



**Committee on Transportation and Infrastructure
U.S. House of Representatives**

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Washington, DC 20515

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July 11, 2014

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SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Water Resources and Environment Subcommittee Hearing on "EPA's Expanded Interpretation of its Permit Veto Authority under the Clean Water Act"

PURPOSE

The Water Resources and Environment Subcommittee is scheduled to meet on Tuesday, July 15, 2014, at 10:00 a.m., in 2167 Rayburn House Office Building, to receive testimony on the Environmental Protection Agency's (EPA) expanded interpretation of its veto authority under the Clean Water Act.

BACKGROUND

Clean Water Act

In 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act (CWA). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The primary mechanisms for achieving this objective are the CWA's general prohibition against the discharge of pollutants into jurisdictional waterbodies, and the CWA permitting process for such discharges, either through a National Pollutant Discharge Elimination System (NPDES) permit, or through a separate permit program, for the discharge of dredged or fill material into jurisdictional waterbodies, including wetlands.

The U.S. Environmental Protection Agency (EPA) has the basic responsibility for administering and enforcing most of the CWA, including the NPDES permit program, and the U.S. Army Corps of Engineers (Corps) has the lead responsibility for administering the dredge or fill (wetlands) permit program under section 404 of the CWA. The EPA has a complementary role in administering section 404, both in the development of environmental guidelines to provide a means of evaluating whether any discharge of fill is environmentally acceptable, and through its review of the program's implementation under section 404(c). Under the wetlands permitting program, the Corps has authority to issue dredge or fill permits (typically for a permit term of five years) for the discharge of materials into jurisdictional waterbodies at specified

disposal sites. It is unlawful for a facility to discharge dredge or fill materials into a jurisdictional waterbody unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps.

Section 404 of Clean Water Act

Under Section 404 of the Clean Water Act, the Corps has authority to issue dredge and fill permits for the discharge of materials into navigable waterways at specified disposal sites. The Corps develops and issues these disposal site permits with oversight by the EPA. Congress intended for expeditious decisions on Section 404 permits. Specifically, it instructed that, to the maximum extent practicable, decisions on Section 404 permits will be made within 90 days.

The Corps' internal procedures require the Corps to review permit applications for completeness and, within 15 days of receiving applications, issue a public notice for applications deemed complete. By regulation, the comment period shall last for a reasonable period of time within which interested parties may express their views, but generally should not be more than 30 days. The Corps generally must decide on all applications no later than 60 days after receipt of a complete application.

Section 404 assigns the EPA two tasks specifically in regard to fill material. First, the EPA must develop, in conjunction with the Corps, the guidelines for the Corps to follow in determining whether to permit a discharge of dredge or fill material. Second, the Act confers on the EPA authority, under specified procedures, to prevent the Corps from authorizing certain disposal sites. The EPA oversees the Corps' review of the environmental effects of the proposed disposal sites. For example, no permit shall be issued if it causes or contributes to any violation of water quality standards.

The EPA may comment on the Corps' application of the Section 404 guidelines to particular permit applications during the interagency review period required for each permit. In addition, the EPA has limited veto authority under Section 404(c) to prevent the Corps from authorizing a particular disposal site. To exercise that authority, the EPA must determine, after notice and an opportunity for public hearing, that certain unacceptable environmental effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas would result. The EPA does not have authority to exercise unfettered enforcement of compliance with the Section 404 guidelines. EPA must also consult with the Corps and publicize written findings and reasons for any determinations it makes under Section 404(c).

The EPA's Assertion of 404(c) "Veto Authority"

Recently, the EPA has asserted more broadly its veto authority under section 404(c) of the CWA. EPA's broad interpretation has evolved into the authority to veto before a permit is applied for, while an application is pending, or after a permit has already been issued. It was Congress' intent that the issuance of a federal permit should come with certainty that the activity can go forward unencumbered but within the bounds of the permit. The EPA's new broad interpretation has led to uncertainty throughout the business communities that rely on 404 permits. Businesses and investors start to raise the question, if an agency is given the authority to revoke an already issued permit that has not been in violation of any precondition terms – is any permit ever actually final?

A recent example of the EPA's new assertion of its veto authority is Spruce Mine. In 2007, the Corps of Engineers issued a section 404 permit in connection with the Arch Coal, Mingo Logan, Inc., Spruce No. 1 Surface Mine, located in Logan County, West Virginia.

Prior to the issuance of the permit, Arch Coal conducted an extensive 10-year environmental review, including a 1,600 page Environmental Impact Statement (EIS) in which EPA fully participated and agreed to all the terms and conditions included in the authorized permit. Subsequently, the mine operated pursuant to and in full compliance with the section 404 authorization. This detailed level of environmental review is unprecedented for activities on private lands.

Even though the mine operated pursuant to, and in compliance with, their section 404 permit, on April 2, 2010, the EPA Region III published a Proposed Determination to prohibit, restrict or deny the authorized discharges to certain of the waters associated with the Spruce project site. The notice was followed by public comment and hearings. In addition, the notice prompted a legal challenge in the federal district court where Mingo Logan Coal Company, Inc. challenged the agency's unlawful attempt to revoke a CWA Section 404 permit more than three years after the permit's issuance.

On September 24, 2010, the EPA Region III Regional Administrator signed a Recommended Determination recommending the EPA withdraw the discharge authorization. In response, Mingo Logan Coal provided the EPA with substantial technical comments to support its opposition to the Recommended Determination. The Final Determination of permit veto was signed on January 13, 2011.

In March 2012, a U.S. District Judge sided with Mingo Logan Coal, Inc. and overruled the 2011 permit revocation of Spruce Mine's 404 permit. The judge stated that the veto was "a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute." This ultimately led to an appeal by the EPA.

In April 2013, a decision by the U.S. Court of Appeals for the District of Columbia overruled a U.S. District Judge's conclusion that the EPA lacked the legal authority to veto a Clean Water Act 404 permit. The appeals court said the Clean Water Act contains "unambiguous language" that "manifests the Congress' intent to confer on EPA a broad veto power extending beyond the permit issuance." As of now, the Supreme Court has declined to take up the Spruce Mine case.

The EPA has not only asserted itself after a permit has been issued, it has recently been preempting potential applicants. A recent example of the EPA exercising its veto authority before someone even applies for a 404 permit is Pebble Mine, Bristol Bay, Alaska. In this case, without ever receiving an application describing a proposed action, the EPA has declared that no permit can ever be issued in a designated area. To date, there have not been any judicial rulings on this practice by the EPA.

Some public and private entities that rely on section 404 permits to conduct their business are concerned about the EPA expanding its interpretation of its veto authority to include before an application is submitted and after a permit has been issued. Until recently, the EPA had only

exercised its veto a few times and only after an application had been received and when it appeared that the Corps was about to issue a permit over the EPA's objections. Some are concerned that this has brought uncertainty to the development process that could chill future investments in vital infrastructure and other projects that require section 404 permits. Considering that, according to David Sunding, a professor at University of California – Berkley, approximately \$220 billion worth of projects are dependent each year on section 404 permits, the potential exists for this new practice by the EPA to have a significant impact to local, regional, and national economies.

WITNESSES

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