June 2007

Statutory Complexity Disguises Agency Capture in Citizens Coal Council v. EPA

Reid Mullen

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38PC1H

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
In Citizens Coal Council v. EPA, an en banc panel for the Sixth Circuit Court of Appeals considered a challenge to EPA regulations promulgated pursuant to the Clean Water Act (CWA). The EPA promulgated the regulations in an attempt to incentivize coal companies to remine once abandoned mine sites. Petitioners, two nonprofit environmental organizations, claimed that the regulations violated the Clean Water Act and Administrative Procedure Act by allowing coal companies to remine without adhering to any enforceable pollution limitations. The EPA countered that more remining would improve water quality at abandoned sites.

The Sixth Circuit rejected Petitioners’ claims, finding that the EPA’s regulations were reasonably consistent with the CWA’s goal of restoring the integrity of the nation’s waters. In so holding, the court struggled to understand the meaning of the CWA’s complex procedural and technical language, and allowed the EPA to justify the rule based on the CWA’s broad statement of purpose. Such superficial judicial review sets a dangerous precedent in environmental law, because it exacerbates the risk of agency capture.

A captured agency promulgates regulations that benefit industry, not the environment. Without the judiciary acting as a meaningful check against agency capture, the public loses a valuable tool in the fight against major industrial polluters like the domestic coal industry. Citizens Coal Council therefore stands as a cautionary tale, a warning sign that the judiciary may be unable to identify agency capture where the regulations...
at issue are promulgated pursuant to a complex statute like the Clean Water Act.

Introduction ............................................................................................................. 928
I. Discussion ............................................................................................................. 929
   A. Coal Mining, the U.S. Energy Infrastructure, and the Environment ................. 932
   B. EPA Regulation of Coal Mining Under the Clean Water Act ............................. 934
      1. The EPA, the NPDES, and the Requirements of the CWA ............................... 936
         a. The EPA Must Analyze Existing Technology to Determine Effluent Limitations for Each Point Source of Water Pollution .................................. 936
         b. Effluent Limitation Guidelines and NPDES Permits ......................................... 938
      2. Early EPA Coal Mining Regulations and the Continuing Problem of Abandoned Mines .............................................................. 940
         a. Congress Attempts to Address the Abandoned Mine Problem by Amending the CWA ......................................................... 941
         b. EPA Promulgates a New Rule Intended to Act as a Further Incentive to Coal Remining Operations .................................... 943
   C. Environmental Public Interest Groups Challenge the EPA in Federal Court, Claiming that the Final Rule Violated the Clean Water Act and Administrative Procedure Act .............................................................. 945
II. Analysis ............................................................................................................... 948
   A. The Court Should Have Found the Final Rule Arbitrary and Capricious Because the EPA Established Effluent Limitations Without Assessing Existing Technology to Determine What Level of Pollution Reduction Was Attainable ......................................................... 948
   B. The Complexity of the CWA Prevented the Sixth Circuit from Engaging in a Meaningful Review of the Final Rule ............................. 950
   C. Without the Judiciary Operating as a Meaningful Check on EPA Action, the Agency is at a High Risk of Capture ................................................................. 951
Conclusion .............................................................................................................. 953

INTRODUCTION

The Clean Water Act (CWA or “the Act”) is intended to “restore and maintain the chemical, physical, and biological integrity of the
Nation's waters.”¹ The purpose may seem simple, but the CWA is an overwhelmingly complex statute. The Act is a virtual labyrinth of sections and subsections piled upon references and cross-references. In a recent decision regarding CWA pollution control standards for certain coal mining operations, the U.S. Court of Appeals for the Sixth Circuit struggled to reconcile the Act’s narrow provisions with its broad purpose. The result was a decision that decided nothing. Industry-friendly and procedurally defective rules promulgated by the Environmental Protection Agency (EPA) survived three years of costly litigation simply because the court found that the rules were intended to “restore and maintain the . . . integrity of the Nation’s waters.”²

The *Citizens Coal Council* litigation is a cautionary tale of what happens when reviewing courts fail to understand the meaning and requirements of the many complex provisions in the Clean Water Act. By allowing the EPA to justify its actions based solely on the Act’s general purpose, the court failed to take a “hard look”³ at the real reasons behind the agency’s industry-friendly rule. Specifically, the court never explored the possibility that the rule could reflect an instance of agency capture where the real beneficiary was the domestic coal industry, not the environment. This toothless form of judicial review effectively eliminates the judiciary as a mechanism to identify and protect against agency capture, and the environment will suffer the consequences.

This Note traces the history of the *Citizens Coal Council* litigation and exposes the many flaws in the Sixth Circuit’s decision. The Introduction addresses the issues at stake in the case and provides a general theory of agency capture. A brief overview of the coal mining industry and the Clean Water Act follows, and Part I concludes by describing the *Citizens Coal Council* holding. Part II of this Note analyzes how the complexity of the CWA influenced the court’s decisionmaking process and how that decisionmaking process exacerbated the problem of agency capture.

I. DISCUSSION

The *Citizens Coal Council* litigation began in January 2003 when two environmental groups (“Petitioners”) challenged an EPA rule designed to encourage coal companies to remine abandoned sites.⁴ Petitioners

---

² Id.
³ See, e.g., Pikes Peak Broad. Co. v. Fed. Commc’ns Comm’n, 422 F.2d 671, 682 (D.C. Cir. 1979); see also Nat’l Lime Ass’n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (noting that the phrase “hard look” refers to an agency’s duty in promulgating a rule and a court’s duty in reviewing the rule).
claimed that the rule violated the Clean Water Act and the Administrative Procedure Act by allowing coal companies to remine without complying with the CWA's existing pollution reduction requirements.\(^5\) Almost three years later, a panel majority of the Sixth Circuit rejected all of Petitioners' claims and found for the EPA.\(^6\) The court praised the EPA's efforts to clean abandoned mine sites and even went so far as to imply that the CWA required, not just permitted, the EPA to promulgate the rule.\(^7\)

The Sixth Circuit's decision raises an obvious threshold question: if the EPA's rule was "entirely consistent with the CWA's goal of eliminating water pollution,"\(^8\) then why did Petitioners—two nonprofit environmental organizations—spend almost three years challenging the rule in federal court? The simple answer is that the rule went too far. In its zeal to encourage remining, the EPA ignored the CWA's technical and procedural requirements. Because these requirements are so difficult to understand and apply, the Sixth Circuit was unwilling or unable to engage in meaningful judicial review. Instead, the court allowed the agency to justify the rule merely by alluding to the first sentence of the first section of the first Clean Water Act amendments.

*Citizens Coal Council* may also reflect an institutional problem in the coal mining regulatory framework. As detailed throughout this Note, remining abandoned sites often results in improved water quality. The same abandoned sites contain large coal deposits that offer significant profit potential for the coal industry. Consequently, abandoned mines create a unique scenario in the contentious and adversarial arena of environmental policy: the economic interests of the regulated industry and the environmental interests of the general public seem to converge.

Both the coal industry and the environment suffer when mine sites remain vacant. The coal industry wants to remine as much as possible because the profit potential is enormous. Environmentalists want to remine as much as possible because the ecological benefits are tremendous.\(^9\) While the convergence of environmental and industry goals ostensibly creates a strong foundation for the EPA to act, it also increases

\(^{5}\) Citizens Coal Council v. EPA (*Citizens Coal Council I*), 385 F.3d 969, 977–78 (6th Cir. 2004), vacated, 447 F.3d 879 (6th Cir. 2006) (en banc).

\(^{6}\) Citizens Coal Council v. EPA (*Citizens Coal Council II*), 447 F.3d 879, 902 (6th Cir. 2006) (en banc).

\(^{7}\) See id. at 906 ("[T]he Final Rule was a reasonable response to a real problem. Had the EPA done nothing in light of this problem, it would not have been acting to fulfill the mandate of Congress to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" (quoting 33 U.S.C. § 1251)).

\(^{8}\) Id. at 900.

\(^{9}\) See JAMES MCELFISH, JR. & ANN BEIER, ENVIRONMENTAL REGULATION OF COAL MINING: SMCRA'S SECOND DECADE 278 (1990); see also PA. DEP'T OF ENVT'L. PROTECTION, DISCUSSION PAPER ON WATER QUALITY ISSUES RELATED TO COAL MINING (1998).
the likelihood that a "captured" EPA will be able to promulgate pro-
industry regulations disguised as pro-environmental regulations.

Agency capture is a theory that examines the relationship between a
regulated industry (e.g., coal mining) and its regulators (e.g., EPA).
An agency is said to be "captured" when the regulated industry is so
powerful and intertwined with the agency's decisionmaking that the
industry, not the agency, sets regulatory policy. A captured agency
therefore makes decisions that reflect the interests of the regulated
industry rather than the general public. Such a scenario is particularly
dangerous in environmental law because the public interest in a clean,
safe, and healthy environment is usually in direct conflict with the
industry's goals to maximize profits.

The judiciary can and should play an important role in combating
agency capture. Careful judicial review provides a critical check against
capture by ensuring that administrative agencies fulfill their statutory
obligations rather than serve the very entities they are charged with
regulating. There should be little room for a captured agency to
promulgate legally defective, industry-friendly policies where Congress
has passed a comprehensive statute, and the courts actively force
compliance with that statute.

The Clean Water Act is nothing if not comprehensive. However, to
ensure compliance with a statute the reviewing court must first
understand what the statute requires. As the following discussion details,
the CWA's overwhelming complexity incapacitated the Sixth Circuit's
ability to assess the EPA's regulations in *Citizens Coal Council*. The
court's superficial review deprived the public of an important check
against the powerful domestic coal industry and created a regulatory
scheme ripe for future exploitation.

The relationship between the coal industry and the EPA is
complicated. The EPA is not the primary administrative agency charged
with monitoring the environmental impacts of coal mining. The Office of
Surface Mining Reclamation and Enforcement (OSMRE) administers
the Surface Mining Control and Reclamation Act (SMCRA), which
regulates nearly all aspects of coal mining. The EPA regulates the coal

11. *See id. at 53.*
12. The OSMRE sits in the Department of the Interior. U.S. Office of Surface Mining
SMCRA contains many provisions relating to the environmental effects of coal mining—
including a federally-administered bond program designed to ensure reclamation—the statute
does not impose specific water pollution control requirements. This Note references SMCRA
only in the context of general regulations applicable to coal mining; the *Citizens Coal Council II*
litigation concerned EPA's obligations under the CWA only.
industry only in the context of the water pollution problems that mining creates. This patchwork regulatory scheme is defined as much by political maneuvering as it is by statutes and regulations.

A. Coal Mining, the U.S. Energy Infrastructure, and the Environment

The United States produces over one billion tons of coal each year.\textsuperscript{14} Coal production is vital to domestic energy needs, as coal is used to produce over half the electricity generated in the United States.\textsuperscript{15} Coal-fired electric power plants consume roughly 992 million tons of coal per year—or 85 percent of all domestically-produced coal.\textsuperscript{16} As energy costs continue to rise and foreign relations with oil exporting countries become more tenuous, the importance of U.S. coal production will likely increase. The coal industry is prepared: domestic coal production has increased over 90 percent since 1970, reaching record levels in 1997.\textsuperscript{17} Recent estimates by the Energy Information Administration show that the reserve base of U.S. coal exceeds 474 billion tons—enough coal to last 250 years.\textsuperscript{18}

Coal mining creates serious environmental problems in the waters near mine sites. Pyrite and other sulfide minerals unearthed during the mining process\textsuperscript{19} react with air and groundwater to form acids and dissolved metals such as aluminum, iron, and manganese.\textsuperscript{20} These mining byproducts drain into large reservoirs in the cavern-like passageways below coal mining sites and run off into nearby rivers and streams.\textsuperscript{21} Groundwater flows through the contaminated reservoirs, and polluted streams connect with lakes and rivers. As a result, acid mine drainage

\begin{footnotes}
\item[16.] See Proposed Rules, 65 Fed. Reg. at 19,444.
\item[17.] See id.
\item[19.] Id.; U.S. EPA, supra note 18, at 1–2.
\end{footnotes}
spreads into an ever-expanding network of ground and surface water. The net effect is an environmental disaster.

Thousands upon thousands of miles of streams are contaminated by pollutants formed during the coal mining process. Contaminated waters are often incapable of supporting certain types of fish or other aquatic life due to low pH levels and high concentrations of dissolved metals. The few fish species that can survive begin to dominate the aquatic community, depleting species diversity in already polluted rivers and streams. Increased acidity induces new chemical reactions that exacerbate natural toxicity problems in receiving waters. Additionally, dissolved iron coats river banks and stream floors with a rusty, brownish-red discoloration. These various adverse environmental effects combine to make coal mining the single largest source of industrial pollution in the Appalachian region of the eastern United States.

The environmental impacts of coal mining do not abate when mining stops. Mine lands that are not restored to their original condition—lands that are not "reclaimed"—continue to produce acid drainage long after the mines are abandoned. Moreover, the dissolved metals created during the mining process remain in the soil for years before slowly precipitating into ground water. For example, Roman mine sites in Great Britain still generate acid mine drainage today, some 2,000 years after abandonment. Acid mine drainage currently impacts almost 10,000 stream miles in the United States. Ninety percent of this impact comes from abandoned mines where no private individual or company is responsible for treating the water.

Abandoned mines are not devoid of coal, and technological advances have made it potentially profitable to extract coal at many sites previously thought to be exhausted. The U.S. Department of Energy (DOE) has estimated that abandoned mine lands in Appalachia may hold over one billion tons of extractable coal. Because of the rapid improvement of mining technology and the ever-expanding market for domestically-produced energy, leftover deposits at abandoned mines
could prove to be extremely important to the U.S. coal industry. At current market prices, the abandoned mine lands in Appalachia alone could hold up to $25 billion dollars worth of coal.35

Although the environmental risks of coal mining are significant, coal remining—the practice of mining abandoned sites—actually can improve water quality by reducing pollutant concentration levels.36 Many abandoned sites were vacated decades ago when the pollution control infrastructure was either ineffective or nonexistent.37 Modern mining techniques are significantly cleaner than their predecessors and can control or remove acid-forming materials while profitably extracting unmined coal.38 Recent EPA studies estimate that remining could reduce pollutant levels in approximately 40 percent of the country's 1.1 million acres of abandoned mine lands.39 Moreover, because federal law now requires coal companies to reclaim mine sites after terminating mining operations, remining can also alleviate physical and aesthetic problems such as dangerous highwalls, vertical openings, and refuse piles.40 These physical improvements to the surrounding land often result in increased wildlife volume and diversity as well as greater recreational use at previously contaminated spaces.41

B. EPA Regulation of Coal Mining Under the Clean Water Act

The Clean Water Act is an epic statute with epic goals. Enacted in a series of amendments to the Federal Water Pollution Control Act in 1972 and 1977, the CWA expressed the "wildly unrealistic" goal of restoring all U.S. waters to fishable or swimmable quality by 1983 and eliminating

35. Id; ENERGY INFORMATION ADMIN., supra note 15, at 222 (noting that the average price of standard coal delivered to electric utilities is $24.28 per ton).

36. See Proposed Rules, 65 Fed. Reg. 19,440, 19,448 (Apr. 11, 2000) (codified at 40 C.F.R pt. 434) ("EPA recognizes that one of the most successful means for improvement of abandoned mine land is for coal mining companies to remine abandoned areas and extract the coal reserves that remain."); U.S. EPA, supra note 20, at 3; see also MCELFISH & BEIER, supra note 9, at 278; PA. DEPT. OF ENVTL. PROTECTION, supra note 9.

37. See Citizens Coal Council II, 447 F.3d 879, 917 (6th Cir. 2006) (en banc) (Martin, J., dissenting) ("Many of these abandoned lands, specifically those that qualified under the Rahall Amendment, were abandoned prior to the mid-1970s. Thus, at the time they were mined, these operations utilized technology that was at least thirty years old at the time the EPA's Final Rule was adopted. . . . Technology, however, has significantly advanced in the past thirty years and is certainly capable of outperforming the thirty-year-old technology and is certainly capable of reducing effluent-limitations.").


39. See U.S. EPA, supra note 20, at 4 (stating that "EPA estimates that 38 percent to 44 percent of AML [Abandoned Mine Lands] acres affected by remining would experience significant decreases in AMD [abandoned mine drainage] pollutant levels").


all discharges of all pollutants into U.S. waters by 1985.\textsuperscript{42} Congress hastily drafted the CWA in the face of intense public pressure to control water pollution.\textsuperscript{43} The resulting legislation was, in the words of the U.S. Court of Appeals for the Second Circuit, a “poorly drafted and astonishingly imprecise statute.”\textsuperscript{44}

Federal courts have often expressed frustration with the Clean Water Act for being both too narrow and too broad.\textsuperscript{45} A dizzying array of technical language and circuitous cross-references makes the Act “difficult to understand, construe and apply.”\textsuperscript{46} These difficulties are compounded by the 1766 page legislative history\textsuperscript{47} in which “statements can be found to uphold almost any position which one cares to take.”\textsuperscript{48} Any expectation that the judiciary can and will understand the Clean Water Act seems to be almost as unrealistic as the Act itself.

For all its complexity, the CWA as a whole embodies one unitary purpose: to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”\textsuperscript{49} The Act operates from a baseline presumption that all pollutant discharges are unlawful unless explicitly allowed by the EPA or an authorized state permitting authority.\textsuperscript{50} Were this blanket restriction the sole operative standard, enforcement efforts would be simple. However, as emphasized throughout this Note, “simple” is not a word often associated with the Clean Water Act.

The actual enforcement mechanism contemplated by the CWA is an intricate series of technology-based standards incorporated into individual permits issued to potential polluters. This permitting system, entitled the National Pollution Discharge Elimination System (NPDES), essentially grants a permit holder a license to pollute up to a certain

43. See Am. Petroleum Inst. v. EPA, 540 F.2d 1023, 1027 (10th Cir. 1976) (noting that “[p]opular demand for legislative action to control water pollution . . . was a major cause of the unsatisfactory legislation”).
44. Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 627 (2d Cir. 1976) (assessing the Act against a “background of puzzling statutory language, ambiguous legislative history and conflicting court decisions”); see also American Petroleum, 540 F.2d at 1027 (noting the difficulties that other federal courts have had in applying the Act).
45. Hooker Chemicals, 537 F.2d at 626–27.
46. American Petroleum, 540 F.2d at 1026.
47. Id. at 1027.
48. Hooker Chemicals, 537 F.2d at 626–27.
49. 33 U.S.C. § 1251(a) (2006); see also Am. Petroleum Inst. v. EPA, 540 F.2d 1023, 1028 (10th Cir. 1976) (“[T]he guiding star [of the Clean Water Act] is the intent of Congress to improve and preserve the quality of the Nation’s waters.”).
50. See 33 U.S.C. § 1311 (“Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”).}
amount. No one may pollute without a permit, but a polluter in compliance with an NPDES permit is automatically in compliance with the CWA. The Act directs the EPA to administer and enforce the NPDES.

1. The EPA, the NPDES, and the Requirements of the CWA

The CWA regulates every “point source” of water pollution. A point source is “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.” The CWA’s broad definition of “point source” imposes an extraordinary regulatory duty on the EPA: the agency must identify and regulate every conceivable source of water pollution in the entire country. Naturally, different point sources leak different pollutants in different ways with different environmental effects. Moreover, a single point source can and often does emit multiple types of water pollutants. The EPA must identify not only the specific point sources of water pollution, but also the specific types of pollutants emitted from those sources.

Coal mining is one of many point sources of water pollution that the EPA regulates under the Clean Water Act. Coal mining operations emit five recognized types of water pollutants: (1) acid mine drainage; (2) iron; (3) manganese; (4) settleable solids; and (5) suspended solids. The CWA requires that the EPA undertake certain steps to develop and implement regulations applicable to coal mining. Like all regulations enacted pursuant to the CWA, EPA coal mining regulations must be intended to “restore . . . [the] integrity of the Nation’s waters.”

a. The EPA Must Analyze Existing Technology to Determine Effluent Limitations for Each Point Source of Water Pollution

Although the Clean Water Act aims to eliminate all water pollution, the Act expressly contemplates that the EPA will issue NPDES permits

---

53. See Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 627 (2d Cir. 1976) (“The very magnitude of the task undertaken by Congress and delegated to the EPA for fulfillment probably accounts for the lack of clarity.”).
54. See Citizens Coal Council I, 385 F.3d 969, 972 (6th Cir. 2004), vacated, 447 F.3d 879 (6th Cir. 2006) (en banc).
58. See Am. Petroleum Inst. v. EPA, 540 F.2d 1023, 1028 (10th Cir. 1976) (noting that “the guiding star [of the Clean Water Act] is the intent of Congress to improve and preserve the quality of the Nation’s waters”).
allowing some pollution. But the EPA does not have unfettered discretion to determine how much pollution to allow from a given class or category of point sources. The CWA mandates that the agency assess existing pollution control technologies and determine what level of pollution reduction is attainable through the use of those technologies. These resulting figures are “effluent limitation guidelines.” For example, the EPA might survey the available technology and determine that coal mining companies could feasibly limit iron flows to 3.5 mg/L. The agency must then establish a national effluent limitation guideline prohibiting iron flows above that amount. All future NPDES permits would incorporate this guideline, and a coal mining company with a valid permit would be immune from CWA liability for iron discharges below 3.5mg/L.

Effluent limitations are said to be “technology forcing” in that they effectively compel the regulated entities to adopt certain pollution control technologies in order to comply with the guidelines. Forced technological innovation is necessary because environmental goals often conflict with an industry’s profit motives. The private market does a poor job of quantifying the value of a clean environment. The private market is similarly inadequate in its ability to furnish economic benefits on environmentally friendly businesses. Consequently, powerful industries like domestic coal have little or no market incentive to develop pollution control technologies. Effluent limitation guidelines correct for this glaring market failure by forcing industrial polluters to adopt the technologies analyzed by the EPA in setting the guideline. Consequently, the EPA’s

---

59. See 33 U.S.C. § 1342(a)(1) (2006) (“Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.”).

60. See id. § 1314(b)(1)(A), (2)(A), (4)(A) (“[T]he Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons . . . identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology . . . best control measures and practices achievable . . . [and] best conventional pollutant control technology . . . or classes and categories of point sources.”).

61. “Effluent” is a generic term; it does not describe any specific type of pollutant. Under the CWA, an effluent limitation is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C § 1362(11).

62. See Murchison, supra note 51, at 580.


64. See id.
ability to identify available control measures and extrapolate effluent limitation guidelines for a category of point sources is a fundamental component of the agency's CWA obligations.

Because the CWA seeks to restore water quality by eliminating all pollutant discharges, the EPA has a general duty to improve water quality, not simply prevent deterioration. Naturally, cleaner technologies lead to cleaner water. Although effluent limitation guidelines allow some pollution, Congress intended that the EPA institute "progressively more stringent effluent discharge guidelines in stages," resulting in an eventual phase-out of all pollutants. Accordingly, the CWA requires that the EPA identify and assess three types of technology—each with a different degree of stringency—to establish effluent limitations. For every point source pollutant, the EPA must identify: the (1) Best Practicable Technology (BPT), (2) Best Available Technology (BAT), and (3) Best Conventional Technology (BCT).

b. Effluent Limitation Guidelines and NPDES Permits

Because the CWA already prohibits the discharge of any pollutant, effluent limitation guidelines create no additional obligations or escape hatches for polluters. A potential polluter must obtain an NPDES permit from the EPA or an authorized state permitting authority to capitalize on the pollution allowance. Every NPDES permit must incorporate the relevant effluent limitation guidelines for the point source regulated. A permit holder is legally allowed to pollute up to, but not in excess of, the numerical limitations of the permit.

65. See 33 U.S.C. § 1251(a)(1) (stating that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").
66. BP Exploration & Oil, Inc. v. EPA, 66 F.3d 784, 789 (6th Cir. 1995).
68. BPT is the least stringent and most cost-conscious method of pollution control technology considered by the EPA. See BP Exploration & Oil, 66 F.3d at 789.
69. BAT is the most stringent and least cost-conscious method of pollution control technology considered by the EPA. See id. at 790.
70. BCT applies only to conventional pollutants (as opposed to toxic pollutants). See id. This level of technology is best described not as another level of pollution control, but as a BAT substitute for conventional pollutants.
72. The EPA can, and does, delegate much of its permit writing authority to preapproved state environmental agencies. Congress has explicitly stated a policy that the states should be responsible for administering the NPDES program. See Briefing Paper, N.M. Envtl. Dep’t, NPDES State Program Authorization 1 (July 2004), available at http://www.nmenv.state.nm.us/swqb/Projects/NPDES/NPDES-DelegationBriefingPaper_July-04.pdf. To date, 45 of 50 states are authorized to administer the NPDES program. The federal standards established by EPA apply regardless of whether EPA or a state authority issues the NPDES permit. Id.
73. 33 U.S.C § 1342(a) (2006).
74. See id. § 1311(a).
NPDES permits are contractually binding and carry the force of law. Should the permit holder pollute more than the amount the permit allows, the EPA, a state permitting authority, or a private citizen may bring an enforcement action. Permit violations can result in heavy penalties, sometimes exceeding $25,000 per day for serious violations. Forced compliance with a national permitting system accomplishes two important objectives of the CWA. First, effluent limitation guidelines and NPDES permits coerce regulated industries into developing new technologies to find more efficient and cost-effective ways to comply with permit requirements. As noted above, the U.S. coal industry has achieved extraordinary technological advances in pollution control measures over thirty years of federal regulation. Given the lack of market incentive to invest in developing such technologies, it seems at least plausible that many of these advancements occurred as a direct result of federal regulations.

Second, federal regulation through NPDES permits creates a uniform basis for enforcement actions. Pre-CWA pollution control efforts were ineffective because states offered "lax standards and toothless enforcement" to attract coal mining business; states lacked the expertise to assess pollution control technologies being used elsewhere in the country; and state-by-state standards often failed to consider the interstate effects of water pollution. By mandating that all point sources adhere to national standards through NPDES permits, the CWA mitigates many of these problems and also provides for an enforcement system that is—at least in theory—easily administered and reviewed. Uniform national standards therefore alleviate the risk that coal or other powerful industries will be able to coerce state governments into adopting weak or nonexistent environmental regulations in exchange for the economic windfall of having a major industrial presence within the state.

75. See id. § 1319.
76. Murchison, supra note 51, at 570.
79. See Comment, EPA's Power to Establish National Effluent Limitations for Existing Water Pollution Sources, 125 U. PA. L. REV. 120, 156 (1976).
80. Id. at 155.
81. See Am. Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1044 (3rd Cir. 1975) (noting that "uniformity was clearly a major congressional concern" in enacting the CWA).
2. Early EPA Coal Mining Regulations and the Continuing Problem of Abandoned Mines

Congress established the Coal Mining Point Source Category (CMPSC) in the 1977 amendments to the Clean Water Act. Shortly thereafter, the EPA assessed the available technology and promulgated effluent limitations for that category. Neither the 1977 amendments nor the subsequent EPA guidelines distinguished one type of coal mining operation from another. Recognizing the wide variance in the pollution and technological issues inherent to different types of coal mining operations, the EPA altered the blanket regulatory approach in 1985 by creating four new subcategories within the CMPSC: (1) Coal Preparation Plants; (2) Acid or Ferruginous Mine Drainage; (3) Alkaline Mine Drainage; and (4) Post-Mining Areas. Until the EPA promulgated the 2002 rule which would become the subject of the Citizens Coal Council litigation, every coal mining operation in the United States was classified under one of these four subcategories.

The EPA's regulations were successful in minimizing pollution emitted from active mining sites, but the regulations did little to address the problem of abandoned mines. Effluent limitations were incapable of curbing discharges from abandoned sites because, by definition those sites were abandoned and there was no active polluter to impose limitations on. Abandoned mine sites contained enormous coal deposits but the domestic coal industry would not return to those sites for fear of incurring CWA liability for the preexisting discharges. With a plethora of virgin sites still available, the coal industry had no reason to incur the enormous start-up costs necessary to bring an abandoned site into compliance with existing effluent limitation guidelines. Consequently, abandoned mines remained abandoned and U.S. waterways remained polluted.

Congress initially responded to the abandoned mine problem through SMCRA, not the CWA. Title IV of SMCRA created the

86. *Citizens Coal Council II*, 447 F.3d at 884.
87. *Id.* at 898; *see also* U.S. EPA, *supra* note 18, at 1. Most abandoned sites had been vacant for so long that the EPA could not establish any individual or corporate liability for pollution at those sites. *Id.*
88. *Citizens Coal Council II*, 447 F.3d at 884.
89. *Id.* ("Application of these guidelines created a disincentive to potential reminers of abandoned mines because of the prohibitive cost of bringing pre-mined lands to the same standard as virgin lands, often resulting in untreated pollution for 'pre-existing discharges.'").
90. *Id.*
Abandoned Mine Land program (AML),\textsuperscript{92} applying a per-tonnage federal tax to all surface-mined coal.\textsuperscript{93} Revenue generated from the tax was held in the Abandoned Mine Reclamation Fund, which Congress used to pay for AML projects.\textsuperscript{94} The AML program was underfunded from the start, and the "cost of remediating AML problems far exceed[ed] the amount that [would] ever be collected."\textsuperscript{95} For example, a 1998 report showed that the costs of restoring abandoned mines in Virginia would exceed $430 million, while the AML program generated just $5 million for Virginia.\textsuperscript{96} The EPA recognized the obvious: "alternative solutions should be found to reclaim AML sites."\textsuperscript{97}

\textit{a. Congress Attempts to Address the Abandoned Mine Problem by Amending the CWA}

The EPA's approach to coal mining regulation under the CWA ensured that few coal companies would engage in remining. Meanwhile, EPA studies showed that remining could significantly improve water quality at abandoned sites.\textsuperscript{98} Congress responded to the agency's inaction by amending the CWA. The amendment's sponsor, West Virginia Representative Nick Rahall, described its purpose:

Throughout the Appalachian region abandoned coal mine lands exist which, due to erosion and acidic discharges, pose a serious threat to water quality. . . . This coal remining provision will enable industry to enter abandoned mine sites and engage in mining under modified water quality standards established on a case-by-case basis. The end result of this effort will be the reclamation of the site and as such, as [sic] improvement in water quality over that which existed at the site prior to remining.\textsuperscript{99}

The Rahall Amendment provisions are complex and laden with technical language, but the basic premise behind the legislation is that the U.S. coal industry would not remine abandoned lands unless effluent limitations were relaxed. The amendment altered the CWA regulatory structure by exempting certain remining operations\textsuperscript{100} from the effluent

\begin{footnotes}
\item 94. \textit{Id}.
\item 95. \textit{Id} at 6.
\item 96. \textit{Id}.
\item 97. \textit{Id}.
\end{footnotes}
limitation guidelines otherwise applicable to all coal mining sites. The amendment does not relieve the EPA of its CWA duty to assess existing technology and promulgate national effluent limitations, but rather allows an individual NPDES permit writer to ignore those limitations if the site qualified for a Rahall permit. In place of the EPA's effluent limitations, the permit writer—either the EPA or an authorized state permitting authority—uses his or her "best professional judgment" to assign an alternative numerical effluent limitation based in part on the amount of pollution already emanating from the site. The permit writer determines the appropriate limit by identifying BAT on a case-by-case basis, but in no case can a Rahall permit issue if pollution flow at the remining site would exceed preexisting discharge levels.

By enacting the Rahall Amendment, Congress eschewed bright-line national standards in favor of ambiguous local requirements in order to entice the coal industry to remine. Despite these incentives, relaxed effluent limitations through Rahall permits did not result in a significant increase in remining activity. Many states were unable to identify standard procedures for calculating preexisting discharges, assessing available technology, or developing workable effluent limitations. Without standardized procedures, the coal industry viewed state-issued Rahall permits as too uncertain to provide adequate protection against potential CWA liability. Many in the industry feared that the EPA would reject state Rahall permits issued pursuant to procedurally or technically-flawed standards. Still other states never met baseline federal procedural requirements necessary to obtain the authority to

101. *Citizens Coal Council II*, 447 F.3d 879, 884 (6th Cir. 2006) (en banc). The Rahall Amendment states in pertinent part:

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program . . . may issue a permit under section 1342(b) of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.


103. *Id.* The amendment also requires that coal companies seeking Rahall permits demonstrate that “the coal remining operation will result in the potential for improved water quality.” *Id.* § 1311(p)(2).


106. *See id.*

107. *Id.*
issue Rahall permits.\(^\text{108}\) As a result, the domestic coal industry continued to mine virgin lands where the CWA obligations were more transparent—and abandoned mine lands continued to destroy national water resources.\(^\text{109}\)

**b. EPA Promulgates a New Rule Intended to Act as a Further Incentive to Coal Remining Operations**

Neither the original CWA nor the Rahall Amendment adequately addressed the problem of abandoned mines. To remedy these shortcomings, the EPA promulgated a new rule in January 2002 ("the Final Rule") designed to further incentivize coal companies to remine.\(^\text{110}\) The EPA determined that the Rahall Amendment failed largely because of industry uncertainty regarding the legal effect of state-issued Rahall permits on existing national effluent limitation guidelines.\(^\text{111}\) The agency alleviated the looming specter of CWA liability for remining operations by creating a new subcategory—the Coal Remining Point Source Subcategory (Remining Subcategory)—within the CMPSC. Whereas the Rahall Amendment allowed some remining operations to affirmatively opt out of existing effluent limitations if certain conditions were met, the Final Rule automatically exempted all remining operations from the existing effluent limitation guidelines.\(^\text{112}\) The EPA then promulgated a set of lenient and ambiguous effluent limitation guidelines applicable to all sites within the new subcategory.\(^\text{113}\)

The Remining Subcategory encompasses all preexisting discharges\(^\text{114}\) that are "within or . . . hydrologically connected to" a remining

---

108. Id.

109. Id.; see also 65 Fed. Reg. at 19,488 (stating, "[T]he potential of the statutory exemption contained in the Rahall Amendment to overcome [the industry uncertainty] disincentive and derive the maximum environmental benefits from remining operations has not been fully realized in the absence of implementing regulations. If mining companies face substantial potential liability or economic loss from remining, they will continue to focus on mining virgin areas and ignore abandoned mine lands that may contain significant coal resources. Based on information collected in support of this proposal, EPA believes that remining operations are environmentally preferable to ignoring the coal resources in abandoned mines.”).


111. See id.

112. See generally 40 C.F.R. § 434.5 (2007). The Final Rule also created a "Western Alkaline Coal Mining Subcategory" that applies to "mine drainage from applicable areas of western coal mining operations." See id. § 434.82(a). While the Citizens Coal Council II litigation does implicate this aspect of the Final Rule, the court's analysis for this subcategory largely parallels the analysis for the Coal Remining Point Source Subcategory. Because regulations in this field are so complex, it is not possible to discuss here the technical and procedural aspects of both subcategories. This Note addresses only the Coal Remining Point Source Subcategory.

113. See 40 C.F.R. § 434.5.

114. Preexisting discharges are "any discharge resulting from mining activities that have been abandoned prior to the time of a remining permit application." 40 C.F.R. § 434.70(c).
By promulgating national effluent limitations for these newly-classified point sources, the EPA appeared to substitute uniform federal standards for the inconsistent state standards that had undermined the goals of the Rahall Amendment. However, these effluent limitation guidelines look much different than past EPA guidelines. Rather than analyzing existing BPT, BAT, and BCT to determine what level of pollution reduction is attainable, the Final Rule simply requires that discharges "not exceed baseline loadings," i.e. the discharge levels that existed when remining began. If measuring baseline loadings is infeasible, the permit writer may issue a permit containing no effluent limitations at all so long as he or she finds that remining "will result in significant improvement" to water quality at the site.

Much of the language in the Final Rule parallels the Rahall Amendment, but the legal effects of the two schemes are much different. Rahall permits were a congressionally authorized exemption from existing CWA requirements. The Rahall Amendment did nothing to change the EPA's statutory obligation to identify available technology and institute "progressively more stringent" environmental regulations. The modified permits simply afforded a permissive opt-out scheme for certain coal mining operations. Conversely, the Final Rule relieves the EPA of its CWA obligation to identify and assess available technology. The Rule simply sets effluent limitations at a level "not [to] exceed baseline loadings," without any inquiry into whether existing technology could achieve actual reductions.

Because the Final Rule sets effluent reductions at zero—i.e. no increase or decrease in existing pollution—NPDES permits for the Remining Subcategory do not force coal remining companies to adopt any new technologies. Rather, the Final Rule requires only that a remining company submit a site-specific Pollution Abatement Plan (PAP) identifying the Best Management Practices (BMP) for

---

115. 40 C.F.R. § 434.71.
117. 40 C.F.R. § 434.72(b)(1).
118. Id.
120. See BP Exploration & Oil, Inc. v. EPA, 66 F.3d 784, 789 (6th Cir. 1995); see also 33 U.S.C. § 1311(p)(1).
121. 40 C.F.R. § 434.72(b)(1).
122. Citizens Coal Council II, 447 F.3d 879, 917 (6th Cir. 2006) (en banc) (Martin, J., dissenting). The Final Rule describes various technological procedures to aid the permit writer in determining the level of baseline loadings. Id at 912.
123. BMPs vary but generally consist of processes such as regrading and revegetation, diversion ditches, and various types of channels, drains and wells. See Citizens Coal Council I,
controlling pollution at the site. The EPA or an authorized state permitting authority then incorporates these measures—which are deemed equivalent to EPA determinations of BPT, BAT, and BCT—into an NPDES permit. The Final Rule thus requires only that a remining company show potential for improved water quality, not that the remining operation actually result in improved water quality. Once the permit is issued, a remining company faces no additional environmental regulations under the CWA since compliance with a valid NPDES permit is de facto compliance with the Clean Water Act.

In addition to abrogating the EPA’s statutory duty to identify and enforce progressively more stringent technological standards, the Final Rule differs from the Rahall Amendment in two other ways. First, the Final Rule expands the definition of “remining.” Under the Rahall Amendment, only sites that were abandoned prior to August 3, 1977—the date SMCRA became effective—benefited from the relaxed environmental regulations. The Final Rule allows relaxed regulations at any site that has been previously mined and then abandoned. Second, the Final Rule expands the number of pollutants eligible for relaxed regulations. Whereas the Rahall Amendment only exempted pH, iron, and manganese, the Final Rule also exempts total suspended solids.

In sum, the EPA increased the universe of sites and chemicals eligible for relaxed pollution standards while effectively eliminating its fundamental CWA duty to implement technology-forcing standards designed to “restore . . . [the] integrity of the Nation’s waters.”

C. Environmental Public Interest Groups Challenge the EPA in Federal Court, Claiming that the Final Rule Violated the Clean Water Act and Administrative Procedure Act

Shortly after the EPA promulgated the Final Rule in January 2002, two environmental groups challenged the rule in the U.S. Court of

385 F.3d 969, 987 (6th Cir. 2004) (Suhrheinrich, J., concurring in part and dissenting in part), vacated, 447 F.3d 879 (6th Cir. 2006) (en banc).
125. See id. §§ 434.72, 434.73, 434.74.
126. CARLSON ET AL., supra note 42, at 669; Murchison, supra note 51, at 542.
128. 40 C.F.R. 434.70(a) (defining a coal remining operation as any “coal mining operation at a site on which coal mining was previously conducted and where the site has been abandoned”).
129. See Citizens Coal Council II, 447 F.3d 879, 886 (6th Cir. 2006) (en banc).
Appeals for the Sixth Circuit. 131 Kentucky Resources Council, Inc., a nonprofit corporation dedicated to “prudent use and conservation of the natural resources of the Commonwealth”132 and Citizens Coal Council, a national membership organization “dedicated to clean water, safe homes and a healthy environment for the residents of the nation’s coalfields”133 (collectively “Petitioners”) had previously objected to the Final Rule during the notice and comment period.134 In their complaint, Petitioners claimed that the EPA had violated the CWA and the Administrative Procedure Act (APA).135 Petitioners asserted that the Final Rule exceeded the EPA’s general statutory authority under the CWA, violated specific provisions of the Rahall Amendment, and was arbitrary and capricious under the APA.136

A three-judge panel heard the case (Citizens Coal Council I) in January 2004.137 A majority invalidated the rule, holding that it was promulgated “without observance of procedures required by law” and therefore violated section 706(2)(D) of the APA.138 The court found that the EPA shirked its CWA duty to first consult the available technology and then “determine the degree of effluent reduction attainable.”139 Because it found the rule violated section 706(2)(D) of the APA, the court did not rule on Petitioners’ claim that the Final Rule was arbitrary and capricious under section 706(2)(A).140

One panel member, Judge Richard Suhrheinrich, dissented from the majority’s APA analysis, finding that Petitioners had not brought a claim under APA section 706(2)(D),141 and that even if they had, the CWA contained “no sequential language” defining the process by which the EPA must determine effluent limitations.142 Judge Suhrheinrich found that, by imposing chronological steps that appear nowhere in the

131. See Citizens Coal Council I, 385 F.3d 969 (6th Cir. 2004), vacated, 447 F.3d 879 (6th Cir. 2006) (en banc).
134. Citizens Coal Council II, 447 F.3d at 904.
135. See Citizens Coal Council I, 385 F.3d at 977.
136. See id.
137. Id.
138. Id. at 980.
139. Id. at 981.
140. Id.
141. See id. at 986 (Suhrheinrich, J., dissenting in part).
142. Id.
statutory language, the majority undermined the EPA's ability to promulgate rules addressing the remining problem.

The EPA petitioned for *en banc* review, and a thirteen-judge panel for the Sixth Circuit heard the case again less than a year later (*Citizens Coal Council II*). The *en banc* court vacated the *Citizens Coal Council I* decision for "ruling on grounds not raised by the parties," and upheld the Final Rule on all contested grounds. Both the majority and dissent found that the Rahall Amendment was a "permissive, opt-out" scheme and that nothing in the CWA limited the EPA's ability to create a remining subcategory that differed from the remining definition contained in the Rahall Amendment. Both sides of the divided court stressed their narrow standard of review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and held that the EPA's decision to create the Remining Subcategory was reasonable in light of the CWA's goal of "restor[ing]...the Nation's waters.

Although the majority and the dissent agreed that the Final Rule did not violate the general provisions of the CWA or the specific provisions of the Rahall Amendment, the court split on whether the effluent limitations established by the EPA for the remining point source subcategory were arbitrary and capricious under section 706(2)(A) of the APA. The majority opinion—this time authored by Judge Suhrheinrich, the lone dissent in *Citizens Coal Council I*—held that the new effluent limitations were not arbitrary and capricious for the same reasons that the subcategory as a whole was consistent with CWA goals. Specifically, the majority found that the CWA requires the EPA to promulgate regulations to improve water quality; remining improves water quality; and each aspect of the Final Rule was reasonably calculated to increase remining.

---

143. *Id.* at 985-86 ("More problematic, however, is that the majority then uses this artificial series of steps to chastise the EPA for engaging in what the majority views as circular reasoning.").
144. *Id.* at 986 ("Because the costs associated with bringing the previously mined lands into compliance with those regulations were prohibitive, those effluent limitation guidelines were not effective in reducing acid mine drainage from abandoned mine lands because operators would not remine the area.").
146. *Id.* at 905.
147. *Id.* at 892, 915.
150. *Id.* at 889.
151. *Id.* at 892.
152. *Id.* (stating that the EPA promulgated the rule in the hopes of providing "better environmental results than the [then-] current requirements") (citing Proposed Rules, 65 Fed. Reg. 19,440, 19,446 (Apr. 11, 2000) (codified at 40 C.F.R pt. 434)).
The dissent agreed with the majority that the effluent limitations contained in the Final Rule were designed to encourage remining, but nevertheless found that the EPA arrived at those limitations without considering the relevant pollution control technologies identified in the CWA. The dissent resurrected the same APA section 706(2)(D) arguments that the Citizens Coal Council I court raised sua sponte and the Citizens Coal Council II court vacated on review. Specifically, the dissent found that the EPA had “shirk[ed] [its] duty to determine the degree of effluent reduction attainable.” Because the EPA failed to consider BPT, BAT, and BCT at any point in determining effluent limitations for the Remining Subcategory, the dissent found the resulting limitations to be arbitrary and capricious under the APA.

II. ANALYSIS

As the Citizens Coal Council litigation underscores, the Clean Water Act is a complex statute. In fact, the Act is so complex that it effectively incapacitated the Sixth Circuit’s ability to review the Final Rule. The majority simply did not understand what the CWA requires of the EPA when the agency sets national effluent limitations. Rather than parse the CWA’s “byzantine system of cross references,” the court allowed the EPA to justify the Final Rule by referencing the statement of purpose in the first section of the first page of the Clean Water Act. Such superficial judicial review only exacerbates the risk of agency capture.

A. The Court Should Have Found the Final Rule Arbitrary and Capricious Because the EPA Established Effluent Limitations Without Assessing Existing Technology to Determine What Level of Pollution Reduction Was Attainable

Although the Clean Water Act does not explicitly define a series of ordered steps that the EPA must complete to establish effluent guidelines, the Act clearly requires the agency to assess existing technology to determine what level of pollution reduction is attainable. The Act states that “the Administrator shall . . . identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable”.

153. Id. at 917 (Martin, J., dissenting).  
154. Id. at 916 (finding that “there is no evidence that the EPA considered the relevant technological data or sought data on the types of technology that would result in a reduction of effluent limitations beyond that which existed when the land was abandoned”).  
155. Id. at 916.  
156. Id.  
using BPT, BAT, and BCT.\textsuperscript{158} The Act goes on to identify a list of nonexhaustive factors which the agency may consider in formulating its BPT, BAT, and BCT standards.\textsuperscript{159} The EPA did not consider any of these factors, nor did the agency apply BPT, BAT, or BCT to determine the degree of effluent reduction attainable for sites within the new Coal Remining Subcategory.\textsuperscript{160}

As the majority candidly acknowledged, "an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem."\textsuperscript{161} The pollution problems created by abandoned mines are well documented. Most of those sites were abandoned long ago when pollution technology was ineffective or nonexistent. Congress chose to address this and other water quality problems by requiring the EPA to force technological advances through national effluent limitation guidelines. In promulgating the Final Rule, the EPA entirely ignored existing technology and arbitrarily set effluent limitations at zero. The agency failed to consider the single most critical aspect of the problem: whether modern technology could reduce pollution at remining sites.

The EPA purported to compensate for its failure to assess existing technology by pre-ordaining that the Pollution Abatement Plans submitted by individual remining polluters were the statutory equivalent of BPT, BAT, and BCT.\textsuperscript{162} Under the Final Rule, Pollution Abatement Plans are required to identify Best Management Practices (BMPs) for controlling pollution at a given remining site. The plans must show a potential for pollution reduction, although they need not actually result in pollution reduction. Moreover, the EPA has no role in formulating BMPs. Those formulations are left to the individual coal reminers seeking NPDES permits. The EPA did not "examine the relevant data and articulate a satisfactory explanation" for its decision to allow the coal industry to formulate its own technology-based effluent limitations.\textsuperscript{163} Thus, the court should have found that the Final Rule was arbitrary and capricious under the APA.\textsuperscript{164}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{159} See id. at § 1314(b)(1)(b), (2)(b), (4)(b) ("Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.").
\item \textsuperscript{160} Citizens Coal Council II, 447 F.3d 879, 921 (6th Cir. 2006) (en banc) (Martin, J., dissenting).
\item \textsuperscript{161} Id. at 890 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
\item \textsuperscript{162} See 40 C.F.R. §§ 434.72, 434.73, 434.74 (2007).
\item \textsuperscript{163} See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.
\item \textsuperscript{164} See id.
\end{enumerate}
\end{footnotesize}
B. The Complexity of the CWA Prevented the Sixth Circuit from Engaging in a Meaningful Review of the Final Rule

Citizens Coal Council II is noteworthy not simply because the end result is wrong, but because the entire process of review was wrong. The court was unable to reconcile the specific technical provisions and the broad policy goals of the Clean Water Act. Operating from the ubiquitous and dangerous premise that the EPA’s only CWA duty is to “restore . . . [the] integrity of the Nation’s waters,” the court effectively held that any rule reasonably calculated to that end is ipso facto consistent with the CWA. If this proposition is correct, then the broad purpose of the CWA trumps every other provision in the statute, thereby allowing the EPA to execute an end-run around any and all CWA procedural requirements as long as that end-run is reasonably calculated to improve water quality. In a sense, the majority would hold that the only operative provision of the entire Clean Water Act is the first paragraph. This could not possibly reflect Congress’s intent in drafting the CWA, which some commentators have called the “most comprehensive” piece of environmental legislation ever enacted.

The Sixth Circuit likely struggled in part because of the unique scenario presented by the Final Rule: both the industry and the environment seemed to benefit from increased remining. The coal industry would not engage in remining if the EPA applied existing BPT, BAT, and BCT to determine effluent limitations because the compliance costs would be prohibitively high. The EPA created the Remining Subcategory without setting technology-based effluent limitations in an attempt to further incentivize remining and, ostensibly, to “restore . . . [the] integrity of the Nation’s waters.” As stated by the EPA, this goal is clearly consistent with the CWA. However, searching and careful judicial review requires that the court look beyond the agency’s stated purpose for a rule.

Although the Final Rule may in fact have been designed to encourage remining, the EPA made no effort to explore whether it could increase remining while simultaneously requiring some degree of reduction in effluents. The EPA did not consult or assess the available technologies to determine that no reduction was attainable at remining

166. See Citizens Coal Council II, 447 F.3d 879, 889 (6th Cir. 2006) (en banc).
167. See id.
The agency chose arbitrary limits and left the rest to be determined on a case-by-case basis. In doing so, the EPA trusted the domestic coal industry to self-regulate by assessing BMPs and drafting Pollution Abatement Plans. The CWA and APA require more of the EPA, and so too should the Sixth Circuit.

C. Without the Judiciary Operating as a Meaningful Check on EPA Action, the Agency is at a High Risk of Capture

The legal history of the Citizens Coal Council litigation exemplifies the intricate relationship between the various actors in the complex field of coal mining regulation. At a basic level, each actor holds a well-defined place in the regulatory framework. Congress enacts legislation directing the EPA to regulate water pollution emanating from coal mines. The EPA assesses the available technology and determines how best to accomplish congressional goals. If necessary, the judiciary reviews the EPA action to ensure compliance with the CWA and APA.

In reality, the coal mining regulatory framework is not nearly as well defined as one might believe. Congressional directives are not always clear, agency actions are not always logical, and judicial review is not always productive. When one actor in this intricate system underperforms, the entire legislative scheme is compromised. The Sixth Circuit underperformed in Citizens Coal Council. The court ignored Congress’s comprehensive statutory scheme and allowed the EPA far too much latitude in establishing national effluent limitations. Such toothless judicial review opens a space for a new actor to creep into the regulatory framework. Specifically, the coal industry captures the EPA and the regulated becomes the regulator, leaving the general public with no protection from weak, industry-friendly environmental regulations.

The prospect of diminished judicial presence in the coal mining regulatory scheme is dangerous for the environment because it increases the risk that the EPA will be captured by the powerful domestic coal industry. The dissent in Citizens Coal Council II recognized the risk of agency capture when EPA rules purport to benefit both industry and the environment, stating:

It is disheartening to see a regulatory agency adopt regulations that effectively undermine its own authority and sell out the environment for the sake of the coal industry. The regulation at issue does just that.174

The majority in Citizens Coal Council II conducted a cursory review based on broad statements of the CWA’s general purpose and never

---

172. See id. at 920.
173. See id.
really considered the possibility that the Final Rule could be the result of agency capture. Accordingly, the public is deprived of the benefit of an active judiciary serving as a backstop to filter out instances of capture. We are instead faced with the prospect of EPA rules that seem to satisfy a public goal like “restor[ing] . . . [the] integrity of the Nation’s waters,” but really satisfy the goals of the private coal industry by validating weaker regulations than would otherwise be required under the Clean Water Act. Without the judiciary to identify such rules, the public will never even realize that the agency has been captured, thus intensifying an already serious environmental problem.

Unfortunately, the problem of agency capture is not limited to the coal mining industry. EPA decisions in many other environmental regulatory fields are plagued by scientific and policymaking uncertainty. The technical nature of environmental regulations makes it difficult for the judiciary to identify and smoke out instances of agency capture. EPA determinations of BAT, BPT, and BCT are merely estimates or summaries of the prevailing regulatory capabilities within a field. Such determinations are uncertain in that there is likely no intrinsically correct standard that the agency can attain even if it diligently gathers all possible information and fully explains the basis for its decision. The “available” or “practicable” technological approaches to pollution control are simply too many and too varied to be adequately described by a quantitative standard.

Federal courts are not designed to assess the merits of EPA rules. The EPA is far better suited to resolve technical environmental matters. However, the courts are designed to review agency action for compliance with controlling statutes. To perform even this limited function, reviewing courts must be able to identify the relevant provisions of a statute and conduct a meaningful inquiry into whether EPA action comports with those provisions. The Citizens Coal Council I court failed to perform this duty because it did not fully grasp the effect of various CWA provisions. The EPA used the complexity of the CWA to obfuscate its obligations under the Act and persuade the court that any rule designed to “restore . . . [the] integrity of the Nation’s waters” was, as a matter of law, not arbitrary and capricious. In doing so, the EPA wrote a blank check to the coal mining industry, and the court was too oblivious to bounce it.

177. CARLSON ET AL., supra note 42, at 668.
178. See id.
179. See id.
CONCLUSION

There is no readily apparent solution to the problems created by the complexity of the Clean Water Act. On one hand, the judiciary generally possesses a great deal of expertise in issues of statutory interpretation. The public expects the courts to be capable of analyzing any statute, even one as daunting as the CWA. On the other hand, the judiciary has no specific expertise in the issues of scientific and technical analysis that often adhere to CWA provisions. The courts are ill-equipped to question the merits of the EPA’s effluent limitations and seemingly do not understand the effect of the various steps the agency takes in that process.

At a minimum, the public needs to be aware that at least some courts struggle mightily to understand the Clean Water Act. If lenient judicial review does in fact increase the risk of agency capture in other cases, the public needs to find another way to control powerful industries like domestic coal. The courts may not be the answer to the perils of agency capture, and sometimes they may not even understand the question.