

Nos. 07-1355; 07-1479; 07-1480; 07-1964; 07-2112

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OHIO VALLEY ENVIRONMENTAL COALITION, COAL RIVER
MOUNTAIN WATCH, and WEST VIRGINIA HIGHLANDS CONSERVANCY,
Plaintiffs-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*
Defendants-Appellants,

and

WEST VIRGINIA COAL ASSOCIATION
Intervenor-Defendant-Appellant,

and

ARACOMA COAL COMPANY, ELK RUN COAL COMPANY,
ALEX ENERGY, INC., INDEPENDENCE COAL COMPANY, INC.,
and MINGO LOGAN COAL COMPANY
Intervenors/Defendants-Appellants.

On appeal from the United States District Court
for the Southern District of West Virginia

**PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING
OR REHEARING EN BANC**

March 30, 2009

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INTRODUCTORY STATEMENT

Plaintiffs-Appellees petition for rehearing or rehearing *en banc* from a decision by a divided panel of this Court that upheld four mountaintop removal mining permits issued to Defendant-Intervenors by the U.S. Army Corps of Engineers under the Clean Water Act, 33 U.S.C. § 1344 (“CWA”). *Ohio Valley Env’tl Coalition (“OVEC”) v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009) (“Panel op.”); FED. R. APP. P. 35, 40; 4th Cir. R. 35, 40. This decision conflicts with Supreme Court and Circuit precedent that directs the Court: (1) to give effect to the plain text of agency regulations; (2) to deny deference to an internal agency interpretation that changes the meaning of a regulation without notice and comment; and (3) to effectuate all applicable statutory and regulatory requirements that mandate cumulative impact analysis.

As explained by Judge Michael, the panel majority wrongly upheld a Corps’ action that “constitutes a clear abuse of discretion.” *OVEC*, 556 F.3d at 219 (Michael, J., dissenting in part, concurring in part) (“Diss. op.”). Judge Michael emphasized that this decision “will have far-reaching consequences for the environment of Appalachia” and that it “risks significant harm to the affected watersheds and water resources.” *Id.* at 226. Therefore, as discussed below, the Appellees respectfully request that the Court grant rehearing or rehearing *en banc*.

ARGUMENT

I. The Panel Decision Conflicts With Supreme Court Precedent that Requires Courts to Give Effect to the Plain Text of Agency Regulations.

Supreme Court precedent requires the Court to apply the text of a regulation that is unambiguous. The Court may not defer to an agency's proposed interpretation if the regulation is clear, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *see, e.g., Humanoids Group v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004), or if the proposed interpretation is "plainly erroneous or inconsistent with the regulation," *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Rehearing should be granted because "the majority declines to give effect to the unambiguous requirements of the [CWA] regulations," Diss. op., 556 F.3d at 217, and thus contravenes Supreme Court precedent.

A. EPA's Regulation Requires the Corps to Evaluate the Effects of Fill Discharge Permits on the "Structure and Function" of Affected Streams

CWA regulations require the Corps to "[d]etermine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure *and* function of the aquatic ecosystem and organisms." 40 C.F.R. § 230.11(e) (emphasis added). This determination is essential for the Corps (and the Court) to be able to decide whether issuing a section 404 permit will cause "significant degradation," *id.* § 230.10(c), or result in "an unacceptable adverse impact" to the aquatic ecosystem, *id.* § 230.1(c). There is no doubt that "[t]he

word ‘and’ between [two] elements . . . is accepted for its conjunctive connotation” such that “both conditions must be satisfied.” *Williams v. U.S. Merit Sys. Prot. Bd.*, 15 F.3d 46, 49 (4th Cir. 1994) (quotation omitted). The plain text of the CWA regulation places “and” between the words “structure” and “function” so that there is only one plausible interpretation: as Judge Michael explained, the regulation “clearly mandates that the Corps assess both structure and function.” *Diss. op.*, 556 F.3d at 217. Each type of assessment is a different and necessary analysis, and neither can be reduced to “merely a redundancy” or repetition of the other. *Id.* at 218. The text of EPA’s regulation “plainly compels” both types of assessments. *Humanoids*, 375 F.3d at 306. The Environmental Protection Agency (“EPA”) promulgated this rule after consultation with the Corps, and regulations prohibit the Corps from modifying or ignoring these requirements. *See* 40 C.F.R. § 230.2(c); EPA, Rule, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336 (Dec. 24, 1980).

Yet, there is no dispute that the Corps did not assess function before issuing the permits here, but instead “relie[d] on the best professional judgment of its staff” as a “substitute method” for assessing function, which the Corps has decided it may use when “not possible” to assess function. *Panel op.*, 556 F.3d at 199, 200 n.16. The Corps assessed only structure, and then claimed to use that assessment “as a surrogate for function.” *Id.* at 198. The Corps did not assess function

independently because “[t]he Corps currently does not have a functional assessment protocol in place for use in West Virginia.” *Id.*

B. The Panel Refused to Give Effect to the Word “And” in EPA’s Regulation and Allowed the Corps to Avoid Evaluating Function

Although it explicitly acknowledged that the Corps did not assess function, the panel majority did not give effect to the plain text of the regulation, 40 C.F.R. § 230.11(e). Neither did the panel majority attempt to find that the phrase “structure and function,” *id.*, is unclear as to whether both assessments are required. Instead, the panel majority reasoned that the Corps’ avoidance of the plain text might be lawful because the term “function” is ambiguous, suggesting the Corps might somehow be able to satisfy the spirit of the regulation even if violating its plain terms. Panel op., 556 F.3d at 199-200. But the fact that the word “function” is not defined in the regulation is beside the point. The word “and” is clear, and the record shows that, whatever function means, the Corps did not assess both “structure and function.” The panel could not properly ignore “the regulation’s obvious meaning.” *Christensen*, 529 U.S. at 580.

It is clear that, at best, the Corps assessed structure *instead* of function even though “function” is a “central term in the controlling regulations.” Diss. op., 556 F.3d at 219. What “function” means is a question that the panel majority should not have attempted to answer, and one which the Court instead should remand to the Corps. The Corps remains “in the process of developing [a functional

assessment protocol],” to address this very question, Panel op., 556 F.3d at 198, 200 n.19, which obviates the need for the Court to opine further on what might be appropriate. Until the record includes such a functional assessment, the Corps remains unable to justify (as required by applicable law and the standard of review, *see* 5 U.S.C. § 706(2)) its decision that the permits would not cause “significant degradation,” 40 C.F.R. § 230.10(c); *id.* § 230.1(c), under the CWA, 33 U.S.C. § 1344(b), or its decision that no Environmental Impact Statement (“EIS”) need be completed under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.9, 1508.13. This issue infects the remainder of the Court’s analysis, as the Corps’ failure to assess the effects of the discharges on stream function makes its conclusions on mitigation and cumulative impact arbitrary and unsupported. Diss. op., 556 F.3d at 222-26. “The effect is to completely undermine the goal of mitigation: replacement of what is being lost,” as Judge Michael explained. *Id.* at 217. Without this analysis, there is “good reason based on the record . . . to question whether the mitigation will prevent significant degradation of waters of the United States,” *id.* at 225 (citing “virtually no scientific support for the viability of creating working streams from scratch”).¹

¹ The resulting high level of uncertainty and substantial controversy, 40 C.F.R. § 1508.27(b)(4)-(5), caused by the Corps’ failure to assess function or provide support for related determinations, as recognized by the panel and Judge Michael’s separate opinion, *see, e.g.*, Panel op., 556 F.3d at 187, 203, 205; Diss. op., *id.* at 217, 219, 222-25, creates a circuit conflict. Other Courts of Appeals would, at

To conform with Supreme Court precedent, therefore, this Court should grant rehearing or rehearing *en banc* and remand for the Corps to perform an assessment of both structure *and* function as required by the binding CWA regulation, 40 C.F.R. § 230.11(e).

II. The Panel Decision Conflicts With Supreme Court and Circuit Precedent That Require Courts to Deny Deference to Internal Agency Guidance That Changes a Rule Without Notice and Comment.

The panel majority’s opinion conflicts with binding precedent from the Supreme Court, this Court, and the D.C. Circuit requiring the denial of deference to an internal agency guidance document that changes the meaning of the underlying regulation without public notice and comment. As this Court has held, an agency may not create a “*de facto* new regulation” that was not subject to public notice and comment. *See Humanoids*, 375 F.3d at 306 (quoting *Christensen*, 529 U.S. at 588). The same is true in the D.C. Circuit, where “[a]n interpretation of a legislative rule cannot be modified without the notice and comment procedure that would be required to change the underlying regulation—otherwise, an agency could easily evade notice and comment requirements by amending a rule under the

minimum, remand where the agency has not prepared an EIS and so much remains unknown – including whether an untested mitigation measure will work. *See, e.g., Nat’l Parks & Conserv. Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001); *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 17-18 (2d Cir. 1997); *see also OVEC v. U.S. Army Corps of Eng’rs*, 479 F. Supp. 2d 607, 640-42, 647-49 (S.D. W. Va. 2007) (JA 455, 488-91, 495-98); 40 C.F.R. § 230.75(d) (requiring mitigation to be “demonstrated to be effective in circumstances similar to those under consideration,” unless authorized only as a “small scale” pilot).

guise of reinterpreting it.” *Env’tl Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005). Therefore, the panel majority’s deference to the Corps’ Regulatory Guidance Letter No. 02-02 (Dec. 24, 2002) (“RGL”), creates a conflict that would warrant rehearing or rehearing *en banc* – *even if*, as the panel majority erroneously concluded, the regulation at issue, 40 C.F.R. § 230.11(e), were ambiguous in any way (notwithstanding Part 1, *supra*).

A. The Internal Guidance Attempts to Eliminate the Regulatory Requirement to Evaluate the Effects on Stream Function

The Court simply may not defer to this internal Corps guidance document. The panel majority noted that “RGL 02-02 . . . allow[s] Corps engineers to use their best professional judgment” instead of assessing function. Panel op., 556 F.3d at 199. But the text of the regulation “clearly mandates that the Corps assess both structure and function.” Diss op., *id.* at 217. Therefore, the RGL is entitled to no deference because it changes the evaluation required to satisfy the regulation. Previously, both a structural and functional assessment were needed; after the RGL, a functional assessment is no longer needed. Panel op., *id.* at 199. By deferring to the Corps’ changed interpretation, the panel majority has created an irreconcilable conflict with binding precedent, *Humanoids*, 375 F.3d at 306, and with the D.C. Circuit, *see Env’tl Integrity*, 425 F.3d at 995.

B. The Panel Ignored the Regulation’s Prohibition on Changes Without Required Notice and Comment

The conflict with established precedent is even more striking because – far from enjoying controlling weight – in actuality the RGL should have no effect. This is true for three additional reasons – none of which the panel majority addressed. First, such guidance letters “do not purport to change or interpret the regulations applicable to the section 404 program . . . [and] are not binding, either upon permit applicants or Corps District Engineers.” Diss. op., 556 F.3d at 223 (quoting cases). Second, any interpretation created by the Corps alone *could not* purport to change the regulation because it was not promulgated by the Corps but rather by the EPA. *See* 45 Fed. Reg. 85,336. Moreover, the CWA regulations explicitly bar any agency other than EPA from taking independent action to modify them, including section 230.11(e), in any way. 40 C.F.R. § 230.2(c) (“No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the Administrator [of EPA] under the [APA].”). Finally, *even if* the regulation were ambiguous, and *even if* the RGL could somehow receive deference, because the RGL changes the meaning of the regulation by allowing the Corps to evade a functional assessment, it is plainly “inconsistent” with the regulation. Diss. op., 556 F.3d at 223. Allowing this internal guidance to govern, therefore, also contravenes Supreme Court precedent.

See Auer, 519 U.S. at 461. For each of these reasons alone, rehearing or rehearing *en banc* is warranted.

III. The Panel Decision Conflicts with Supreme Court and Circuit Precedent that Require the Court to Effectuate All Applicable Statutory and Regulatory Requirements Mandating Cumulative Impact Analysis.

Because the panel majority overlooked material facts concerning the Corps' own basis for its cumulative impact determination in the administrative record, it failed to address a direct conflict with the Fifth Circuit. Even if this were not the case, the panel majority's decision requires rehearing because it refused to fully effectuate each statutory and regulatory requirement under the CWA and NEPA that governs the activities in question.

A. The Panel Misapprehended the Basis for the Cumulative Impacts Determination and Thus Its Decision Conflicts With the Fifth Circuit

Under both NEPA and the CWA, the Corps must analyze the cumulative effects of CWA discharge permits in conjunction with past, present, and future activities that fill streams in the affected area. *See* 40 C.F.R. §§ 1508.7, 1508.25, 1508.27(b)(7) (NEPA regulations); 40 C.F.R. § 230.1(c) (CWA regulation). The record in this case reveals that the Corps failed to conduct such an analysis.

Instead, the Corps grounded its claim of no significant *cumulative* impacts on its theory that mitigation for the impacts of *individual projects* would entirely compensate for those impacts by reducing them to insignificance. The record demonstrates that the Corps simply totaled up the lost stream and watershed

acreage for each *individual* permit (with losses ranging between 8-14% of headwater streams and between 25-45% of affected watersheds) and then baldly concluded that this amount of destruction was *cumulatively* insignificant.² As the District Court found, “the Corps defends its [permit] approvals by relying on mitigation to offset these impacts, thereby rendering the effects not significant.” *OVEC v. U.S. Army Corps of Eng’rs*, 479 F. Supp. 2d 607, 631 (S.D. W. Va. 2007) (JA 480). The Corps determined cumulative impacts were not significant “by assuming that mitigation entirely eliminates the adverse impacts of destroying many additional miles of headwater streams, despite the alarming cumulative stream loss caused by valley fills in these watersheds.” *Id.* at 659 (JA 506-07). This approach violates NEPA.³ Notably, the Corps did not rely upon either of the documents cited by the panel majority as support for its decision regarding cumulative impacts either in the administrative record of each permit or in its

² For example, after noting that the Laxare East and Black Castle mines – along with other nearby mines – would bury more than 73,000 feet of streams, and conceding that this would permanently destroy 11.2% of the streams in the Laurel Creek watershed, the Corps noted simply that “[t]his [total permanent stream] loss would be offset by the proposed CMPs [compensatory mitigation plans].” *See* JA 1778 (Black Castle mine), 2317 (Laxare East mine); *see also* JA 1280 (finding 10% permanent stream loss in Dingess run watershed “would be offset by the [mitigation]” for Camp Branch mine).

³ NEPA regulations state that “[c]umulative impacts can result from individually minor but collectively significant impacts taking place over a period of time.” 40 C.F.R. § 1508.7. Thus the Corps cannot lawfully presume that reducing the impacts of each individual project would also reduce cumulative impacts.

briefs in the District Court or this Court. *Id.* at 630, 659 (JA 479-80, 506-07); Corps Br. at 53-56.⁴

Nevertheless, the panel majority cited those documents in an effort to distinguish *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 234-35 (5th Cir. 2007). There the Fifth Circuit held that the Corps could not rely – as the Corps did here – on bald claims that mitigation of impacts from *individual* permit actions could avoid the required NEPA analysis of *cumulative* impacts. The Fifth Circuit refused to accept the presumption that “when the individually ‘mitigated-to-insignificant’ fill effects of this permit are added to the actual post-dredge and fill effects of 72 other permits issued to third parties by the Corps in the area . . . the result will not be *cumulatively* significant.” *Id.* at 235. The panel majority cited this holding with approval but stated that this case is different because while the Corps did “lean, to some extent, on mitigation” of individual projects, it also “rel[ie]d in part on both the WVDEP’s CWA § 401 certification and SMCRA permitting process.” Panel op., 556 F.3d at 208.

Thus, the first fundamental problem with the panel’s approach is that it misapprehends the central basis for the Corps’ determination that cumulative

⁴ Although the Corps included the state’s water quality certifications pursuant to section 401 of the CWA and hydrologic assessments pursuant to SMCRA in the administrative record, the Corps’ response to comments, *e.g.*, JA 2384, and a limited reference to a hydrologic study at a particular mine, JA 3577-78, do not substitute for the Corps’ stated basis for its cumulative impact determinations in each of its permit decision documents. *See, e.g.*, JA 1280; 1769-78; 2305-17.

impacts would not be significant. In fact, just as in *O'Reilly*, the Corps based its determination in this case squarely on the notion that mitigation of *individual projects* would render *cumulative* impacts insignificant. The Corps' basis for its supposed determination on cumulative impact must stand – or in this case fall – as stated in the administrative record. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (holding “that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”); *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006). Because the Corps' explanations of its cumulative impact determination in each permit decision did not rely upon the documents that the panel majority cited, the decision warrants rehearing. Once this material issue is viewed accurately, the panel majority's opinion conflicts with *O'Reilly*, which bars an agency from relying on mitigation of individual impacts alone, for the requisite, independent cumulative impact determination under NEPA. See 477 F.3d at 235.

The second fatal problem with the panel's approach is that neither the WVDEP certification under CWA section 401 nor its SMCRA hydrologic analysis (“Cumulative Hydrologic Impact Analysis” or “CHIA”) can substitute for the complete cumulative impact analysis that NEPA and the CWA require of the Corps. The state's certification under section 401 of the CWA is performed on a case-by-case, project-specific basis and is limited to evaluating compliance of the

specific discharge with water quality requirements. It is not required to contain any cumulative impact analysis. *See* 33 U.S.C. § 1341(a)(1). The state-created CHIA under SMCRA is limited to one aspect of surface mining impacts – “the hydrologic balance outside the permit area” – and to only one type of development activity: “surface mining operations.” *See* 38 C.S.R. 2-3.22.e. Thus, while a CHIA may look at hydrologic impacts off-site, the evaluation does not provide *any* analysis of cumulative impacts on matters unrelated to hydrology when combined with the full scope of development activity in the area – which is what NEPA and the CWA require. *See* 40 C.F.R. §§ 1508.7, 1508.8, 1508.25, 1508.27(b)(7); 40 C.F.R. § 230.1(c).⁵ In short, neither a CHIA nor a CWA certification addresses the full scope of cumulative impacts from all past, present, and future environmental disturbances in the affected watersheds.

B. The Panel Violated the SMCRA Savings Clause and Contravened Supreme Court Precedent By Failing to Effectuate NEPA and the CWA

As a related problem, the panel’s approach runs afoul of Supreme Court precedent which directs that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *See Morton v. Mancari*, 417 U.S. 535, 551

⁵ SMCRA regulations make clear that hydrologic evaluations are limited to an assessment of water flow and storage. *See* 30 C.F.R. § 701.5. They include virtually none of the environmental impacts required to be assessed under NEPA and the CWA. *See, e.g.*, 40 C.F.R. § 230.11; 40 C.F.R. §§ 1508.7, 1508.8.

(1974); *see, e.g., United States v. Mitchell*, 39 F.3d 465, 472 (4th Cir. 1994). In this case, three statutes apply to the activities in question: NEPA, the CWA, and the Surface Mine Control and Reclamation Act (“SMCRA”). Moreover, the language of SMCRA section 702 makes plain that its provisions are *subordinate* to NEPA and the CWA, stating that SMCRA shall not be “construed as superseding, amending, modifying, or repealing” NEPA or the CWA. 30 U.S.C. § 1292(a).

The panel directly contradicted this explicit SMCRA savings clause by looking outside of the Corps’ own basis for its decision and invoking plainly insufficient actions taken by WVDEP under SMCRA and the CWA to justify the Corps’ conclusion. Relying on a SMCRA analysis to supersede the requirement for a cumulative impacts analysis under NEPA and the CWA contravenes *Morton* because it fails to accommodate all three statutes; rather than ensuring that SMCRA in no way supersedes the requirements of NEPA and the CWA, it uses a SMCRA action to override them. Similarly, relying on a state CWA certification that is limited to water quality for an individual project evades the NEPA requirement to analyze the totality of cumulative impacts. Thus, rehearing is warranted to follow the Supreme Court command to effectuate the requirements of both the CWA and NEPA.

CONCLUSION

As the separate opinion by Judge Michael underscores, this proceeding involves matters of exceptional importance. The four permits at issue in this case will permanently destroy headwaters in more than thirteen miles of Appalachian streams and will fill twenty-three valleys, resulting in harm downstream in each watershed. Moreover, the Corps' ability to evade EPA regulations implementing the Clean Water Act presents an issue of nationwide concern with significant implications for the protection of U.S. waters. The precedent in this case will determine in this Circuit whether other agencies must at least prepare an environmental impact statement before authorizing such a level of destruction.

For the foregoing reasons, Plaintiffs-Appellees respectfully request panel rehearing or rehearing *en banc*.

Respectfully submitted,

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Dated March 30, 2009

