# Chapter 19 • MINING AND MINERAL EXTRACTION
# 2012 Annual Report[1]

## I. CASE LAW DEVELOPMENTS

### *A. Federal Court Decisions*

#### 1. Permitting of Mountaintop Removal Coal Mine Operations

Years of litigation have followed the method of coal mining descriptively called mountaintop removal and its use of valley fills. If a valley fill associated with mountaintop removal is constructed in waters of the United States, the operator must obtain a section 404 permit from the Army Corps of Engineers (COE) where the COE specifies the area for the discharge of dredged or fill material by evaluating the environmental effects of the disposal site pursuant to section 404(b)(1) of the Clean Water Act (CWA) guidelines.[2]

As part of the section 404 permitting process, the U. S. Environmental Protection Agency (EPA) has authority to prohibit, deny or restrict the COE's specification of defined areas that can be used as fill disposal sites, including sites for valley fills.[3] In 2009, EPA, pursuant to section 404(c), sought to expand this authority by implementing a two-step process via its Enhanced Coordination Process (EC Process) Memoranda:[4] 1) pending COE section 404 permits are screened via the Multi-Criteria Integrated Resource Assessment (MCIR Assessment) to determine which permits will follow standard COE review and which permits will be subjected to the EC Process; and 2) the EC Process itself.[5] In conjunction with the EC Process, EPA initiated a "retroactive veto" by withdrawing the specification of defined areas for disposal in a section 404 permit already issued by the COE. Recently, two important decisions upholding industry's challenges to EPA's EC Process and retroactive veto were issued by the United States District Court for the District of Columbia. These decisions have been appealed and will continue the ongoing litigation over the coming year regarding mountaintop removal.

##### a. *National Mining Association v. Jackson*

Plaintiffs challenged EPA's MCIR Assessment and EC Process on the basis that EPA: 1) exceeded its statutory authority by introducing changes to the permitting process that expanded the EPA's role beyond Congress' intent that the COE is the principal player in the permitting process; and 2) violated the Administrative Procedure Act (APA)

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[2]33 U.S.C. § 1344 (2012); Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230 (2012).

[3]33 U.S.C. § 1344(c) (implementing regulations in 40 C.F.R. § 231 (2012)).

[4]Memoranda from Lisa P. Jackson, Adm'r, EPA, & Terrence "Rock" Salt, Acting Assistant Sec'y (Civil Works), Dep't of the Army, on Enhanced Surface Coal Mining Pending Permit Coordination Procedures to Acting Reg'l Adm'rs in EPA Regions III, IV, and V, and Army Corps of Engineers District Commanders in Appalachian States (June 11, 2009).

[5]National Mining Ass'n v. Jackson, 768 F. Supp. 2d 34 (D.D.C. 2011) (*NMA I*).

because the MCIR Assessment and EC Process were legislative rules established without meeting the notice and comment requirements of the APA.[6] The District Court agreed.

First, the court stated that section 404 was unambiguous in establishing the COE as the principal agency in the permitting process and that "EPA is to play a lesser, clearly defined supporting role."[7] By implementing the MCIR Assessment and EC Process, EPA expanded its role in the permitting process in excess of its statutory authority. Second, the court went on to explain how the MCIR Assessment, particularly where EPA applied the section 404(b)(1) guidelines in lieu of the COE doing so, signified "a substantive, rather than a procedural, change to the permitting framework."[8] Since the MCIR Assessment and EC Process conferred additional reviewing authority on the EPA and modified the permitting process, they were legislative rules subject to the notice and comment requirements of the APA. By not meeting these requirements, the court held that the MCIR Assessment and EC Process violated the APA.

b. *Mingo Logan Coal Co. v. U. S. Environmental Protection Agency*

On March 23, 2012, the district court concluded that EPA exceeded its statutory authority under section 404(c) of the CWA when it attempted to retroactively veto a permit already issued by the COE.[9] The COE issued a section 404 permit for Mingo Logan's Spruce No. 1 Mine on January 22, 2007. After participating extensively in the permitting process and specifically declining to exercise its section 404(c) authority before the permit was issued, the EPA, nearly four years after the permit was issued, withdrew the specification of defined areas as disposal sites in the Spruce No. 1 Mine permit.[10] After effectively nullifying the permit, Mingo Logan challenged EPA's action.

In agreeing with Mingo Logan, the court concluded, after reviewing section 404(c), the entire CWA and legislative history, "that the statute does not give EPA the power to render a permit invalid once it has been issued by the [COE]."[11] The court noted the central importance of the permit to the regulatory regime of the CWA and that compliance with a permit is deemed compliance with the CWA. The court held EPA's view of its authority was inconsistent with this central concept because a permit holder could never truly rely upon a permit if EPA could veto that permit after it was issued. Furthermore, the court found that the legislative history clearly envisioned EPA's review of the specification of disposal sites would occur prior to the COE issuing the section 404 permit. The court was convinced the clear provisions regarding the centrality of the permit and the legislative history made it unnecessary to go beyond the first step of *Chevron* analysis.[12]

However, due to what the court believed was an awkwardly written section 404(c), the court conducted the second step of *Chevron* analysis. Even assuming ambiguity in the statute and according some deference to the EPA, the court held that EPA's interpretation granting it the authority to retroactively veto a permit was unreasonable. The court explained that EPA's attempt to indefinitely extend its veto authority would sow uncertainty in the permit scheme where finality was the intent. Additionally, EPA and COE were directed by Congress to work together in developing

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[6]National Mining Ass'n v. Jackson, 816 F. Supp. 2d 37 (D.D.C. 2011) (*NMA II*).
[7]*Id.* at 44–45.
[8]*Id.* at 47.
[9]850 F. Supp. 2d 133 (D.D.C. 2012).
[10]*See generally* Notice, Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV, 76 Fed. Reg. 3126 (Jan. 19, 2011).
[11]*Mingo Logan*, 850 F. Supp. 2d at 134.
[12]*Id.* at 145–47.

procedures and minimizing delay in the implementation of section 404. This cooperation resulted in a memorandum of agreement between the agencies that made no mention of a retroactive veto by EPA and expressly contemplated that EPA would exercise its section 404(c) authority prior to the COE issuing the permit. Since "[n]either the statute nor the Memorandum of Agreement between EPA and the [COE] makes any provision for a post-permit veto, and the agency was completely unable to articulate what the practical consequences of its action would be," EPA's interpretation was unreasonable.[13]

2. EPA Authority under SMCRA and the CWA

The same plaintiffs in *NMA II* also challenged EPA's July 21, 2011 Final Guidance regarding Appalachian surface coal mining. In the third ruling from the district court in *National Mining Association v. Jackson*, the court held that EPA, by issuing the Final Guidance, "overstepped its statutory authority under the CWA and Surface Mining Control and Reclamation Act (SMCRA), and infringed on the authority afforded state regulators by those statutes."[14] The court disposed of jurisdictional issues by holding: 1) the Final Guidance was a final agency action because it was the consummation of EPA's decision making process and was being implemented as binding, boilerplate disclaimers to the contrary notwithstanding, and had a practical effect on the permitting process; 2) none of the subsections of 33 U.S.C. § 1369(b)(1) that confer exclusive jurisdiction upon the Circuit Court of Appeals are triggered by the Final Guidance; 3) the decision is ripe because there is no further administrative action needed to clarify EPA's position; and 4) plaintiffs have standing because the Final Guidance was implemented as binding, thus imposing obligations that amount to injuries.[15]

With regards to EPA overstepping its authority under SMCRA, the Final Guidance attempted to influence the review of SMCRA permit applications by having the permitting authority – either the Office of Surface Mining or the state with an approved program – evaluate and incorporate certain impact minimizations or specifying to the permitting authority what constitutes appropriate best management practices. EPA attempted to insert itself into the SMCRA permitting process where it had no explicit or implicit authority to do so. "[T]he EPA cannot justify its incursion into the SMCRA permitting scheme by relying on its authority under the CWA – it has no such permitting authority."[16]

As to overstepping its authority under the CWA, the court held EPA exceeded its authority in two principle ways: 1) violating the procedures set forth in section 303[17] of the CWA for establishing water quality standards by effectively setting a region-wide standard for conductivity;[18] and 2) directing states to conduct a pre-issuance reasonable potential analysis in violation of the state's discretion to determine when and if a discharge has reasonable potential to exceed water quality standards based upon

[13] *Id.* at 134.
[14] 880 F. Supp. 2d 119, 142 (D.D.C. 2012) (*NMA III*).
[15] *Id.* at 130–36.
[16] *Id.* at 137.
[17] 33 U.S.C. § 1313 (2012).
[18] In layman terms, higher conductivity essentially means the water is getting saltier. EPA's scientific studies have indicated that as conductivity increases above EPA's benchmark conductivity level, 300 µS/cm, substantial impacts occur to aquatic life; thus, EPA assumes any discharge above that level is a violation of narrative water quality standards meant to protect aquatic life. *See generally* Environmental Assessment, *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams (Final Report)*, EPA.GOV, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=233809 (last updated Dec. 8, 2011).

conductivity levels in the discharges.[19] Section 303 sets forth the procedure for developing water quality standards and allocates primary authority to do so to the states. Although EPA has limited authority under section 303 to develop water quality standards in certain instances, that is not the case with the Final Guidance. Therefore, the court did not have to determine what authority EPA had, just whether or not EPA established a water quality standard with the Final Guidance. Having ruled that the Final Guidance was implemented in a binding fashion, the Court held that the Final Guidance effectively set a region-wide water quality standard and subjected states to EPA's conductivity benchmark. Therefore, the court determined that EPA overstepped its authority under section 303.

States with approved programs are the primary permitting authority for CWA section 402[20] permits (NPDES permits). It is the state that determines when to conduct a reasonable potential analysis and whether there is reasonable potential to cause or contribute to an exceedance of water quality standards.[21] Instead of deferring to the states' authority, the Final Guidance insisted that the states conduct the reasonable potential analysis pre-issuance. Furthermore, the Final Guidance presumed all discharges would have the reasonable potential to exceed water quality standards based upon EPA's scientific studies regarding conductivity. "[B]y presuming anything with regard to the reasonable potential analysis, the EPA has effectively removed that determination from the state authority."[22] As such, EPA again overstepped its statutory authority by infringing upon the authority granted the states. As noted above, EPA has appealed the *NMA* decisions.

### 3. Mining on Public Lands

#### a. Roadless Rule

The legal status and applicability of the "Roadless Rule" is a subject that has been litigated for nearly a decade. The final version of the Roadless Rule was issued on January 12, 2001.[23] The rule prohibited construction and reconstruction in "inventoried roadless areas" (IRAs), and prohibited the cutting, sale, or removal of timber from IRAs. In *Wyoming v. U.S. Department of Agriculture.*, the District Court of Wyoming held in 2008 that the rule was promulgated in violation of the Wilderness Act and the National Environmental Policy Act (NEPA).[24]

On appeal, the Tenth Circuit overruled the underlying court's determinations, holding that the Roadless Rule did not designate de facto wilderness areas in violation of the Wilderness Act because the Roadless Rule only restricts two activities, road construction and timber harvesting. The Tenth Circuit further ruled that the United States Forest Service also properly exercised its authority under the Organic Administration Act and the Multiple-Use Sustained Yield Act.[25]

The Tenth Circuit also rejected Wyoming's claim that the Forest Service had predetermined the outcome of the NEPA analysis. The court noted that broad discretion

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[19] *NMA III*, 80 F. Supp. 2d at 138–42.
[20] 33 U.S.C. § 1342 (2012).
[21] *See NMA III* at 138–41 (stating regulation as written does not mandate when the reasonable potential analysis must be conducted); *see also* Establishing Limitations, Standards, and Other Permit Conditions (Applicable to State NPDES Programs, see § 123.25), 40 C.F.R. § 122.44 (2012).
[22] *NMA III* at 141.
[23] Protection of Inventoried Roadless Areas, 36 C.F.R. §§ 294.10–.14 (2001).
[24] 570 F. Supp. 2d 1309 (D. Wyo. 2008), *rev'd*, 661 F.3d 1209 (10th Cir. 2011).
[25] Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1225 (10th Cir. 2011).

granted an agency to define the purpose and objective of a proposed action, so long as such action is reasonable. Here, the defined purpose of the Roadless Rule was to provide "long-term protection of the values prevalent in roadless areas by immediately stopping activities that have the greatest likelihood of degrading desirable characteristics of IRAs."[26] The court found that "the Forest Service considered a reasonable range of alternatives in the [Environmental Impact Statement], and reasonably rejected those alternatives that did not further the defined purpose of the Roadless Rule."[27] Curiously, the court also found that the Forest Service did not act arbitrarily and capriciously in conducting its NEPA analysis "[b]ecause the record [did] not contain sufficient evidence to show that the Forest Service irreversibly and irretrievably committed itself to a certain outcome before the NEPA analysis was completed."[28] In other words, although the Forest Service's stated purpose for the subject rule was arguably too narrow to allow for any alternative other than the one ultimately reached by the agency, the absence of any evidence suggesting an irreversible commitment to that outcome shielded the agency from an arbitrary and capricious finding.

Many had anticipated that the Supreme Court would ultimately rule on the Roadless Rule. However, on appeal from the Tenth Circuit, the Supreme Court denied *certiori* and the rule stands.[29]

b. Mining Claims in Wilderness Areas

In *McMaster v. United States*, the Eastern District of California considered how the designation of an area as wilderness might affect a valid mining claim located in that area.[30] In 1984, Congress enacted the California Wilderness Act which designated the area upon which plaintiffs' mining claim was located as wilderness. Even though the plaintiffs located their mining claim in 1953, the plaintiffs failed to file their application to obtain a patent over their mining claim until 1992. Notably, the California Wilderness Act provided that subject to "valid, existing rights," mining patents within the wilderness area shall reserve the surface estate to the United States.[31] That is, absent a valid, existing right, surface in the wilderness area would belong to the United States. Even though plaintiffs held a valid mining claim for the subject area, plaintiffs did not obtain a "valid, existing right" to a patent for both the minerals and the surface area of the subject mining area because the court found that the right to a patent accrues upon completion of a patent application. Therefore, failure to obtain a patent over their mining claim prior to the enactment of the California Wilderness Act proved fatal to plaintiff's ability to exploit the subject mine. Plaintiffs appealed to the Ninth Circuit and a decision is anticipated in the coming year.

c. Notice, Comment and Appeal of Forest Service Actions

In *Sequoia ForestKepper v. Tidwell*,[32] an environmental association and its members challenged 36 C.F.R. §§ 215.4(a) and 215.12(f) ("215 Regulations"), "two of the public notice, comment, and administrative appeal regulations" promulgated by the Forest Service as part of its implementation of the Forest Service Decisionmaking and

[26] *Id.* at 1245.
[27] *Id.* at 1250.
[28] *Id.* at 1266.
[29] Colorado Mining Ass'n v. Dep't of Agric., 133 S. Ct. 144 (2012).
[30] No. 2:10-cv-00881, 2011 WL 3882475 (E.D. Cal. Sept. 2, 2011); *see also* McMaster v. U.S., No. 2:10-cv-881, 2010 WL 3582555 (E.D. Cal. Sept. 10, 2010).
[31] 16 U.S.C. § 543c(g) (2012).
[32] 847 F. Supp. 2d 1217 (E.D. Cal. 2012).

Appeals Reform Act (ARA).[33] Plaintiffs argued that the 215 Regulations were a violation of section 322 of the ARA because, while the ARA directs the Forest Service to "establish a notice and comment process 'for all proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans,'" the 215 Regulations exclude from notice and comment those projects and permits categorically excluded under NEPA.[34] The court agreed with the plaintiffs and enjoined the Forest Service from following the 215 Regulations.

In response to the court's ruling, the Forest Service issued a memorandum directing all Forest Service units from applying the 215 Regulations.[35] Additionally, the Forest Service indicated that "all units shall provide notice, comment and appeal opportunities for all projects and activities implementing land and resource management plans that are documented in a decision memo, decision notice, or record of decision."[36] The Forest Service has decided, however, not to retroactively apply the court's order to projects and activities that preceded the court's March 19, 2012 decision.

### *B. Interior Board of Land Appeals Decision*

The holder of an unpatented mining claim, mill site, or tunnel site is required to pay a maintenance fee for each claim or site.[37] In *Art Anderson*, the Interior Board of Land Appeals (IBLA) reversed a previous ruling and clarified the deadline date for when this claim maintenance fee or waiver must be submitted.[38] Confusion had arisen given the seeming conflict between two subsections of 30 U.S.C. § 28f. Particularly, subsections (a) and (b) seemed to be in conflict because subsection (a) requires payment of claim maintenance fees "on or before September 1" of each year and subsection (b) requires payment be made "before the commencement of the assessment year," which was amended to 12:01 A.M. on September 1 of each year by the Consolidated Appropriations Act of 2008.[39] Therefore, "a payment made on September 1 that would have been timely under subsection (a), would have been untimely under subsection (b)." The IBLA noted that the conflict between the two subsections was not unique to the 2008 amendments and that previous Board decisions have found subsection (a) controlling in the event of a conflict. As such, maintenance fees or waiver certifications filed during regular business hours on September 1 would be deemed timely.[40]

## II. REGULATORY DEVELOPMENTS

### *A. Regulations Related to Financial Assurance Requirements for Hardrock Mining Under CERCLA Delayed*

Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires the President of the United States to promulgate regulations that ensure facilities involved with hazardous substances remain financially

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[33]Forest Service Decisionmaking and Appeals Reform Act of 1992, Pub. L. No. 102-381, 106 Stat. 1419 (codified as amended at 16 U.S.C. § 1612 (2012)).
[34]*Sequoia*, 847 F. Supp. 2d at 1238.
[35]Memorandum from Thomas L. Tidwell, Chief, U.S. Forest Serv., on Adverse Ruling in Sequoia ForestKeeper v. Tidwell to Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors (March 29, 2012).
[36]*Id.* (internal quotations omitted).
[37]30 U.S.C. § 28f(a)–(b) (2012).
[38]Art Anderson, 182 IBLA 27 (2012) (on reconsideration).
[39]*Id.* at 31 (citing 30 U.S.C. § 28f(a)–(b) (2012)).
[40]*Id.* at 32.

responsible for cleaning up any substances improperly disposed.[41] In *Sierra Club v. Johnson*, the Northern District of California required the EPA to comply with this CERCLA mandate.[42] The EPA responded to that order and identified facilities within the hardrock mining industry that would be the subject of financial responsibility requirements. The next step is for the EPA to develop actual financial responsibility regulations and a proposed rule. The EPA initially indicated that it would publish a rule in the Federal Register in February of 2012. The EPA has since indicated that publication of the proposed rule will be pushed back until April 2013.[43]

### *B. SEC Disclosure Rules Extending From Sections 1502 and 1504 of Dodd-Frank Wall Street Reform and Consumer Protection Act*

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[44] Among the many financial reforms outlined in the legislation, sections 1502 and 1504 directed the Securities and Exchange Commission (SEC) to implement certain regulations that will affect some mining and mineral extraction companies. In 2012, the SEC issued its Final Rule in each of these areas, as detailed below.

#### 1. Disclosure of Use of Conflict Minerals

Congress enacted section 1502 of the Dodd-Frank Act due to concerns that the exploitation, development and trade of certain minerals from the Democratic Republic of Congo Region was helping fund conflict in the area and contributing to the growing humanitarian crisis. Accordingly, any company that uses the minerals tantalum, tin, gold or tungsten may be required to file an additional disclosure form (Form SD) to the SEC.[45] A company will be required to file an additional disclosure form if use of the highlighted minerals is "necessary to the functionality or production of a product manufactured or contracted to be manufactured by" the company.[46] The final rule does not exempt foreign private issuers or smaller reporting companies from this requirement. Additionally, a company is considered to be contracting to manufacture if the company has some actual influence over the manufacturing of that product.

#### 2. Payments to Foreign Governments by Resource Extraction Issuers

Section 1504 of the Dodd-Frank Act required the SEC to issue rules concerning the disclosure of certain payments made to the federal government or foreign governments by resource extraction issuers, i.e., companies engaged in the development of oil, natural gas, or minerals. The new disclosure requirements apply to domestic and foreign issuers and to smaller reporting companies that meet the definition of resource

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[41] 42 U.S.C. § 9608 (2012).
[42] No. C 08-01409 WHA, 2009 WL 2413094 (N.D. Cal. Aug. 5, 2009).
[43] *See generally* Regulatory Development and Retrospective Review Tracker, *Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hard Rock Mining Industry*, EPA.GOV, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2050-AG61 (last updated Mar. 1, 2013).
[44] Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[45] Conflict Minerals, 77 Fed. Reg. 56,274, 56,275 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).
[46] *Id.* at 56,293.

extraction issuer in the statute. Additionally, an issuer is required to disclose payments made by a subsidiary or another entity controlled by the issuer.[47]

Under the new rules, a resource extraction issuer is required to disclose payments that are made to further the commercial development of oil, natural gas, or minerals, are "not de minimis," and are within the types of payments specified in the rules. The rules define "'commercial development of oil, natural gas, or minerals' to include . . . exploration, extraction, processing and export, or the acquisition of a license for any such activity." "[T]he final rules define 'not de minimis' to mean any payment, whether a single payment or a series of related payments, that equals or exceeds $100,000 during the most recent fiscal year."[48] The specific types of payments specified in the rules are: taxes, royalties, fees (including licensing fees), production entitlements, bonuses, dividends and infrastructure improvements.

### *C. Challenges to Phosphate Mine Permitting in Florida*[49]

Phosphate deposits in central Florida occur principally in an area of approximately 1.3 million acres. An environmental resource permit, which allows for the disturbance of wetlands, and a conceptual reclamation plan, which addresses the post-reclamation vision for the property, are the two most significant approvals required from the Florida Department of Environmental Protection (DEP).[50] Additionally, an individual permit is needed from the COE for wetland impacts.[51]

Every significant phosphate mine permit over the last decade has been challenged as mining moves further and further south from its historic locus. *Lee County v. Mosaic Fertilizer, LLC*[52] involved an administrative challenge by two counties to the state permits for the South Fort Meade-Hardee Mine Extension, a nearly 11,000 acre site in Hardee County. Although a state-level hearing and appeal were resolved in favor of Mosaic in 2010, the COE permit was subject to two more years of litigation. The federal district judge, in a surprise move to some, twice ordered a halt to mining pending the outcome of the proceedings. Mosaic entered into a settlement agreement with the plaintiffs in February 2012 to resume stalled operations. In exchange for dismissal, Mosaic agreed to additional onsite preservation and offsite land donation, among other things. The settlement agreement was approved by the court in March 2012 and the case dismissed after already adding three years to the permitting timeline.[53]

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[47] Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249).

[48] *Id.* at 56,368.

[49] Further discussion of this information can also be found at Susan L. Stephens & Timothy M. Riley, *Effect of Third-Party Participation on Phosphate Mine Permitting in Florida*, A.B.A. ENERGY & NATURAL RES. LITIG. COMM. NEWSLETTER, Feb. 2013, at 5.

[50] FLA. STAT. § 373.413– .414 (2012); FLA. ADMIN. CODE r. 62-330.200(3) (2012); FLA. ADMIN. CODE r. 40D-4 (2012).

[51] Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323 (2011); Compensatory Mitigation for Losses of Aquatic Resources, 33 C.F.R. § 332 (2011); Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230 (2011).

[52] No. 08-3886, 2008 WL 5322949 (2008) (Fla. Div. Admin. Hearings Dec. 18, 2008), *aff'd per curiam sub nom.*, Lee County v. Dep't Envtl. Protection¸ 29 So. 3d 301 (Fla. Dist. Ct. App. 2010).

[53] Sierra Club, Inc. v. U.S. Army Corps of Eng'rs, No. 3:10-cv-00564-HLA-JBT (M.D. Fla. Mar. 28, 2012) (order approving settlement agreement and dismissing action with prejudice).

In *FINR II, Inc. v. CF Industries, Inc.*, CF Industries' South Pasture Extension, a 7,500 acre expansion of its existing South Pasture mine, was challenged by an adjacent property owner, who argued that mining was incompatible with its medical treatment facility.[54] This was the first mining case brought since the 2011 amendment to the Florida Administrative Procedure Act, which shifted the burden of proof from applicants to the third party challengers when petitioning DEP for an administrative hearing to modify or deny a proposed environmental permit.[55] The Final Order approved the permits, and the matter is currently under appeal.

Challenges to Florida phosphate mine permits, like those in *Lee County* and *CF Industries*, have become the norm. At the state level, however, recent legislative changes have streamlined and shortened the process, and multiple findings supporting permit issuance have arguably created a tougher litigation climate. At the federal level, the playing field is wide open, particularly given the pendency of the COE's Jacksonville District "Areawide Environmental Impact Statement on Phosphate Mining in the Central Florida Phosphate District" (AEIS) initiated in September 2010. The processing of the AEIS has stopped the issuance of all COE phosphate mine permits. A draft AEIS was published on June 1, 2012. Comments on the draft were officially accepted until August 1, 2012, and the COE has indicated its intention to publish notice of the Final AEIS by March 1, 2013. The COE permits following the AEIS will likely be challenged, but it is unclear how the mining litigation of 2012 will affect those challenges.

## III. LEGISLATIVE DEVELOPMENTS

### *A. Mining Claim Maintenance Fees and Filing Date Amendments Per the Consolidated Appropriations Act*

The Consolidated Appropriations Act of 2012 was signed into law on December 23, 2011.[56] The bill, among other things, amended 30 U.S.C. § 28f(a) (2011). The amendment provided that a "claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. §§ 28-28e) and the related filing requirements contained in section 1744(a) and (c) of title 43."[57] The amendment further provides that the maintenance fee is to be paid "for each [twenty] acres of the placer claim or portion thereof."[58] That is, the $100 fee per claim or site is applied to each twenty acres of an area. For example, where a placer mining claim might include up to 160 acres, rather than treating the entire block as a single claim for fee purposes, the block is broken up into twenty acre parcels for fee purposes.

[54]No. 11-6495, 2012 WL 1564904 (Fla. Div. Admin. Hearings Apr. 30, 2012), *notice of appeal filed*, No. 1D12-3309 (Fla. Dist. Ct. App. July 9, 2012).
[55]FLA. STAT. § 120.569(2)(p) (2011).
[56]Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786.
[57]30 U.S.C. § 28f(a)(1) (2012).
[58]*Id.* § 28f(a)(2).