UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL CO., INC., **Plaintiff,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** **Defendant.**	)	Case No. 1:10-cv-00541-ABJ

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF

Pursuant to the concurrently filed Motion for Leave, the *amici curiae* listed in that motion respectfully submit this brief in support of Plaintiff Mingo Logan Coal Company ("Mingo Logan")'s motion for summary judgment.

INTRODUCTION

In January 2011, when the U.S. Environmental Protection Agency published a "Final Determination" purporting to unilaterally modify a Clean Water Act permit that had been issued to Mingo Logan by the U.S. Army Corps of Engineers four years earlier, its decision echoed far beyond the coal mines in the mountains of West Virginia. Never before had EPA acted against a Corps permit ***after*** it was issued. Now, suddenly, EPA is claiming the power to step in and alter the terms of an existing Corps permit any time it determines that the project's impacts are "unacceptable"—even when the agency had previously reviewed the permit and assented to its issuance, and even when the permit holder is in full compliance. If EPA has this authority to revise or revoke Corps permits after they issue, over the objections of the Corps and the State, Corps permit holders can no longer be sure that their current or future projects are safe from a similar fate.

The universe of projects contingent on Clean Water Act Section 404 permits issued by the Corps is a significant part of the U.S. economy. Every year, the Corps' Section 404 permitting program authorizes approximately $220 billion in economic investment. EPA's assertion that it has the authority to revise Section 404 permits after the Corps issues them creates tremendous investment uncertainty for all permit holders and potential project proponents.

Amici are a wide-ranging coalition of industry groups whose membership deals daily with the necessity of obtaining permits from the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. They include: the Chamber of Commerce of the United States, the National Association of Manufacturers, the American Road and Transportation Builders Association, the Association of American Railroads, the National Association of Home Builders, the American Farm Bureau Federation, the Fertilizer Institute, the National Council of Coal Lessors, the Industrial Minerals Association – North America, the Utility Water Act Group, the Foundation for Environmental and Economic Progress and the Western Business Roundtable.[1] In light of EPA's unprecedented efforts to modify Mingo Logan's Section 404 permit, members of each of these groups face significant investment uncertainty with respect to both the permits they are currently holding and the permits they plan to acquire in the future. Inevitably, that uncertainty will translate into higher risks in borrowing, less investment, lost jobs and slower growth throughout the U.S. economy. These impacts are not mere speculation on the part of industry. Dr. David Sunding, Professor in the Department of Agricultural and Resource Economics at the University of California, Berkeley, has evaluated the economic impacts associated with EPA's actions and found them to be significant.

[1] The specific interests of these *amici* are set forth in the accompanying motion for leave.

Other than saying that it rarely uses authority under Section 404(c) of the Clean Water Act, EPA has made little effort to justify its unprecedented and aggressive expansion of that authority, much less to consider how its actions against Mingo Logan would affect financing and economic investment by other Section 404 permit holders and permit applicants. *Amici* can attest that allowing EPA to assert such unbridled authority with respect to previously issued Section 404 permits risks substantial economic dislocations in a variety of industries. Accordingly, *amici* urge the Court to stop EPA from arrogating the authority to modify Section 404 permits after they have been issued.

ARGUMENT

I. EPA's unprecedented action represents a significant change to the established system of permitting under Section 404 of the Clean Water Act.

A. Section 404 permits are used by *amici* in a wide variety of circumstances.

Virtually any economically significant activity in the United States, whether undertaken by public or private entities, requires some sort of regulatory approval. For activities that discharge fill material into waters of the United States (including wetlands), a project proponent often must obtain a Section 404 permit from the U.S. Army Corps of Engineers.

As indicated by the variety of industries and interests represented by *amici*, the need for a Section 404 permit can arise in a surprisingly broad range of circumstances. The Corps estimates that more than $220 billion of investment each year is conditioned on the issuance of these permits. All sorts of activities—construction of utility infrastructure, housing and commercial development, renewable energy projects like wind farms or solar arrays, and

transportation infrastructure projects such as highways and rail lines—frequently involve the permitted filling of the broadly defined "waters of the United States."[2]

Most project proponents that apply for Section 404 permits simply cannot avoid impacting waters that fall under the Corps' jurisdiction. The regulatory definition of "waters of the U.S." encompasses most everything from ponds to simple creeks or drains to virtually any area where the soil is saturated by surface or groundwater. *See* 40 C.F.R. 230.3(s), (t). It would be impossible to provide utility and electric service, transportation, housing, food, fiber or other amenities in those places without affecting waters or wetlands. For this reason, investment in many sectors hinges on the Section 404 permitting process. *Amici* represent a cross-section of the industries that are making those investments. Accordingly, *amici* and their membership are dependent not only on the availability of Section 404 permits, but also on the predictability of the regulatory process.

B. EPA's attempt to modify an already-issued Section 404 permit is unprecedented.

Section 404(a) of the Clean Water Act authorizes the Secretary of the Army to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Corps of Engineers, as the Secretary's delegatee, has promulgated detailed regulations setting forth the substantive and procedural requirements for obtaining these Section 404 permits. *See* 33 C.F.R. Parts 323, 325. After the Corps issues a permit under those regulations, it retains authority to modify, suspend or revoke that permit under certain circumstances, provided that it adheres to the established procedures for doing so.

[2] EPA has recently issued draft guidance that advocates an even broader interpretation of the term "waters of the United States." *See* 76 Fed. Reg. 24479 (May 2, 2011).

See 33 C.F.R. § 325.7.[3] Most Corps permits explicitly state that they are subject to modification, suspension or revocation under the terms of the Corps' regulations.

This case, of course, turns on the scope of EPA's authority under Section 404(c) of the Clean Water Act. EPA asserts that it has exercised this power only 13 times since the Clean Water Act became law in 1972. *See* Testimony of Nancy K. Stoner, Acting Asst. Admin., Office of Water, before the Subcomm. on Water Res. and Env't, U.S. House of Rep. Transp. and Infrastructure Comm. ("Stoner Testimony") at 4 (May 11, 2011), attached as Appendix B. It is important to recognize, however, that the number of times EPA has formally acted pursuant to Section 404(c) is but a "miniscule fraction" of the number of times it has "resolved issues" by using the threat of such action to obtain concessions from the Corps or project proponents. *Id*. at 5. In other words, the sheer number of times that EPA has used its authority under Section 404(c) does not even begin to capture the influence that the agency can have on the Section 404 permitting process.

For present purposes, the important issue is not how many times EPA has acted under Section 404(c), or how it wields influence during the permitting process. Instead, the key point—the reason that *amici* are faced with a dramatic change in the Section 404 permitting process—is that "EPA has ***never before*** used its Section 404(c) authority to review a ***previously permitted project*** . . . ." Letter from William C. Early, Acting Regional Administrator, to Colonel Robert D. Peterson, District Engineer ("Early Letter") (Oct. 16, 2009), AR011906

[3] The relevant regulations state that the Corps will consider several "factors" before modifying, suspending or revoking a Corps permit, including: the extent of the permittee's compliance with the permit's terms and conditions, a change in circumstances related to the permitted activity, the continued adequacy of or need for permit conditions, significant objections to the activity not already considered, revisions to applicable statutory or regulatory authorities, and the extent to which the change in the permit would adversely the permittee's plans, investments or actions. *See* 33 C.F.R. § 325.7(a).

(emphasis added); *see also* EPA Proposes Veto of Mine Permit Under Clean Water Act (March 26, 2010), AR000001 (EPA press release stating that the agency had "never" used its Section 404(c) authority "for a previously permitted project"). Permit holders and prospective project proponents who once looked to the Corps' regulations governing suspension, modification and revocation (*see* 33 C.F.R. § 325.7) as the exclusive framework under which Section 404 permits might be altered or amended now face a completely new and undefined threat to those permits from EPA.[4]

EPA, for its part, has done little to describe—much less delimit—the circumstances under which it might employ its newly asserted power to act against a previously issued permit. True, EPA has offered repeated assurances that the use of its Section 404(c) authority is used "sparingly" (Stoner Testimony at 4) and that it "is not contemplating the use of Section 404(c) on any other previously permitted surface coal mining projects in Appalachia" (*id*. at 10). But the agency's legal position seems to be that it can use its authority under Section 404(c) to modify an already-issued permit any time it believes that the permitted project has "unacceptable" impacts. This is not a meaningful or workable standard for those who want to invest in projects requiring a Section 404 permit.

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[4] Despite the agency's prior clear statements to the contrary, EPA Assistant Administrator Nancy K. Stoner recently claimed that the Spruce No. 1 Mine was actually "the second time that EPA has used its authority under Section 404(c) to withdraw authorization to discharge under a previously issued permit . . . ." Stoner Testimony at 9. *Amici* surmise that Assistant Administrator Stoner was referring to EPA's actions against a project in Florida more than thirty years ago. In that case, the Corps had originally permitted a facility for recreational purposes without objection from EPA. *See* 45 Fed. Reg. 51275, 51276 (Aug. 1, 1980). When the Corps subsequently proposed issuing a ***new permit*** that would have allowed the facility to be turned into a landfill, EPA used its Section 404(c) authority against that new permit. *See id*.; 46 Fed. Reg. 10203 (Feb. 2, 1981). But regardless of how it is now interpreting events from the early 1980s, EPA's statements in October 2009 and March 2010 reflect a consensus that, prior to the agency's actions against Mingo Logan's permit, EPA had never attempted to use its Section 404(c) powers against a "previously permitted project."

Regardless of how rare EPA says these types of actions have been in the past, or how frequently it asserts that the circumstances in the present case are exceptional, its clearly expressed rationale is disconcerting, and reflects the agency's view that its powers under Section 404(c) are essentially unconstrained. Apparently, EPA believes it has the prerogative to revisit an already-issued Section 404 permit any time that the permitted project's impacts strike it as "unacceptable," regardless of whether those impacts are mitigated. And now that EPA has opened the door to using its Section 404(c) authority against permits previously issued, and where the permit holder is in compliance, there is no way to predict when the agency's vague, standardless determination that a project's impacts are unacceptable will cause it to target some other permit or group of permits.

II. EPA's actions in this case threaten to cause significant disruption throughout the economy.

EPA's unprecedented effort to modify Mingo Logan's previously issued Section 404 permit has caused significant uncertainty for both holders of and applicants for Section 404 permits. Obtaining a Section 404 permit already imposes significant burdens on a project proponent that must be factored into the project's overall economic cost. The additional doubt that EPA's actions have cast over the long-term stability of those permits increases those economic costs, thereby altering the incentives to invest in projects that must pass through the Section 404 process.

A. The Section 404 permitting process imposes substantial costs on industry.

Virtually any project that could have an impact on the natural environment requires the project proponent to make a significant capital investment months or even years before receiving any return on that investment. On top of any capital outlays, the proponent must also take into account the costs associated with obtaining necessary regulatory approvals, which often may

include a Section 404 permit. Satisfying the applicable regulatory requirements is not only time consuming, but also requires the applicant to generate—and provide the regulator with—a great deal of information about the project. These regulatory process costs are just as real as any other economic burden facing the project proponent. *See* David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* ("Sunding Report") at 7 (May 2011), attached as Appendix A.

An economically rational investor will not make decisions based simply on a ratio comparing a project's costs and benefits. Rather, it will factor into its analysis a calculation of the "hurdle rate"—the expected rate of return necessary for the project's benefits to exceed its actual costs. Sunding Report at 7.[5] Where there is uncertainty about the future costs and benefits of the project, the investor will adjust the hurdle rate accordingly. *Id*. The greater the risk, the higher the hurdle rate, and the more likely it becomes that the investment will be delayed or deterred. *See id*. When regulatory process costs are predictable, they can facilitate investment by lowering risk; when those costs are unpredictable because the regulatory process is uncertain, investment is discouraged. *See id*. at 7-8. This deterrence effect is especially strong in cases like this one, where the agency claims authority to revoke a permit despite the permittee's full compliance with the terms of that permit, thus leaving the permit holder without any means of limiting or managing the risk of revocation. *See id*. at 8.

Under the system as it existed prior to EPA's actions against Spruce No. 1 Mine, Section 404 permit applicants did not need to include in their hurdle rate calculations the risk that EPA would modify or revoke a permit once it had been secured. When the Corps issued a permit, the permit holder knew that the ***only*** way for it to be altered would be through the Corps' regulations

governing suspension, revocation and modification in 33 C.F.R. § 325.7. After EPA's action against Mingo Logan's permit, however, permit holders face a new risk that EPA will attempt to modify their Section 404 permit after it issues, based on factors that the agency has done almost nothing to articulate. As Dr. Sunding shows, this threat causes a distortion in the benefit-cost ratio of new investment projects. *See* Sunding Report at 8.

B. EPA's attempt to use its Section 404(c) authority in this case will have a significant adverse impact on the economy.

As already discussed, and as EPA has rightly acknowledged, the agency's decision to review the previously issued Section 404 permit for Spruce No. 1 Mine is without precedent. By definition, it represents a change in the existing statutory and regulatory framework. Section 404 permit applicants accordingly must make adjustments to their cost-benefit calculations that take into account the risk that EPA could exercise its newly-asserted power to modify previously issued permits. These adjustments include not only the risk that EPA will formally exercise its Section 404(c) authority against the permit authorizing an applicant's proposed project, but also the possibility that the agency someday may decide that an applicant's project needs to be changed or eliminated, and that it will use the threat of action under Section 404(c) to force the implementation of its desired changes.

1. EPA's regulatory actions will delay or deter investment in new projects.

Increasing the amount of uncertainty that surrounds the Section 404 permitting process, as EPA has done, simultaneously raises the investment threshold for both public and private project proponents. Moreover, Dr. Sunding's report demonstrates that the negative effect on investment would be strong, even if the risk of EPA exercising its purported authority under

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[5] Sunding's work shows that the benefit cost calculation for a given project can be represented mathematically as *Benefit*/*Cost* > 1 + *hurdle rate*. *See id*. at 7.

Section 404(c) is relatively small. For example, if the project proponent foresees a mere 1% chance that EPA would act against its previously issued permit, it would decrease the expected cost-benefit ratio for the project by 17.5%. Sunding Report at 9. A 2% chance that EPA would act adversely decreases the project's cost-benefit ratio by an astounding 30%. *Id*.

Not surprisingly, project proponents have already begun to recognize the consequences of an increased risk that EPA will either negotiate or require whatever modifications of the permit it wants, whenever it wants them. For the reasons discussed above, this increased risk means a significant decrease in the expected cost-benefit ratio of a proposed project. In some instances, the decrease in the cost-benefit ratio will be sufficient for the project proponent to be dissuaded from pursuing the project. *See* Sunding Report at 9. This chilling of investment would occur across the entire range of activities that require a Section 404 permit—the total of which is currently estimated at around $220 billion annually.

Greater uncertainty may also reduce investment in projects that need a Section 404 permit by making it more difficult to obtain financing. Banks could account for the type of risk that EPA's actions against a previously issued permit have created by charging higher interests rates on money they lend to other projects requiring a Section 404 permit. *See* Sunding Report at 10. Bond rating agencies also consider regulatory risk when evaluating a proposed bond issuance. *See id*. This makes borrowing capital more expensive for project proponents and, at the margin, would cause some proponents to abandon their projects.

In other cases, banks may also deal with the increased uncertainty that EPA has generated by "rationing" their credit. As Dr. Sunding explains, this sort of rationing can occur even when the project proponent is willing to pay the higher interest rate that the risk of an adverse EPA action would likely require. *See* Sunding Report at 10. If the threat of EPA action pushes the

interest rate above the "bank-optimal" rate, banks could see it as a sign that the loan is not worth the risk it entails. *See id*. at 10-11. For some project proponents, that could mean a complete loss of access to the credit market, which might leave them with no realistic way to move their projects forward.

The impact of the uncertainty created by EPA's actions against the Mingo Logan Section 404 permit does not stop with increased interest rates and loss of access to credit markets. Because projects requiring Section 404 permits regularly involve substantial irreversible investment—*i.e.*, capital expenditures that offer no return unless used in production—they are often riskier than other types of investment. As a result, private firms and public agencies commonly use higher hurdle rates when comparing benefit-cost ratios for such projects. Sunding Report at 7. When the regulatory environment is uncertain, the hurdle rate will be set even higher. *Id*. This uncertainty will delay or completely deter irreversible investments that would otherwise be made. *Id*. at 8. This deterrent effect is even greater for larger projects, which inherently require a larger capital outlay. *Id*. at 9.

2. By deterring investment in new projects, EPA's actions will cause direct and indirect harms throughout the economy.

Amici, as representatives of many project proponents from a variety of industries who will bear these increased costs, would be directly and adversely affected. Moreover, because such a wide variety of activities are permitted under Section 404, reducing investment in those activities will have far-reaching negative effects on the economy as a whole. For those industries that rely on Section 404 permits, a reduction in investment would translate directly into lost jobs

and reduced economic activity. Projects that would otherwise have been built, and jobs that would otherwise have been created, will never materialize.[6]

In addition, reduced investment in Section 404-dependent projects will have downstream impact on the other parts of the economy. Many developments that require a Section 404 permit are the types of projects that tend to spur other investment, or offer benefits to consumers and the public. *See* Sunding Report at 3-6. These benefit-generating projects can include private sector activities, such as projects that increase the supply of housing or commercial space, and public sector activities such as libraries, schools and infrastructure projects that reduce costs throughout the economy and contribute to overall quality of life.[7] *See id*. These multiplying, downstream benefits will be lost, however, if the initial investment in the Section 404-dependent project does not occur.

Finally, it is important to note that the increased uncertainty and risk caused by EPA's actions in this case have an adverse impact on landowners whose property may include jurisdictional wetlands or open waters. In a competitive land market, land prices will reflect the returns that could be generated if the land were dedicated to its highest and best use. *See* Sunding Report at 11. For undeveloped land, this price includes the amount that developers would be willing to pay to acquire the land for a project. *See id*. Because EPA's actions have, at the very least, lowered the expected returns from a project that requires the developer to obtain a

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[6] For instance, studies have shown that each dollar spent on new housing construction produces approximately three dollars in total economic activity; every $1 billion in residential construction creates close to 10,000-11,000 jobs. *See* Sunding Report at 3, 5. The reverse is also true—every dollar that is not invested in housing construction projects as a result of EPA's actions represents lost jobs and reduced economic activity.

[7] The evidence shows, for example, that transportation infrastructure projects frequently have large benefit-cost ratios, meaning that the total benefits to society greatly exceed the project costs. *See* Sunding Report at 3.

Section 404 permit, developers will not be willing to pay as much for the land they need. *See id*. This will reduce the equilibrium market price of land, harming both landowners who might be interested in selling their land, and long-term landholders such as farmers, whose land is their primary asset. *See id*.

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EPA's effort to modify Mingo Logan's Section 404 permit cannot be viewed as an isolated action against a coal mine in West Virginia. If EPA is free to unilaterally modify Mingo Logan's permit, which was issued four years ago, there is nothing to stop it from also modifying other previously issued permits. The specter of such unpredictable regulatory actions will discourage project proponents from pursuing Section 404-dependent development, which will in turn cause significant harm to the entire U.S. economy.

Dr. Sunding's appended study explains in some detail the mechanics of measuring the economic impacts that could result from EPA's action against Mingo Logan. Those calculations are important because *amici* expect the harms caused by EPA's reinterpretation of its Section 404(c) authority to be severe. Equally important, however, is the breadth of those impacts. As described above, EPA's attempt to change the established Section 404 permitting process will have ripple effects that spread out far beyond the coal mining industry in Appalachia. *Amici* represent a diversity of industries bound together by their frequent reliance on Section 404 permits. Thousands of permit holders—public entities and private entities, farmers, builders and manufacturers—have been relying on the Corps' Section 404 regulations and predictable process for decades. If EPA is allowed to change the game, to interfere in the operation of a longstanding permitting system, it will send shockwaves across the country, adversely impacting

amici and all the industry participants that they represent. Those impacts, *amici* submit, are a vital consideration in this case.

CONCLUSION

For all the reasons stated in this brief, *amici* urge the Court to find in favor of Plaintiff Mingo Logan Coal Company, and to hold that EPA does not have the authority to modify previously issued Section 404 permits.

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Respectfully submitted,

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