EPA'S UNPRECEDENTED EXERCISE OF AUTHORITY UNDER CLEAN WATER ACT SECTION 404(C)

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I. Background

On January 13, 2011, the Environmental Protection Agency (EPA), for the first time, exercised its authority under Section 404(c) of the Clean Water Act (CWA) to effectively revoke a Section 404 permit that had previously been issued by the U.S. Army Corps of Engineers (Corps). Final Determination of the U. S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/spruce.cfm.

Section 404(a) of the CWA regulates the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Section 404(c) gives EPA the authority "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area (including the withdrawal of specification) as a disposal site." 33 U.S.C. § 1344(c). Section 404(c) authority, therefore, extends to "specifications," but does not mention EPA authority over "permits," which instead is vested with the Corps under Section 404(a).

In this case, the Corps issued a permit for the mining project at issue in January 2007, after ten years of study, including the preparation of an environmental impact statement (EIS). Dozens of state and federal regulators, including EPA, were involved in reviewing the project before the permit holder was granted authorization to proceed. West Virginia's Department of Environmental Protection (WVDEP) analyzed the project under Section 401 of the CWA and certified that it would meet West Virginia's water quality standards. WVDEP also issued a National Pollutant Discharge Elimination System (NPDES) permit, under Section 402 of the Act, authorizing the discharge of treated water from sediment ponds at the site into downstream waters. Following these approvals and detailed review, the Corps issued a permit under CWA Section 404.

Although it had participated in these regulatory reviews, EPA had not exercised any statutory authority to challenge or contest any of these regulatory approvals. Rather, on March 26, 2010, and three years after the Section 404 permit had been issued, EPA Region III announced that it now intended to exercise its authority under Section 404(c). EPA cited no violations of any permit, but merely noted that it believed that the project would have "unacceptable adverse effects" on "wildlife." In this case, the primary "unacceptable adverse effects" were water quality-related changes that EPA believed would adversely impact a particular type of sensitive macro-invertebrate species, the mayfly, in waters downstream from the project site. Ultimately, Region's III determination was upheld by EPA's Headquarters earlier this year.

EPA's unprecedented exercise of authority raises significant implications for the Section 404 program, including whether any CWA permit is vulnerable to revocation under EPA's Section 404(c) authority even after permit issuance and despite compliance with the permit's terms.

II. The Clean Water Act

A. Corps Authority to Issue Permits for the Discharge of Dredged or Fill Material

The CWA includes a broad prohibition against any discharge of pollutants from point sources to navigable waters. 33 U.S.C. § 1311(a). Such discharges are only permissible if done pursuant to a validly issued permit. *See* 33 U.S.C. § § 1342(a), 1344(a), and 1328(a). The type of permit required depends on the type of discharge. Discharges of "fill material" require a Corps-issued permit under Section 404. 33 U.S.C. § 1344(a). In order to issue a permit under Section 404, the Corps must first specify a disposal site for the discharges of fill material. *Id.* at 1344(a)–(b). These disposal sites are specified by applying the Section 404(b)(1) guidelines. 33 U.S.C. § 1344(b)(1). The Corps is also responsible for enforcing compliance

with permit terms, 33 U.S.C. § 1344(s), and has the power to decide whether those permits should be modified, suspended, or revoked after they are issued. 33 C.F.R. § 325.7. Importantly, once the Corps issues a permit, the permit holder may lawfully discharge the fill material and the permit effectively nullifies the ban on such discharges that forms the basis of the CWA. 33 U.S.C. § 1311. To reaffirm the authorization granted in a permit, Congress enacted Section 404(p), which formally establishes that discharges in compliance with the permit comply with the CWA. 33 U.S.C. § 1344(p).

B. EPA's Role Under Section 404

Although the Corps is the lead agency in permitting discharges of dredged or fill material into the navigable waters, Congress gave EPA a role in this process. In conjunction with the Corps, EPA promulgates the guidelines that the Corps applies to specify disposal sites. See 33 U.S.C. § 1344(b)(1); 40 C.F.R. pt. 230. EPA also provides comments to the Corps during the permitting process. See 33 U.S.C. § 1344(a); 33 C.F.R. § 325.2. And if EPA has concerns about a proposed discharge that it believes the field-level personnel at the Corps are not addressing, it may seek elevation of a permit decision to the Division and Headquarters levels of the Corps. See 33 U.S.C. § 1344(q); "Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army" (Aug. 11, 1992), available at http://www.epa.gov/wetlands/regs/dispmoa.html. EPA also reviews and evaluates all environmental impact statements prepared by federal agencies, and, if it is concerned about an agency's compliance with the National Environmental Policy Act (NEPA), EPA may refer the matter to the White House Council on Environmental Quality (CEQ) for resolution. See 42 U.S.C. § 7609; 40 C.F.R. pt. 1504.

In addition to these proscribed roles, Congress in Section 404(c) authorized EPA to prohibit, restrict, or withdraw the "specification" of a disposal site that the Corps proposes to include in a permit. *See* 33 U.S.C. § 1344(c). Section 404(c) states:

> **Denial or restriction of use of defined areas as disposal sites**
> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

Id. Section 404(c) allows EPA to do two things: (1) "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site"; and (2) "deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site." *Id.*

EPA adopted regulations setting forth the process for implementing Section 404(c). *See* 40 C.F.R. § 231.1 et seq. The four main steps in this process are: (1) the Regional Administrator's notice to the Corps, the property owner, and the applicant (and/or project proponent) of the intention to initiate the Section 404(c) process; (2) the Regional Administrator's publication of a Proposed Determination to withdraw, deny, restrict, or prohibit the use of the site, soliciting public comment and offering an opportunity for a public hearing; (3) the Regional Administrator's recommendation to the Assistant Administrator for Water and Waste Management at EPA Headquarters to withdraw, deny, restrict, or prohibit the use of the site (Recommended Determination); and (4) the Assistant Administrator for Water and Waste

Management's Final Determination to affirm, modify, or rescind the Regional recommendation.
The standard for acting under Section 404(c) is whether the Administrator determines that the activity will result in "an unacceptable adverse effect" on the specified resources identified in Section 404(c). EPA's regulations define "unacceptable adverse effect" as an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas." 40 C.F.R. § 231.2(e). In the preamble to these regulations, EPA stated that "[t]he term 'unacceptable' in [its] view refers to the significance of the adverse effect—e.g., is it a large impact and is it one that the aquatic and wetland ecosystem cannot afford." 44 Fed. Reg. 58,076, 58,078 (Oct. 9, 1979).

EPA's regulations also state that in "evaluating the unacceptability of such impacts, consideration should be given to the *relevant portions* of the Section 404(b)(1) guidelines (40 C.F.R. Part 230)." 40 C.F.R. § 231.2(e) (emphasis supplied); *see also Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 1182 (D.D.C. 1985). While Section 404(c) could be read to limit the veto to the environmental effects specified in the statute and 40 C.F.R. § 231.2(e) (e.g., degradation of municipal water supplies or significant loss of or damage to fisheries, etc.), EPA has interpreted this authority to authorize vetoes based on the availability of practicable alternatives, an interpretation upheld by the courts. *See Bersani v. EPA*, 674 F. Supp. 405, 417 (N.D.N.Y. 1987), *aff'd sub nom Robichaud v. EPA*, 850 F.2d 36 (2d Cir. 1988).

In *Bersani*, EPA exercised its Section 404(c) authority after determining that the permit would have an unacceptable adverse impact on "wildlife," one of the veto criteria expressly set out in Section 404(c). However, as part of that determination, EPA relied on portions of the Section 404(b)(1) Guidelines that prohibit discharges where there are practicable alternatives. 674 F. Supp. at 411. EPA found there were practicable alternatives, which would be less damaging to the wildlife habitat. *Id.* The permit applicant argued that the avoidability of potential impacts could not be considered in evaluating the unacceptability of those impacts. *Id.* at 413. It claimed that the Section 404(b)(1) Guidelines are "concerned with a greater number of environmental factors" than are listed as grounds for veto in Section 404(c) and, therefore, it was wrong to rely on this broader spectrum of regulatory factors. *Id.* at 414. The district court found that "EPA did not use the Section 404(b)(1) Guidelines to find an unacceptable adverse impact on any resource not specified in Section 404(c)" because "[t]he unacceptability of the site was determined with respect to wildlife, a category explicitly enumerated [under Section 404(c)]." *Id.* Thus, while EPA can use a broad spectrum of tools listed in the Section 404(b)(1) Guidelines to make a veto decision, those tools do not replace or broaden the exclusion veto criteria listed in Section 404(c).

C. EPA Has Never Retroactively Vetoed a CWA Section 404 Permit

Prior to its January 2011 action, EPA had only exercised its veto authority twelve times since 1972. *See* EPA, "Clean Water Act Section 440(c) 'Veto Authority,'" *available at* http://www.epa.gov/owow/wetlands/pdf/404c.pdf. All of those decisions occurred prior to the issuance of the permit at issue. EPA, however, acknowledged in the preamble to its regulations that it could utilize Section 404(c) where a permit had already been issued by the Corps. At the same time, EPA also acknowledged that it would be "much preferable to exercise this authority before the Corps . . . has issued a permit, and before the permit holder has begun operations . . . based on . . . a concern for the plight of the applicant." 44 Fed. Reg. at 58,077. *See also id.* at 58,082 ("It is expected that the suspensions will be infrequent, since it is EPA's policy to try to resolve environmental problems before permits are issued."). EPA further noted that, when it asserts its Section 404(c) authority after a permit has been issued, it should endeavor to do so in limited circumstances such as where "new information may come to EPA's attention; there may be new scientific discoveries; or in very rare instances, EPA may not receive actual notice of the Corps' intent to issue a permit in advance of issuance." *Id*. at 58,077.

III. EPA's Final Determination to Exercise 404(c) After the Corps Has Issued a Permit

The permittee in this case received its Corps permit in 2007 and began spending money preparing the site and commencing operations immediately. In September 2009, EPA sent a letter to the Corps formally requesting that the Corps "use its discretionary authority provided by 33 C.F.R. 325.7 to suspend, revoke, or modify" the permit. The Corps and the State of West Virginia wrote strongly worded letters back to EPA stating that "[a]t some point, a project must be deemed to have been studied enough. . ." Ultimately the Corps refused EPA's request, finding that none of the factors under its regulations warranted revocation of the permit.

Despite the Corps' determination that no grounds existed for modifying, suspending, or revoking the Permit, on March 26, 2010, EPA Region III gave notice that, pursuant to CWA section 404(c), it intended to modify or revoke the Permit by "withdraw[ing] or restrict[ing] use of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch." On April 2, 2010, EPA Region III published its "Proposed Determination" in the *Federal Register*. 75 Fed. Reg. 16,788 (Apr. 2, 2010). EPA took public comment on the Proposed Determination and held a public hearing. On September 24, 2010, EPA Region III forwarded a "Recommended Determination to EPA Headquarters, recommending that EPA modify the Spruce No. 1 Permit by revoking the Permit's authorization to discharge fill into Pigeonroost and Oldhouse Creeks.

On January 13, 2011, EPA published its "Final Determination," pursuant to CWA Section 404(c), claiming to modify Mingo Logan's Section 404 permit by revoking the permit's authorization to discharge fill into Pigeonroost and Oldhouse Creeks. Notice of Final Determination, 76 Fed. Reg. 3,126 (Jan. 19, 2011). The Final Determination concludes, as the justification for EPA's action, that the authorized discharges "will have unacceptable adverse effects on wildlife." Final Determination at 6. The Final Determination does not allege that there has been any violation of applicable water quality standards, nor does the Final Determination predict that any such violation will occur. Instead, the Final Determination largely seeks to establish and apply new water quality standards for conductivity. The Final Determination applies a 500 μS/cm conductivity threshold, a standard that has been successfully challenged in litigation.[1] Ultimately, and among other things, the Final Determination claims that conductivity increases caused by the project will cause "shifts" in the macro-invertebrate community downstream of the project, and, thus, result in unacceptable adverse impacts to "wildlife."

The Corps has continued to take no action with respect to the permit, despite the EPA Final Determination to withdraw the specifications.

IV. Wide-Ranging Implications of This Decision

The permit holder has challenged EPA's decision in the U.S. District Court for the District of Columbia arguing that EPA overstepped its authority under the CWA by effectively revoking the permit.[2] The permittee argues that EPA's authority does not extend to permits at all, as Section 404(c) does not refer to permits. Rather, EPA can object to the "specification of a disposal site" *prior to* permit issuance. But once the Corps issues a Section 404 permit, EPA's authority under Section 404(c) ceases. This threshold legal determination is only one of the many issues at play in this case. In addition, the case will also present fundamental legal issues relating to the distinction between Sections 402 and 404 permits and the scope of EPA's authority to override State decisions regarding water quality.

If EPA has the authority to retroactively veto CWA Section 404 permits, the implications are wide-spread. While the permit vetoed by EPA here was for a mining project, Section 404 permits are required for many other types of projects, including building, agriculture, mining, transportation, and energy projects. EPA's action means that any Section 404 permit could be vulnerable, regardless of the permit-holder's compliance with the permit or the State's or Corps's views. Having invested substantial resources in a project requiring a Section 404 permit (including

substantial resources in the permitting process itself), the permit holder would have no assurance, contrary to Section 404(p), that it would be allowed to reap the benefits of its investment if it complies with the permit and be shielded from CWA liability. Instead, there would be great uncertainty and regulatory limbo regarding whether any permit was going to be vetoed and whether validly permitted projects will be able to be completed.

Indeed, several industry trade associations already have recognized the significance of EPA's action. Before the final decision, industry groups of the Waters Advocacy Coalition wrote a letter to Chair of the Council for Environmental Quality, Nancy Sutley, asking her to stop EPA from exercising Section 404(c) over the permit. Ms. Sutley commented, that the CEQ "does not get involved in individual permit matters." Following EPA's decision, the Waters Advocacy Coalition also wrote to Congress raising their concerns with the unfairness of the decision, noting that the Corps program authorizes some $220 billion in economic development and that the decision to revoke a permit has dire consequences for the U.S. economy.

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Endnotes

[1] The National Mining Association recently brought a challenge to the EPA conductivity standard. On January 14, 2011, the U.S. District Court for the District of Columbia held that NMA was likely to prevail on its claim that EPA, in establishing the 500 µS/cm as a "benchmark" for conductivity, exceeded its statutory authority under Sections 303, 402, and 404 of the CWA. *Nat'l Mining Ass'n v. Jackson*, No. 1:10-cv-1220-RBW, 2011 WL 124194, at *2 (D.D.C. Jan. 14, 2011).

[2] Complaint, *Mingo Logan Coal Co. v. U.S. Envtl. Prot. Agency*, Case No. 1:10-cv-00541 (CKK) (D.D.C. Apr. 5, 2010). In addition, legislation has been introduced in Congress to limit EPA's authority under 404(c). At the time of this writing, the status of that legislation was uncertain. A Bill to Amend the Water Pollution Control Act, H.R. 457, 112th Cong. (2011); EPA Fair Play Act, S. 272, 112th Cong. (2011).