 404 permit, EPA requested that the Corps suspend, modify, or revoke the permit because EPA claimed that new information had arisen or that the Corps had failed to fully consider certain issues that had been raised during the permitting process. The Corps rejected EPA's request, finding no grounds to suspend, modify, or revoke the permit. Over a year later, EPA issued a Final Determination withdrawing the specification as disposal sites of two streams encompassing the vast majority of the permitted discharge area. Mingo Logan asked the district court to declare that EPA lacks the authority to modify or revoke a validly issued CWA § 404 permit.

The district court found that EPA exceeded its section 404(c) authority and vacated EPA's Final Determination withdrawing the specifications of disposal sites. EPA argued that section 404(c) grants it plenary authority to withdraw a specification and that such withdrawal effectively modifies or revokes a permit that the Corps has duly issued. The court analyzed whether Congress had unambiguously and directly spoken to the precise question at issue by examining section 404's text, structure, purpose, and legislative history. The court found that section 404(c) does not clearly grant EPA the authority to exercise a post-permit veto. Fundamentally, the court observed that section 404(c) never mentions the term "permit," a mechanism of central importance to the CWA scheme, and that the phrase "withdrawal of specification" does not provide EPA with any express authority to undermine an existing permit.

Although the court found the language of section 404(c) to be awkward, once the court examined the statute as a whole, it found no ambiguity regarding Congress's intent. The court noted that Congress gave exclusive permitting authority to the Corps in section 404(a) and that Congress declared in section 404(p) that a permit would provide legal protection for those discharging in compliance with the permit's terms. In addition, in section 404(q), Congress directed that EPA resolve its disputes with the Corps expeditiously *prior* to permit issuance – a direction that would be undermined by EPA's claimed ability to invoke later disputes to overturn a final, issued permit. The court held that all these sections, taken together, demonstrate that EPA's purported retroactive veto cannot be squared with the statutory scheme.

Beyond that, the court held that even if the statute left a question as to Congress's intent, EPA's interpretation of the statute was not reasonable. EPA claimed it was not revoking a permit because it was only withdrawing a specification. Yet, EPA simultaneously claimed that the withdrawal of the specification effectively nullifies the permit. The court described this "non-revocation revocation" as "magical thinking," and explained that it would leave permittees in the position of not being able to rely on their permit and would cause substantial practical uncertainty. Moreover, the court noted that EPA's interpretation of section 404(c) was inconsistent with joint agency agreements implementing the CWA.

As the court noted, EPA's veto in this case has caused consternation and anxiety for members of the business community because it threatens the finality of their wetland and stream permits. The court's decision curbs EPA's claim of this extraordinary power and instead directs EPA to exercise its authority during the permitting process, before the Corps has made its decision to issue a permit. Thereafter, the Corps alone will control the administration and enforcement of the issued permit.

On May 11, 2012, EPA appealed Judge Jackson's ruling to the United States Court of Appeals for the District of Columbia Circuit.

### b. Pre-Permit

On March 28, 2012, the Natural Resources Defense Council ("NRDC") petitioned EPA to pre-emptively veto a Clean Water Act § 404 permit prior to submission of a permit application.[2] The petition asks EPA to invoke its CWA § 404(c) authority to prohibit the disposal of fill in watersheds near Bristol Bay, Alaska, in which large scale mining may occur. The action is precedent-setting in many respects. First, such a petition process does not exist under the CWA, nor does the CWA or EPA have procedures for developing a response to such a petition. And, EPA has never before attempted to exercise its 404(c) authority completely outside the permit process (*i.e.*, in this case before a permit application is submitted).

The petition alleges that large-scale mining proposed at the Pebble Mine project[3] is irreconcilable with the health and integrity of the fishery, drinking water, wildlife, and recreational resources of the Bristol Bay watershed, and that EPA has the clear statutory authority to protect those resources by exercising its veto authority prior to submission of a section 404 permit application. NRDC Petition at 1. The petitioners believe that the CWA's text explicitly provides EPA with authority to prohibit, deny, or restrict the use of an area as a disposal site for dredged or fill material in order to avoid unacceptable environmental degradation. NRDC argues that EPA has correctly interpreted this language authorizing the agency to act *whenever* the administrator determines "the environmental impacts would be unacceptable to include even before the commencement of the Army Corps's section 404 permitting process." *Id.* at 17-18.

EPA responded to the petitions by initiating a study of the Bristol Bay area. The study, "An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska," is a

[2] Brief on Behalf of the Natural Resources Defense Council in Support of Petitions to the U.S. Environmental Protection Agency for Action Regarding the Proposed Pebble Mine Under Section 404(c) of the Federal Water Pollution Control Act, March 28, 2012. The petition follows a similar petition filed in 2010 by six federally-recognized tribes and later additional tribal requests. *See* Letter from Six Federal-recognized Tribes in the Kvichak and Nushagak River Drainages of Southwest Alaska to Lisa P. Jackson, Administrator of the U.S. Environmental Protection Agency (May 2, 2010).

[3] The Pebble Mine Project is a joint venture among Anglo American PLC and Northern Dynasty Minerals Ltd. engaged in exploration of the Pebble deposit in Southwest Alaska. Additionally, Rio Tinto has a 19 percent share in Northern Dynasty Minerals.

comprehensive look at a "hypothetical" large-scale mine and assessment of potential risks, including cumulative impacts of multiple mines, on the Bristol Bay area. The study was released to the public in the form of an External Review Draft on May 18, 2012, with a sixty-day comment period.

The State of Alaska has expressed concerns with the assessment in letters from Michael Geraghty, Attorney General, and through various inquiries from Senator Lisa Murkowski in various legislative hearings and meetings. Repeatedly, on behalf of Alaska, Mr. Geraghty, has requested that EPA cease its work on the Bristol Bay Watershed Assessment and to refrain from exercising its section 404(c) authority until a section 404 permit application has been submitted and other applicable regulatory reviews are conducted.[4] Alaska is concerned that the assessment effort reaches well beyond any process or authority contemplated by the CWA and with the vastness of the assessment's scope, covering 15 million acres of largely State-owned land.

Key to Alaska's objections is the potential conflict with federal and State laws governing the use of Alaska's natural resources. Alaska believes that EPA's actions have the potential to extinguish both the State of Alaska's mineral rights under the Statehood Compact and the mineral interests held by locators and lessees, in violation of the Alaska Statehood Act.[5] EPA has responded that its authority under CWA § 104 directing the Administrator to "establish national programs for the prevention, reduction and elimination of pollution," is broad enough to include the Bristol Bay Watershed Assessment. EPA plans a series of public meetings in Alaska throughout the summer, including an open meeting of the Science Advisory Board that has been convened by EPA to review the assessment. EPA states that the Watershed Assessment will provide important data that will help inform future decision-making with respect to Bristol Bay − whether it be under the agency's 404(c) or another action.[6]

### 4. Expanded Use of Aquatic Resources of National Importance ("ARNI") to Delay and Oppose Projects

EPA has begun using with increased frequency a designation that had previously been reserved for elevating section 404 permit decisions where EPA may disagree with the Corps' intent to issue a section 404 permit. An Aquatic Resource of National Importance ("ARNI") is a designation used as a basis for determining whether a dispute between EPA and the Corps regarding individual permit cases are eligible for elevation under a 1992 Memorandum. The designation had been used only a total of ten times prior to 1992 and has been used just eighteen times since then. But recently, EPA has invoked the designation with increasing regularity in comment letters on proposed section 404 permits as a means to slow or block permits for development projects. Since EPA does not post on its website every letter that "threatens" to invoke elevation, it is difficult to track how often the designation is being used to leverage EPA's desired changes to permits prior to issuance. In addition to industry concerns with increased

[4] *See* Letters from Attorney General, Michael C. Geraghty, to EPA Region X Regional Administrator, Dennis McLerran, dated March 9, 2012 and April 17, 2012.

[5] Pub. L. No. 85-508, 72 Stat. 339 (July 7, 1958).

[6] *See* Letter from EPA Region X Regional Administrator, Dennis J. McLerran, to The Honorable Michael C. Geraghty, Attorney General, State of Alaska, dated April 5, 2012.

frequency in use, there are also concerns with what appears to be an expanding list of "waters" meeting the designation criteria and EPA's position that the ARNI designation is not appealable.

On November 12, 1985, EPA and the Corps entered into a Memorandum of Agreement ("MOA") concerning the elevation of section 404 permit applications to the Assistant Secretary of the Army for Civil Works ("ASA(CW)") pursuant to CWA § 404(q). That MOA laid out three criteria under which EPA could request elevated consideration of a section 404 permit application: (1) insufficient coordination, including a failure to resolve EPA stated concerns on compliance with the 404(b)(1) guidelines; (2) sufficient new information; and (3) issues of national importance. Only permit applications implicating one of those three criteria could be flagged by EPA as warranting additional review, thereby allowing for all other permits to be issued without additional delay.

On August 11, 1992, EPA and the Corps entered into a new MOA to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits," thereby terminating the November 1985 MOA. The new MOA laid out, among other things, new procedures concerning the elevation of section 404 permits to the ASA(CW) for additional review in cases where there was a dispute between the Corps and EPA. After the elevation and review procedures have been completed, should the Corps decide to proceed with the issuance of a permit over EPA's objection, EPA can then initiate a CWA § 404(c) "veto" action.

The new MOA established a new classification of water resource called "aquatic resources of national importance," or "ARNIs." For an individual permit to be elevated pursuant to the 1992 MOA, it must involve an ARNI. Specifically, the MOA explains that elevation of individual permit cases should be limited to those cases where the net loss (*i.e.*, after considering mitigation) from a project (*i.e.*, within the scope of impacts being evaluated by the Corps) will result in unacceptable adverse effects to aquatic resources of national importance. As a basis for comparison, these cases will cause resource damages similar in magnitude to cases evaluated under section 404(c) of the CWA. The final decision on the need to elevate a specific individual permit rests solely with the ASA(CW).

Neither the MOA nor any other law, regulation, or guidance document defines the term ARNI. The only additional information concerning what constitutes an ARNI can be found in EPA's dispute resolution document, wherein EPA lists several factors relevant to determining whether a particular resource qualifies as an ARNI. These factors include "economic importance of the aquatic resource, rarity or uniqueness, and/or importance of the aquatic resource to the protection, maintenance or enhancement of the quality of the Nation's waters." EPA has noted that "past 404(q) elevations have identified the Chesapeake Bay, vernal pools, bottomland hardwoods, sub-alpine fens, bogs and costal marshes as ARNIs."

As a supplement to the 1992 MOA, EPA issued an additional memorandum dated October 30, 2006, entitled "U.S. EPA coordination between Regional offices and Headquarters on CWA § 404(q) actions." That memorandum, designed to facilitate communication and consistent approaches in CWA § 404(q) implementation, expressly states that "The [1992] MOA acknowledges the potential delays in permitting resulting from the implementation of the

coordination procedures outlined … and stated that actions … would be initiated 'only when absolutely necessary.'"

There is no notice and comment process or other avenue for appeal of an ARNI decision. Indeed, EPA has expressly stated their view that even the Corps cannot challenge EPA's designation of a resource as an ARNI.[7] Additionally, the ARNI designation can arise at any time during a section 404 permit application process.

Concerns with increased use or misuse of the ARNI designation to object to projects within certain States has prompted Congressional interest. For example, Senator Murkowski (R-Alaska), in a December 21, 2011, letter, expressed concerns with two new designations in Alaska that appear to be associated with applications for permits for significant rail and natural resource development projects important to the State.

### 5. CWA § 402(*l*) Exemption for Oil and Gas Wells

EPA Region III is seeking increased oversight over drilling well siting by requiring that drilling operators obtain Clean Water Act § 404 permits for construction of hydraulic fracturing and other natural gas drilling sites. EPA suggests that increased drilling in the Marcellus Shale has resulted in unlawful discharges of rock, dirt, gravel, or sediment into jurisdictional waters, materials considered CWA "fill material" and requiring a permit authorizing any such discharges to waters of the United States.

EPA has issued a number of compliance orders under section 309(a) of the CWA to drilling operators requiring them to cease and desist all discharges to waters of the United States without a permit and mitigate the site to pre-disturbed conditions. Failure to comply with the Order is deemed a violation and may result in further EPA enforcement action, including but not limited to civil penalties up to $37,500 per day and criminal charges and fines up to $50,000 per day.

This recent push for increased oversight of drilling operations follows an effort by EPA to expand the agency's jurisdiction through the CWA's stormwater regulations. At Congressional hearings late last year, EPA expressed concern with well construction occurring in "sensitive areas" and within stream banks that, according to EPA, should be captured by CWA stormwater permitting requirements. But, currently, oil and gas operations are exempt from the stormwater permitting requirements under the CWA.

In 1987 when Congress amended the CWA to regulate stormwater discharges, Congress specifically chose to exempt oil, gas, and mining operations from the new requirements where those stormwater runoff discharges are composed entirely of flows from conveyances that do not come into contact with any overburden, raw material, intermediate products, finished product,

[7] *See* EPA response in California Floristic Province elevation, December 2000, where EPA stated that the Corps' January 4, 2001, response appears to misinterpret the agencies' agreement under section 404(*l*). Specifically, the letter seems to indicate that the Corps can reject a determination by EPA of what constitutes an aquatic resource of national importance ("ARNI"). It is important to clarify that the MOA is structured such that EPA determines what is an ARNI and thereby, determines what resources merit a higher level of review by the Corps.

byproduct, or waste products located on the site, *i.e.*, "uncontaminated runoff" from these operations was expressly exempt. 33 U.S.C. § 1342 (*l*)(2). But Congress left to EPA to determine what constituted "uncontaminated runoff." Over time, by regulatory interpretation, the agency narrowed the exemption rendering it unclear and confusing, particularly as between operational activities and construction-related activities occurring at the sites.

Responding to this regulatory uncertainty, Congress again amended the CWA, in the Energy Policy Act of 2005, clarifying that the exemption applied not only to oil and gas *operations*, but also to *construction activities* associated with these operations. EPA revised its regulations to codify Congress's clear intent. In the rule, EPA determined that "exempting storm water discharges of sediment from oil and gas construction sites from CWA permitting requirements reflects a reasonable interpretation of Congressional intent in limiting the 402(*l*) exemption. 71 Fed. Reg. 33,628, 33,634. Shortly, thereafter, the Natural Resources Defense Council (NRDC) challenged these aspects of the rule in the U.S. Court of Appeals for the Ninth Circuit. *NRDC v. U.S. Envtl. Prot. Agency*, 526 F.3d 591 (9th Cir. 2008). EPA defended the rule, but the Ninth Circuit disagreed and vacated that portion of the rule that exempted discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations from CWA permitting requirements.

In 2008, EPA issued Guidance, "Regulation of Oil and Gas Construction Activities," making clear that the Ninth Circuit's decision did nothing to change the CWA exemption, and that uncontaminated discharges of stormwater from oil and gas operations, including construction activities, remain exempt from the CWA National Pollutant Discharge Elimination System ("NPDES") permitting program. But these recent actions by EPA, targeting runoff from these oil and gas operations, suggests EPA may be reconsidering this long-standing interpretation as a means of expanding federal authority over operations that have historically been within the primary authority of the States to regulate.

### 6. Recent Supreme Court Decisions − Do They Change Anything?

#### a. *Sackett v. U.S. Environmental Protection Agency*

On March 21, the U.S. Supreme Court issued a unanimous decision in *Sackett v. U.S. Environmental Protection Agency*, 566 U.S. __ (2012). The Court held that an EPA-issued Clean Water Act (CWA) administrative compliance order is a final agency action and therefore judicially reviewable under the Administrative Procedure Act ("APA"). The Court also held that the CWA does not preclude pre-enforcement review of a compliance order. This decision is important for recipients of CWA administrative orders because it allows them to challenge the Corps' or EPA's assertion of jurisdiction over the territory included within the order prior to accruing stiff enforcement penalties.

The Sacketts are Idaho residents who desire to build a home on their residential lot near the shore of Priest Lake. The Sacketts filled in part of their lot with dirt and rock. Months later, the Sacketts received an administrative compliance order from EPA finding that the property contains jurisdictional wetlands, asserting that the Sacketts violated the CWA by discharging fill material, and ordering the Sacketts to immediately restore the site pursuant to an EPA-approved work plan. If the Sacketts refuse to comply with the compliance order, they face civil penalties

of up to $37,500 per day for violating the CWA and an additional $37,500 per day for violating the compliance order itself.

The Sacketts, who do not believe that their property is subject to CWA jurisdiction, sought a hearing with EPA, but the hearing request was denied. The Sacketts then brought suit in federal court contending that EPA's issuance of the compliance order was arbitrary and capricious under the APA and violated the Fifth Amendment's due process protections. The U.S. District Court for the District of Idaho dismissed the claims for lack of subject matter jurisdiction. The U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that the CWA precludes pre-enforcement judicial review of compliance orders, and that such preclusion does not violate due process guarantees.

In an opinion written by Justice Scalia, the U.S. Supreme Court reversed, holding that the compliance order was a final agency action subject to APA review and that the CWA does not preclude that review. The Court found that the compliance order was final agency action under the APA because it placed legal obligations on the Sacketts to restore their property, it was not subject to further agency review and therefore marked the "consummation" of the agency's decision making process, the Sacketts faced increased fines for non-compliance with the order, and they had no other adequate remedy in court. The Court noted that judicial review in CWA enforcement cases typically occurs when EPA brings a civil action. Because the Sacketts could not initiate that process, they were essentially forced to "wait for the agency to drop the hammer," while accruing potential civil penalties. Moreover, the Court found nothing in the CWA that expressly precludes judicial review under the APA, and that there is no suggestion that Congress sought to overcome the APA's presumption of judicial review or exclude compliance order recipients from the CWA's review scheme. The Court concluded that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."

Although the Court did not reach the merits of EPA's assertion of CWA jurisdiction, it noted that the Sacketts' suit over the compliance order flows from an underlying dispute over the scope of "waters of the United States" subject to CWA jurisdiction. Prior to the *Sackett* decision, as Chief Justice Roberts noted during the *Sackett* oral arguments, when EPA made a jurisdictional determination that an area is a "water of the United States" subject to the permitting requirements of the CWA, the lack of pre-enforcement review essentially meant that the agencies were "never going to be put to the test." Although the *Sackett* opinion does not clarify the scope of waters subject to CWA jurisdiction under *Rapanos*, the result of this decision will likely be that overbroad agency assertions of CWA jurisdiction will be given greater scrutiny. EPA and the Corps will therefore need to compile a strong record before issuing administrative compliance orders.

### b. *PPL Montana, LLC v. Montana*

On February 22, the U.S. Supreme Court issued a unanimous decision in *PPL Montana, LLC v. Montana*, 565 U.S. __ (2012). The Court reversed the Montana Supreme Court's ruling that had required PPL Montana, a hydroelectric dam operator, to pay rent for the use of the riverbeds covered or inundated by its dams. This decision may provide some support for groups facing a CWA jurisdictional question with EPA or the Corps.

*PPL Montana* concerned three rivers that flow through Montana. The State of Montana contended that these rivers were navigable at the time the State entered the Union in 1889, and therefore the State gained title to the disputed riverbeds under the equal-footing doctrine. Based on its title claims, Montana sought compensation from PPL Montana, a power company that owns 10 dams on the three rivers, for its use of the riverbeds for its hydroelectric projects. As a result of the Montana Supreme Court's decision, PPL Montana faced the prospect of paying the State $41 million in rent for its use of the riverbeds for the period from 2000 to 2007 alone.

In an opinion written by Justice Anthony Kennedy, the U.S. Supreme Court reversed the State court's decision. The Court explained that the basic test for "navigable waters" was formulated in *The Daniel Ball*, an 1870 Supreme Court opinion that held that waters are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." This test has been invoked in considering the navigability of waters for other purposes, such as admiralty determinations and assessment of federal regulatory authority through the application of specific federal statutes such as the CWA. The Court emphasized, however, that the test for navigability is not applied in the same way in these distinct types of cases.

The Court held that to determine title to riverbeds under the equal footing doctrine, the State court should have considered the rivers on a segment-by-segment basis to assess whether each segment was navigable at the time the State entered the Union. Moreover, the Court held that the State court erred in its reliance upon the evidence of present-day, primarily recreational, use as evidence of navigability under the equal footing doctrine, because the State court did not examine whether these recreational watercraft, such as canoes and kayaks, were similar to those customarily used for trade and travel at the time of statehood.

In proposed jurisdictional guidance from EPA and the Corps, the agencies purport to assert CWA jurisdiction over a water body as a "traditional navigable water" simply because a kayak or canoe can float on it. The *PPL Montana* Court's emphasis on use in interstate commerce provides support for the argument that recreational use alone is not sufficient to demonstrate a water body is jurisdictional under the CWA.

## B. Permitting

### 1. Relatively New Obligations for NPDES Permits Related to Pesticide Application

In October 2011, EPA issued a final NPDES Pesticide General Permit ("PGP") for point source discharges from the application of pesticides to waters of the United States. This general permit will provide coverage for discharges in the areas where EPA is the NPDES permitting authority. This action was in response to *National Cotton Council of America v. U.S. Environmental Protection Agency*, 553 F.3d 927 (6th Cir. 2009), in which the court vacated EPA's 2006 rule that had exempted aquatic pesticides from NPDES permitting requirements, holding that point source discharges of biological pesticides, and chemical pesticides that leave a residue, into waters of the United States are pollutants under the CWA.

The Agency's final PGP covers Operators that apply pesticides that result in discharges from the following use patterns: (1) mosquito and other flying insect pest control; (2) weed and algae control; (3) animal pest control; and (4) forest canopy pest control. The permit requires permittees to minimize pesticide discharges through the use of pest management measures and monitor for and report any adverse incidents. Some permittees are also required to submit Notices of Intent prior to beginning to discharge and implement integrated pest management ("IPM")-like practices. Pesticide application use patterns not covered by EPA's PGP may need to obtain coverage under an individual permit or alternative general permit if they result in point source discharges to waters of the United States.

In March 2011, the House passed H.R. 872, bipartisan legislation that was introduced by Water Resources and Environment Subcommittee Chairman Gibbs (R-OH), Chairman Schmidt (R-OH) of the House Agriculture Committee's Subcommittee on Nutrition and Horticulture (also a member of the Transportation Committee), and other House Members. H.R. 872 exempts from the NPDES permitting process a discharge to waters involving the application of a pesticide authorized for sale, distribution, or use under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), where the pesticide is used for its intended purpose and in compliance with pesticide label requirements. The legislation would amend FIFRA and the CWA to clarify Congressional intent and eliminate the duplicative NPDES permit requirement. Sen. Boxer (D-CA), Chair of the Environmental and Public Works Committee, and Sen. Cardin (D-MD) put a hold on the bill, insisting on a comprehensive study of pesticide impacts on waters.

In April 2012, Sen. Hatch introduced the Reducing Regulatory Burdens Act of 2012, as part of S. 2365, which has been referred to the Committee on Energy and Natural Resources. The bill would have the same effect as the earlier House-passed bill that stalled in the Senate.

### 2. Revised Nationwide Permits

In February, the Corps announced the issuance of final nationwide general permits ("NWPs") for the next five-year cycle. 77 Fed. Reg. 10,184 (Feb. 21, 2012). Nationwide permits are issued under CWA § 404(e), which authorizes the Corps to issue general permits for categories of activities involving discharges of dredged or fill material into waters of the United States that the Corps determines will cause only minimal adverse environmental effects. NWPs are intended to provide timely authorizations for the regulated public and to reduce administrative burdens. Some highlights of the 2012 NWPs include the following:

#### a. New NWPs for Renewable Energy Projects

Two new NWPs − 51 and 52 − have been issued for "Land Based Renewable Energy General Facilities" and "Water Based Renewable Energy Generation Pilot Projects." The final rule provides important clarifications for related linear features. With respect to linear features connecting to these facilities (such as transmission lines, pipelines, or roads), each "separate and distant" crossing of a waterbody constitutes a separate and complete linear project that may be authorized under NWP 12. Accordingly, NWPs 51 and 52 (and potentially other NWPs) may be utilized for a renewable energy facility, and NWP 12 may be separately utilized each time "separate and distant" linear features serving the facility cross a waterbody. However, each

separate and distant crossing will be evaluated to determine if the cumulative effects of the overall utility line are more than minimal and therefore do not qualify for NWP authorization.

### b. Mining Industry

NWPs important to the mining industry have been reissued. NWP 21 has been reissued, including for the Appalachian coal region where the Corps had suspended its use since June 18, 2010. For activities authorized under the existing NWP 21, the Corps provided an additional 12-month grandfather period for completion of projects that were commenced prior to expiration of the existing permit on March 18, 2012. For those authorized activities that will not be completed upon expiration of the grandfather period, the Corps will consider reauthorizing without imposing new limitations, upon written request for reauthorization to the District Engineer by February 1, 2013.

New threshold limitations are imposed on activities authorized under NWP 21 after March 19, 2012. NWP 21 is limited to discharges with impacts not greater than a half acre of waters, including no more than 300 linear feet of streambed. The District Engineer may waive the 300-linear-foot limit by making a written determination that the discharge will result in minimal individual and cumulative adverse effects.

NWP 21 is not available for discharges associated with construction of valley fills. The term "valley fill" is broadly defined as a fill structure that is typically constructed within valleys in steep, mountainous terrain and associated with surface coal mining activities.

NWP 44 has been reissued for non-coal mining with threshold limits and waiver provisions consistent with NWP 21. Applications require inclusion of a reclamation plan with the pre-construction notice if such a plan is a requirement of other statutes.

NWP 49 has been reissued for re-mining and reclamation of previously mined areas, provided the total area to be disturbed by the new mining does not exceed 40 percent of the total acreage previously impacted. In making this determination, the Corps will consider the Office of Surface Mining's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the re-mining and reclamation of the previously mined area. The permittee must include a document describing how the overall mining plan will result in a net increase in aquatic resource functions.

Lastly, NWP 50 has been reauthorized for discharges associated with underground coal mining and reclamation activities with the same threshold and waiver provisions as before.

### c. Mitigation

Compensatory mitigation to offset the loss of aquatic resources must comply with the Corps' 2008 mitigation rule, which is codified at 33 C.F.R. Part 332. The final rule requires that District Engineers determine appropriate and practical mitigation to ensure that adverse effects on the environment are minimal, but also provides the District Engineer with discretion to, for example, require compensation below a one-for-one ratio where adverse effects of the activity are minimal; allow restoration along only one side of an affected stream; and decline to require long-term management of mitigation sites.

### d. Jurisdiction

The preamble clarifies that the NWPs are not to be read to assert jurisdiction over waters and wetlands, and that determining geographic jurisdiction under the Clean Water Act or the Rivers and Harbors Act is a separate process from NWP authorization.

### e. Greenhouse Gases

The preamble explains that any greenhouse gas emissions that occur other than as a result of the discharge of dredged or fill materials are outside the Corps' National Environmental Policy Act ("NEPA") scope of analysis because the Corps does not have the legal authority to control those emissions.

In February, the National Marine Fisheries Service released a Biological Opinion concluding that the Corps has failed to insure that the NWPs it proposes to authorize activities in navigable and other waters of the United States are not likely to jeopardize the continued existence of endangered and threatened species under the jurisdiction of the National Marine Fisheries Service and are not likely to result in the destruction or adverse modification of critical habitat that has been designated for these species. Therefore, the Corps is required to notify the National Marine Fisheries Service's Office of Protected Resources of its final decision on implementation of the reasonable and prudent alternatives discussed in the Biological Opinion.

## 3. Construction General Permit

In February, EPA issued the Final 2012 Construction General Permit ("CGP"). 77 Fed. Reg. 12,286 (Feb. 29, 2012). The 2012 CGP replaces the 2008 CGP and includes new requirements to implement the Effluent Limitation Guidelines and New Source Performance Standards for the construction and development industry, which were issued by EPA on December 1, 2009. Construction projects of greater than one acre must obtain an NPDES permit for discharges of stormwater. EPA and most approved State NPDES programs have already adopted general permits for stormwater discharges from construction sites. The CGP applies only in States, territories, or Indian lands which do not have an EPA-approved NPDES program, and it is immediately effective in those jurisdictions. States and other jurisdictions with EPA-approved NPDES programs may implement the federal CGP, in whole or in part, in the course of renewing stormwater general permits for construction sites.

A permittee in a jurisdiction subject to a federally-administered NPDES program must demonstrate that it satisfies certain conditions in order to obtain coverage under the CGP. Notably, EPA has increased the "waiting period" after filing a Notice of Intent from 7 to 14 days. EPA expanded the notice period to provide itself more time to perform endangered species-related reviews when evaluating NOIs. The CGP also requires permittees to design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities. Under the CGP, permittees are required to stabilize exposed portions of the site. Permittees must also design, install, and maintain effective pollution prevention measures to ensure pollutant discharges are eliminated or minimized, depending on the source. The pollution prevention requirements restrict the discharge of a wide range of construction-related chemicals and materials.

#### 4. Effluent Limitation Guideline Development / Turbidity

EPA issued a numeric limit for turbidity in the 2009 Final Effluent Guideline Rule for the Construction and Development Point Source Category which established national monitoring requirements and enforceable numeric limitations on stormwater discharges from construction sites. 74 Fed. Reg. 62,996 (Dec. 1, 2009). Subsequently, EPA withdrew the limit to correct a calculation error that was identified in petitions filed by the Small Business Administration and the National Association of Home Builders. EPA submitted a proposed rule to revise the turbidity limit to the Office of Management and Budget ("OMB") in December 2010. EPA subsequently withdrew that proposal as well. EPA then decided to seek additional treatment performance data from construction and development sites before proposing another revised numeric turbidity limit.

EPA published a Federal Register notice on January 3, 2012, requesting additional data on the performance of technologies in controlling turbidity in stormwater discharges from construction sites. 77 Fed. Reg. 112. The notice also requests information on other topics relevant to establishing numeric effluent limitations for stormwater discharges from these sites, including sample collection, applicability to electric transmission line construction, cold weather considerations, and the ability of small sites to meet a numeric standard. EPA plans to use the data and information received from the public in consideration of a future rulemaking.

### C. Water Quality Criteria Development

#### 1. Conductivity

Please see Ms. Nathanson's presentation regarding this issue.

#### 2. Selenium

Please see Ms. Nathanson's presentation regarding this issue.

### D. Groundwater Wells and Underground Injection Control (UIC) Program; Carbon Capture and Storage Class VI Wells

On December 10, 2010, EPA finalized minimum federal requirements under the Safe Drinking Water Act ("SDWA") for underground injection of carbon dioxide ($CO_2$) for the purpose of geologic sequestration ("GS"). 75 Fed Reg. 77,230. Under the authority of the SDWA, EPA established a new class of well, Class VI, for underground injection of $CO_2$ for the purpose of GS. The Agency set minimum technical criteria for the permitting, geologic site characterization, area of review and corrective action, financial responsibility, well construction, operation, mechanical integrity testing, monitoring, well plugging, post-injection site care, and site closure of Class VI wells to protect underground sources of drinking water.

Under 40 C.F.R. § 145.21(h), EPA provided States with 270 days, from December 10, 2010, to submit a complete primary enforcement responsibility application for implementation of the Class VI Program. EPA provided that the federal rule would become effective beginning September 7, 2011, in every State that had not submitted a primacy application within the 270-

day transition period provided by SDWA. EPA did not receive any complete primacy applications for Class VI Program implementation by September 6, 2011; thus, the federal requirements have become effective nationwide. 76 Fed. Reg. 56,983 (Sept. 15, 2011).

EPA has also published a proposed rule regarding the Resource Conservation and Recovery Act ("RCRA") implications of Class VI wells. Hazardous Waste Management System: Identification and Listing of Hazardous Waste: Carbon Dioxide (CO2) Streams in Geologic Sequestration Activities, 76 Fed. Reg. 48,073 (Aug. 8, 2011). EPA proposes to conditionally exclude $CO_2$ streams that are hazardous from the RCRA definition of hazardous waste, provided these hazardous $CO_2$ streams are captured from emission sources, are injected into Class VI Underground Injection Control wells for purposes of geologic sequestration, and meet certain other conditions. Those conditions include: (1) the transportation of the $CO_2$ stream is in compliance with applicable Department of Transportation (DOT) requirements; (2) the injection of the $CO_2$ stream is in compliance with the applicable requirements for Class VI wells, including the applicable requirements in 40 C.F.R. Parts 144 and 146; (3) no other hazardous waste is mixed with or co-injected with the $CO_2$ stream; and (4) an authorized representative (*i.e.*, plant manager) annually signs a certification statement stating that all of these conditions have been met, keeps the certification on-site for no less than three years, and makes the certification available within 72 hours of a written request from the regional administrator or State director. EPA believes that the management of these $CO_2$ streams under the proposed conditions does not present a substantial risk to human health or the environment, and therefore additional hazardous waste regulation pursuant to RCRA Subtitle C is unnecessary.

## II. FEDERAL-STATE RELATIONS

### A. Increased Federal Oversight of State NPDES and Anti-Degradation Policies

Under one pilot EPA is considering, regulators would send compliance advisory letters for both paperwork and effluent limit violations to power plants that self-report their violations. EPA also indicated in its 2011 priorities document that it was considering a similar pilot for the mining sector. Traditionally, States, not EPA, have enforced compliance with NPDES permits, so it is unclear for what purpose EPA would send compliance advisory letters to violators. In April, the Association of Clean Water Administrators ("ACWA") wrote to EPA to express State regulator's concerns with EPA's pilot project proposal. States have strongly stated that this approach does not make sense given that the States are authorized to address such violations, and either have done so, or have found that a particular violation does not warrant a formal/informal enforcement response. Some States have found that their electric power sources have high compliance rates or few priority violations. These States believe that EPA's pilot project fails to meet the shared goal of EPA and States of directing limited regulatory resources to serious water quality problems related to NPDES related sources.

ACWA further stated that EPA's power plant pilot will result in duplicative State, EPA headquarters, and EPA regional efforts and will conflict with the agreed CWA Action Plan, as it does not necessarily target a State's or region's highest priority water quality concerns. It puts EPA in the role of directly implementing the NPDES enforcement program rather than overseeing it in partnership with the States. Moreover, States feel that this pilot will send mixed

messages to the regulated community and add inefficiency, as permittees will raise questions regarding EPA's involvement when they have been overseen by the State in the past.

### B. Stricter Oversight of SMCRA Programs − Stream Buffer Zone Rewrite

The Department of the Interior ("DOI") Office of Surface Mining ("OSM") began its outreach for a planned rulemaking to clarify excess spoil/stream buffer zone requirements for surface mining operations in 2003. That effort prompted the development of an Environmental Impact Statement ("EIS") and proposed rule by August 2007. A final rule was issued December 12, 2008. The final rule was challenged in the United States District Court for the District of Columbia.

In March 2009, the Obama Administration's DOI filed a motion asking the court to remand and vacate the rule. Intervenor, National Mining Association, argued that granting the motion would wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule. The court denied the government's request, finding the Administrative Procedure Act ("APA") requires government agencies to follow certain procedures, including providing for notice and comment, before enacting or amending a rule, and that an agency must follow the same procedure in order to repeal a rule.[8] OSM eventually reached a settlement agreement in 2010, with OSM committing to propose a rule to amend or replace the 2008 Stream Buffer Zone Rule no later than June 29, 2012.[9]

Subsequently, OSM began developing a new EIS to support what would be a new stream protection rule to replace agency's 2008 stream buffer zone rule. However, the scope of the new rule would be much broader and nationwide in scope. OSM's actions immediately sparked criticism when a draft agency economic analysis predicted that the preferred alternative would result in the elimination of 20 to 30 percent of surface coal mining operations in the East. In addition, concerns with new prohibitions that would prevent the issuance of 50 percent of permits at underground coal mines increased concerns that the proposed rule would devastate the coal mining industry.

The coal mining States remain joined in their opposition to the rule. Among their concerns are serious questions about the need and justification for the proposal, quality and completeness of the draft, a lack of data and information beyond Appalachia, and questions about DOI's management of consultants. As a result, a series of legislative hearings followed focused on obtaining information regarding the rulemaking motive, including the issuance of two subpoenas from House Natural Resources Committee Chairman Doc Hastings (R-Wash.).

[8] *Nat'l Parks Conserv. Ass'n v. Salazar*, No. CV-09-00115 (D.D.C. Aug. 12, 2009).

[9] *See Agreement to Settle Cases Seeking Judicial Review of the 2008 Stream Buffer Zone Rule* (March 19, 2010) at 3.

## C. Waste

### 1. Coal Ash Regulation

#### a. Bevill Litigation Status

EPA is currently facing multiple lawsuits filed by ENGOs, coal ash recyclers, and a utility association for failure to meet certain statutory deadlines for completing the review and revision of regulations under the Resource Conservation and Recovery Act ("RCRA") regarding the disposal of coal ash. While the goal of these lawsuits is similar in seeking to compel EPA to issue a final rule on the disposal of coal ash, the claims and prayers for relief are markedly different.

These lawsuits raise three significant issues. First, the ENGOs wish to force EPA to overturn its previous regulatory determination that coal combustion residuals do not warrant regulation under RCRA Subtitle C as hazardous waste. Second, the ENGOs and coal ash recyclers desire to change waste management standards applicable to solid waste under RCRA Subtitle D. Third, the ENGOs seek to force EPA to revise the Toxicity Characteristic Leaching Procedure ("TCLP"), which is used to determine the characteristics of hazardous waste, in a manner that would weaken support for the Bevill Amendment.

##### i. Earthjustice Complaint

On April 4th, Earthjustice filed a complaint in the U.S. District Court for the District of Columbia on behalf of almost a dozen ENGOs and an Indian tribe (the "ENGO" Plaintiffs). The ENGO Plaintiffs seek to compel EPA to review and revise RCRA regulations. The ENGOs claim that the RCRA statute requires EPA to review RCRA regulations every three years and make an explicit determination as to whether any RCRA regulations are in need of revision. If regulations are determined to be in need of revision, the ENGOs claim that EPA must also revise those regulations within the same three year cycle. As support, they cite to RCRA § 2002(b), which provides: "REVISION OF REGULATIONS.—Each regulation promulgated under this Act shall be reviewed and, where necessary, revised not less frequently than every three years." 42 U.S.C. § 6912(b). The Plaintiff ENGOs seek to compel through their lawsuit the expeditious review and revision of RCRA regulations governing: (1) the Bevill Amendment exemption of coal ash from hazardous waste regulation; (2) the characteristics of open dumps versus sanitary landfills; and, (3) the TCLP used to determine wastes deemed to be inherently hazardous.

**40 C.F.R. § 261.4(b):** The Plaintiff ENGOs wish to force EPA to overturn its previous Bevill Amendment regulatory determinations that coal combustion residuals do not warrant regulation under RCRA Subtitle C as hazardous waste.[10] As support for the need to revise Bevill Amendment regulations to reverse these regulatory determinations, the ENGOs point out that coal ash regulations are relatively old; reference data from EPA's Toxic Release Inventory and EPA human health and ecological risk assessments; describe past failures of ash pond

[10] EPA determined in two phases in 1993 and 2000 that RCRA Subtitle C regulation for hazardous waste would be inappropriate for coal combustion residuals. 58 Fed. Reg. 42,466 (Aug. 9, 1993); 65 Fed. Reg. 32,214 (May 22, 2000).

impoundments resulting in releases of coal ash slurry; and cite information from EPA's proposed coal ash regulation regarding instances of pollution in the vicinity of coal ash repositories. *See* Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35,128 (June 21, 2010). The ENGOs also note that coal ash contains numerous heavy metals such as selenium.

**40 C.F.R. Part 257, Subpart A Criteria:** The Earthjustice lawsuit also claims that EPA must expeditiously review and revise waste management standards applicable to solid waste under RCRA Subtitle D. These regulations govern the characteristics of prohibited open dumps versus legal sanitary landfills. As support for the necessity of revised Subtitle D regulations, the ENGOs cite EPA's Regulatory Determination on Wastes From the Combustion of Fossil Fuels, 65 Fed. Reg. 32,214, 32,221 (May 22, 2000), which concluded:

> We have determined at this time that regulation of coal combustion wastes under subtitle C is not warranted. However, we have also decided that it is appropriate to establish national regulations under non-hazardous waste authorities for coal combustion wastes that are disposed in landfills and surface impoundments. We believe that subtitle D regulations are the most appropriate mechanism for ensuring that these wastes disposed in landfills and surface impoundments are managed safely.

The ENGOs claim that this EPA determination that Subtitle D regulations are "appropriate" meant that "revision of subtitle D regulations was in any case *immediately required* with regard to disposal of coal ash in landfills and surface impoundments." (Emphasis added.) Earthjustice then notes that development of coal ash regulations under RCRA Subtitle D has been on EPA's published regulatory agenda since 2001, but has not yet occurred.

Earthjustice wishes such Subtitle D regulations governing solid waste disposal sites to include more water protections, such as updated contaminant limits for common constituents, liner requirements or other design standards to prevent hazardous releases, and mandatory groundwater monitoring and corrective action, and air protections such as daily dust covers to control fugitive dust and a final cover to be installed upon closure of solid waste disposal sites. *See* 40 C.F.R. §§ 257.3-3, 257.3-4, and 257.3-7.

**40 C.F.R. § 261.24:** Earthjustice's third claim for relief targets EPA's failure to review and revise the TCLP, which is used to determine wastes deemed to be inherently hazardous because of their toxicity, as well as EPA's failure to revise Table 1 in Section 261.24 to account for changes in the maximum contaminant levels of various metals. Earthjustice alleges that "for wastes such as coal ash, the TCLP has provided a basis for the EPA's final regulatory determinations to provide sweeping exemptions from regulation under subtitle C."

Courts have previously determined the TCLP to be inadequate to characterize many mineral wastes. *Edison Elec. Inst. v. U.S. Envtl. Prot. Agency*, 2 F.3d 438 (D.C. Cir. 1993) (TCLP bears no rational relationship to non-high volume mineral wastes). However, the TCLP only applies to deem solid wastes as hazardous if those solid wastes are *not* already excluded from hazardous waste regulation under the Bevill exemption regulations. Thus, this issue is intertwined with the

ENGOs' attack upon the Bevill exemption itself − in that if coal ash wastes become no longer Bevill-exempt, then they may be exposed to listing as hazardous under a revised TCLP.

Earthjustice requests that the court: (1) declare EPA violated RCRA for failing to meet statutory deadlines for completing the reviews and necessary revisions to address the risks of coal ash; (2) order EPA to complete the review of the regulations applying to coal ash and TCLP as soon as possible; and (3) order EPA to issue "necessary" revisions of the regulations in accordance with RCRA § 2002(b) as soon as possible.

### ii. Headwaters Resources & Boral Material Technologies Lawsuits

Two companies − Headwaters Resources, Inc. and Boral Material Technologies, Inc. (the "coal ash recyclers") − have also filed lawsuits against EPA seeking revision of RCRA Subtitle D regulations, which will likely be consolidated with the ENGOs' lawsuit. The two complaints are similar in the positions of the plaintiffs and the relief they seek. Both coal ash recyclers assert that EPA has failed in its duty to review and revise 40 C.F.R. Part 257, Subpart A, which provides criteria distinguishing between illegal open dumps and legal sanitary landfills. These are the same regulations that the ENGOs seek to revise in the second part of their complaint.

The coal ash recyclers claim that EPA's delay in issuing final regulations under RCRA Subtitle D to more specifically regulate coal combustion residuals ("CCRs"), along with the possibility of regulation of such residuals as hazardous waste in EPA's recent proposed regulation, has created uncertainty in the beneficial use marketplace and negatively impacted the coal ash recycling industry. The coal ash recyclers seek the certainty of sensible coal recycling regulations.

### iii. Utility Solid Waste Activities Group Intervention

The Utility Solid Waste Activities Group ("USWAG") has sought to intervene in the Earthjustice lawsuit as a defendant. USWAG is the association that represents the majority of electric utilities regarding solid waste disposal issues. USWAG is concerned that the ENGOs' lawsuit will subject EPA to a court-ordered deadline to promulgate RCRA regulations governing coal ash according to a schedule that would not allow for EPA to properly consider and respond to the 450,000 comments already filed on EPA's proposed coal ash rule; cabin EPA's discretion regarding how to revise those regulations; and force EPA to revise all RCRA regulations in rapid-fire three-year rulemaking cycles.

### iv. National Mining Association Intervention

In June, the National Mining Association ("NMA") filed a motion to intervene as well. NMA intervened to protect several interests of the mining industry, including (1) the impact the lawsuit may have on EPA's process and timeframe for completing its coal ash rulemaking under RCRA; (2) the precedential effect the lawsuit may have on other Bevill-exempt wastes such as mining (extraction and beneficiation) and mineral processing wastes; and (3) the impact the lawsuit may have on the regulatory process for revising the TCLP.

### v. State and Congressional Responses

Prior to these lawsuit filings, the Environmental Council of the States ("ECOS") sent a letter on March 2 to EPA Administrator Jackson urging the agency to contest Earthjustice's NOI and arguing that the agency has already met its obligations under RCRA § 2002(b). Additionally, ECOS expressed concerns that consent to a deadline would "inappropriately cut short the agency's obligations under the Administrative Procedure Act . . . to thoroughly review and respond to the thousands of comments from affected entities raising issues with elements of the [coal ash] proposal." ECOS also expressed concern over the precedent such consent would set for the development of federal and State RCRA programs in the future, emphasizing that "rapid-fire three-year cycles" would lead to "burdensome" and "unworkable" rulemakings.

The House Committee on Energy and Commerce also sent a letter to EPA Administrator Jackson on February 17th urging the agency to recognize its discretion under RCRA § 2002(b) to revise regulations only when deemed "necessary" by the agency. The letter argues that consenting to a court-ordered deadline would preclude the thorough consideration of concerns raised by stakeholders, resulting in a "potentially closed-door, judicial process involving only narrow interests of select parties." The letter also expresses concern over the precedential impact on other RCRA programs and requirements of having to review and revise all RCRA regulations every three years and requests information from the agency on the cost of doing so.

On April 18, the House passed H.R. 4348, which extends federal transportation funding through September. The measure passed on to the Senate included Rep. David B. McKinley's (R-W.Va.) coal ash amendment that would create a program under RCRA Subtitle D for States to permit coal ash disposal sites in accordance with federal standards for non-hazardous solid waste.

## b. OSM Mine Placement Regulation

In tandem with EPA's intended rulemaking proposal for CCR disposal in landfills and impoundments, in 2007 OSM asked for public comment before it begins drafting rules to control the use of coal ash and sludge to reclaim coal mines. ANPR Placement of Coal Combustion Byproducts in Active and Abandoned Coal Mines, 72 Fed. Reg. 12,026 (Mar. 14, 2007).

In 2003, Congress directed EPA to commission an independent study of the health, safety, and environmental risks associated with the placement of CCRs in active and abandoned coal mines. As a result, the National Research Council ("NRC") published a report on March 1, 2006, entitled "Managing Coal Combustion Residues in Mines." The committee "concluded that putting CCRs in coal mines as part of the reclamation process is a viable management option as long as (1) CCR placement is properly planned and is carried out in a manner that avoids significant adverse environmental and health impacts and (2) the regulatory process for issuing permits includes clear provisions for public involvement." The committee also noted that the placement of CCRs in coal mines "can assist in meeting reclamation goals (such as remediation of abandoned mine lands)" and "avoids the need, relative to landfills and impoundments, to disrupt undisturbed sites" − which result has a direct influence upon EPA's proposed rule.

### 2. Toxics Release Inventory ("TRI")

#### a. TRI Rule to Modify Metal Mining Reporting

EPA's Toxics Release Inventory ("TRI") Program is continuing to consider modifications and/or clarifications to TRI reporting requirements and terms that apply to metal mining operations. Before embarking on the formal phases of a regulatory development effort, the TRI Program in November 2008 conferred via an external contractor with a few representatives of key stakeholder groups (*i.e.*, the metal mining industry, national and grassroots environmental organizations, and technical consultants) to gauge their levels of interest in holding further discussions regarding the issues such a rulemaking might cover. The dialogue with stakeholder groups led to an online stakeholder forum on the issues of: (1) ways that TRI can drive environmental improvement; (2) accurate measurement of releases; (3) releases beyond containment; and (4) definitional issues. The discussion forum remained open and available for comment through June 30, 2010. EPA has stated the agency's intent to soon publish a proposed rule regarding these issues.

#### b. TRI Stakeholder Process Targeting Phosphate and Iron Ore Mining

In 2009, the Greater Yellowstone Coalition petitioned EPA to add phosphate mining to the TRI. EPA's TRI Program is currently considering expanding industry sectors subject to TRI reporting requirements to include, *inter alia*, phosphate and iron ore mining. As originally enacted, EPCRA § 313, also known as the TRI, applied only to the manufacturing industry sectors. The statute, however, allows EPA to add sectors to TRI to the extent that doing so is relevant to the purposes of EPCRA § 313. Under this authority, EPA in 1997 added seven additional industry sectors to the list of sectors covered by TRI.

EPA is considering the addition of facilities classified under Phosphate Rock Mining to the list of facilities subject to EPCRA § 313. These facilities would potentially be required to submit TRI reports for toxic chemical constituents of phosphate ore and waste rock, as well as for chemicals used or produced coincidentally in beneficiation operations. Phosphate Rock Mining falls under SIC Code 14 (Nonmetal Mining), which EPA opted not to include in its 1997 Industry Expansion Rule. Facilities classified under Phosphoric Fertilizer Manufacturing are already covered by TRI.

EPA is also considering the addition of facilities classified under Iron Ore Mining to the list of facilities subject to EPCRA § 313. These facilities would potentially be required to submit TRI reports for toxic chemical constituents of iron ore and waste rock, as well as for chemicals used or produced coincidentally in beneficiation operations. EPA added the Metal Mining Industry group (SIC Code 10) to the TRI list in its 1997 Industry Expansion Rule, but deferred action on Iron Ore Mining at that time.

Before embarking on the formal phases of a regulatory development effort, the TRI Program established an online stakeholder forum on the benefits of adding to TRI the phosphate and iron ore mining sectors. The discussion forum remained open and available for comment through November 10, 2011. Comments regarding the benefits of adding Phosphate Rock Mining to TRI were submitted by J.R. Simplot Co., The Fertilizer Institute, the Idaho Mining Association, and

Earthworks. The ENGOs' comments were primarily concerned with grazing animal deaths and effects upon aquatic ecosystems potentially related to selenium discharges from weathered waste rock. The industry comments assert that: (1) selenium is a naturally occurring element that does not fall within the scope of TRI reporting because it is not manufactured, processed, or otherwise used; (2) even assuming that the selenium minerals in the phosphate rock are somehow deemed subject to TRI reporting, amounts contained in waste rock meet the *de minimis* exemption from reporting; and, (3) TRI reporting would not provide the public with any new information where, as here, the Idaho Mining Association member phosphate companies signed an agreement with EPA, U.S. Forest Service, U.S. Bureau of Land Management, Idaho Department of Environmental Quality, and the U.S. Fish and Wildlife Service that have led to publicly available and site-specific studies at the mine sites to determine the extent of the naturally-occurring selenium, the risks associated with the amounts of selenium, options for addressing any risks, and implementation of remedies.

### 3. Definition of Solid Waste

EPA settled a lawsuit brought by the Sierra Club regarding EPA's 2008 Definition of Solid Waste Rule, via a court order to have a final revised rule promulgated by December 31, 2012. In July, EPA proposed a rule on the Definition of Solid Waste, 76 Fed. Reg. 44,094 (July 22, 2011). The rule proposes to revise certain exclusions from the definition of solid waste for hazardous secondary materials intended for reclamation that would otherwise be regulated under Subtitle C of RCRA. The purpose of these proposed revisions is to ensure that the recycling regulations, as implemented, encourage reclamation in a way that does not result in increased risk to human health and the environment from discarded hazardous secondary material.

### 4. TSCA Chemical Reporting Rule

In August 2011, EPA issued a final Toxic Substances Control Act ("TSCA") Chemical Data Reporting ("CDR") Rule. 76 Fed. Reg. 50,816 (Aug. 16, 2011). The proposed rule was previously referred to as the Inventory Update Reporting ("IUR") Modifications Rule. 75 Fed. Reg. 49,656 (Aug. 13, 2010). The CDR rule enables EPA to collect and make public information on the manufacturing, processing, and use of commercial chemicals, including metals and metal compounds. The CDR data are used to support risk screening, assessment, priority setting, and management activities. The reporting period began on February 1st. On June 11th, EPA extended the 2012 CDR submission period final deadline until August 13, 2012.

## III. EXPANSION OF THE ENDANGERED SPECIES ACT

### 1. *Karuk Tribe of California v. U.S. Forest Service*

In June, the U.S. Court of Appeals for the Ninth Circuit issued an *en banc* decision holding that the U.S. Forest Service must engage in Endangered Species Act ("ESA") § 7 consultation upon receipt of a Notice of Intent ("NOI") to conduct small-scale recreational mining operations in areas containing critical habitat for listed species (e.g., suction dredging). *Karuk Tribe of Cal. v. U.S. Forest Serv.*, No. 05-16801 (9th Cir. June 1, 2012) (*en banc*). The decision reversed an earlier panel decision and was issued over a vigorous and colorful dissent.

The Ninth Circuit held that the Forest Service violated the ESA by "approving" four Notices of Intent to conduct mining activities in areas designated critical habitat for the endangered coho salmon without first consulting with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service. The Forest Service's regulations require any person proposing to conduct a mining activity that "might cause" disturbance of surface resources to submit a Notice of Intent to the appropriate District Ranger. 36 C.F.R. § 228.4(a). A Notice of Intent is a relatively simple document that describes planned mining operations in general terms by providing "information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport." *Id*. Within 15 days from the date of receipt of such a notice, the District Ranger may require the submission of a more detailed "plan of operations," which must be submitted for approval by the Forest Service. *Id*. § 228.4(a)(2).

Section 7(a)(2) of the ESA provides that each federal agency shall ensure through consultation with the Fish and Wildlife Service or the National Marine Fisheries Service that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). ESA § 7 consultation procedures apply to federal agency action, which is defined as "activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies" such as the "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. § 402.02.

In *Karuk Tribe*, the Forest Service responded to the notices with letters stating that the mining activities were "authorized" and could begin once all applicable state and federal permits were obtained. The District Ranger did not require a plan of operations for any of the four notices at issue in *Karuk Tribe*. The Forest Service took the position that it had not engaged in federal agency action triggering section 7 consultation because the miners had a statutory right to engage in mining and that its response letters constituted decisions not to regulate their mining activities.

Judge William A. Fletcher, writing for the majority, held that by not requiring a plan of operations, the Forest Service effectively authorized the mining activity and thereby engaged in agency action. The dissenting judges stated, however, that this sort of decision by an agency not to exercise regulatory authority has not been understood by the courts as agency action. As Judge Milan D. Smith, Jr., stated in his dissent, "[u]ntil today, it was well-established that a regulatory agency's inaction is not action that triggers the [ESA's] arduous interagency consultation process. Yet the majority flouts this crystal-clear and common sense precedent, and for the first time holds that an agency's decision *not to act* forces it into a bureaucratic morass."

The *Karuk Tribe* decision may lead to an increase in determinations that section 7 consultation is required for activities that agencies choose not to regulate, particularly in the States included in the Ninth Circuit. The effects of this increase in consultations may be especially pronounced in light of the Fish and Wildlife Service's recent commitment to make listing decisions for hundreds of species.