Testimony of Richard O. Faulk

Senior Director, Initiative for Energy and the Environment
Law & Economics Center, George Mason University School of Law, Arlington, Virginia
Partner, Hollingsworth LLP, Washington, DC

Before the
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
United States House of Representatives

July 15, 2014

Thank you for inviting me to speak to you today. At the outset, let me note that I am not appearing here on behalf of any client or organization. I have responded to the committee's invitation as a concerned citizen, and I will provide information based upon my experience and observation.

I serve as the Senior Director of the Initiative for Energy and the Environment for the Law & Economics Center at George Mason University School of Law, where I develop and participate in forums designed to promote constructive dialogue regarding our nation's energy and environmental concerns. I am also a partner in the Washington DC law firm of Hollingsworth LLP, where I maintain a trial and appellate practice that includes environmental litigation matters. For most of my 37 years of practice, I have focused on complex toxic tort and environmental litigation.

Over my years of practice, I have become familiar with the sources of the Environmental Protection Agency's alleged authority to veto permits issued under Section 404 of the federal Clean Water Act, as well as the disputes that have arisen recently regarding the extent of that authority both before and after permits have been issued by the Corps of Engineers – the primary regulatory body responsible for such actions.

Based upon my review of three situations that have arisen recently, I believe there is an urgent need for a comprehensive inquiry into whether the current statutory structure authorizes – or

can be construed to authorize – abusive retrospective and prospective vetoes of legitimate business activities. The risk presented by such vetoes can be evaluated by reviewing three recent situations:

(1) EPA's revocation of section 404 permit that the Corps issued to the Spruce No. 1 Mine, a surface coal mine in Logan County, West Virginia. Mingo Logan Coal Company;

(2) EPA's threat to use Section 404(c) prospectively to withdraw large geographic areas from any extractive development by Pebble Mine partnership in Alaska even before the company seeks a permit for extractive activity in that area. *See* http://corporate.pebblepartnership.com/news-article.php?s=lawsuit-targets-overreaching-epa-pre-emptive-veto-process (last visited July 13, 2014); and

(3) The request made on May 27, 2014 to the EPA by a group of Native American tribes in Northern Wisconsin's Penokee Hills to use Section 404(c) prospectively to protect treaty rights, aquatic resources, fisheries, wildlife, subsistence and public use in the Bad River Watershed and western Lake Superior Basin from metallic mining, including a potential mine by Gogebic Talconite – again before a permit has even been requested.

If the Congressional inquiry reveals that such risks exist, Congress should consider amending the Clean Water Act to preclude such abuses. Such amendments should require that EPA's objections and withdrawal of specifications occur only during the normal permitting process – not before the permitting process is commenced, and not after the process is concluded. Such reforms will preclude the prejudice sustained when permits are "withdrawn" after operations have commenced, and also ensure that all issues and arguments are considered as part of the permitting process – rather than exercised preemptively. Without such protections, these practices – enhanced by deferential judicial review – unreasonably expand the EPA's regulatory range and threaten to upset the delicate balance of powers and participation necessary to ensure fair administration of the Clean Water Act.

Retrospective Veto: Mingo Logan

After more than two years of litigation in federal courts, the authority of the U.S. Environmental Protection Agency ("EPA") authority to "veto" permits issued under Section 404 of the Clean Water Act ("CWA") remains a highly contested issue. Section 404 permits, which are issued by the U.S. Army Corps of Engineers ("Corps"), authorize the discharge of dredged or fill

material into navigable waters at specified disposal sites identified in the permit. Such permits are required for a broad range of industrial activities including the extraction of natural resources and the development of energy infrastructure. EPA has taken the position that it may "veto" a Section 404 permit after the permit is issued by "withdrawing" the permitted disposal sites.

Last year, in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*,[1] the U.S. Court of Appeals for the D.C. Circuit agreed that EPA had such authority. Mingo Logan then sought certiorari in the Supreme Court. Although the Supreme Court denied review, Mingo Logan's arguments frame many issued relevant to this hearing.

Mingo Logan argued that, read in the context of the broader statutory scheme, and as supported by the legislative history, section 404 does not allow EPA to exercise post-permit withdrawal authority that "effectively nullif[ies] a permit properly issued by the Corps [of Engineers].."[2] In support of this argument, Mingo Logan appealed to the Supreme Court's recognition in *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009), that the Corps, and not EPA, has primary authority to issue section 404 permits. As in that case, Mingo Logan argued, overlapping permitting authority between the Corps and EPA for section 404 permits would create regulatory burdens and confusion unintended by Congress.

Aside from the legal arguments, Mingo Logan and a multitude of *amici curiae* also argued that retrospective vetoes raised significant economic problems. Giving EPA the unconstrained authority to revoke section permits at any time strips the permits of the finality and regulatory certainty intended by Congress. While the Corps is required to consider impacts on investment-backed expectations before revoking a permit, EPA exercised its "veto" authority with no such constraints.

---

[1] 714 F.3d 608 (D.C. Cir. 2013).

[2] Petition for Writ of Certiorari in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency* (No. 13-599), at i, 9-22 ("Mingo Logan Cert. Petition").

Such authority would have a devastating chilling effect on investment in industries that rely on section 404 permits and would have a negative ripple effect across the nation's entire economy. For example, the regulatory uncertainty created by the D.C. Circuit decision jeopardized millions of dollars of investments in the construction and maintenance of energy infrastructure that requires section 404 permits.[3] Reduced investment makes it harder to develop energy infrastructure, thus reducing the reliability of energy delivery and resulting in higher costs for ratepayers in every sector of the economy.

Mingo Logan and the *amici* also raised broader constitutional and federalism concerns. First, they argue that because tremendous investments are staked on the expectation of certainty and finality of the section 404 permit, the sudden revocation of such permits raises constitutional takings concerns. Additionally, EPA's veto would disrupt the balance of state and federal authority to regulate water. Mingo Logan, and West Virginia and other states filing as *amici curiae*, noted that EPA's post-permit revocation of specifications based on purported impacts to water quality usurps the states' primary authority to regulate water quality.

Prospective Veto: Pebble Mine and Gogebic Talconite

Although retrospective vetoes of section 404 permits effectively preclude continued operations, prospective vetoes preclude development without the information typically generated in the permitting process – thereby depriving potential extractors and operators from meaningful participation in EPA's decision-making process. Under section 404(c), the only appropriate time for EPA to consider such veto authority is *after* a company has sought a section 404 permit from the U.S. Army Corps of Engineers. Although section 404(c) provides an opportunity for "notice and public hearing" before withdrawal, it does not allow Corps to consider the permit application and perform a review under the National Environmental Policy Act (NEPA). As a result, the process is

[3] Brief for the American Petroleum Institute, et al in Support of Petitioner in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency* (No. 13-599) (filed Dec. 16, 2013) ("API Brief").

subverted on the basis of a "hypothetical" situation, thereby enabling withdrawal may occur without a participatory factual record.

These practices raise concerns that EPA may use this "authority" as a form of "zoning" to preclude exploration and production of minerals, including oil and gas, before plans to extract those minerals are announced. Such tactics would preempt any efforts by the Corps and the prospective extractors to reduce or eliminate environment effects – something the permitting process is designed to encourage.

More alarmingly, EPA's interpretations of the Clean Water Act are presently entitled to deferential judicial review – which the U.S. Supreme Court deems "dispositive" so long as the interpretation is "reasonable."[4] Even if the controlling provision or regulation is vague or ambiguous, the High Court commonly defers to the regulator's interpretation.[5] Finally, when complex questions of scientific issues and conclusions are involved, administrative agencies conclusions are entitled to "extreme deference."[6] These deferential evaluations enhance the unfairness and prejudice of EPA's decisions by precluding meaningful judicial review of objections to EPA's conclusions. They also diminish the circumstances under which the EPA may be held accountable for arguably "reasonable" but economically unsound interpretations. Although problems of "deference" are not unique to the Clean Water Act, the problems examined in today's hearing provide excellent examples of the need for more active judicial review that constrains the President and his executive agencies within their proper Constitutional sphere.

---

[4] *See EPA v. Homer City Generation LP*, 572 U.S. ___ (April 29, 2014)(Slip. Op. at 20), available at http://www.supremecourt.gov/opinions/13pdf/12-1182_553a.pdf (last visited July 13, 2014).

[5] *See Auer v. Robbins*, 519 U. S. 452, 461–463 (1997).

[6] *See City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003).