IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL COALITION, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 3:05-0784

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants,

and

ARCOMA COAL COMPANY, et al.,

Intervenors Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiffs' motion for partial summary judgment [Doc. 118]. In this action, Plaintiffs challenge the U.S. Army Corps' of Engineers ("Corps") final agency decision to issue individual Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, permits for four surface coal mines. Plaintiffs seek a declaratory judgment that (1) the stream segments located between the toes of the valley fills and the sediment pond embankments are "waters of the United States"; (2) the Corps lacks authority to permit discharge from the valley fills into the stream segments as "secondary impacts"; and (3) the discharge of pollutants into the stream segments below the valley fills is impermissible unless in compliance with CWA § 402. For the reasons stated below, Plaintiffs' motion is **GRANTED**.

BACKGROUND

I. Statutory Background

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act aimed to eliminate the discharge of all pollutants into the Nation's waters by 1985. 33 U.S.C. § 1251(a)(1). The Act also sought to improve water quality conditions for fish, shellfish, wildlife, and recreation in and on the water. 33 U.S.C. § 1251(a)(2). Congress considered the use of water for the disposal of waste to be a primary concern in passing the CWA. S. Rep. No. 92-414, at (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674. ("The use of any river, lake, stream or ocean as a waste treatment system [to be] unacceptable.").

To accomplish these objectives, the Act prohibits the discharge of all pollutants except as in compliance with the provisions of the Act. 33 U.S.C. § 1311(a). The discharge of a pollutant is defined broadly to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and pollutant is defined to include not only traditional contaminants, but also solids such as dredged spoil, rock, and sand. 33 U.S.C. § 1362(6). Specifically, the discharge of any pollutant is unlawful unless it complies with the requirements of § 301, § 306, § 402, or § 404. 33 U.S.C. § 1311(a).

Pursuant to § 301, the EPA is required to adopt increasingly stringent, technology-based effluent limitations for points sources.[1] These effluent limitations restrict the quantity, rate, and

[1]A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

concentration of chemical, physical, biological, and other constituents discharged into the navigable waters, 33 U.S.C. § 1362(11), and apply to all point sources that discharge pollutants. 33 U.S.C. § 1311(e). In addition, the EPA is required pursuant to § 306 to implement standards for the discharge of pollutants for newly constructed sources, including buildings, structures, facilities, or installations, that may discharge pollutants. 33 U.S.C. § 1316.

In § 402 of the CWA, Congress established the National Pollutant Discharge Elimination System ("NPDES") permit program to enforce the effluent limitations and performance standards set forth in accordance with § 301 and § 306. The EPA is tasked with administering the NPDES program and is authorized to permit the discharge of any pollutant, or combination of pollutants, so long as that discharge complies with § 301 and § 306. 33 U.S.C. § 1342(a)(1). The NPDES program is designed to limit the discharge of pollutants into waterways as much as technically possible by imposing numerical discharge restrictions. 33 U.S.C. § 1342.

The CWA established a secondary permit program in addition to the NPDES program. In § 404, Congress authorized the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into the water at specified disposal sites. 33 U.S.C. § 1344(a). The Corps' regulations define "fill material" as material placed into waters of the United States that either replaces waters with dry land or changes the bottom elevation of any portion of a water. 33 C.F.R. § 323.2(e)(1)(i)–(ii). The § 404 permit process is a limited program, however, and does not apply to the discharge of pollutants such as sediment.

Congress drafted the Clean Water Act as applying to "navigable waters,"[2] which is statutorily defined within the CWA to be "waters of the United States." 33 U.S.C. § 1362. In 1980, the Corps

[2]*See, e.g.*, 33 U.S.C. §§ 1342(b),1344(a).

and the EPA adopted identical jurisdictional regulations construing the term "waters of the United States" to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(1) (Corps' definition); 40 C.F.R. § 232.2 (EPA's definition). The regulations also include as "waters of the United States" "all impoundments of waters otherwise defined as waters of the United States under the definition." 33 § 328.3(a); 40 C.F.R. § 232.2. The regulations further state that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the [CWA] (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition) are not waters of the United States." 33 § 328.3(a)(4); 40 C.F.R. § 232.2.

II. Factual Background

The underlying facts in this case are largely undisputed. The intervenors consist of several coal mining companies who employ mountaintop removal to mine the seams of coal throughout southern West Virginia. Mountaintop removal mining involves the excavation of mountaintop rock and soil above a seam of coal. Once the coal is removed, the rock and soil is returned to the mountain in an effort to recreate the original contour of the mountain. This process results in excess rock and soil, however, as the mountaintop rock and soil taken from its natural state swells by as much as 15 to 25%. This excess, called overburden, is placed in the valley, resulting in valley fills.

Streams flow through these valleys prior to the placement of overburden. The valley fills permanently bury the streams, destroying the aquatic ecosystems within the streams. The coal companies may only fill the streams pursuant to a permit issued by the Corps, as the overburden is classified as "fill material" according to the CWA regulations.

Surface water and groundwater flowing from the valley fill drains from the toe of the fill into what remains of the stream, carrying sediment from the disturbed land into the stream. This segment is a natural stream and clearly remains within the "waters of the United States" at the time the valley fill is constructed. Sediment is considered a pollutant and the sediment load discharged into the stream cannot exceed a specific quantity under state and federal water quality standards. The preferred method of reducing or removing sediment is through the use of sediment ponds where the sediment settles to the bottom and can be removed periodically. In these permits—as is the industry practice—the applicant is allowed to dam the stream, some distance below the toe of the fill, to create a sediment pond in the stream. The Corps has authority to permit construction of the embankment to create the pond, since that activity involves the use of fill material in the stream. The regulatory practice appears to require applicants to construct the sediment ponds as close to the toe of the fill as practical, considering the terrain and estimated area needed to create the pond. In some cases, the in-stream sediment ponds may be constructed very close to the toe while others may be as much as a half mile downstream. Whatever that distance, the stream receives the sediment laden runoff from the fill and transports it downstream to the sediment pond.

If there was no in-stream sediment pond, the discharge from the valley fill would require a § 402 permit, as a discharge into a stream otherwise subject to sediment limits. In this case, the Corps has not required a permit to discharge into the stream segments flowing into the sediment ponds. Instead, the Corps asserts that these stream segments can no longer be classified as "waters of the United States," because they now form a "waste treatment system."

In this case, Plaintiffs challenge the § 404 permits issued by the Corps authorizing the Intervenors to place non-fill material into the stream segments, which connect each of the valley fills

to the corresponding sediment ponds. These stream segments vary in length, ranging from approximately 275 to 1,970 feet in length.[3] After the valley fill is stabilized, the Corps requires that the embankment creating the sediment pond be removed and the stream segment restored. Plaintiffs argue that permitting this activity violates the CWA's plain language prohibiting the discharge of any unpermitted pollutant into "waters of the United States" except as in compliance with the Act, and that pursuant to the Act, the Corps may only permit the discharge of dredged or fill material. In response, the Corps does not dispute that non-fill or non-dredged material is to be placed into the stream segments. Instead, the Corps argues that the stream segments between the valley fill and the sediment ponds form a "waste treatment system," which is excluded from the "waters of the United States" pursuant to the Corps' regulations. As such, the stream segments do not fall within the jurisdictional bounds of the CWA and, therefore, no CWA permit is necessary. For that reason, the Corps argues that it is irrelevant whether the Corps is authorized to permit discharges into the stream segments under either § 404 or § 402.

DISCUSSION

I. Standard of Review

When reviewing an agency action, the Court first turns to the statute that grants the agency its authority. In examining the statute, the Court conducts the familiar two-step *Chevron* analysis. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). First, the Court determines whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If

[3]For example, the Black Castle mine requires the use of six different in-stream sediment ponds, with 4,475 linear feet of streams located between the toe of the respective valley fills and the corresponding sediment ponds. *Combined Decision Document for Black Castle Contour Surface Mine Application*, 3 (July 18, 2006). Individually, the Corps estimates the individual stream lengths to be 362, 447, 685, 490, 521, and 1970 linear feet, respectively.

Congress' intent is clear, that is the end of the inquiry as both the Court and the agency must abide by it. *Id.* at 842–43. If the statute is silent or ambiguous as to the question at issue, however, the Court must defer to the agency's interpretation of that statute so long as it is "based on a permissible construction of the statute." *Id.* at 843.

In this case, the Court must consider not only the agency's interpretation of the statute, but also the meaning of its regulations interpreting that statute. Therefore, before proceeding to step two of the *Chevron* analysis, the Court first determines the meaning of the regulations before turning to whether the regulation represents a "permissible construction of the statute." *Kentuckians for Commonwealth, Inc. v. Riverburgh*, 317 F.3d 425, 439 (4th Cir. 2003). Where the construction of an agency regulation is at issue, "judicial review of an agency's interpretation of its own regulation is sharply circumscribed." *West Virginia Coal Ass'n v. Reilly*, 728 F.Supp. 1276, 1290 (S.D.W. Va. 1989). The Court gives "controlling weight" to an agency's interpretation of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Kentuckians for Commonwealth, Inc.*, 317 F.3d at 439. If the regulation is unambiguous, no deference is required as the plain language of the regulation, not the agency's interpretation, controls. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

II. Stream Segments as Waters of the United States

The question before the Court is whether the stream segments located between the toe of the valley fill and the sediment ponds are considered "waters of the United States," thereby requiring a permit for the discharge of sediment from the valley fills. Plaintiffs argue that the plain language of the statute clearly demonstrates that Congress intended to regulate all discharges into waters of

the United States or, alternatively, that the Corps' interpretation of "waters of the United States" is patently unreasonable and not entitled to deference. In response, the Corps argues that the stream segments below the fills fall within the Corps' regulatory definition of "waste treatment systems" and, thus, are excluded from the "waters of the United States." Before turning to the Corps' interpretation of its regulations, the Court first must determine whether the CWA is unambiguous as to this matter.

1. Corps Entitled to Interpret Clean Water Act

The initial question under the *Chevron* framework is whether Congress has "spoken to the precise question at issue." *Chevron*, 467 U.S. at 843. If the statute is unambiguous, then the plain language of the statute controls and the agency has no discretion to interpret it. *Id.* Here, the precise question is whether the Clean Water Act defines "waters of the United States" or whether the Act delegates to the Corps the authority to define"waters of the United States."

As discussed above, the Clean Water Act prohibits the discharge of pollutants into "navigable waters" absent a permit. 33 U.S.C. §§ 1342(a), 1344(a). The Act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). In turn, the Corps defines "waters of the United States" in its corresponding regulations. 33 C.F.R. § 328.3. The Fourth Circuit has previously held, and this Court agrees, that the statutory term "'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps." *United States v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003). Therefore, the Corps has the authority to determine which waters fall within the bounds of the statute.

2. Corps' Regulation is Ambiguous

Next, the Court turns to the regulations promulgated by the Corps under this delegated authority. When the language of a regulation is ambiguous, the Court ordinarily defers to an agency's construction of its own regulation. *Christensen*, 529 U.S. at 588. Such deference is entirely inappropriate, however, when the agency interpretation is merely a *post hoc* rationalization offered by the agency to defend its action, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988), and does not reflect the agency's "fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462.

In this case, it is undisputed that the stream segments between the toe of the valley fill and the sediment pond ordinarily would fall within the Corps' definition of "waters of the United States." In its regulations, the Corps defines "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams)." 33 C.F.R. § 328(a)(3). Prior to the construction of the valley fill, the stream segments at issue exist as a portion of a natural stream, thereby falling within the definition set forth in 33 C.F.R. § 328(a)(3). Further, the Corps includes as "waters of the United States" "[a]ll impoundments of waters otherwise defined as waters of the United States under the definition." 33 C.F.R. § 328(a)(4). Therefore, it is clear under this regulatory definition that these streams, as impounded waters otherwise defined as "waters of the United States," are typically subject to the provisions of the CWA. In addition, the stream segments above the dam continue to flow with the same characteristics as before the disturbance.

The Corps asserts that these stream segments form a "waste treatment system," and therefore no permit is required for Intervenors to discharge pollutants into the stream segments. The

regulatory definition of "waters of the United States" explicitly excludes "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA . . . ." 33 C.F.R. § 328(a). Yet, the plain language of this regulation offers little guidance as to what a "waste treatment system" is. The regulation could be read narrowly, excluding only "waste treatment systems" such as "treatment ponds or lagoons designed to meet the requirements of the CWA." Alternatively, the regulation can be construed broadly, to exclude any type of "waste treatment system."

Plaintiffs argue that the regulation must be construed narrowly in order to comport with the purpose and plain language of the Clean Water Act. For that reason, Plaintiffs contend that the "waste treatment system" exclusion only applies to waste treatment systems *outside* of jurisdictional waters and to those treatment systems existing prior to the Clean Water Act regulations, and not newly created systems. In contrast, the Corps argues that the "waste treatment system" exclusion applies whenever the system is created, even if the system is created within the "waters of the United States." Further, the Corps asserts that the "longstanding interpretation" of the EPA has been that "waste treatment systems may be located in waters of the United States where duly authorized through the CWA § 404 permitting process." (Defs.' Mem. in Opp'n 16.)

After careful examination of the regulation, as well as consideration of the parties' arguments, the Court concludes that the regulation is ambiguous as to the meaning of "waters of the United States" and "waste treatment system." Accordingly, the Court will now turn to the Corps' interpretation of "waste treatment system."

3. Corps' Interpretation of "Waste Treatment System"

The Corps asserts that its regulations provide the authority to remove a stream segment temporarily[4] from the "waters of the United States" under the "waste treatment system" exclusion, so long as that system operates to ensure discharges below the sediment pond embankments will meet state water quality standards and comply with CWA § 402. The Corps argues that this interpretation represents the EPA's "longstanding" view and the Corps "adopt[ed] and rel[ied]" on this interpretation. *See, e.g., Combined Decision Document for Camp Branch Surface Mine Application*, 2 (July 6, 2006).

An agency's interpretation of an ambiguous regulation, such as the "waste treatment system" exclusion at issue here, ordinarily controls unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Seminole Rock & Sand Co.*, 325 U.S. at 414). However, an agency decision may only be affirmed on the grounds stated by the agency. *Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 651–52 (1990) ("[I]t is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself."); *SEC v. Chenery Corp.*, 318 U.S. 80, 97 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Further,

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[4]In this case, temporary can mean as many as ten years. For example, the Black Castle mine plan calls for the restoration of the affected stream segments in year 10 of a 10.6 year project plan. *Combined Decision Document for Black Castle Contour Surface Mine Application*, 45–49 (July 18, 2006). Similarly, the stream segments affected during the mining of the Laxare East site will not be restored until year 12 of a projected 15 year plan. *Combined Decision Document for Laxare East Surface Mine Application*, 44–45 (July 18, 2006). None of the sediment ponds may be removed for at least two years after the last seeding of the valley fills, which cannot occur until mining ceases and the fills have been reclaimed. *See, e.g., Compensatory Mitigation Plan for Laxare East Surface Mine*, 1 (Nov. 23, 2005).

no deference is given where an agency interpretation "appears to be nothing more than an agency's convenient litigation position." *Georgetown Univ. Hosp.*, 488 U.S. at 213.

In this case, the Corps' adoption of the "waste treatment system" interpretation supplied by the EPA appears to be precisely the type of *post hoc* rationalization worthy of no deference by the Court. The initial three permits issued by the Corps for the Camp Branch Surface Mine ("Camp Branch"), the Black Castle Contour Surface Mine ("Black Castle"), and the Republic No. 2 Surface Mine ("Republic No. 2") did not purport to rely on the "waste treatment system" exclusion as the basis for not requiring a permit to discharge pollutants into the stream segments located between the valley fills and the sediment ponds. Instead, the Corps explained that it considered the sediment dispersing into the stream segments to be a "secondary impact" to the impounded sediment ponds and required mitigation to offset the environmental impact to the stream segments. *See, e.g.*, *Combined Decision Document for Camp Branch Surface Mine Application*, 142 (July 12, 2005). The Corps did not reference the "waste treatment system" in its initial decisions despite public comments arguing that the Corps had no authority under the CWA to permit the stream segments at issue to be used for "waste transport and assimilation." *See, e.g.*, *id.* The Corps did not "adopt[] and rely[]" upon the EPA interpretation of "waste treatment system" until July 2006, a full year after the Camp Branch permit was issued and a month after Plaintiffs filed their motion for partial summary judgment. Further, the EPA did not provide this interpretive guidance to the Corps until March 1, 2006, well after the Camp Branch, Black Castle, and Republic No. 2 permits had been issued.

It is well-settled that an agency interpretation ordinarily is entitled to deference by the Court. *Auer*, 519 U.S. at 461. Such deference is warranted even where the interpretation first appears in

an amicus brief of an ongoing litigation. *Id.* at 462. Yet, underlying this deferential theory lies the prerequisite that the interpretation reflect the agency's "fair and considered judgment on the matter in question." *Id*. *Chevron* deference and its progeny is predicated, in part, upon superior agency expertise in a particular subject matter, delegated to that agency by Congress, which the courts do not possess. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). In this case, however, the Corps does not appear to be exercising its expertise in interpreting and applying the "waste treatment system" exclusion to the stream segments at issue. Instead, the Corps first issued the Camp Branch, Black Castle, and Republic No. 2 permits without reference, implictily or explicitly, to the "waste treatment system" exclusion despite the longstanding requirement to "cogently explain why it has exercised its discretion in a given manner," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Insur.*, 463 U.S. 29, 48 (1983), within the administrative record in order to allow for judicial review, *see Chenery Corp.*, 318 U.S. at 97. The Corps then advanced this "waste treatment system" interpretation upon reissuance of the permits without any explanation or guidance for whether this represents a clarification or a modification in its decision. Clearly, an agency may alter its decisions or even its legal interpretation of a statute or regulation if necessary. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). However, "an agency changing its course must supply a reasoned analysis." *State Farm Mut. Auto. Insur.*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 845, 852 (D.C. Cir. 1971)).

In this case, the Corps does not provide any reasoned basis for the Court to determine how or why it came to this conclusion. Instead, the Corps appears to be offering a *post hoc* rationalization for the purposes of this litigation and, in not providing a reasoned basis to show that

this interpretation reflects its "fair and considered judgment on the matter," this interpretation is not entitled to deference from the Court. *Auer*, 519 U.S. at 462; *Georgetown Univ. Hosp.*, 488 U.S. at 212–13 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Azko Nobel Salt, Inc. v. Fed. Mine Safety and Health Review Comm'n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (finding agency interpretation not entitled to deference because it did not reflect its fair and considered judgment on the matter); *see also CSI Hydrostatic Testers, Inc. v. Comm'r*, 103 T.C. 398, 409 1994 WL 466342 (1994), ("In short, unless an agency's interpretation of a statute is a matter of public record and is an interpretation upon which the public is entitled to rely when planning their affairs, it will not be accorded any special deference."), *aff'd* 62 F.3d 136 (5th Cir. 1995).

4. EPA Interpretation of "Waste Treatment System"

In addition, the EPA interpretation upon which the Corps relies suffers from similar flaws,[5] primarily that the EPA has inconsistently interpreted the "waste treatment system" exclusion without supplying a reasoned basis to explain its change in position. The fact that the EPA has changed its interpretation, standing alone, does not affect the deference to which an agency interpretation is due. On the contrary, a revised interpretation may still receive deference from the Court because "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. In revising its interpretation, however, the agency must justify its change with a "reasoned analysis." *State Farm Mut. Auto. Insur.*, 463 U.S. at 57. In this case, the Court finds no reasoned analysis to support the change in the EPA's interpretation and, therefore, accords it no deference.

[5]Although the EPA is not a party to this litigation, its interpretation is entitled to deference. *See Chevron*, 467 at 844; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (explaining that deference is to be given to the interpretation given a statute by the agency charged with its administration).

The initial regulations promulgated by the EPA were quite clear in defining "waste treatment system." The original definition of "waters of the United States" included an additional sentence limiting the "waste treatment system" exclusion to manmade bodies of water, not the impounding of natural waters.[6] The EPA suspended this clarifying sentence shortly after it was promulgated because of concerns that the regulation may be interpreted to require permits for existing waste treatment systems, such as power plant ash ponds.[7] 45 Fed. Reg. 48,620 (July 21, 1980). In suspending the sentence, the EPA explained that the purpose behind the sentence had been to "ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system." *Id.* Although the clarifying sentence was suspended, the EPA stated that it intended to develop immediately a revised definition and publish it as a proposed rule for public comment. *Id.* It never released this planned revision.

Despite the suspension, the EPA continued to adhere to this interpretation of "waste treatment system." This can be seen through both internal memorandum as well as litigation within

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[6] Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 432.11(m) which also meet the criteria for this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

45 Fed. Reg. 33,424 (May 19, 1980).

[7] The plaintiffs and intervernors focus heavily in their briefs on whether this suspension had any legal effect on the earlier promulgated rule. The Court declines to consider this argument as it would not materially effect the outcome of this case.

this very Court. For example, a 1986 internal EPA memorandum, relying on the preamble to the 1980 regulations,[8] explained that although "[o]ne could argue that the suspension . . . is an affirmative statement by EPA that any 'waste treatment system' which is 'designed to meet the requirements of the CWA' is excluded from the definitions of 'waters of the U.S.,' not withstanding its creation in or by impounding such waters," such an interpretation would be "inconsistent with EPA's intent." Memorandum from Marcia Williams, Director, EPA Office of Solid Waste to James H. Scarbrough, Chief, Residuals Management Branch, Region IV, *Closure of a DOE Surface Impoundment that Lost Interim Status*. (April 2, 1986), *available at* http://yosemite.epa.gov/osw/rcra.nsf/documents/4BD7508AD59EA15F852565DA006F0A63. The memorandum also stated that "[i]n applying this interpretation [of the 'waste treatment system' exclusion] to specific cases EPA applies a standard which treats newly created impoundments of waters of the United States as "waters of the U.S.," not as "waste treatment systems designed to meet the requirements of the CWA . . . ." *Id.*

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[8]The EPA included the preamble to explain a number of changes to the definition of "waters of the United States," including this portion explaining the "waste treatment system" exclusion:

> The proposal exempted "treatment ponds or lagoons designed to meet the requirements of the CWA" from the definition of navigable waters. To clarify that the scope of this exemption is not limited to treatment ponds or lagoons, it is now limited to cover "waste treatment systems including treatment ponds or lagoons . . . ." Because CWA was not intended to licenses dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting, interstate or foreign commerce.

45 Fed. Reg. 33,298 (May 19, 1980).

In addition, coal mining associations and mining companies in 1989 brought suit in this Court against the EPA to attack this interpretation of the "waste treatment system" exclusion. The EPA previously had announced that the "impoundment of waters of the United States for instream treatment of mining related wastewaters is prohibited." *West Virginia Coal Ass'n v. Reilly*, 728 F.Supp. 1276, 1279 (S.D. W. Va. 1989) (quoting EPA Region III Policy for Instream Treatment of Mining Wastewaters 1 (1987)). As a result of this policy, the EPA had objected to numerous NPDES draft permits issued by the West Virginia state agency charged with administering the local NPDES program. Coal mining companies filed suit, arguing that the EPA had no authority to regulate in-stream fills and ponds. Much of the litigation focused on the suspended sentence within the 1980 regulations. The coal companies argued that by suspending the final sentence, the EPA eliminated the requirement that treatment ponds be constructed in manmade bodies of water in order to fall within the "waste treatment system" exclusion. *Id.* at 1289. The EPA countered that the waters above the treatment ponds remained "waters of the United States" because "they constitute[d] 'an impoundment of waters otherwise defined as waters of the United States.'" *Id.* at 1290 (quoting 40 C.F.R. § 232.2(q)(4)). The EPA argued that the suspended sentence was intended to be explanatory, not definitional, and therefore, its suspension had "no effect upon the clear definitional mandate that impoundments of waters of the United States remain 'waters of the United States.'" *Id.* This Court upheld the EPA's interpretation, finding it to be neither plainly erroneous or inconsistent with the regulation, *id.*, and the Fourth Circuit subsequently affirmed, holding that "the in-stream treatment ponds and the waters above such ponds fall within the definition of 'waters of the United States.'" *West Virginia Coal Ass'n v. Reilly*, 932 F.2d 964, at *5 (4th Cir. 1991) (unpublished).

In the years following *Reilly*, the EPA appears to have selectively altered its interpretation of "waste treatment systems", albeit without offering any explanation as to why the exclusion applies in certain instances and not others. In October 1992, the EPA issued a memorandum to settle a disagreement between the Corps and the EPA as to whether the discharge of mine tailings from two Alaskan gold mine projects into sediment ponds required a § 402 permit from EPA or a § 404 permit from the Corps. *See* Memorandum from LaJuana S. Wilcher to Charles E. Findlay, *Clean Water Act Regulation of Mine Tailings Disposal* (Oct. 2, 1992), attached as Ex. 1, Defs.' Mem. in Opp ("Wilcher memo"). The memorandum concluded that neither a § 402 permit nor a § 404 permit was required because the creation of the sediment pond, "if permitted by the Corps under Section 404 for purposes of creating a waste treatment system, would no longer be waters of the United States." *Id.* This position was contrary to that advanced in the *Reilly* litigation just a few years earlier, yet the EPA failed to explain the change in policy.

In a later memorandum dated March 1, 2006—the memorandum upon which the Corps claims to have relied[9]—the EPA purported to provide "clarification regarding the applicability of Clean Water Act (CWA) Section 404 to the regulation of waste treatment systems, constructed in waters of the United States, associated with surface coal mining activities." *See* Memorandum from

[9]Curiously, the March 2006 memo also describes a 2004 EPA memo to the Corps concerning the Kensington mine project, the mine discussed in the 1992 Wilcher memorandum. March 2006 memo at 2. In this 2004 memorandum, the EPA explained that the agencies' revised definition of "fill material" allowed the Corps to regulate the discharge of mine tailings into impounded waters pursuant to § 404 because the tailings had the effect of raising the bottom elevation of the lake. As a result of this 2004 memorandum, the Corps did not rely upon the "waste treatment system" exclusion in issuing CWA permits for the Kensington mine, despite the availability of the 1992 Wilcher memo. These permits have subsequently been vacated, as the Ninth Circuit found that the CWA does not provide any § 404 exception for the performance standards promulgated pursuant to § 301 and § 306. *See Se. Alaskan Conservation Council v. U.S. Army Corps of Engineers*, -- F.3d ----, 2007 WL 1469694 (9th Cir. 2007).

Benjamin Grumbles to John Paul Woodley (March 1, 2006), attached as Ex. 2, Defs.' Mem. in Opp ("March 2006 memo"). This clarification memorandum applies "only to the particular circumstances of surface coal mining operations as practiced in the Appalachian Mountain states." *Id.* Relying on the 1992 memorandum, the EPA explains that, in these circumstances, the "waste treatment system exclusion continues to apply to the creation or use of a waste system in waters below a valley fill permitted by the Corps." *Id.* The EPA then discusses the impracticality of locating the sediment pond directly below the valley fill, which, therefore, requires some portion of the stream to be used to transport water from the fill to the sediment pond below. *Id.* As a result, the stream segment is "an unavoidable and necessary component" of the treatment system. *Id.* In conclusion, the EPA explains that it defines the physical extent of the "waste treatment system" to include the embankment of the sediment pond at one end and the toe of the valley fill at the other. *Id.*

Clearly, the EPA now advances a different interpretation of the "waste treatment system" exclusion that conflicts with the interpretation offered contemporaneously with the enactment of the regulations and subsequent decade.[10] An agency may revise or alter its interpretation over time, but this revised interpretation may be entitled to less deference than a position consistently held, particularly when the agency does not provide a reasoned analysis for the revision. *Good Samaritan Hosp.*, 508 U.S. at 417 ("[A]n administrative agency is not disqualified from changing its mind . . . . On the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due.") (citations omitted). The EPA has discretion to adopt a different interpretation, but

[10]It appears this new interpretation applies only in the context of surface coal mining in the Appalachian mountains, however, and not uniformly throughout the nation.

in doing so it has a "duty to explain its departure from prior norms." *Am. Fed'n of State, County, & Mun. Employees v. Am. Int'l Group, Inc.*, 462 F.3d 121, 129 (2d Cir. 2006) (quoting *Atchinson, Topeka & Sante Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)). In order for a revised interpretation to be entitled to deference, the agency must supply a reasoned analysis for the change. *State Farm Mut. Auto. Insur.*, 463 U.S. at 57; *see also Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 580 (2d Cir. 1994) ("[A]n agency may alter its interpretation of a statute so long as the new rule is consistent with the statute, applies to all litigants, and is supported by a reasoned analysis.") (citation and quotation omitted). In this case, the EPA provided no reasoned analysis in the Wilcher memo for the changed interpretation of the "waste treatment system" exclusion. The Court cannot speculate as to the EPA's reasoning in issuing this memorandum, *Chenery Corp.*, 318 U.S. at 97 (instructing courts not to stray from the reasons provided in the administrative record when performing judicial review of an agency action), but it hardly appears to set forth a uniform, nationwide change to its "waste treatment system" interpretation. If anything, the memorandum suggests that this "waste treatment system" interpretation applies only in the context of two specific Alaskan gold mines, given that it was issued in a fact specific situation, not through a national policy statement or notice and comment procedures.

Similarly, the March 2006 memo contains no reasoned analysis for the changed interpretation. The March 2006 memo purports to rely upon the clarification of the "waste treatment system" exclusion provided in the Wilcher memo and offers no other reasoning as to why the EPA

changed its interpretation within the Appalachian region.[11] Moreover, it fails to explain why this interpretation applies "only to the particularly circumstances of surface coal mining operations as practiced in the Appalachian Mountain states." March 2006 memo at 1. The memorandum describes the overburden byproduct created by mountaintop removal mining process, but does not show how this region differs from surface mining operations throughout the United States. Further, the March 2006 memo states that the "waste treatment system" exclusion *continues* to apply to waters below a valley fill. March 2006 memo at 2 (emphasis added). Yet, the Corps provided no other evidence in the record to show when the EPA changed its interpretation within the Appalachian region post-*Reilly*, suggesting this interpretation within the Appalachian region is a *post-hoc* rationalization similar to that of the Corps.

As a whole, the EPA interpretation falls short. Neither the Wilcher memo nor the March 2006 memo provides a reasoned analysis to explain why the EPA departed from its earlier interpretation of the "waste treatment system" exclusion. Without such analysis, the Court cannot defer to the revised definition. *State Farm Mut. Auto. Insur.*, 463 U.S. at 57. Moreover, the timing of the March 2006 memo, in combination with the specific limitation to the Appalachian region, suggests this interpretation is a *post-hoc* rationalization, *Georgetown Univ. Hosp.*, 488 U.S. at 212–13, not the "fair and considered judgment" of the EPA. *Auer*, 519 U.S. at 462. There is nothing within the memoranda, nor within the administrative record, that justifies a different interpretation for the Appalachian region than the rest of the nation. Accordingly, the Court finds

[11]The 1989 *Reilly* litigation had made clear that the EPA interpreted the "waste treatment system" exclusion as not applying to in-stream sediment ponds created for Appalachian coal mining operations.

the revised EPA interpretation is not entitled to deference and is left to reconcile the "waste treatment system" exclusion with the plain language of the regulations and the statute.

5. Corps Interpretation Inconsistent with CWA

The Court must now determine the meaning of the "waste treatment system" exclusion in the context of this matter. *See, e.g.*, *Rapanos v. United States*, 126 S.Ct. 2208 (2006) (interpreting the phrase "waters of the United States" after determining that Corps' interpretation not entitled to deference for not being based on permissible construction of statute); *see also Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction . . . ."). Administrative regulations must be construed consistently with their governing statute. *United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("For regulations, in order to be valid must be consistent with the statute under which they are promulgated."). If a conflict exists within the regulations, the provisions should be interpreted in a manner that is consistent with legislative intent. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("[The Court] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

The Court must construe exceptions to the jurisdictional and permit requirements of the CWA narrowly in order to achieve the clear mandate of the CWA. *See United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). This is evidenced by Congress' intent that the term "navigable waters" be given the "broadest possible constitutional interpretation." S. Conf. Rep. 92-1236, at 144, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. Congress also expressed concern with the use of

rivers, lakes, streams, or the ocean as waste treatment systems and deemed their use in such regard as "unacceptable." S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674.

Congress intended the CWA to be an absolute prohibition against the discharge of pollutants not in compliance with § 301 and § 306. *E.I. du Pont de Nemours & Co.*, 430 U.S. 112, 138 (1977). The language of the Clean Water Act clearly prohibits *any* discharge that does not comply with the provisions of the Act, including § 301 and § 306, as well as §402 and § 404. Specifically, § 301(e) applies the effluent limitations established by EPA to the discharge of pollutants from *all* point sources. 33 U.S.C. § 1311(e). Further, § 306(e) prohibits *any* discharge not in compliance with the standards of performance promulgated by the EPA. 33 U.S.C. § 1316(e).

As a result, it is difficult to reconcile the Corps' interpretation in this matter. In explaining the discharge of excess spoil sediment into the streams below the valley fills, the Corps reasons that only a § 404 permit is required to place fill material into jurisdictional waters to impound the stream and construct the sediment ponds. (Corps' Mem. in Opp. at 10.) Once the in-stream sediment ponds are constructed, the Corps argues that the stream segments, which undoubtedly were included within the "waters of the United States" before construction of the ponds, become "temporarily removed"[12] from that definition as part of a "waste treatment system." (*Id.* at 12.) Clearly, § 404 is inapplicable to these stream segments as the sediment flowing into the streams is a pollutant, not fill material as defined by the Corps. Therefore, the discharge of sediment into these stream segments is unlawful under the CWA if these stream segments remain "waters of the United States" without a § 402 NPDES permit.

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[12]These streams ultimately are removed from the protection of the Clean Water Act for a period of ten or more years. *See, e.g., Combined Decision Document for Black Castle Contour Surface Mine Application*, 45–49 (July 18, 2006).

In effect, the Corps' approach results in the following sequence: (1) the Corps issues a § 404 permit to allow the construction of the valley fill; (2) the applicant selects the location of the sediment pond within the stream—which at this time falls within the "waters of the United States—and, given the area's topography, could be as far as half a mile downstream from the fill; (3) the Corps then issues a § 404 permit to allow the placement of fill material to construct the sediment pond; and (4) the stream below the fill, which was protected as a "water[] of the United States" until the moment the sediment pond was constructed, is suddenly "temporarily removed" from the protection of the Clean Water Act because it lies between the fill and the sediment pond.

The Corps' interpretation presents a contradiction between the "waste treatment system" exclusion and 33 C.F.R. §§ 328.3(a)(3) and (a)(4). Prior to the construction of the sediment ponds, the streams below the valley fills satisfy the definition of "waters of the United States" under 33 C.F.R. § 328.3(a)(3). After impounding the stream, the sediment pond then falls under 33 C.F.R. § 328.3(a)(4) as the "impoundment[] of waters otherwise defined as waters of the United States." The streams above the sediment ponds remain unaffected by the impoundment and, as natural streams, continue to satisfy the regulatory definition of "waters of the United States" as set forth in 33 C.F.R. § 328.3(a)(3).

The Corps interprets the exclusion as removing waters plainly defined as "waters of the United States"—the natural stream segments above the sediment pond and the sediment pond created by impounding the natural stream—from the protection of the CWA. The Corps' interpretation of the "waste treatment system" exclusion appears to have no limits, to exclude any and all "waters of the United States" used to transport a pollutant to system designed to meet CWA requirements. This interpretation allows the exception to swallow the rule. The Corps attempts to

label these waters as part of a "waste treatment system" upon its belief that protected waters can lose that status by assisting in the discharge of pollutants. The Clean Water Act offers no such provision. Rather, the Act provides an absolute prohibition against the discharge of pollutants without a NPDES permit. Considering that the EPA previously considered these stream segments as impounded waters protected by the CWA, the Court finds the Corps' interpretation to be an unreasonable interpretation of the statute. Accordingly, the Court adopts the EPA's original *Reilly* interpretation of the "waste treatment system" exclusion. *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (deferring to an agency's initial interpretation of a statute made contemporaneously with the enactment of that statute and rejecting agency's subsequent conflicting interpretation). Therefore, the stream segments below the fills remain "waters of the United States." As a result, the Corps has no authority under the Clean Water Act to permit the discharge of pollutants into these stream segments.

In conclusion, the Court, construing the regulation narrowly, interprets the "waste treatment system" exclusion to not apply to in-stream waste treatment systems incorporating waters already within the regulatory definition of "waters of the United States." This interpretation prevents manmade systems from inadvertently falling under the auspices of the CWA, while still protecting the natural waters as Congress intended. *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system [to be] unacceptable.").

III. Plaintiffs' Claim is not Untimely

Although the Corps has argued that Plaintiffs' claim is untimely because it was not filed within the six year statute of limitations following the enactment of the regulations in 1980, this

argument has little merit. The plaintiffs in this case have not challenged the Corps authority to promulgate the regulations nor the regulations per se. Rather, Plaintiffs contend the Corps' interpretation of these regulations violates the CWA. "[A] district court can hear challenges to an interpretation placed on a regulation, but not challenges to the regulation itself." *Pittston Co. v. Lujan*, 798 F.Supp. 344, 353 (W.D. Va. 1992). Accordingly, the Corps' argument is inapplicable to this matter.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment [Docket #118] is **GRANTED**. The Court **FINDS** the "waste treatment system" exclusion inapplicable to the stream segments below the valley fills and **FINDS** the Corps does not possess authority to permit the discharge of pollutants into these stream segments pursuant to the Clean Water Act.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: June 13, 2007

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE