

Nos. 07-1355; 07-1479; 07-1480; 07-1964; 07-2122 (consolidated)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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OHIO VALLEY ENVIRONMENTAL COALITION;  
COAL RIVER MOUNTAIN WATCH;  
WEST VIRGINIA HIGHLANDS CONSERVANCY  
*Plaintiffs-Appellees*

and

COAL MAC, INCORPORATED; FRASURE CREEK MINING, LLC  
*Movants*

v.

UNITED STATES ARMY CORPS OF ENGINEERS; ROBERT L. VAN ANTWERP, Commander  
and Chief of Engineers, U. S. Army Corps of Engineers;  
DANA R. HURST, Colonel, District Engineer,  
U. S. Army Corps of Engineers, Huntington District  
*Defendants-Appellants*

and

WEST VIRGINIA COAL ASSOCIATION;  
*Defendant-Appellant*

ARACOMA COAL COMPANY; ELK RUN COAL COMPANY;  
ALEX ENERGY, INCORPORATED; INDEPENDENCE COAL  
COMPANY, INCORPORATED; MINGO LOGAN COAL COMPANY  
*Intervenors/Defendants-Appellants*

**FEDERAL APPELLANTS' RESPONSE TO PETITION  
FOR PANEL REHEARING AND REHEARING EN BANC**

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## INTRODUCTION

The Appellees' (collectively "OVEC") have petitioned for rehearing and rehearing en banc, and this Court has ordered us to respond. The Court should deny the petition. This is an administrative record review case in which the majority concluded, based on the record developed by the Corps, that the Corps did not act arbitrarily or capriciously when it issued four permits under section 404 of the Clean Water Act. The majority applied well-established principles to reach that result, and its decision does not conflict with any cases from the Supreme Court or another court of appeals.

This case does not merit further review. As both the majority and the dissent noted, the Corps is developing a functional assessment tool to use when analyzing impacts to streams in West Virginia. A functional assessment tool will consider physical, chemical and biological functions; it will consider contributions from the entire upstream watershed. Its adoption will thus render obsolete the method of analyzing impacts to streams the Corps used for these four permits. And the Corps and EPA are also reviewing how these kinds of section 404 permits will be analyzed in the future. Because the opinion defers to an agency's interpretation of an ambiguous regulation, nothing in the opinion will constrain the Corps and EPA in deciding how to analyze permits in the future, which could include additional

environmental safeguards. Further, each new permit will be subject to judicial review based on the merits of the Corps' analysis for that permit. The decision in this case does not present an issue of exceptional importance.

Finally, OVEC does not contend that either the panel's unanimous decision that the Corps correctly defined the scope of its National Environmental Policy Act analysis, or its unanimous decision that the Corps correctly concluded that permitted sediment control ponds are part of a waste treatment system and therefore are not waters of the United States, is incorrect. Thus, even if the Court grants the petition, it should limit its consideration to the issues raised in the petition. That is especially true for the waste treatment system portion of the opinion, which derives from appeals from a separate district court order. Because the petition does not raise issues relevant to those separate appeals, even if the Court grants the petition the cases should be unconsolidated and the mandate should issue in numbers 07-1964 and 07-2112.

## ARGUMENT

**I. The panel’s decision concluding that the Corps’ complied with 40 C.F.R. § 230.11(e) does not conflict with any case from the Supreme Court or another court of appeals or present a question of exceptional importance.**

OVEC contends that the majority opinion conflicts with Supreme Court precedent because it does not give effect to the plain meaning of the regulation requiring the Corps to analyze impacts on “the structure and function of the aquatic ecosystem and organisms.” Pet. 2-6; 40 C.F.R. § 230.11(e). But the majority opinion does not disagree with or conflict with the well-established principle that an agency must abide by the unambiguous terms of its regulations. Instead, it concludes that the regulation at issue is ambiguous because the word “function” is not defined and there is no guidance on how “structure” or “function” should be assessed. *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 199 (4th Cir. 2009) (“the Guidelines in fact offer no definition of the word ‘function’ or any explanation of how ‘structure’ and ‘function’ are to be assessed.”). Even the district court disagreed with OVEC that the regulation is unambiguous, holding instead that the Corps is entitled to deference on how best to measure stream structure and function. *See id.*

The inherent ambiguity in the regulation on what function means and how to measure it provides the Corps' with a double layer of deference. First, "an agency's interpretation of its own regulations is due significant deference," *id.* at 199; *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). Second, in "matters involving complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'" *Id.* at 201 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 105 (1983)). The panel therefore deferred to the Corps' determination that, because a full functional assessment is not available at this time, information about the functional attributes of streams can be measured by examining the streams' structure and the seven factors explicitly listed in the regulation. *Id.* at 199-201, 200 n.16. Indeed, the only guidance on the Corps' responsibility under the regulation are those seven factors, and "each of the Corps' [Combined Decision Documents] undisputably address these factors." *Id.* at 201 n.19.

Thus, the Corps exercised its best professional judgment on how to analyze stream function and the panel deferred to that judgment. OVEC's contention that the Corps and the majority read the term "function" out of the regulation is therefore incorrect. Indeed, as even the dissent acknowledges, both the Corps and the majority opinion concluded that the Corps' analysis satisfied the requirement

to analyze both the structure and the function of the impacted streams. *Id.* at 199-201; *id* at 219-20. The Combined Decision Documents (“CDDs”) explained the basis for measurement of different attributes (physical, chemical and biological characteristics) of the relevant affected environment, the site-specific data collected using various techniques, and the Corps’ own findings of the effects of the planned activities on the structure and function of the aquatic ecosystem, including substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation and salinity on the recolonization and existence of indigenous aquatic organisms or communities at the disposal sites.

The Black Castle CDD is representative of the Corps’ analysis of the four permits. JA1803, 1823-25. At the Black Castle site, the Intervenors conducted, and the Corps analyzed, numerous studies “to determine the current biological, chemical, and physical water quality and physical and morphological conditions of the streams proposed to be impacted by the Black Castle Contour Surface Mine.” JA1826-27. The Corps’ analysis included, for example, physical and chemical measurements of the valley fill sites and surrounding stream segments; JA1744-45 (setting forth stream flow, water temperature, pH, and conductivity); and water patterns and water circulation and the normal water fluctuations in the existing stream; JA1746-47, 1767 (“Attachment J-6 of the applicant’s WVDEP approved

SMA includes the minimum, average and maximum flows collected during the sampling period for this proposed project.”).

The Corps also cited detailed measurements of the benthic macroinvertebrate population. JA1754, 1828-29. Those measurements included a numeric determination of taxa richness and a quantified assessment of the functional feeding groups present. Those measurements allowed the Corps to arrive at a variety of conclusions about the level of stream function at the proposed fill sites, such as the conclusions regarding the site of proposed valley fills 6, 7, 8, 9 and 10: “The extremely low total abundances, low diversity, low EPT representation, missing mayflies, poor representation of stoneflies and caddisflies, and poor representation of some functional feeding groups were all indicators of poor water quality which undoubtedly limited the benthic macroinvertebrate communities including these two sections of Laurel Creek.” *Id.*; JA1788-89. The panel recognized those scientific findings and deferred to them. *OVEC*, 556 F.3d at 200-01.

The Black Castle CDD also explains the relevant findings from the inter-agency EIS conducted on issues related to coal mining. That EIS recognizes that some of the effects of filling ephemeral streams on nutrient cycling are difficult to measure, especially in a regulatory setting, because of periods where

water is not flowing in ephemeral and intermittent streams. The EIS notes the lack of consensus on the best way to collect quantitative evidence regarding these functions. JA1809-10, 1826-27, 1836. In order to address these effects, impacts to nutrient cycling are reduced by limiting impacts to channels that do not sustain long periods of flow and by establishing a successful riparian buffer around mitigation sites. *Id.* The Corps adopted those methods at Black Castle, and the other decision documents contain similar analyses. JA1260-67, 1274, 1288-90; JA1319-20, 1322-23, 1326-27; JA1422-34; JA2277-90, 2303-04, 2352, 2357; JA2497-2511; JA3570-74, 3598; JA3684-95.

The panel thus rightly determined that the Corps did not adopt a “plainly erroneous” reading of the regulation, and that the Corps’ best professional judgment on how to analyze the structure and function of the aquatic ecosystem was not so arbitrary and capricious that the Court must set it aside. Those fact-bound determinations are grounded in the Supreme Court’s jurisprudence on review of and deference to agency action. They do not merit en banc review.

OVEC also contends that the majority’s decision conflicts with this Court’s decision in *Humanoids Group v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2000), and the D.C. Circuit’s decision in *Environmental Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005). Pet. at 6-9. OVEC claims that those cases stand for the

proposition that no deference is due to an agency’s internal guidance document that changes the meaning of the underlying regulation. But in *Humanoids* this Court concluded that the agency’s “interpretation cannot be considered to be so far afield of the regulation’s text as to constitute a ‘de facto new regulation’”—and the majority opinion reaches the same conclusion in this case, *OVEC*, 556 F.3d at 200 n.16 (“we cannot say that this approach is ‘plainly erroneous or inconsistent with the regulation’”).

In *Environmental Integrity Project*, the D.C. Circuit concluded that EPA’s interpretation of a regulation was flawed not because it was outside the realm of how the regulation might be interpreted, but because it represented a “flip-flop” from EPA’s previous interpretation. 452 F.3d at 995. There is no allegation that the Corps ever changed its interpretation of section 230.11(e) in this case.

OVEC’s objection, at bottom, is not that the majority ignored or misapplied Supreme Court precedent; instead, it is that the majority erroneously found (as had the district court) that the regulation is ambiguous on how to measure “function” and the majority (unlike the district court) deferred to the Corps’ interpretation and application of the regulation. The majority’s determination that the regulation is ambiguous, and its resulting deference to the Corps as the law requires does not

conflict with any decision and is based entirely on the facts of this case and well-established principles of review of agency action.

Because the panel’s opinion is fact-bound and consistent with normal principles of review of agency action, it does not warrant en banc review absent some question of exceptional importance. OVEC claims that the case presents a question of exceptional importance because of possible impact to the environment in Appalachia. But, as both the majority and the dissent note, the method of analysis the Corps used in this case will soon be replaced by a full functional assessment tool—which OVEC claims the Corps should have used in this case. *OVEC*, 556 F.3d at 198; *id.* at 219. This Court should not grant en banc review to consider an interpretation and application of a regulation that will be overtaken by the development of the new functional assessment tool.

**II. The panel’s decision on cumulative impacts analysis does not conflict with any case from the Supreme Court or another court of appeals or present a question of exceptional importance.**

OVEC alleges that the panel decision conflicts with the Fifth Circuit’s decision in *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 234-35 (5th Cir. 2007), and that the panel “overlooked facts” which caused it to “fail[] to address” the conflict. Pet. at 9-13. According to OVEC, the Corps’ conclusion that the permits would not cause significant cumulative impacts to the environment under

NEPA was based entirely on its earlier conclusion that the direct impacts of the permits would each be mitigated to insignificance. That is not so. The Corps' cumulative impacts analysis followed CEQ's 1997 Handbook entitled "Considering Cumulative Effects Under the National Environmental Policy Act" and USEPA (May 1999) guidance. Consistent with these guidance documents, the Corps considered relevant topics such as the area in which cumulative effects would be felt, the impacts in the area from the proposed project, other past, present, and reasonably foreseeable actions with expected impacts in the area, and the overall impact if individual impacts are allowed to accumulate.

The CDDs include a description of the baseline condition that considers "how conditions have changed over time and how they are likely to change in the future without the proposed action." JA1277-78; JA1775-79; JA2315-18; JA3600-01. That determination is made based on past land use, stream and riparian losses, water quality, the intensity of the anticipated environmental effects of the proposed project, the probable interactions among the environmental effects of the proposed project when combined with existing conditions and conditions resulting from other past or future impacts, identification of valued ecosystem components, and appropriate mitigation and monitoring. JA1274-80; JA1769-79; JA2305-18. The Corps also considered direct and indirect effects, including

potential impacts from actions outside the Corps' regulatory jurisdiction. 40 C.F.R. § 230.11(g). Consistent with the Guidelines, the Corps has exercised its best professional judgment to determine the likelihood and significance of cumulative effects of the proposed project on the aquatic environment. The Corps' determinations were based on a view of the *cumulative* impacts, and were not based solely on mitigation of direct impacts, as the panel correctly ruled. Thus, as the panel recognized, "this case is different" than *O'Reilly. OVEC*, 556 F.3d at 208.

OVEC also takes issue with the panel's reliance on the West Virginia Department of Environmental Protection's water quality certification under section 401 of the Clean Water Act and that office's Cumulative Hydrological Impact Assessment. Pet. at 10-14. Neither the Corps nor the panel relies solely on those documents for the Corps' cumulative impacts analysis. Instead, the Corps correctly cited the documents as a limited part of its analysis, stating for example that the water certification satisfied a "portion of cumulative impacts analysis," *OVEC*, 556 F.3d at 208, and including the Cumulative Hydrologic Impact Assessment as part of each administrative record, *id.*. That is entirely proper under the regulations. *See* 33 C.F.R. § 320.1(a)(5) ("[S]tate and federal regulatory programs should compliment rather than duplicate one another."); 33 C.F.R. §

337.1; 40 C.F.R. 1506.2(b); 33 C.F.R. § 320.4(d). Thus, while those documents may not address the full scope of cumulative impacts by themselves, it was proper for the Corps to rely on those documents as part of its overall cumulative impacts analysis. Not even OVEC argues that the Corps could not consider those documents at all. The panel did not err in considering the documents when reviewing the Corps' actions.

OVEC also contends that the panel contradicted the SMCRA savings clause by citing the 401 water quality certification and the Cumulative Hydrologic Impact Assessment. Pet. at 14. Again, that argument turns on OVEC's view that those documents were the sole basis for the panel's decision, which is not the case. As we have explained, the Corps and the panel relied on those documents only as part of the cumulative impacts analysis under NEPA, which is entirely proper.

The panel's decision in this case is a fact-bound decision that turns entirely on the particulars of this administrative record. It is therefore necessarily limited to the four permits that are at issue. Any future permits will also be subject to judicial review on the records produced to support them. Because it resolves a fact-bound case on the basis of well-established principles of judicial review of agency action, and there is no question of exceptional importance, the decision does not meet the standards for en banc review by this Court.

## CONCLUSION

The court should deny the petition for rehearing and rehearing en banc.

Respectfully Submitted,

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April 28, 2009  
90-5-1-4-17706

## CERTIFICATE OF SERVICE

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