Mountaintop removal at Oven Fork, near Whitesburg (Letcher County, KY). From The Mountaintop Removal Roadshow, http://mountainroadshow.com

The D.C. Circuit has rejected a challenge to consultation procedures developed by the EPA and Corps of Engineers for reviewing mountaintop removal mining permits and to EPA's guidance for reviewing permits issued by the Corps or state permitting agencies.

Because it rests on standard administrative law, the decision shouldn't merit comment. But it does, because it comes at a time when there is a great deal of judicial confusion specifically about the roles of EPA and the Corps in Clean Water Act section 404 decisions and generally about review of guidance documents. This concise, cogent opinion could help clear up that confusion.

Mining interests argued that both the consultation procedures, dubbed by the agencies the Enhanced Coordination Process, and the guidance violated the Clean Water Act and Administrative Procedure Act. The Court of Appeals disagreed on both counts. It held that the Enhanced Coordination Process, which essentially provided that EPA would screen a number of pending applications for Clean Water Act section 404 permits for mountaintop

removal projects for potential problems before the Corps made permit decisions, was a procedural rule allowed by the Clean Water Act and did not require notice and comment rulemaking.

Not exactly newsworthy, except that the District Court had gotten it badly wrong, holding that the Enhanced Coordination Process overstepped EPA's role in the section 404 permitting process. That never made any sense — EPA, after all, shares responsibility for developing the rules under which permits are issued, and has the right ultimately to veto any permit it finds allows unacceptable environmental impacts. Of course EPA should be allowed to signal the Corps early in the process if it thinks the Corps is headed off the rails. But the District Court's opinion wasn't entirely out of the blue. Mining interests have been pushing hard to limit EPA's role, because they perceive the Corps as a more friendly regulator. And they got some help from the Supreme Court in a 2009 case called Coeur Alaska v. Southeast Alaska Conservation Council, where 6 justices emphasized that the Corps, rather than EPA, had jurisdiction over sludge discharges of slurry mining waste.

This opinion reminds us that EPA has a key statutory role in section 404 permitting decisions, and avoids artificially relegating that role to the end of the process. As the court says:

> Given the backdrop of Executive Branch tradition, sound government practice, and constitutional principle, we will not, as plaintiffs request, read into this statute an implicit congressional intent to restrict consultation and coordination between two executive agencies.

That language might trouble environmentalists if extended to White House involvement. Indeed, when EPA was developing its mountaintop removal guidance I criticized the White House Office of Management and Budget for delaying a process in which I think it had no place. But you can't argue with it where two (or more) executive agencies have been told by Congress that they must be involved.

As for the EPA guidance, which explained what the agency would expect states and the Corps to require before issuing permits under CWA 402 and 404, the court finds that was a general policy statement not subject to judicial review. Again this shouldn't be news. The final guidance, as I explained earlier and as the court here notes, repeatedly emphasized that it was not legally binding but simply explained what the statute itself requires. The court explains:

> An agency action that merely explains how the agency will enforce a statute or regulation – in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule – is a general statement of policy.

Statements of policy, like this one, need not be preceded by notice and comment rulemaking, and are not themselves subject to review. When and if EPA, the Corps, or a state denies a permit, that decision will be subject to challenge and must be defended by reference to binding law, not to the guidance. But the guidance itself is not subject to judicial review.

That's an important holding, especially coming from the D.C. Circuit, which because of its docket is highly influential on matters of administrative law. The judiciary (including other panels of this court) has been tying itself in knots over what agency statements are reviewable and when. Most notably, in Iowa League of Cities v. EPA, 711 F.3d 844 (8th Cir. 2013), the Eighth Circuit concluded that two EPA letters to Congressmen about implementation of the Clean Water Act were judicially reviewable. Although EPA does not regard that decision as binding nationally, it has emboldened regulated industries to challenge a number of other informal agency interpretations. The D.C. Circuit's opinion in this case should help put the lid on those kinds of challenges, and give the agency the freedom to discuss it's non-binding interpretations of the statute it implements without fear of immediate litigation.