UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION, et al.,

Plaintiffs,

v.

SIERRA CLUB, et al.,

Defendant-Intervenors.

MEMORANDUM OPINION

This case is before the Court on the parties' cross-motions for partial summary judgment regarding the Final Guidance memorandum issued by the Environmental Protection Agency ("EPA") on July 21, 2011.[1] See Plaintiffs' Motion for Partial Summary Judgment ("Pls.'

[1] On July 20, 2010, plaintiff National Mining Association ("the Association") filed a complaint seeking declaratory and injunctive relief against multiple federal defendants. On September 17, 2010, the Association filed a

56 (D.D.C. 2011) ("Nat'l Mining Ass'n I"). After that ruling, four cases pending in United States District Courts in West Virginia and Kentucky were transferred to this Court and consolidated with case number 10-cv-1220, the case in which the Association had moved for a preliminary injunction in this Court. The plaintiffs proposed, and the Court accepted, a bifurcated summary judgment briefing schedule with respect to the challenged EPA actions (i.e., the Enhanced Coordination Process and the Interim Detailed Guidance).

On October 6, 2011, the Court granted the plaintiffs' first motion for partial summary judgment after it concluded that the EPA exceeded its statutory authority under the Clean Water Act ("CWA"), 33 U.S.C. 1251 (2006), in adopting its Multi-Criteria Integrated Resource Assessment ("MCIR Assessment") and Enhanced Coordination Process ("EC Process"). See Nat'l Mining Ass'n v. Jackson , 816 F. Supp. 2d 37, 49 (D.D.C. 2011)

(Continued . . .)

Mot."); United States' Motion for Partial Summary Judgment ("Defs.' Mot."). The Court heard oral argument on the motions on July 13, 2012. For the reasons that follow, the plaintiffs' motion will be granted and the defendants'

Enforcement ("Office of Surface Mining"), 30 U.S.C. § 1211(c)(1), but a state may assume primary jurisdiction over the regulation of surface mining within its borders by having its proposed program approved by the Secretary of the Interior,[3] 30 U.S.C. § 1253. Pursuant to the SMCRA, before approving a state program the Secretary must solicit and then publicly disclose the views of certain federal agencies regarding the state regulatory program and must obtain the written concurrence of the EPA with respect to the aspects of the state program that relate to water quality standards promulgated under the Clean Water Act, 33 U.S.C. § 1313 (2006). 30 U.S.C. § 1253(b). Once a state program is approved, the state has the primary responsibility for all aspects of the regulatory program. See In re PSMRL, 653 F.2d at 516 ("The Secretary may only approve the state program if he finds it capable of carrying out the exacting provisions of the [SMCRA] and consistent with his own regulations."); id. at 518 ("Under a state program, the state makes decisions applying the national requirements of the [SMCRA] to the particular local conditions of the state. The Secretary is initially to decide whether the proposed state program is capable of carrying out the provisions of the [SMRCA], but is not directly involved in local decisionmaking after the program has been approved.").

The statute provides only a limited role for the EPA. First, the SMCRA requires the Secretary of the Interior to obtain the EPA's written concurrence on any SMCRA-implementing regulations that relate to air or water quality standards. Second, as noted, the Office of Surface Mining may not approve a proposed state program until it has solicited and publicly disclosed the EPA's views and obtained the EPA's written concurrence as to any aspects of the state program that relate to water quality standards promulgated under the CWA. In short, although

[3] Of the six Appalachian states with active coal mining and subject to the Final Guidance, only Tennessee does not have an approved state SMCRA permitting program. Defs.' Mem. at 12; Pls.' Mem. at 3, n.2.

Clean Water Act, id., the EPA and the Corps promulgated 404(b)(1) guidelines to guide the Corps'

a. The Relationship Between Section 301 Effluent Limits and Section 402 Permits

In accordance with Section 301 of the CWA, 33 U.S.C. § 1313, NPDES permits "typically contain numerical limits called 'effluent limitations'[6] that restrict the amounts of specified pollutants that may be discharged." Defs.' Mem. at 9. "Water quality based effluent limitations are required for all pollutants that the permitting authority determines 'are o

Section 402 and 404 permits. The plaintiffs maintained that the interim guidance had (1) effectively established a region-wide water quality standard based on conductivity[8] levels it associated with adverse impacts to water quality, (2) was being used by the EPA to cause indefinite delays in the permitting process, and (3) caused various permitting authorities to include the conductivity level into pending permits. See Pls.' Mem. at 14-16. The defendants responded by arguing that the interim guidance was not final agency action and was therefore not ripe for review. In an opinion denying both the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss, the Court observed that "based on the record [then] before the Court . . . , it appear[ed] that the EPA [wa]s treating the [interim] [g]uidance as binding." Nat'l Mining Ass'n I, 768 F. Supp. 2d at 45.

On July 21, 2011, the EPA issued the Final Guidance, which, according to the EPA, reflects public input on the interim guidance and accounts for and responds to key concerns raised by the Appalachian states and the mining industry during the earlier stages of this litigation. Defs.' Mem. at 1-2. The plaintiffs, however, allege that the EPA's Final Guidance exceeds the EPA's authority under the SMCRA and the CWA, is arbitrary and capricious, and is an abuse of discretion. See Pls.' Mem. at 1-2. The defendants' principal response is a bevy of arguments targeting the Court's ability to review the Final Guidance. They assert that the Final Guidance is not final agency action, Defs.' Mem. at 13; that the Final Guidance is not ripe for review, id. at 24; and that the plaintiffs do not have standing to maintain their challenges to the Final Guidance, id. at 26. Alternatively, the defendants maintain that if the Final Guidance does

[8] As the defendants helpfully explain, "[a]n increase in conductivil10(gs)3(e ha)inAst iestnal

constitute final agency action, 33 U.S.C. §1369(b)(1) vests exclusive jurisdiction of its review in the District of Columbia Circuit. Id. at 23. The defendants further assert that the Final Guidance is consistent with existing statutory and regulatory authority. Id. at 30, 33. Lastly, the defendants maintain that the Final Guidance satisfactorily explains its recommendations and thus does not violate the APA. This Memorandum Opinion addresses these arguments in turn.

III. STANDARD OF REVIEW

The summary judgment standard set forth in Federal Rule of Civil Procedure 56(a) does not apply in a case involving review of a final agency action under the APA due to the limited role of a court in reviewing the administrative record. See Catholic Health Initiatives-Iowa, Corp. v. Sebelius, 841 F. Supp. 2d 270, 276 (D.D.C. 2012). "Under the APA, . . . 'the function of the district court is to determine whether . . . as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" Id. (quoting Occidental Eng'g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir. 1985)); see also Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D.D.C. 1995) (explaining that where a case involves a challenge to a final administrative action, a court's review is limited to the administrative record) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973))). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Catholic Health, 841 F. Supp. 23d at 276 (citing Richards v. INS, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977)).

agency action, or, alternatively, if it is, that exclusive jurisdiction for its review rests with the Circuit, that the Final Guidance is not ripe for review, and that the plaintiffs lack standing to challenge the Final Guidance. As explained below, "[a]ll [four] arrows miss their target." Id.

1. Final Agency Action

The APA limits judicial review to "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. In other words, finality is a "threshold question" that determines whether judicial review is available. Fund for Animalr

> it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes binding.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (emphasis added). However, "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." Norton, 415 F.3d at 15.

Here, the Court finds that the EPA's Final Guidance marks the "consummation of the agency's decision making process." Bennett, 520 U.S. at 177-78. Indeed, the defendants concede that the first prong of the Bennett test is met as the arguments in their opposition pertain only to whether the Final Guidance is a binding legislative rule or whether it is merely a policy statement. See Defs.' Mem. at 15-23. This concession was expressed again at the July 13, 2012 hearing when defense counsel explicitly stated that the EPA does not dispute that the Final Guidance is the consummation of the decision making process.

Despite the defendants' concession, because final agency action is a "threshold question," Fund for Animals, Inc., 460 F.3d at 18, the Court is compelled to briefly set forth its reasoning why the first prong of the Bennett test is satisfied. The Final Guidance was issued after the EPA received over 60,000 comments on the interim guidance. See Norton, 415 F.3d at 14 (concluding that the agency protocols at issue "clearly marked the consummation of the decision making process," and observing that the protocols were "published after [the agency] solicited input from specialists and reviewed" past data); Appalachian Power, 208 F.3d at 1022 (observing that the EPA guidance in dispute followed the circulation of two earlier drafts). The Final Guidance itself notes that it "replaces [the] EPA's interim final guidance issued on April 1, 2010,

the EPA's settled position on both its understanding of its authority under the respective statutes and regulations, see id. at 2 (A.R. FG005441), and its understanding of the science upon which the Final Guidance is based, see id. at 5 (A.R. FG005444). It is thus clear that the Final Guidance represents the consummation of the EPA's decision making process.

Next, the Court must assess whether the second element of Bennett is satisfied—whether the Final Guidance is an action "by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. at 178. Unsurprisingly, the plaintiffs argue yes and the defendants argue no. The EPA contends that the Final Guidance "is a policy statement, not a legislative rule."[9] Defs.' Mem. at 15. Of the various claims the defendants advance in support of this assertion, of greatest import here is their contention that "the Guidance does not establish new obligations, change the governing legal norm, or purport to provide [the] EPA with any authority that [the] EPA does not already possess to review draft permits or permit applications. Rather, the Guidance relies upon existing standards in the CWA and [the] EPA's regulations." Id. at 17. At the July 13, 2012 hearing, the defendants similarly maintained that the "critical point" is that the Final Guidance does not provide new authority to the EPA. The plaintiffs obviously disagree, asserting that "[p]rior to the issuance of the Final Guidance, neither the SMCRA nor the CWA nor EPA regulations nor case law authorized EPA regional directors to regulate mine design and planning upland from waters of the United States." Pls.' Reply at 3.

As an initial matter, the Court is unconvinced by the defendants' arguments in regard to the nonbinding language in the Final Guidance. See A

EPA reports and their review by the EPA’

communication also reveals at least one instance in which a state permitting agency has acceded to the regional office's request, resulting in the abandonment of the EPA objection for that particular permit. See United States' Response to the Court's July 2, 2012 Order ("Defs.' Extra-record Resp."), Declaration of Mark Nuhfer ("Nuhfer Decl.") ¶ 18 ("Kentucky submitted a revised permit fully meeting [the] EPA's objection and that permit has been issued."). Specifically, with regard to a draft Section 402 permit for Matt/Co, Inc., the EPA's September 29, 2010 objection

> was based on the [Kentucky Department of Water's (KDOW)] failure to conduct an adequate reasonable potential analysis, in accordance with 40 C.F.R. § 122.44(d), to determine whether the proposed discharge will cause, have reasonable potential to cause, or contribute to, a violation of state water quality standards (WQS), and KDOW's failure to include in the permit, effluent limits

To complete its final agency action analysis, the Court

respect to future permits")

The Final Guidance is not subject to the Circuit's original jurisdiction on the basis of 33

1369(b)(1)(E) therefore does not vest exclusive jurisdiction in the Circuit because the Final Guidance did not approve or promulgate Section 301 effluent limitations.

Next, because the EPA has neither issued nor denied any Section 402 permits, § 1369(b)(1)(F) does not vest exclusive jurisdiction in the Circuit. While the EPA's formal objection to draft 402 permits may once have been construed as the "functional denial" of a permit, see Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980), it is clear that after the 1977 Amendments to the CWA, an EPA objection "is no longer 'functionally similar' to denying a permit."

asserts standing on its own behalf, or on behalf of its members. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982).

The defendants assert that the plaintiffs have failed to demonstrate injury in fact and causation because "[t]he [Final] Guidance does not impose any obligations on the regulated industry and does not bind [the] EPA, the States, or the Corps in taking action on permit applications." Defs.' Mem. at 26. The defendants' standing argument thus strikes a similar chord to their arguments on final agency action. And those arguments have already been rejected by the Court. The Final Guidance is binding in regard to the obligations it imposes on the state permitting authorities, and thus the members of the regulated industry seeking the permits, and these obligations amount to injuries caused by the Final Guidance. And a

suggestion that "it possesses plenary authority to act within a given area simply because

of any purported overlap between the SMCRA and the CWA, the defendants' argument fails. Under the CWA, the EPA possesses neither the authority to apply the 404(b)(1) Guidelines to Section 404 permits, nor, once it has approved state permitting programs, the authority to work with the regulated industry on their Section 402 permits. For example, the defendants assert that the "[Final] Guidance identifies best management practices that can facilitate compliance with the CWA and the 404(b)(1) Guidelines," but, as explained above, the EPA itself has a very limited role in the issuance of CWA permits and has only the authority to develop the 404(b)(1) guidelines with the Corps (while it is the Corps, as the permitting authority, that actually determines compliance with the guidelines). It is thus beyond the EPA's purview to declare that "[p]rov(PheTj 0.4d ("j 0.4d(onl)-130he)4( )1(beva2(de)4(lu)-2(a)4(t)-2()-1(a),)-2()-2(h)-10(r)4(f)3(e)4( )-

impermissibly interjected itself into the SMCRA permitting process with the issuance of the Final Guidance.

2. The EPA's Authority Under the CWA

The plaintiffs assert that, with the issuance of the Final Guidance, the EPA has overstepped the limitations on its CWA authority in two principal ways: (1) by setting "what is tantamount to a region-wide water quality criterion for conductivity," thus infringing on the State's role under Section 303, Pls.' Mem. at 32, and (2) by insisting that draft permits contain a pre-issuance reasonable potential analysis, thus "usurping the State's primary authority to determine when and if a discharge has the 'reasonable potential' to exceed" water quality standards, Defs.' Mem. at 37. The Court will examine each of these contentions in turn.

a. The EPA's Section 303 Authority

As explained above, Section 303 of the CWA allocates primary authority for the development of water quality standards to the states. All parties agree that the EPA does have the authority to promulgate section 303 water quality standards in certain instances, but likewise agree that they those procedures have not been undertaken here. See Defs.' Mem. at 33, n.23 (citing Pls.' Mem. at 9-10, 31); see also 33 U.S.C. § 1313(c)(3)-(4). Logically, then, having recognized that the EPA has only limited authority under Section 303 to establish water quality standards, and having conceded that it has not exercised that authority here, the question is not what authority the EPA possess. The question necessarily becomes whether the EPA, through the Final Guidance, has established a water quality standard. And this is where the parties disagree. See Pls.' Mem. at 32 (arguing that the Final Guidance amounts to a region-wide water quality criterion for conductivity); Defs.' Mem

Throughout their briefs, the defendants assert the nonbinding language of the Final Guidance, but nowhere more than in regard to the conductivity "benchmarks" or "triggers." See Defs.' Mem. at 33 ("The conductivity benchmarks set forth in the [Final] Guidance are just that—benchmarks."); id. ("Neither the language of the [Final] Guidance itself, nor the experience in the field, supports [the p]laintiffs' contention that the conductivity benchmarks are binding water quality standards or that they have been applied as such."); id. at 34 ("There is simply nothing in the [Final] Guidance to support [the p]laintiffs' assertion that the conductivity benchmarks are binding water quality standards."); id. at 36 (noting that the Final Guidance merely "recommends" that states give serious consideration to the science contained in the EPA's two studies, which indicated that substantial impacts on aquatic life occur as conductivity increases beyond the lower range of the EPA's benchmark). The defendants thus offer nothing more than a repetition of the arguments made in regard to the finality of the Final Guidance, arguments earlier ejected by the Court.

With the Court and the parties all in agreement as to the EPA's statutory authority under Section 303, the assessment of the plaintiffs' claim that the EPA has impermissibly infringed on the states' Section 303 authority is less a matter of statutory interpretation and more a matter of assessing the Final Guidance itself. Accordingly, in light of its earlier determination that the Final Guidance's conductivity benchmarks were being treated as binding by the EPA's regional offices, see supra at 14, 17, the Court must again conclude that the Final Guidance impermissibly sets a conductivity criterion for water quality. The EPA has, therefore, overstepped the authority afforded it by Section 303 of the CWA.

b. The EPA's Section 402 Authority

As described earlier in this Memorandum Opinion, the Appalachian States subject to the Final Guidance all have EPA-approved permitting programs and thus administer the Section 402 permitting scheme for permits sought within their state borders. As such, the states are the primary permitting authority for Section 402 permits, but must submit draft permits to the EPA for review. Should the EPA determine that the draft permit does not meet the requirements of the CWA, the EPA possesses the statutory authority to object to that draft permit. If the state does not respond to the EPA's objection, the EPA may assume the responsibility to issue the permit. It is this authority—the authority to review draft permits for compliance with the CWA—that the defendants cite as the authority underpinning the Final Guidance.

The plaintiffs assert that the EPA has usurped the State's primary authority to determine when and if a discharge has the reasonable potential to exceed state water quality standards. Pls.' Mem. at 37. Specifically, the plaintiffs maintain that

> it is the state permitting authority, not [the] EPA, that "determines," in the first instance, whether the discharge has the "reasonable potential" to exceed state water quality standards and whether [the] next steps (e.g., adopting numeric [Section 301] effluent limits for conductivity in order to meet state narrative water quality standards for such pollutants) must be taken.

Id.; see also id. at 38 ("40 C.F.R. § 122.44(d)(1) is clear and unambiguous that states, not [the] EPA, make the 'reasonable potential' determination.") The plaintiffs continue: "There is no permissible construction of the CWA or its regulatory scheme that would permit [the] EPA to displace state permitting authorities from their role of determining whether a discharge violates their own state narrative water quality standards and/or when specific numeric effluent limits must be established." Id. at 38; see also Pls.' Reply at 22 ("Under the plain language of the CWA, the states, not [the] EPA, determine how to best interpret their narrative standards and

when there is a reasonable potential to cause or contribute to an excursion from those standards. [The] EPA cannot substitute its judgment for the states' in a guidance document."). Lastly, the plaintiffs maintain that since the issuance of the Final Guidance, "[s]tate permitting authorities no longer have the discretion to conduct post-permit [reasonable potential analyses] and determine through collection of site-specific data whether the discharge actually will cause or has the potential to cause a violation of state standards." Pls.' Mem. at 38.

The defendants respond that the "EPA promulgated regulations more than 20 years ago that require state permitting authorities to incorporate water quality-

suggestion that relevant data can be secured through evaluation of similarly situated facilities in adjacent watersheds." Defs.' Mem. at 38.

It is thus clear that the

for coal mining projects on lands within their state boundaries. And it is clear that the permitting authority is afforded the authority to determine whether a discharge "causes, has the reasonable potential to cause, or contributes to" and excursion of water quality standards. Id. § 122.44(d)(1)(ii). As written, the regulation does not mandate when the state permitting authority must conduct its analysis of the discharge's impact on the water quality standard. For example, 40 C.F.R. § 122.44(d)(1)(i) provides that "limitations must control all pollutants . . . which the Director determines are or may be discharged," suggesting that the pollutants could already have been discharged at the time the Director makes the determination or may be discharged in the future. Additionally, the regulation sets forth procedures for the state-permitting authorities to use "when determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard." 40 C.F.R. § 122.44(d)(1)(ii) (emphasis added). The fact that two of these determinations are written in the present—rather than future—tense belies the defendants' assertion that the CWA, and particularly § 122.44, require a pre-issuance reasonable potential analysis. To be clear, the Court agrees that § 122.44(d)(1) sets forth requirements with which the states must comply, but it does not impose or mandate the timing of that compliance (i.e., whether compliance must be achieved prior to the issuance of the permit).

Accordingly, the EPA's "presumption" that, based on the scientific studies regarding conductivity, it is likely that all discharges will lead to an excursion or that the conductivity studies will be instructive on the matter, Defs.' Mem. at 38, removes the reasonable potential analysis from the realm of state regulators. In other words, by presuming anything with regard to the reasonable potential analysis, the EPA has effectively removed that determination from the state authority. And there can be no question that a plain reading of the regulation leaves that

determination, and the decision as to when it must be made, solely to state permitting authorit

REGGIE B. WALTON
United States District Judge