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Cooperative Federalism in Environmental Law: A Growing Role for Industry

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Abstract

The principle of cooperative federalism underlies several of the major environmental regulatory statutes that Congress enacted in the 1970s, including the Clean Water Act and the Surface Mining Control and Reclamation Act. In those regimes, Congress purposefully allocated varying levels of regulatory and enforcement responsibility to the states, in recognition of the states' historic role as the traditional protectors of local lands and waters and the geographic differences between states that must be taken into account in environmental regulation. Tension almost inevitably follows such shared responsibility between sovereigns, but tensions between the states and the federal government are at an all-time high. Since the Obama Administration took office in 2009, the federal government has attempted to assert ever-increasing control over state permitting, enforcement, and environmental regulation, particularly in the realm of coal mining. Citizen advocacy groups also have concertedly expended great effort to federalize environmental regulation through policy, regulation, and, most frequently, litigation. States have pushed back against these efforts in litigation across the country, contending that they contravene Congress' allocation of authority. But states no longer are the sole entities seeking to preserve that carefully constructed division of authority between the federal government and its local counterparts. The regulated community is increasingly playing a significant role in this debate by spearheading the effort to defeat what it believes are improper attempts to redraw the boundaries of cooperative federalism without legislative action. This paper uses three case studies to explore that debate and the growing role for industry in advocating for cooperative federalism under the CWA and SMCRA. This paper also discusses the implications of and opportunities for the regulated community's future role in the ever-evolving realm of environmental law.

Introduction

“Cooperative federalism” is a system under which the federal and state governments share some degree of regulatory authority.² Where Congress has the authority to regulate private activity under the

¹ The authors of this article are or have previously been counsel in the cases discussed herein. The views expressed in this article are their own and do not necessarily reflect the views of their clients.

² See, e.g., Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179, 187-88 (2005); Phillip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 Mich. State U. - DCL L. Rev. 727, 728-29.

Commerce Clause, it may offer the states the choice of regulating that activity in accordance with federal standards or having state law preempted by federal regulation.³ The federal government is typically seen as the “dominant partner” in any federal-state collaboration, but because the Constitution reserved to states all powers that were not explicitly allocated to the federal government, and because federal resources are limited, the federal government often relies heavily on state cooperation and involvement to achieve national environmental goals.⁴

The virtual explosion of environmental legislation in the 1970s introduced cooperative federalism as “an enduring, organizing concept in environmental law.”⁵ It has long been recognized that a state “has [an] interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”⁶ And the state possesses a “legitimate state concern[] for [the] conservation [of natural resources] and [the] protection of wild animals” that is “similar to the State[’s] interests in protecting the health and safety of citizens.”⁷ In incorporating cooperative federalism principles into environmental laws, Congress recognized the states’ historic roles as protector of their resources, as well as the local nature of many environmental issues.

Regulatory schemes that contemplate such shared regulation take many forms, such as the very different roles assigned to the states and federal government under the Clean Water Act (“CWA”) and the Surface Mining Control and Reclamation Act (“SMCRA”).⁸ SMCRA’s unique federalist scheme gives states the exclusive authority to regulate surface mining once they have an approved program, while the federal government retains only limited oversight authority. The CWA on the other hand presents a more narrow form of cooperative federalism. Importantly, however, each statute gives states substantial

³ See *New York v. United States*, 505 U.S. 144, 167-68 (1992) (listing environmental statutes that employ cooperative federalism).

⁴ Fischman, *supra* note 2, at 183; see *New York*, 505 U.S. at 155-59. Importantly, states must voluntarily enter into such collaboration as Congress may not simply “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981) (upholding SMCRA against constitutional challenge because “the States are not compelled to enforce . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government”).

⁵ Fischman, *supra* note 2, at 187.

⁶ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); see also *McCready v. Virginia*, 94 U.S. 391, 394 (1876); *Cont’l Ins. Co. v. Ne. Pharm. & Chem. Co., Inc.*, 811 F.2d 1180, 1186 n.14 (8th Cir. 1987); *United States v. Turner*, 175 F.2d 644, 647 (5th Cir. 1949). Although a state does not possess absolute ownership over its natural resources, references to the state’s “ownership” has historically “expressed the importance . . . [of the concept] that a State have power to preserve and regulate the exploitation of an important resource.” *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (internal quotation marks omitted).

⁷ *Hughes*, 441 U.S. at 336-37.

⁸ See U.S. General Accounting office, Report to the Chairman, Committee on Environment and Public Works, U.S. Senate, *Regulatory Programs; Balancing Federal and State Responsibilities for Standard Setting and Implementation* (Mar. 2002), available at <http://www.gao.gov/assets/240/234074.pdf>. The historic roots of cooperative federalism are based in the New Deal era which saw the enactment of new economic regulation involving shared federal and state powers, like antitrust, securities, labor, and tax law. Fischman, *supra* note 2, at 186-87.

responsibility and specific regulatory authority that Congress did not intend to be informally re-allocated to the federal government.

Tension almost inevitably arises when two sovereigns attempt to share regulatory authority. However, tensions appear to be at an all-time high, particularly in the realm of coal mining regulation, where the Obama Administration has attempted to assert increased federal control over mining in order to reduce what it has deemed to be the undesirable environmental aspects of coal mining. That attempt was memorialized in the June 11, 2009 Memorandum of Understanding signed by the U.S. Environmental Protection Agency (“EPA”), the U.S. Army Corps of Engineers (“Corps”), and the Department of the Interior, which announced a major policy shift targeting coal mining, with a particular emphasis on surface coal mining and the technique of mountaintop removal.⁹ The federal government has been joined in this effort by citizen advocacy groups, who seek to move “America Beyond Coal” and have supported the increased federalization of environmental regulation in pursuit of that goal. That initiative has spurred litigation nationwide. States have sought to countermand that effort and to preserve what they see as their congressionally mandated role in regulating coal mining under the Clean Water Act and SMCRA. The regulated community has joined in that effort and is playing an increasingly prominent role in the ongoing debate over the boundaries of cooperative federalism in this nation’s environmental laws. This article explores that debate using three ongoing lawsuits as illustrative case studies.

Overview of CWA and SMCRA’s Cooperative Federalism Schemes

The Clean Water Act and SMCRA represent two very different examples of the kind of environmental regulation that may occur under a cooperative federalism scheme. However, both incorporate important roles for states by establishing clear boundaries between federal and state regulatory authority. For example, “[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: to ‘restore and maintain the chemical, physical, and biological integrity of the nation’s waters.’”¹⁰ Congress made federal money available to states contingent upon the creation of a regulatory scheme that is at least as stringent as the federal minimum standards, although states may tailor water quality criteria to local needs, implement their own pollutant discharge elimination systems, and enforce their own administrative rules.¹¹

Under CWA Section 303, states have the primary responsibility to establish, periodically review, and revise water quality standards.¹² Congress gave EPA a secondary role under Section 303—EPA reviews new or revised state water quality standards to determine whether they satisfy the CWA’s requirements.¹³ If necessary, EPA recommends changes and, if the state fails to comply, only then does

⁹ See June 11, 2009 MOU, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 3, available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf.

¹⁰ *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251).

¹¹ See 33 U.S.C. §§ 1251-1887; Fischman, *supra* note 2, at 189-93.

¹² 33 U.S.C. § 1313; *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

¹³ 33 U.S.C. §§ 1313(c)(3).

the CWA permit EPA to promulgate water quality standards for the state.¹⁴ Importantly, EPA may do so only in limited circumstances that are carefully delineated by the Act.¹⁵

Under the CWA's system of cooperative federalism, states also may assume primary enforcement and administration of the Section 402/National Pollutant Discharge Elimination System ("NPDES") program for discharges of pollutants other than dredged or fill material.¹⁶ After EPA approves a state's program, the state issues permits and EPA retains limited oversight authority.¹⁷ Although this scheme balances state and federal authority, Congress strove to do so in a way that nevertheless preserved and protected "the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."¹⁸

SMCRA grants states an even greater role in regulating surface mining and the surface effects of underground coal mining. Congress enacted SMCRA to strike a balance between the nation's interests in protecting the environment and in assuring the nation's coal supply as a necessary source of energy, and to fill a statutory gap, regulating coal mining and reclamation in a way that the CWA could not.¹⁹ Although Congress concluded that a nationwide program establishing minimum standards to protect the environment was necessary, it also determined that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations . . . should rest *with the States*."²⁰

Congress therefore enacted SMCRA to "assist the States in developing and implementing a program to achieve the purposes of this Act" and to "provide[] a truly federalist distribution of regulatory authority for the coal-mining industry," giving states an avenue by which they could create their own statutory and regulatory regime for surface coal mining so long as they incorporated certain minimum standards into that regime.²¹ Once the Secretary of the Interior approves a state's regulatory program, the state has *exclusive jurisdiction* over surface coal mining and reclamation on non-federal and non-Indian lands, the federal provisions "drop out," allowing state law and regulations to govern, and the federal

¹⁴ 33 U.S.C. § 1313(c).

¹⁵ *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993). For a more detailed discussion of water quality standards, see Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 *Env'tl. & Energy L. & Pol'y J.* 63 (2011).

¹⁶ 33 U.S.C. §§1311(b)(2), 1342.

¹⁷ *Id.* §§ 1312(a), 1342(d); 40 C.F.R. §§ 122.44(d), 123.44.

¹⁸ 33 U.S.C. § 1251(b), (g); see *Keating*, 927 F.2d at 622 ("The states remain, under the Clean Water Act, the prime bulwark in the effort to abate water pollution[.]"); *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980 (holding that, in the CWA, "Congress carefully constructed a legislative scheme that imposed major responsibility for control of water pollution on the states . . . Congress envisioned the EPA's role as largely a supervisory one").

¹⁹ 30 U.S.C. § 1202(a), (d), (f); H.R. Rep. No. 940896, at 92-93 (1976).

²⁰ 30 U.S.C. § 1201(f) (emphasis added).

²¹ *Id.* §§ 1202(g), 1253, 1255; *In re Permanent Surface Mining Regulation Litig.*, 617 F.2d 807, 808 (D.C. Cir. 1980); see also *Hodel*, 452 U.S. at 289; *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 315-16 (3d Cir. 2002).

government retains only a limited oversight role to ensure that the state is still complying with the state program.²²

Litigation Testing the Bounds of Cooperative Federalism Under the CWA and SMCRA

Several ongoing cases illustrate the increasingly prominent role that the regulated community has played in the ongoing debate over the boundaries between federal and state authority in the CWA and SMCRA.

National Mining Ass'n v. McCarthy

In the 2009 MOU, EPA and the Corps pledged to coordinate review of coal mining permit applications in six Appalachian states, including West Virginia and Kentucky. On the same day that the MOU was signed, EPA and the Corps announced a new extra-regulatory review of certain Clean Water Act Section 404 permits known as the “Enhanced Surface Coal Mining Pending Permit Coordination Procedures” or the “Enhanced Coordination Process” under which EPA would unilaterally screen permits, diverting them away from the codified permit review process and the statutorily and regulatory imposed timelines.

EPA then issued a guidance document, first in interim and then final form, to EPA Regions III and IV that, although crafted in ostensibly nonbinding terms, created what states and the regulated industry saw as a mandatory water quality standard for conductivity²³ and as an impermissible attempt to regulate upland mining activities in contravention of the division of regulatory authority between the states and the federal government under both the CWA and SMCRA. West Virginia and Kentucky are both primacy states, with approved NPDES and SMCRA state regulatory programs and state standards that govern mining and reclamation. But as those states and the industry that they regulate have maintained, the “suggestions” in EPA’s guidance document were effectively binding mandates.

The National Mining Association (“NMA”) filed suit against EPA and the Corps in the U.S. District Court for the District of Columbia on July 20, 2010, arguing that EPA and the Corps had violated the CWA, SMCRA, and the Administrative Procedure Act (“APA”) by unlawfully usurping power given to the states under CWA Sections 303 and 402 and under SMCRA, and failing to properly conduct notice-and-comment rulemaking.²⁴ On January 14, 2011, the district court denied the Government’s motion to dismiss, recognizing that EPA had implemented a change in the permitting process and holding that the agency actions were ripe for review and for which NMA had standing to challenge.

²² 30 U.S.C. § 1253; *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 288-89, 293 (4th Cir. 2001). Although the agency charged with federal regulation of surface mining is the Department of Interior’s Office of Surface Mining and Enforcement (“OSM”), EPA also plays a minor role at the programmatic level—SMCRA requires that the Secretary of the Interior obtain EPA’s concurrence on any regulations promulgated by the Secretary that relate to air or water quality standards as well as EPA’s concurrence on any aspects of a state program that relate to such standards. 30 U.S.C. §§ 1251(a), 1253(b).

²³ EPA adopted that conductivity standard despite the fact that neither West Virginia nor Kentucky has adopted a numeric standard for conductivity. Indeed, West Virginia has explicitly rejected the use of conductivity as an appropriate measure of water quality in the state. And yet, in issuing the interim guidance document, then-Administrator Lisa Jackson declared that “no, or very few, valley fills [] are going to meet this standard” for conductivity. See David Farenthold, *Environmental Regulations to Curtail Mountaintop Mining*, Wash. Post., Apr. 2, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040102312.html>.

²⁴ NMA also contended that EPA had impermissibly intruded on the Corps’ authority to review and issue CWA Section 404 permits.

West Virginia and Kentucky and other members of industry later filed suit in various federal courts in those states, which were transferred to the District of Columbia and consolidated with NMA's action. The states joined the representatives of the regulated community in urging the court to overturn what they viewed as the federal government's usurpation of authority granted to the states under the CWA to establish their own water quality standards and under SMCRA to regulate the upland aspects of surface mining.²⁵

The district court (Walton, J.) granted plaintiffs' motion for summary judgment on the first phase of the case, vacating the Enhanced Coordination Process and EPA's screening procedure on the grounds that both actions were contrary to the CWA and were legislative rules that should have undergone notice-and-comment rulemaking.²⁶ The court then granted summary judgment in favor of the National Mining Association, the State of West Virginia, the Commonwealth of Kentucky, the Kentucky Coal Association, and the City of Pikeville, Kentucky, invalidating the Final Guidance as contrary to SMCRA as well as the Clean Water Act and the APA.²⁷

The United States appealed to the D.C. Circuit.²⁸ That case has been fully briefed but had not yet been scheduled for oral argument at the time of this article. Alabama, Alaska, Florida, Kansas, Michigan, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Virginia have filed an amicus brief in support of NMA and its fellow parties, arguing that EPA's memorandum conflicts with principles of cooperative federalism, undermines state interests, and is part of a recent pattern of EPA improperly circumventing cooperative federalism principles in environmental statutes, including under the Clean Air Act.²⁹

NMA v. McCarthy is significant both for the court's holding regarding the government's overreach and intrusion into authority reserved for the states, and for the leading role that the regulated community has played in that case in defending the rights that it contends were given to the states under CWA and SMCRA. Industry brings a different perspective to the cooperative federalism debate, as it is in a unique position to describe practical impacts of the federal government's actions in a way that the states cannot. For example, NMA and its members were able to describe the adverse effects of the new Enhanced Coordination Process on their permit applications and mining operations, without which the court may not have grasped the true implications of the delay imposed by that process and may not have concluded that the challenged agency actions were final and ripe for review. Indeed, participation by the regulated community in that case has expanded as several industry groups have filed an *amicus* brief on appeal urging the appellate court to affirm the district court's holding that the challenged agency actions violate the APA, the CWA, and SMCRA.³⁰

²⁵ Several citizen advocacy groups also intervened as defendants in support of the federal government's actions.

²⁶ *Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011).

²⁷ *Nat'l Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119, 135-42 (D.D.C. 2012).

²⁸ *Nat'l Mining Ass'n v. McCarthy*, Case Nos. 12-5310; 12-5311 (D.C. Cir.). The case was restyled on appeal after Gina McCarthy's appointment as EPA Administrator.

²⁹ *See* Case No. 12-5310 (Dkt. 1448105 (July 23, 2013)).

³⁰ Those groups include the American Farm Bureau Foundation, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Council of Coal Lessors, Inc., Pacific Legal Foundation, and Utility Water Act Group. *See* Case No. 12-5310 (Dkt. 1448008 (July 23, 2013)).

Montana Environmental Information Center v. Stone-Manning

The authority allocated to a primacy state under SMCRA's robust cooperative federalism scheme was also at issue in a citizen suit brought by the Montana Environmental Information Center and the Sierra Club against the Director of the Montana Department of Environmental Quality ("DEQ") in the U.S. District Court for the District of Montana. Those groups brought claims for alleged violations of SMCRA and the Montana state law equivalent to SMCRA and asserted that the Eleventh Amendment did not protect a state regulator from suit in federal court under SMCRA's citizen suit provision.³¹

The plaintiffs in *MEIC v. Stone-Manning* alleged that DEQ had engaged in what they called "a pattern and practice" of failing to comply with non-discretionary duties imposed by SMCRA and the Montana Strip and Underground Mining Reclamation Act³² in determining whether proposed mining activities would cause "material damage" to the "hydrologic balance."³³ The citizen advocacy groups asserted that the Montana regulator had failed to adequately make that assessment in its approval of mining permits over a number of years and invoked a litany of mining permits that they claim involved inadequate Cumulative Hydrologic Impact Assessments ("CHIAs") and faulty material damage determinations. They also alleged that DEQ would likely continue that pattern and practice for a pending permit application for Western Energy Company's expansion of its mining operations at the Rosebud Mine near Colstrip, Montana.

The groups contended that the State was not entitled to sovereign immunity from suit because federal law does not "drop out" when a state obtains primacy; instead, they contended, state law is somehow "codified" as federal law when the state program is approved, despite contrary holdings by the Third and Fourth Circuit Courts of Appeals.³⁴

In defending against the lawsuit, the State was joined by a group of defendant-intervenors made up of coal mine owners, operators, and employee representatives.³⁵ DEQ moved to dismiss, invoking Montana's sovereign immunity from suit. The Defendant-Intervenors moved for judgment on the pleadings, agreeing with the State's invocation of sovereign immunity and raising additional justiciability and exhaustion arguments, including the contention that the court lacked jurisdiction under SMCRA's citizen suit provision because it asserted claims regarding a discretionary duty imposed by state, not federal, law.

³¹ 30 U.S.C. § 1270(a)(2). SMCRA's citizen suit provision authorizes private suits against a state regulator only to compel compliance "with this chapter" and only "to the extent permitted by the eleventh amendment to the constitution." *Id.*

³² Montana is a primacy state and the Montana Strip and Underground Mining Reclamation Act is Montana's SMCRA statute. *See* Mont. Code Ann. §§ 82-4-301, *et seq.*; Mont. Admin. R. 17.24.301 through 1309.

³³ Montana, not OSM, defines what constitutes "material damage." Mont. Code Ann. § 82-4-203(31); Mont. Admin. R. 17.24.301(67). OSM purposefully left that issue to primacy states, and approved Montana's definition in approving the state program. *See, e.g.*, 30 C.F.R. § 926.30; 73 Fed. Reg. 78,790, 78,997 (Dec. 24, 2008).

³⁴ *See Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 315-16; *Bragg*, 248 F.3d at 288-89, 293.

³⁵ Those defendant-intervenors were the Crowe Tribe of Indians, International Union of Operating Engineers, Local 400, Western Energy Company, Westmoreland Resources, Inc., Spring Creek Coal LLC, Great Northern Properties Limited Partnership, and Natural Resource Partners L.P.

The district court (Christensen, J.) granted the State and Defendant-Intervenor's motions on January 22, 2013, dismissing the case without prejudice as to any remedy available to the environmental groups in state court.³⁶ The court held that sovereign immunity barred the groups' suit against DEQ in federal court for an alleged violation of state law, SMCRA's minimum standards having "dropped out" when Montana achieved primacy. Accordingly, "[a] suit against [the Director of DEQ] would, in essence, be a suit against the State of Montana."³⁷

The court also held that dismissal was warranted because, as the coal owners, operators, and employee representatives contended, SMCRA's citizen-suit provision permits federal lawsuits only for failure to perform clear-cut or ministerial functions, and a material damage determination is a discretionary duty that requires agency technical knowledge and judgment, including an assessment of Montana's narrative water quality standards. Finally, the court held that, even if plaintiffs could state a claim for relief, their action was not yet ripe for review—DEQ had not yet issued a material damage determination in connection with the challenged expansion of Western Energy's Rosebud Mine and thus, plaintiffs had not exhausted their state and administrative remedies for the permits challenged in the complaint.

The citizen advocacy groups have appealed to the Ninth Circuit, and briefing is underway. The Ninth Circuit is being asked for the first time to determine the extent of SMCRA's exclusive grant of jurisdiction to primacy states and the availability of sovereign immunity to suit under SMCRA's citizen suit provision.

In that case, the regulated community has supplemented the state's sovereign immunity arguments and has presented alternative, narrower grounds that may provide a basis for affirmance. The participation of coal owners, operators, and employee representatives also provides the court with a perspective on how issues of cooperative federalism shape the permitting and enforcement relationship between the regulator and industry and the potential impact on the regulated community if it must answer to two sovereigns, state and federal, rather than only one.

Mingo Logan v. EPA ("Spruce")

Finally, in a case that illustrates the intricacies of federal and state environmental regulation in the context of coal mining, Mingo Logan Coal Company filed suit against EPA in the U.S. District Court for the District of Columbia challenging EPA's "veto" of its CWA Section 404 dredge-and-fill permit, issued by the Corps. After completing an Environmental Impact Statement, the Corps had issued a Section 404 permit on January 22, 2007, authorizing Mingo Logan to discharge fill material from its Spruce No. 1 surface coal mine in Logan County, West Virginia into nearby streams. Although EPA had had initial concerns about and objections to various permits for the Spruce No. 1 surface mine, it worked with the Corps and the State of West Virginia to resolve those issues.

Only after the Obama Administration took office did EPA take action against the permit. On September 3, 2009, EPA requested that the Huntington District Office of the Corps revoke, suspend, or modify Mingo Logan's permit, contending that new information and circumstances justified its about-face.³⁸ The Corps disagreed, rejecting EPA's request.³⁹ Accordingly, EPA itself took action. Nearly

³⁶ See *Mont. Env'tl. Info. Ctr. v. Opper*, No. 12-cv-34, 2013 WL 485652, at *4 (D. Mont. Jan. 22, 2013). The case was restyled *MEIC v. Stone-Manning* on appeal.

³⁷ *Id.* at *4. The court also declined to "meddle in Montana's coal permitting process" and noted that plaintiffs had appropriate state remedies under which they could seek state administrative and judicial review. *Id.* at *4-5.

³⁸ *Mingo Logan Coal Co., Inc. v. EPA*, 850 F. Supp. 2d 133, 137 (D.D.C. 2012).

three years after the Corps issued the permit, EPA published a Final Determination purporting to withdraw the specification of the receiving streams as disposal sites, and thereby to invalidate the permit for those sites. As the district court recognized, “[t]his attempt to withdraw the specification of discharge sites after a permit has been issued is unprecedented in the history of the Clean Water Act.”⁴⁰ EPA did so over objections from the Corps and West Virginia.

Mingo Logan’s judicial challenge to EPA’s “veto” primarily involved the scope of EPA’s authority under CWA Section 404(c) and whether 404(c) grants EPA authority to unilaterally modify or revoke a permit that has been duly issued by the Corps and to do so at any time.⁴¹ The case also raised issues of federalism, however, because the Corps was not the only agency to issue a permit for the project. The State of West Virginia, which participated as an amicus at the summary judgment briefing stage of the case (and thereafter on appeal) had regulated Spruce for fourteen years, issuing Mingo Logan multiple, interrelated permits and permit modifications under CWA Sections 401 and 402 and SMCRA.⁴² In issuing those permits, the state had certified “that Mingo Logan’s operations at Spruce comply with the State’s water quality standards and mining regulatory requirements.”⁴³ EPA also was actively involved in that process, issuing comments and objections, but nevertheless emphasizing its willingness to “work together” with the Corps and the State. Indeed, EPA ultimately resolved its objections.⁴⁴ Now, the State contended, after the change in administrations, “[t]he veto willfully ignores the State’s (and the EPA’s) prior resolution of the same issues upon which EPA now bases its ‘veto.’”⁴⁵ In the State’s and Mingo Logan’s view, EPA’s actions not only essentially ignored the State’s reasoned permitting decisions, but also usurped the State’s authority to issue water quality standards under Section 303 because EPA based its decision in large part on the new *de facto* conductivity standard announced in its guidance document.⁴⁶

The district court (Jackson, J.) emphasized the reasoned decisions reached by the State and the Corps and held that the CWA did not give EPA authority to exercise a post-permit veto; however, the

(continued...)

³⁹ *Id.*

⁴⁰ *Id.* at 134.

⁴¹ Mingo Logan also asserted APA claims that the district court declined to address, having decided to grant summary judgment on other grounds.

⁴² Specifically, Mingo Logan obtained a SMCRA and Section 402/NPDES permit from the West Virginia Department of Environmental Protection (“WVDEP”), as well as subsequent permit modifications. *Id.* at 135. Although EPA initially objected to the proposed NPDES permit, EPA later withdrew its objections. *Id.* WVDEP also certified that the proposed Section 404 permit ultimately issued by the Corps would not violate state water quality standards or anti-degradation regulations under CWA Section 401. *Id.* at 136.

⁴³ Case No. 12-5150, W. Va. Br. at 2, 3-9 (Dkt. 1395327 (Sept. 19, 2012)).

⁴⁴ *Mingo Logan Coal Co.*, 850 F. Supp. 2d at 136.

⁴⁵ W. Va. Br., *supra* note 43, at 2.

⁴⁶ *Id.* at 2-3.

D.C. Circuit overturned that ruling on appeal.⁴⁷ Mingo Logan has recently indicated that it plans to file a petition for *certiorari*.⁴⁸

The *Spruce* litigation provides a key example of a case in which industry is the primary advocate for a state's position, which was only later supported by the State of West Virginia acting as an amicus.⁴⁹ If the coal company had not been willing to bring suit, EPA's action likely would have gone wholly unchallenged.

Conclusion

The cooperative federalist systems established by Congress in the CWA and SMCRA are an increasingly significant source of tension and litigation between the states and the federal government, particularly in the context of coal mining. But the two sovereigns are not the only stakeholders with an interest in defining the boundaries established by Congress. As the above case studies illustrate, the regulated community and citizen activist groups also play a significant role in that debate. Indeed, each stakeholder has a unique perspective on the proper boundaries on federal and state authority. And each will contribute to play a significant role in the ongoing debate over the role of cooperative federalism in environmental law.

⁴⁷ *Mingo Logan Coal Co.*, 850 F. Supp. 2d at 139-53; *see also Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013).

⁴⁸ In the years since EPA's final determination, there have been many attempts to pass legislation to alter EPA's authority under Section 404, but to date, none have become law. *See* Amy Oxley, Comment: *No Longer Mine: An Extensive Look at the Environmental Protection Agency's Veto of the Section 404 Permit Held by the Spruce No. 1 Mine*, 36 S. Ill. U. L.J. 139, 151-52 (2012).

⁴⁹ Numerous other regulated entities also participated as *amici* before the district and appellate courts, including NMA.