ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5150

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MINGO LOGAN COAL COMPANY, INC.,

Plaintiff-Appellee,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
Case No. 10-cv-00541 (Hon. Amy Berman Jackson)

INITIAL BRIEF OF DEFENDANT-APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IGNACIA S. MORENO
Assistant Attorney General

AARON P. AVILA
MARK R. HAAG
CYNTHIA J. MORRIS
KENNETH C. AMADITZ
MATTHEW LITTLETON
Attorneys, Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7415
Washington, DC 20044
(202) 514-4010
matthew.littleton@usdoj.gov

Of Counsel:

GAUTAM SRINIVASAN
KARYN I. WENDELOWSKI
STEFANIA D. SHAMET
U.S. Environmental Protection Agency

RUSSELL W. PETIT
Office of Chief Counsel
U.S. Army Corps of Engineers

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and amici. Defendant-Appellant is the United States Environmental Protection Agency. Plaintiff-Appellee is Mingo Logan Coal Company, Inc., a subsidiary of Arch Coal Inc. The parties listed below participated as amici in the district court, unless otherwise indicated. Undersigned counsel has been informed that the underlined parties plan to participate as amici before this Court.

- Alabama Mining Association
- Alaska Miners Association
- American Farm Bureau Federation
- American Road & Transportation Builders Association
- Arizona Mining Association
- Associated General Contractors of America†
- Association of American Railroads
- Chamber of Commerce of The United States of America
- Coal Operators & Associates, Inc.
- Coal River Mountain Watch
- Colorado Mining Association

† Did not participate as amicus in the district court.

- Fertilizer Institute
- Foundation for Environmental & Economic Progress
- Randy C. Huffman, acting in his official capacity as Cabinet Secretary for the West Virginia Department of Environmental Protection and the State of West Virginia
- Idaho Mining Association
- Illinois Coal Association
- Indiana Coal Council, Inc.
- Industrial Minerals Association —North America
- Kentucky Coal Association
- Montana Coal Council
- National Association of Home Builders
- National Association of Manufacturers
- National Council of Coal Lessors, Inc.
- National Mining Association
- National Stone, Sand & Gravel Association
- Natural Resources Defense Council††
- New Mexico Mining Association
- Northwest Mining Association
- Ohio Coal Association

---

†† Did not participate as amicus in the district court.

- Ohio Valley Environmental Coalition
- Pennsylvania Coal Association
- Sierra Club
- Tennessee Mining Association
- United Company
- Utah Mining Association
- Utility Water Act Group
- Virginia Coal Association
- West Virginia Coal Association
- West Virginia Highlands Conservancy
- Western Business Roundtable
- Wyoming Mining Association

B. Rulings under review. The Honorable Amy Berman Jackson issued a Memorandum Opinion and Order in this case on March 23, 2012. *Mingo Logan Coal Co. Inc. v. U.S. E.P.A.*, --- F. Supp. 2d ---, 2012 WL 975880 (D.D.C. 2012); **[**Doc. 87**]**. Judge Jackson granted Mingo Logan Coal Company's motion for summary judgment, denied the United States Environmental Protection Agency's cross-motion for summary judgment, and vacated the "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." **[**Doc. 86**]**; *see* 76 Fed. Reg. 3126 (Jan. 19, 2011); **[**AR10103-201**]**.

C. Related cases. This case has not been before this or any other appellate court previously. Several amici participating in this appeal have challenged United States Department of the Army Permit No. 199800436-3 (Section 10: Coal River), a Clean Water Act § 404(a) permit that is relevant to this case. *See Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, S.D.W. Va. Case No. 3:05-cv-00784, Dkt. No. 250 (fourth supplemental complaint filed Jan. 30, 2007). Both parties in this case are parties to that lawsuit. The issue presented by this appeal, however, is not affected by the ongoing proceedings in that matter. There are no other related proceedings pending before this or any other court, as defined by Circuit Rule 28(a)(1)(C).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Public Laws

Clean Water Act *(cont'd)*

Federal Register Notices

Legislative History

Miscellaneous

GLOSSARY

404(b)(1) Guidelines	40 C.F.R. pt. 230
404(q) Memorandum	Clean Water Act Section 404(q) Memorandum of Agreement between the U.S. Environmental Protection Agency and the U.S. Department of the Army
APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
EPA	United States Environmental Protection Agency
Final Determination	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
Spruce permit	United States Department of the Army Permit No. 199800436-3 (Section 10: Coal River)

STATEMENT OF JURISDICTION

Plaintiff-Appellee Mingo Logan Coal Company (Mingo Logan) sued Defendant-Appellant the United States Environmental Protection Agency (EPA) under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Mingo Logan alleged that EPA exceeded its authority under § 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), and acted otherwise unlawfully, by withdrawing specification of navigable waters as disposal sites for fill material after the United States Army Corps of Engineers (Corps) had issued a § 404(a) permit authorizing disposal in those sites, *see id.* § 1344(a). **[**Doc. 16, 31-46**]**. The district court had jurisdiction under 28 U.S.C. § 1331. The court entered final judgment for Mingo Logan on March 23, 2012. **[**Docs. 86, 87**]**. EPA filed a timely notice of appeal on May 11, 2012. **[**Doc. 88**]**; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Does § 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), authorize EPA to withdraw specification of navigable waters as disposal sites for fill material after the Corps issues a § 404(a) permit for disposal in those sites?

STATEMENT OF THE CASE

This case presents a question of statutory construction that is an issue of first impression for this Court. Section 404(c) of the Clean Water Act authorizes EPA to "withdraw[ ]" the Corps' "specification" of navigable waters as disposal sites for fill material "whenever" EPA determines that disposal into those sites will have an "unacceptable adverse effect" on wildlife. 33 U.S.C. § 1344(c). Acting on that authority, EPA withdrew specification of certain West Virginia streams as disposal sites for overburden from Mingo Logan's surface coal mine after the agency concluded that filling those streams would have an unacceptable adverse effect on wildlife. **[**AR10103-201**]**.

Mingo Logan sued, alleging that EPA could not withdraw specification of those sites because they were already specified in the company's § 404(a) permit. **[**Doc. 16, 31-33**]**. Mingo Logan argued in the alternative that EPA's action should be set aside as arbitrary and capricious. **[**Doc. 16, 33-46**]**. The district court vacated EPA's decision after concluding, at *Chevron* step two, that EPA cannot act under § 404(c) after the Corps issues a § 404(a) permit, even if EPA receives relevant new information after the permit issues. **[**Docs. 86, 87**]**.

LEGAL BACKGROUND

A. Section 404 of the Clean Water Act

Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act sets several goals, including attainment and preservation of "water quality which provides for the protection and propagation of . . . wildlife." *Id.* § 1251(a)(2). To further its goals, the Act prohibits "discharge of any pollutant" into navigable waters except in accordance with the Act's terms. *Id.* § 1311(a). The term "pollutant" encompasses not only chemical and biological waste but also crushed rock and sand. 33 U.S.C. § 1362(6). Pollutants are known as "fill material" when their discharge raises the bottom elevation of a water body. *See* 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2.

The Act creates two types of permits that authorize discharges of pollutants. Section 404 enables the Corps and approved States to issue permits for discharges of dredged or fill material. 33 U.S.C. § 1344(a), (e), (h). Section 402 authorizes EPA and approved States to issue permits for discharges of pollutants other than dredged or fill material. *Id.* § 1342(a), (b). The two permit programs are mutually exclusive—"if

the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402." *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274 (2009).

That is not to say, however, that EPA plays no role in the § 404 permitting scheme. To the contrary, EPA implements the § 404 program in several respects. First, EPA can authorize individual States to issue § 404 permits. 33 U.S.C. § 1344(h). EPA oversees State programs and may object to particular permits or rescind a State's permitting authority entirely. *Id.* § 1344(i), (j). Second, the Act requires EPA, in conjunction with the Corps, to issue regulations (404(b)(1) Guidelines) that govern the evaluation of permit applications. *Id.* § 1344(b)(1), (h)(1)(A)(i); *see* 40 C.F.R. pt. 230. Third, the Act directs EPA and the Corps to coordinate under § 404 through a memorandum of agreement (404(q) Memorandum). 33 U.S.C. § 1344(q). Fourth, EPA may bring enforcement actions for illegal discharges of fill material and violations of State § 404 permits, just as the Corps may enforce violations of its own § 404 permits. *Id.* §§ 1319(a)(3), 1344(n), (s). Fifth, and most relevant to this appeal, section 404(c) authorizes EPA to prohibit, deny, restrict, or withdraw specification of fill disposal sites.

EPA's authority under § 404(c) requires further explanation. Section 404(a) allows the Corps to issue a permit authorizing a company or individual to discharge fill into specified disposal sites.

> The Secretary [of the Army, acting through the Corps,] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites. . . .

But § 404(b) makes the specification of a disposal site subject to § 404(c).

> Subject to subsection (c) . . ., each such disposal site shall be specified for each such permit by the Secretary . . . .

Section 404(c), in turn, gives EPA authority to withdraw specification of any site specified by the Corps or an approved State.

> 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[1] (including the withdrawal of specification) as a disposal site, whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . ., wildlife, or recreational areas. . . .

---

[1] The statute authorizes EPA to prohibit or withdraw "the specification . . . of any defined area" and to deny, restrict, or withdraw "*the use of* any defined area for specification." 33 U.S.C. § 1344(c) (emphasis added). The phrase "the use of" signifies that EPA may choose to deny, restrict, or withdraw specification only for particular fill material. *See* **[**Doc. 72-1, 11**]**; 44 Fed. Reg. 58,076, 58,076 (Oct. 9, 1979). The distinction is not relevant to the issue on appeal.

In short, the Corps and approved States may specify fill disposal sites in permits, but those specifications are subject to withdrawal by EPA if the agency determines that discharging fill into the specified sites will have one or more unacceptable adverse environmental effects.

Section 404's division of authority is the result of a compromise between the House and Senate versions of the Clean Water Act. In light of the Corps' then-existing authority to issue permits for discharges of fill material, *see* 33 U.S.C. § 403, the House would have allowed the Corps to continue issuing fill permits without formal EPA involvement. H.R. 11896, 92d Cong., § 2 (Mar. 11, 1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1063-64 (1973) (LEGIS. HIST.) (proposed § 404). But the Senate would have given EPA sole authority to issue fill permits. S. 2770, 92d Cong., § 2 (Nov. 2, 1971), 2 LEGIS. HIST. 1392 (proposed § 402(m)). The Act reconciled the views of the two chambers. Congress allowed the Corps to specify fill disposal sites and issue permits, but it authorized EPA to withhold or withdraw specification of any site to prevent what EPA determines to be unacceptable adverse environmental effects.

B. EPA's interpretation of § 404(c)

1. Regulations

In 1979, EPA promulgated regulations governing the exercise of its § 404(c) authority. *See* 40 C.F.R. pt. 231; 44 Fed. Reg. 58,076 (Oct. 9, 1979). Those regulations have never been amended.

EPA's regulations apply to "all existing, proposed or potential disposal sites" for discharges of fill material. 40 C.F.R. § 231.1(c). EPA may withdraw specification of "any area already specified" by the Corps or an approved State. *Id.* § 231.2(a). EPA must notify the public and the "permit holder" of any proposed determination under § 404(c). *Id.* § 231.3(d)(2). The public can comment on the proposed determination, and EPA must hold a public hearing at the permit holder's request. *Id.* § 231.4(a), (b). Upon making a final determination to withdraw specification of a disposal site, EPA must inform the permit holder and publish notice of the § 404(c) determination in the Federal Register. *Id.* §§ 231.3(d)(2), 231.6.

EPA's regulations also establish an emergency procedure used "[w]here a permit has already been issued, and the Administrator has reason to believe that a discharge under the permit presents an

imminent danger of irreparable harm" requiring action by EPA to protect "the public health, interest, or safety." 40 C.F.R. § 231.7. In those circumstances, EPA asks the Corps to suspend the permit while EPA considers withdrawing specification of disposal sites authorized by the permit. *Id.* If necessary, EPA can sue to enjoin any discharge of fill that would cause "an imminent and substantial endangerment" to the public health or welfare. 33 U.S.C. § 1364(a); *see* 40 C.F.R. § 231.7.

The preamble to EPA's 1979 regulations explained why the agency interpreted § 404(c) to authorize withdrawal of specifications after a permit issues. Over the objections of commenters who argued "that such action was outside the scope of section 404(c)," EPA reasoned that Congress used the term "withdrawal" to indicate that EPA can act after a permit issues. 44 Fed. Reg. at 58,077. The regulatory preamble stressed that "where possible it is much preferable to exercise this authority before the Corps or state has issued a permit, and before the permit holder has begun operations." *Id.* EPA recognized, however, that post-permit withdrawal of specifications might be necessary in unusual circumstances, such as where "new information" emerged or "scientific discoveries" occurred after a permit issued. *Id.* EPA also

clarified in the regulatory preamble that a § 404(c) withdrawal cannot render unlawful past discharges authorized under a valid permit. *Id.*

In sum, both the § 404(c) regulations and the preamble to those regulations clearly articulated EPA's construction of the statute. Thus, since at least 1979, EPA has interpreted § 404(c) to authorize the agency to withhold or withdraw specification of a disposal site "before a permit is applied for, while an application is pending, or after a permit has been issued." 44 Fed. Reg. at 58,076.

2. Post-permit determinations

EPA exercised its post-permit § 404(c) authority on two occasions before it acted in this case. The first was in 1981. The Corps had issued a § 404(a) permit to the City of North Miami, Florida, to fill wetlands to develop a recreational facility. **[**Doc. 72-1, 2**]**. After the permit issued, EPA learned that the city was using garbage as the fill material. *See* 45 Fed. Reg. 59,630, 59,631 (Sept. 10, 1980). New data from the site convinced EPA that continued discharge of fill under the permit's terms would damage a valuable ecosystem, Biscayne Bay.[2]

[2] The city's disposal of garbage in the specified sites caused so much environmental damage that EPA eventually designated the property as *(cont'd)*

[Doc. 72-1, 5-8, 10-11**]**. EPA issued a § 404(c) determination withdrawing specification of the entire site for disposal of garbage, and withdrawing specification of most of the site for disposal of any type of fill material. **[**Doc. 72-1, 15**]**. The agency explained that § 404(c) authorized withdrawal of specification of disposal sites that were the subject of the city's § 404(a) permit. **[**Doc. 72-1, 11-12, 20**]**.

EPA exercised its post-permit § 404(c) authority again in 1992. In that case, EPA initially made a § 404(c) determination before a permit issued. But a district court set aside EPA's § 404(c) action as arbitrary and capricious and ordered the Corps to issue a § 404(a) permit for the relevant disposal sites. *James City County, Va. v. EPA*, 758 F. Supp. 348, 353 (E.D. Va. 1990) (*James City I*). On remand from the Fourth Circuit, EPA issued another § 404(c) determination that withdrew specification of disposal sites authorized by the Corps permit.[3] The

---

a Superfund site. *See Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1289-90 (11th Cir. 2002).

[3] EPA's 1992 post-permit § 404(c) determination is publicly available, along with every other such determination, at http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm (click on last hyperlink below "Ware Creek Water Supply Impoundment – James City County, Virginia").

Fourth Circuit upheld EPA's post-permit action. *James City County, Va. v. EPA*, 12 F.3d 1330, 1335-36 (4th Cir. 1993) (*James City IV*).

3. Other statements

Apart from its regulations and post-permit final determinations, EPA has repeatedly asserted that it can withdraw specification of disposal sites authorized under a § 404(a) permit. In 1980, EPA issued the 404(b)(1) Guidelines, the regulations that provide criteria for the Corps and approved States to evaluate permit applications. **[**Doc. 80-2, 2**]**; *see* 33 U.S.C. § 1344(b)(1); 40 C.F.R. pt. 230. In the preamble to those regulations, EPA reiterated that § 404(c) authorizes post-permit withdrawal of specification "in unusual circumstances." **[**Doc. 80-2, 3**]**. And in 1992, EPA and the Corps issued a 404(q) Memorandum to promote coordination under § 404. **[**Doc. 80-3**]**; *see* 33 U.S.C. § 1344(q). That memorandum expressly allows the Corps to issue a permit while EPA considers whether to act under § 404(c).[4]

[4] Under the 404(q) Memorandum, the Corps may issue a permit with "a condition that no activity may take place pursuant to the permit until such 10th day [after notice to EPA], or if the EPA has initiated a Section 404(c) proceeding during such 10 day period, until the Section 404(c) proceedings is [*sic*] concluded and subject to the final determination in such proceeding." **[**Doc. 80-3, 8**]**.

C. The Corps' interpretation of § 404(c)

The Corps has consistently agreed with EPA's interpretation of § 404(c). First, the Corps consulted "extensive[ly]" with EPA regarding the 404(b)(1) Guidelines. **[**Doc. 80-2, 2**]**. As just mentioned, the preamble to those guidelines asserts that EPA can act under § 404(c) after a permit issues. **[**Doc. 80-2, 3**]**. The Corps also joined EPA in issuing the 404(q) Memorandum, which countenances post-permit action under § 404(c). **[**Doc. 80-3, 8**]**. In a 1985 internal memorandum, the Corps' chief counsel stated that "the plain words of 404(c) (as well as legislative history . . .) suggest that Congress authorized EPA to invoke its 404(c) authority . . . after a permit has been granted." **[**Doc. 80-1, 3**]**. Lastly, the Corps agreed in this case that EPA had the authority to withdraw specification of disposal sites authorized under Mingo Logan's § 404(a) permit. There is no evidence that the Corps has ever taken a different view of EPA's § 404(c) authority.

STATEMENT OF FACTS

A. The Spruce permit

In 2007, the Corps issued Mingo Logan a § 404(a) permit ("Spruce permit") to discharge fill material into waters of the United States from

operations associated with the Spruce No. 1 coal mine in southwestern West Virginia. **[**AR25763-77**]**. The Spruce mine is one of Appalachia's largest individual surface mines. **[**AR10108**]**. Mingo Logan's mining project would disturb roughly 3.5 square miles of earth by removing more than 400 feet from the top of a mountain and placing nearly 3 billion cubic feet of overburden into six adjacent valleys. **[**AR10108**]**. A portion of that overburden would fill more than 7 miles of mountain streams subject to the Clean Water Act, including Seng Camp Creek, Pigeonroost Branch, and Oldhouse Branch, and their tributaries. **[**AR10108, 25766-68**]**.

Before the Corps issued the Spruce permit, EPA had expressed several concerns about the environmental impact of Mingo Logan's project. **[**AR8314-15, 8331-32, 10120-21**]**. But the agency chose not to exercise its discretionary § 404(c) authority at that time in light of the information available.

A week after the Spruce permit issued, environmental groups challenged it as part of litigation against the Corps in the United States District Court for the Southern District of West Virginia. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, Case No. 3:05-cv-00784

(S.D.W. Va.) (*OVEC*), Dkt. No. 250 (fourth supplemental complaint filed Jan. 30, 2007). That litigation is ongoing. The environmental groups entered into an agreement with Mingo Logan whereby the company has limited discharge of fill to two of the six disposal sites specified in the Spruce permit. *Id.*, Dkt. No. 257 (filed Feb. 1, 2007). Pigeonroost Branch, Oldhouse Branch, and their tributaries lie in the remaining four sites and have not been disturbed, nor will they be disturbed before this Court decides this appeal. **[**DN 1375105, 2-3**]**.

B. EPA's § 404(c) Final Determination

In 2009, EPA asked the Corps to reconsider the Spruce permit under the 404(b)(1) Guidelines because of "new information and circumstances." **[**AR12756**]**. Based on its own analysis of that new information, EPA recommended that the Corps use its authority to modify, suspend, or revoke the Spruce permit. **[**AR12754-58**]**; *see* 33 C.F.R. § 325.7. The Corps District Engineer replied that "no factors . . . currently compel me to consider permit suspension, modification or revocation." **[**AR12782**]**.

EPA then initiated proceedings under § 404(c) to withdraw specification of certain disposal sites specified in the Spruce permit

because the agency believed that discharging fill into those sites could have an unacceptable adverse effect on wildlife. EPA notified Mingo Logan and published a proposed determination in the Federal Register. **[**AR50-70**]**. EPA then conducted a public hearing in Charleston, West Virginia, where 80 individuals commented on the proposal. **[**AR152-56**]**. The agency also received more than 50,000 written comments, **[**AR10111**]**, including a comment from the United States Fish and Wildlife Service agreeing that the activities authorized by the Spruce permit "would result in unacceptable adverse impacts to aquatic communities and other wildlife," **[**AR6524**]**.

In 2011, EPA issued a final determination (Final Determination) withdrawing specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries as fill disposal sites.[5] **[**AR10103-201**]**. The Final Determination also prevented specification of those waters "for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine." **[**AR10201**]**.

---

[5] EPA's action did not affect Mingo Logan's discharges into Seng Camp Creek, which continue under the terms of the Spruce permit. **[**AR10101 n.1, 10102, 10108 n.1**]**.

EPA's decision explained that § 404(c) authorizes the agency to withdraw specifications after a § 404(a) permit issues. **[**AR10147, 10577-78**]**.

EPA based its Final Determination on the impact that Mingo Logan's proposed discharges would have on wildlife within and downstream of the specified waters. **[**AR10147-75, 10200**]**. In a 99-page decision document, supported by several appendices and more than 300 pages of responses to comments, EPA discussed the "substantial number of project-specific considerations" that drove the agency's "case-specific" decision. **[**AR10201**]**; *see* **[**AR10132, 10141, 10147-49, 10156-60, 10293-94, 10303-08, 10491-95**]**. EPA also explained that, in the agency's view, scientists' understanding of the impacts of surface coal mining on wildlife had increased significantly since the Corps issued the Spruce permit in 2007. **[**AR10122, 10168-69, 10282-83, 10380-82, 10568-70**]**. EPA's improved scientific understanding, coupled with new site-specific information, led the agency to conclude that filling 6.6 miles of the region's "least-disturbed," "high quality headwater streams" with overburden from the Spruce mine would have an unacceptable adverse effect on wildlife "that the

aquatic ecosystem cannot afford." [AR10108, 10152, 10200]. EPA immediately notified Mingo Logan of the Final Determination, as required by regulation.[6] *See* 40 C.F.R. §§ 231.3(d)(2), 231.6.

C. District court proceedings

Mingo Logan sued EPA a week after the agency issued its § 404(c) proposed determination. [Doc. 1]. The company initially sought to prevent EPA from taking further action under § 404(c). [Doc. 1, 19]. After EPA issued the Final Determination, Mingo Logan amended its complaint to allege that EPA's post-permit withdrawal of specifications exceeded the agency's statutory authority and was also arbitrary and capricious in this instance. [Doc. 16, 31-46].

The parties briefed both issues in cross-motions for summary judgment, but the district court limited oral argument to the statutory authority question. [Minute Order (Nov. 28, 2011)]. On March 23, 2012, the court granted summary judgment to Mingo Logan and vacated EPA's Final Determination. [Docs. 86, 87]. The court decided

---

[6] Because the Spruce permit was already in litigation, EPA notified Mingo Logan's counsel by e-mail on the day that the Final Determination issued in lieu of mailing notice to the company.

the case on statutory interpretation grounds at the second step of the two-part inquiry set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

> The court began by examining § 404(c), which authorizes EPA to:
>
> > prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever [EPA] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on . . . wildlife . . . .

Examining this language at *Chevron* step one, the district court concluded that the term "specification" generally refers to any disposal site designated by the Corps or an approved State, **[**Doc. 87, 11**]**, except that when used in the phrase "withdrawal of specification," the term "specification" refers only to those sites already specified when the Clean Water Act was passed in 1972, **[**Doc. 87, 13 n.6**]**. The court also determined that the absence of the word "permit" in § 404(c) signals that the provision "does not give EPA any role in connection with permits." **[**Doc. 87, 14**]**.

The district court then looked to other parts of § 404. The court focused mainly on § 404(p), which deems compliance with a § 404

permit to constitute compliance with several other provisions of the Clean Water Act. 33 U.S.C. § 1344(p). The court found in § 404(p) an "unambiguous Congressional directive" that EPA can never use § 404(c) to prevent discharges of fill material authorized under an existing § 404(a) permit. **[**Doc. 87, 16**]**. The court perceived the same Congressional intent in § 404(q), which directs EPA and the Corps to improve efficiency in permit processing. **[**Doc. 87, 19**]**; *see* 33 U.S.C. § 1344(q).

The district court next turned to legislative history, where it found "very little to go on." **[**Doc. 87, 19**]**. The court closely parsed a Senator's floor statement that mentions EPA acting under § 404(c) "prior to the issuance of any permit." 118 Cong. Rec. 33,692, 33,699 (Oct. 4, 1972), 1 LEGIS. HIST. 177. The court found that remark "instructive," along with another comment by the same Senator that "finality" was one of the goals of the Clean Water Act. **[**Doc. 87, 20-21**]**; *see* 118 Cong. Rec. at 33,693, 1 LEGIS. HIST. 162. According to the district court, the Act's legislative history—as expressed solely by the Senator's floor statement—makes "clear" that Congress did not authorize EPA to act after a § 404(a) permit issues. **[**Doc. 87, 23**]**.

Nevertheless, the district court moved to *Chevron* step two after concluding that the text of § 404(c) did not unambiguously foreclose EPA's interpretation. **[**Doc. 87, 25**]**. The court determined that EPA's interpretation of § 404(c) was owed only *Skidmore* deference because (1) EPA consults with the Corps before making an adverse-effect determination under § 404(c); (2) the Corps plays an important role in the § 404 program; and (3) the Corps disagreed with EPA in this case that new information merited reexamination of the Spruce permit under the 404(b)(1) Guidelines. **[**Doc. 87, 26-27**]**; *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The district court's *Chevron* step two analysis focused on the impact of EPA's interpretation on permittees like Mingo Logan. The court reasoned that it would be "illogical," "impractical," and "logistically complicated" for EPA to withdraw specifications in an existing permit. **[**Doc. 87, 31**]**. The court also examined the 404(q) Memorandum and found that it "says absolutely nothing about a post-permit veto by EPA." **[**Doc. 87, 32**]**. The district court concluded that EPA cannot act under § 404(c) "without limitation" after the Corps has issued a permit, **[**Doc. 87, 30, 33**]**, and the court declined to consider

whether EPA's action in this particular instance was nevertheless permissible, **[**Doc. 87, 30 n.15**]**. The court granted summary judgment to Mingo Logan and vacated EPA's Final Determination. **[**Doc. 87, 34**]**.

SUMMARY OF ARGUMENT

1. Section 404(c) unambiguously authorizes EPA to withdraw specification of navigable waters as disposal sites for fill material after a § 404(a) permit issues. Each disposal site in a permit is specified subject to § 404(c), a provision that expressly authorizes EPA to withdraw specification of any disposal site if an unacceptable adverse effect will ensue. Nothing in the Clean Water Act or its legislative history limits EPA's express authority in § 404(c) to withdraw a specification. This Court should therefore join the Fourth Circuit in holding that EPA can withdraw specification of disposal sites after a permit issues.

2. If this Court concludes that § 404(c) is ambiguous, it should still uphold EPA's action here because it is based on a permissible interpretation of the statute. EPA interprets § 404(c) to authorize the agency to withdraw specification of a disposal site after a § 404(a)

permit issues. That interpretation is reasonable and permissible under the statute, and it is entitled to *Chevron* deference.

Congress struck a balance in § 404 between the respective authorities of EPA and the Corps, and the two agencies' shared interpretation of § 404(c) maintains that balance after a permit issues. The Corps retains authority to modify, suspend, or revoke a permit in certain circumstances, and EPA has the opportunity to reassess whether pending discharges threaten unacceptable environmental harms. EPA has historically exhibited great restraint in its use of § 404(c): in 40 years, the agency has issued only 13 final determinations under § 404(c), and only 3 of those actions withdrew specifications authorized under active permits. In holding that EPA can never use § 404(c) after a permit issues, the district court ignored that history and upset the balance of agency authority that Congress established in 1972.

EPA's interpretation of § 404(c) is entitled to *Chevron* deference because Congress expressly delegated authority to EPA to speak with the force of law when interpreting that provision in regulations and final determinations. Since issuing regulations in 1979, EPA has never

wavered in its view that § 404(c) confers authority to act after a permit issues, and the Corps has consistently agreed with that view. The Corps' important role in the § 404 program does not diminish the deference that this Court owes to EPA's reasonable interpretation of § 404(c). This Court should hold that EPA's interpretation is permissible under the statute and defer to that interpretation.

3. This Court may decide to remand and allow the district court to consider whether EPA's withdrawal of specifications in this particular case was arbitrary or capricious. But the Court may also elect to address that issue in the first instance. If so, EPA's action should be upheld. The Final Determination thoroughly explains why Mingo Logan's discharges would have unacceptable adverse effects on a wide variety of wildlife within and downstream of the specified disposal sites. It also explains why EPA acted in this rare circumstance to prospectively withdraw specifications of disposal sites authorized under an existing permit. EPA's action was reasonable and should be upheld.

STANDARD OF REVIEW

Both the district court's grant of summary judgment and issues of statutory construction are reviewed *de novo*. *Calloway v. District of*

Columbia, 216 F.3d 1, 5 (D.C. Cir. 2000). Where a statute is ambiguous, courts defer to an agency's permissible construction of the statute. *Chevron*, 467 U.S. at 842-43. This Court accords no particular deference to a district court's judgment when reviewing agency action under the APA. *Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012).

ARGUMENT

I. SECTION 404(c) UNAMBIGUOUSLY AUTHORIZES EPA TO WITHDRAW SPECIFICATIONS AFTER THE CORPS ISSUES A § 404(a) PERMIT.

EPA should win this case at *Chevron* step one. Section 404's three original provisions—subsections (a), (b), and (c)—make clear that EPA can withdraw specification of disposal sites after a permit issues. Read in sequence, those provisions state that:

(a) the Corps "may issue permits . . . for the discharge of . . . fill material . . . at specified disposal sites,"

but

(b) "each such disposal site shall be specified" "[s]ubject to subsection (c),"

which authorizes EPA to

(c) "withdraw[ ] . . . specification . . . of any defined area as a disposal site . . . whenever" the agency makes an adverse-effect determination.

33 U.S.C. § 1344(a)-(c). In short, subsections (a) and (b) establish that every specification of a disposal site in a permit is subject to subsection (c). And subsection (c) in turn authorizes EPA to withdraw any specification whenever the agency makes an adverse-effect determination.

Congress used broad, retrospective language to explain EPA's § 404(c) authority. The agency can "*withdraw*[ ] specification . . . of *any* defined area as a disposal site . . . *whenever*" it makes the requisite determination. *Id.* § 1344(c) (emphases added). "[S]tatutes written in broad, sweeping language should be given broad, sweeping application." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (Roberts, J.); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). The only way for this Court to give full effect to the broad language that Congress chose in § 404(c) is to interpret that provision to allow EPA to act after a permit issues.

A. The Corps issues § 404(a) permits for discharge of fill at "specified" disposal sites.

In order for EPA to withdraw specification of a disposal site, there must first be a specification for EPA to withdraw. Section 404(a) and (b) explain that the Corps specifies disposal sites in permits. 33 U.S.C. § 1344(a) (Corps issues permits "for the discharge of . . . fill material . . . at specified disposal sites"); *id.* § 1344(b) ("each such disposal site shall be specified for each such permit"). In this case, the Corps "specified" Pigeonroost Branch, Oldhouse Branch, and their tributaries as fill disposal sites for the Spruce permit. And since the Corps never revoked their specification, those sites were still "specified" when EPA issued the Final Determination.

Mingo Logan argued in the district court that specification ceases when a permit issues. **[**Doc. 64, 2**]**. That proposition, however, is inconsistent with the statute's plain language. If no disposal sites were specified in a permit, the permittee would not be able to legally discharge fill material. *See* 33 U.S.C. § 1344(a) (permits only authorize discharges "at specified disposal sites"). For a lawful discharge to occur, specification must survive permit issuance. The disposal sites at issue here remained "specified" after the Spruce permit issued and were

therefore "[s]ubject to" EPA's § 404(c) withdrawal authority. *Id.* § 1344(b).

B. Section 404(c) authorizes EPA to "withdraw[ ] . . . specification . . . of any defined area as a disposal site."

The text of § 404(c) plainly authorizes EPA to withdraw specification of disposal sites after a permit issues. In addition to authorizing EPA to prospectively "prohibit" and "deny" specification of disposal sites, Congress allowed EPA to "withdraw[ ]" specification of disposal sites once they were specified by the Corps. 33 U.S.C. § 1344(c). Because "withdraw" is a term of retrospective application, the only way to give it meaning is to interpret § 404(c) to authorize EPA to act *after* the Corps specifies disposal sites, whether in a § 404(a) permit or otherwise.[7]

EPA's withdrawal authority broadly applies to "*any* defined area" specified as a disposal site. 33 U.S.C. § 1344(c) (emphasis added). "Read naturally, the word 'any' has an expansive meaning."[8] In this

---

[7] *See* 40 C.F.R. § 230.2(a) (listing other ways in which the Corps and approved States can specify disposal sites).

[8] *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see also Coal. for Responsible Regulation, Inc. v. EPA*, --- F.3d ---, 2012 WL 2381955, at *(cont'd)*

context, the word "any" means that EPA can withdraw *any* specification—including the specification of a disposal site in a § 404(a) permit—if the agency makes the requisite adverse-effect determination. Nothing in the text or legislative history suggests that Congress intended to limit the ordinary scope of the word "any" in § 404(c).

Notwithstanding EPA's express authorization to "withdraw[ ]" specification of "any defined area as a disposal site," 33 U.S.C. § 1344(c), the district court concluded that EPA could only withdraw specification of sites that were already specified when the Clean Water Act was passed in 1972, **[**Doc. 87, 13 n.6, 22 n.10**]**. The court recognized that EPA can prohibit, deny, or restrict specification of "any defined area," **[**Doc. 87, 11**]**, but the court determined that "the term 'withdraw' *could be* read as simply giving EPA the authority to withdraw the specification of those sites that it had never been given the opportunity to review" before 1972, **[**Doc. 87, 13 n.6**]** (emphasis added).

The district court's interpretation of § 404(c) departs from the plain text to ascribe different meanings to the same object—"any

---

*22 (D.C. Cir. June 26, 2012) ("any" is a "broad, indiscriminate modifier").

defined area"—depending on the verb with which it is associated ("withdraw[ ]" vs. "prohibit," "deny," or "restrict"). The court's construction is contrary to fundamental principles of grammar and statutory construction and should be rejected. *Cf. Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000) ("As we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."). Alternatively, the court may have meant to construe the term "specification" to have a unique meaning when used in the phrase "withdrawal of specification." But that strained interpretation of "specification" would run counter to the "vigorous" presumption that multiple, parallel uses of the same word in the same sentence convey the same meaning. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). Just as EPA can prohibit, deny, or restrict specification of "any defined area" as a disposal site, the agency can also withdraw specification of "any defined area" as a disposal site whenever it makes an adverse-effect determination.

C. EPA can act under § 404(c) "whenever" it makes an adverse-effect determination.

Section 404(c) of the Act gives EPA authority to act "whenever" the agency reasonably determines that an unacceptable adverse effect will ensue. 33 U.S.C. § 1344(c). Congress' use of the open-ended term "whenever" confirms that EPA can act under § 404(c) after the Corps issues a permit.[9] "Whenever" can mean "at any time," "in any or every instance in which," or "at such time as." WEBSTER'S NEW INT'L DICTIONARY 2910 (2d ed. 1948) (citing first two definitions); **[**Doc. 87, 13**]** (district court citing third definition). Under any of those definitions, the term "whenever" does not restrict EPA's authority to act under § 404(c), other than requiring the agency to make an adverse-effect determination.

---

[9] In *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), the Supreme Court considered a statutory provision, 42 U.S.C. § 7143(a)(5), that authorizes EPA to override state permitting decisions under the Clean Air Act "[w]henever" it makes a particular finding. The Court noted that Congress had given EPA a "notably capacious," "unequivocal grant of supervisory authority" in that statute and another similar provision, 540 U.S. at 484, 489 n.13, and the Court upheld EPA's decision to override a state permit that had already issued, *id.* at 495.

The district court disregarded the term "whenever" because § 404(c) does not use the word "permit." [Doc. 87, 14-15 & n.8]. In the court's view, the absence of the word "permit" means that EPA cannot play "any role in connection with permits." [Doc. 87, 14]. But § 404(c) does use the word "specification," a term that directly implicates permits. By definition, every permit has at least one specified disposal site. 33 U.S.C. § 1344(a) (permits issued for discharge of fill "at specified disposal sites"). Congress did not need to use the word "permit" in § 404(c); the word "specification" covers the same ground.

In fact, Congress gave EPA more authority—not less—by using the term "specification," as opposed to "permit," in § 404(c). Specifications are broader than permits because disposal sites can be specified for activities that do not require permits.[10] By allowing EPA to withdraw "specifications" as opposed to "permits" in § 404(c), Congress gave EPA authority to review every specification of a disposal

[10] *See* 33 C.F.R. § 336.1(a), (b)(5) (the Corps specifies disposal sites for its own use, subject to § 404(c)); 40 C.F.R. § 230.2(a) (listing other means for the Corps and approved States to specify disposal sites without the need for a permit); *Bd. of Miss. Levee Comm'rs v. U.S. E.P.A.*, 674 F.3d 409, 415-16 (5th Cir. 2012) (describing EPA's withdrawal of specification of a disposal site designated for use by the Corps).

site, whether or not a permit is required to discharge fill into that site. And by using the term "specification" as opposed to "permit," Congress also gave EPA the flexibility to withdraw only those specifications within a given permit that would cause unacceptable adverse environmental effects. EPA used that flexibility in this case when it withdrew specification of four of the six disposal sites in Mingo Logan's Spruce permit, leaving the company free to discharge into the other two specified sites. **[**AR10101 n.1, 10102, 10108 n.1**]**.

D. Other § 404 provisions do not affect EPA's § 404(c) authority.

The district court relied on two later-enacted provisions of the Clean Water Act, § 404(p) and (q), to support its narrow reading of § 404(c). But there is no evidence that Congress intended to silently limit EPA's § 404(c) authority through either of those provisions.

1. Section 404(p)

Section 404(p) of the Clean Water Act provides that a permittee's compliance with a § 404 permit "shall be deemed compliance" with other provisions of the Act prohibiting discharges of pollutants into navigable waters. 33 U.S.C. § 1344(p); *see id.* § 1311(a). Section 404(p) protects permittees from enforcement actions by EPA and citizen suits

under the Act, *see id.* §§ 1319, 1365, but it says nothing about specification of disposal sites or EPA's authority under § 404(c). Yet the district court characterized § 404(p) as an "unambiguous Congressional directive" that permittees can discharge notwithstanding any other provision of the Act, including § 404(c). **[**Doc. 87, 16**]**. The court's broad reading of § 404(p) is not supported by the text or legislative history, and it runs counter to the interpretive canon disfavoring implied amendment of statutes.

The text of the Clean Water Act does not support the district court's interpretation of § 404(p). First and foremost, § 404(p) makes no mention of § 404(c) or specification of disposal sites. Second, the district court's suggestion that § 404(p) gives permittees *carte blanche* to discharge fill material is contrary to other provisions of the Act, such as § 504, which authorizes EPA to sue to enjoin the discharge of fill material "[n]otwithstanding any other provision" of the Act if the discharge poses "an imminent and substantial endangerment" to public health or welfare. 33 U.S.C. § 1364(a). Third, the court's reading is in tension with the continuing power of the Corps and approved States to modify, suspend, or revoke § 404 permits at any appropriate time, even

if a permittee has complied with the permit's terms. *See id.* § 1344(h)(1)(A)(iii); 33 C.F.R. § 325.7; **[**AR25765**]**. Plainly, the Clean Water Act contemplates that post-permit action by EPA or the Corps may prevent a permittee from continuing to discharge pollutants as authorized under its permit.

Section 404(p) was not part of the Clean Water Act as passed in 1972. Congress added the provision as part of comprehensive amendments to the Act in 1977. Pub. L. No. 95-217, § 67(b), 91 Stat. 1566, 1600. In holding that § 404(p) impliedly limits the scope of EPA's § 404(c) authority, the district court ignored the interpretive canon that strongly disfavors implied amendment of statutory provisions by other, later-enacted provisions.[11] To adopt the district court's interpretation, this Court "must find in subsection [(p)] a clearly expressed congressional intent to do implicitly what Congress declined to do explicitly—narrow all of subsection [(c)]" to prohibit EPA from acting after a permit issues. *Village of Barrington, Ill. v. Surface Transp. Bd.*,

---

[11] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("The relationship between the actions . . . of the 95th Congress and the intent of the 92d Congress in passing § 404(a) is also considerably attenuated.").

636 F.3d 650, 662 (D.C. Cir. 2011). No such intent can be found here, even with resort to legislative history.

Neither the House nor the Senate version of the 1977 Clean Water Act amendments contained a precursor to § 404(p). H.R. 3199, 95th Cong., § 216(b) (as passed by House, Apr. 5, 1977), *reprinted in* 4 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 1378-79 (1978) (AM. LEGIS. HIST.); H.R. 3199, 95th Cong., § 53(b) (as passed by Senate, Aug. 4, 1977), 4 AM. LEGIS. HIST. 1088-89. The provision appeared as a conference amendment with no explanation in the conference report other than its text. H.R. Rep. No. 95-830, at 103 (1977), 3 AM. LEGIS. HIST. 287. Section 404(p) was not discussed on the record in either chamber. The likeliest source for the provision is § 402(k), a similar provision enacted in 1972 for permits that EPA issues for discharges of pollutants other than dredged or fill material. 33 U.S.C. § 1342(k). The legislative history of § 402(k), to the extent that it is relevant,[12] indicates that the provision was designed to protect

[12] *See Dir., Office of Workers' Comp. Programs v. Perini North River Assocs.*, 459 U.S. 297, 320 n.29 (1983) (expressing skepticism about relying on legislative history of one statutory provision to interpret another provision).

permittees from enforcement actions and citizen suits based upon stricter regulations passed during the lifetimes of their permits. H.R. Rep. No. 92-911, at 128 (1972), 1 LEGIS. HIST. 815; *see E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). But there is no indication that Congress intended § 402(k), much less § 404(p), to function as an impermeable shield for permittees against any EPA action during the life of a permit.

2. Section 404(q)

Section 404(q) is another provision added by the conference committee considering the 1977 Clean Water Act amendments. H.R. Rep. No. 95-830, at 103, 3 AM. LEGIS. HIST. 287. That provision requires the Corps to enter into agreements with other federal agencies, including EPA, to streamline the permit review process. 33 U.S.C. § 1344(q). The district court concluded that EPA's post-permit exercise of § 404(c) authority was inconsistent with § 404(q)'s aim to "limit duplication and delay" in permit issuance. **[**Doc. 87, 19**]**. But there is nothing inconsistent between Congress' desire in 1972 to give EPA continuing authority to prevent unacceptable environmental impacts and Congress' desire in 1977 to improve efficiency in permit processing.

Moreover, neither the text of § 404(q) nor its legislative history mentions § 404(c) or specification of disposal sites. Again, legislative intent must be "clearly expressed" before this Court will hold a later-enacted statutory provision to impliedly limit an existing provision. *Village of Barrington*, 636 F.3d at 662. No such intent appears in § 404(q) or its legislative history.

The district court erred in holding that Congress impliedly amended § 404(c) through enactment of § 404(p) and (q). Because of the absence of relevant legislative history, the purposes of those provisions can only be discerned from their plain text, which says nothing about § 404(c) or specification of disposal sites. Silence in other provisions is not sufficient to create ambiguity in § 404(c).

E. Legislative history does not create ambiguity in § 404(c).

A court should not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). The district court, however, relied heavily on a small slice of legislative history to support its narrow interpretation of § 404(c). Senator Edmund Muskie, the Senate's leading proponent of the Clean Water Act, briefly recited the Act's key provisions while the

Senate considered the conference bill. With respect to § 404(c), he stated:

> *[P]rior to the issuance of any permit to dispose of spoil*, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

118 Cong. Rec. at 33,699, 1 LEGIS. HIST. 177 (emphasis added). The district court relied on the italicized phrase—and Sen. Muskie's general point that the Act as a whole aimed to achieve "finality," *id.* at 33,693, 1 LEGIS. HIST. 162—to support the view that EPA has no role to play in the § 404 program once a permit issues.

But Sen. Muskie's comments on § 404(c) do not suggest that EPA cannot act after a § 404(a) permit issues. His remarks address only the more common scenario, when EPA prohibits, denies, or restricts specification of disposal sites before a permit issues. Sen. Muskie's silence regarding withdrawal of specification does not mean that EPA has no authority to withdraw specifications after a permit issues.

Even if Sen. Muskie's remarks could be interpreted otherwise, a floor statement of a single legislator, even one so central to the passage

of the Clean Water Act, is not controlling even in analyzing legislative history, let alone the meaning of statutory text. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012). That is particularly so here because Sen. Muskie's brief summary was imprecise in its description of other aspects of § 404. First, he stated that EPA "must" determine whether unacceptable adverse effects to the environment will ensue before a permit can issue. 118 Cong. Rec. at 33,699, 1 LEGIS. HIST. 177. But the Corps can issue a § 404(a) permit when EPA declines to make any determination under § 404(c). *See Coeur Alaska*, 557 U.S. at 270. Second, in the preceding paragraph of his remarks, Sen. Muskie indicated that EPA applies the 404(b)(1) Guidelines to determine whether a disposal site should be specified. 118 Cong. Rec. at 33,699, 1 LEGIS. HIST. 177. Yet the statute gives the Corps authority to specify disposal sites based on those guidelines. 33 U.S.C. § 1344(b). The errors in Sen. Muskie's floor statement diminish whatever weight this Court might ordinarily grant to his remarks. *See United States v. McGoff*, 831 F.2d 1071, 1090-91 (D.C. Cir. 1987).

In sum, this Court should hold for EPA at *Chevron* step one. Section 404(c) plainly states that EPA can "withdraw[ ]" specification of

"any" navigable waters for disposal of fill material "whenever" the agency makes an adverse-effect determination. EPA acted within that authority when it withdrew specification of certain disposal sites specified under Mingo Logan's permit. The district court erred in concluding otherwise.

F. The Fourth Circuit has held that EPA's § 404(c) authority persists after a permit issues.

The Fourth Circuit is the only court of appeals (and, to our knowledge, the only other federal court) to rule on the issue presented in this case.[13] In *James City County, Virginia v. Environmental Protection Agency*, 955 F.2d 254 (4th Cir. 1992) (*James City II*), the Fourth Circuit considered whether a district court erred when it vacated an EPA § 404(c) determination and ordered the Corps to issue a § 404(a) permit allowing fill to be discharged into the disposal sites that were the subject of EPA's action. *See James City I*, 758 F. Supp. at 353. The Corps issued the permit while the appeal was pending. *James City*

---

[13] Other courts have stated in dicta that EPA can withdraw specification of disposal sites after a § 404(a) permit issues. *See, e.g.*, *Hoosier Envtl. Council, Inc. v. U.S. Army Corps of Eng'rs*, 105 F. Supp. 2d 953, 971 (S.D. Ind. 2000); *City of Alma v. United States*, 744 F. Supp. 1546, 1559-60 (S.D. Ga. 1990).

II, 955 F.2d at 257. The Fourth Circuit left the permit in place, but it reversed the district court's decision and remanded EPA's § 404(c) determination to the agency. *Id.* at 261. The court held that EPA could still act under § 404(c) to withdraw specification of the disposal sites now authorized by the Corps. *Id.* at 257. That holding was essential to the judgment; if EPA were barred from acting after the permit issued, the court's remand would have been pointless. This Court should join the Fourth Circuit in holding that EPA can withdraw specification of disposal sites after a § 404(a) permit issues. *See PNC Fin. Servs. Grp., Inc. v. C.I.R.*, 503 F.3d 119, 136 (D.C. Cir. 2007) (noting that this Court avoids circuit splits whenever possible).

II. EVEN IF § 404(C) IS AMBIGUOUS, EPA'S STATUTORY INTERPRETATION IS REASONABLE AND ENTITLED TO *CHEVRON* DEFERENCE.

Even if this Court concludes that § 404(c) is ambiguous as to whether EPA can withdraw specifications after a permit issues, EPA's reasonable and permissible interpretation is entitled to deference under *Chevron* step two. For more than thirty years, the agency has interpreted § 404(c) to allow post-permit withdrawal of specifications. That long-held view "governs if it is a reasonable interpretation of the

statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). EPA's interpretation is not only reasonable, it is the *most* reasonable way to carry out Congress' intent in the Clean Water Act—and in § 404 in particular—to reconcile the overriding goal of environmental protection with the goal of regulatory certainty.

A. EPA's interpretation balances Congress' principal aim of environmental protection with the goal of regulatory certainty.

Congress struck a balance in § 404 between the respective authorities of EPA and the Corps. The Corps, applying EPA guidelines, determines when and where to specify navigable waters as disposal sites for fill material. 33 U.S.C. § 1344(b). But the Corps' specifications are "[s]ubject to" withdrawal "whenever" EPA reasonably determines that the environmental effects of a proposed discharge are unacceptable. *Id.* § 1344(b), (c). Section 404's division of authority resulted from the legislative compromise that preserved the Corps' role as the permitting authority for dredged or fill material, but made all disposal sites subject to EPA oversight. *See supra*, at 6.

EPA and the Corps agree that the balance Congress struck in § 404 persists after a permit issues. The agencies' shared interpretation of § 404(c) allows both EPA and the Corps to reexamine discharges authorized under existing permits based on new circumstances. The agencies may disagree as to the importance of particular information, as they did in this case. Indeed, that is precisely what Congress envisioned when it gave EPA authority to "withdraw[ ]" specifications made by the Corps. 33 U.S.C. § 1344(c). But when the two agencies disagree as to the propriety of a particular specification, EPA's determination under § 404(c) prevails. By holding otherwise, the district court "in effect reallocated the division of responsibility that the Corps and the EPA had been following" since at least 1979, *Coeur Alaska*, 557 U.S. at 273, and undermined Congress' principal goal in the Clean Water Act to "maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a); *see Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("Congress' strong statement of its objective must color . . . our interpretation of specific [Clean Water Act] provisions").

The district court concluded that EPA's post-permit § 404(c) authority poses a grave threat to permittees. The court believed that a permittee would have to "on a daily basis compare their permit to [EPA's] list of specified sites" in order to determine whether a particular discharge is legal. **[**Doc. 87, at 17**]**. The court's concern is unfounded. EPA's regulations require the agency to notify a permittee immediately upon making a § 404(c) determination, 40 C.F.R. §§ 231.3(d)(2), 231.6, and EPA's action has prospective effect only—i.e., withdrawal of specification does not render any previous discharge invalid, *see* 44 Fed. Reg. at 58,077.

The district court also suggested that EPA's post-permit § 404(c) authority greatly undermines regulatory certainty for permittees. **[**Doc. 87, at 19, 31**]**. Experience does not support that view. In the forty years since Congress passed the Clean Water Act, EPA has withdrawn specification of disposal sites authorized under a permit only three times, a miniscule fraction of the number of Corps permits issued during that period. Through this exercise of restraint, EPA has carried out the primary intent of Congress to protect the Nation's waters, while at the same time giving permittees as much certainty as possible that

discharges authorized under an existing permit will be allowed to go forward. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 490 n.14, 493 n.16 (2004) (dismissing concerns about EPA overreach in light of past experience). This Court should respect EPA's exercise of discretion in reconciling those two goals using the power that Congress expressly gave to the agency. *See NRDC, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 199 (D.C. Cir. 1988) ("it falls to the agency to reconcile competing legislative goals").

EPA's use of § 404(c) in this case was consistent with the agency's longstanding practice. In this unusual circumstance, Mingo Logan had not discharged fill into the specified disposal sites for several years after the Spruce permit issued. **[**AR10108 n.1**]**. Those years saw significant advances in EPA's understanding of the disposal sites in question and the impact that the company's proposed discharges would have on wildlife. **[**AR10122, 10132, 10141, 10147-49, 10156-60, 10168-69, 10172-73**]**. EPA had anticipated as early as 1979 that new site-specific and scientific information might justify acting under § 404(c) after a permit issued. 44 Fed. Reg. at 58,077 (preamble to § 404(c) regulations). In EPA's judgment, this case presented those

circumstances, so the agency exercised its post-permit authority for the first time in nearly twenty years to withdraw specifications and prevent Mingo Logan's impending discharges of overburden from having an unacceptable adverse effect on wildlife. EPA's action here fell within its authority under § 404(c) and should be upheld.

At a minimum, EPA's use of § 404(c) in the circumstances presented here—where the agency receives new information after a permit issues—is not unambiguously foreclosed by the statute. Even if this Court were to determine that EPA's interpretation might countenance an unauthorized exercise of statutory authority in another case, it should still sustain the action at issue here. *See E.R. Squibb & Sons, Inc. v. Bowen*, 870 F.2d 678, 684 (D.C. Cir. 1989) (deciding case on narrow grounds by asking "whether the agency's interpretation, as applied to this case, is permissible").

B. EPA's interpretation is owed *Chevron* deference.

1. EPA's interpretation is evident in regulations and final determinations that carry the force of law.

EPA's interpretation of § 404(c) is entitled to *Chevron* deference because Congress expressly delegated authority to EPA to interpret that provision. EPA administers the Clean Water Act "[e]xcept as

otherwise expressly provided," 33 U.S.C. § 1251(d), and the agency may "prescribe such regulations as are necessary to carry out [its] functions" under the Act, *id.* § 1361(a). One of those functions is to withdraw specification of fill disposal sites to prevent the unacceptable adverse effects listed in § 404(c). *Id.* § 1344(c). An express delegation of rulemaking authority is the clearest sign that Congress intends for an agency to speak with the force of law when it addresses ambiguity in a statute. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713-14 (2011); *see also NRDC v. EPA*, 859 F.2d at 202 (recognizing EPA's authoritative role in interpreting the Clean Water Act's complex "regulatory machinery").

EPA's regulations make clear that the agency interprets § 404(c) to allow withdrawal of specification of a disposal site after a permit issues. The regulations explain that "*any* area already specified" by the Corps or an approved State may be withdrawn. 40 C.F.R. § 231.2(a) (emphasis added). The regulations repeatedly refer to the "permit holder," which makes sense only if EPA can act after a permit has issued. *Id.* §§ 231.3(d)(2), 231.4(b). Finally, the regulations establish an explicit procedure whereby EPA exercises its § 404(c) authority after

a permit issues. *Id.* § 231.7. The regulations unambiguously allow EPA to act when appropriate after a permit issues. Even if another interpretation of the regulations were permissible, EPA's interpretation would control. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

To the extent that EPA's regulations leave any doubt about the agency's statutory interpretation, EPA's three post-permit final determinations settle the question. Congress directed EPA to speak with the force of law when it issues a § 404(c) final determination. EPA must "set forth in writing and make public [its] reasons for making any determination" to withdraw specification of disposal sites. 33 U.S.C. § 1344(c). EPA's § 404(c) decisionmaking procedure—which includes publication of proposed and final determinations in the Federal Register, a notice-and-comment process, and a public hearing—"falls comfortably within the category of agency decision-making procedures that support *Chevron* deference." *Village of Barrington*, 636 F.3d at 659. EPA necessarily interpreted § 404(c) to authorize post-permit withdrawal of specifications in each of the agency's three post-permit actions. *See George E. Warren Corp. v. U.S. E.P.A.*, 159 F.3d 616, 624-25 (D.C. Cir. 1998) (deferring to statutory interpretation that was

necessarily presupposed by EPA's action). And in the action challenged here, EPA went further and expressly reaffirmed that § 404(c) authorizes post-permit withdrawal of specifications. [AR10147, 10577-78].

EPA's post-permit actions themselves merit *Chevron* deference, and they illustrate the agency's consistent interpretation of the statute. That consistency further heightens the deference owed to EPA. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *see also Entergy*, 556 U.S. at 224 ("it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion . . . that the agency has been proceeding in essentially this fashion for over 30 years"). Apart from its regulations, EPA has asserted no fewer than five times that it can act under § 404(c) after a permit issues. [Doc. 80-2, 3; Doc. 72-1, 20; AR10147]; 44 Fed. Reg. at 58,077; *see also James City IV*, 12 F.3d at 1332 (referencing 1992 post-permit decision). Even if some of those statements did not carry the force of law, they still enhance the deference that this Court owes to the agency's interpretation. *See Barnhart*, 535 U.S. at 221.

It is of no moment that EPA's interpretation addresses the scope of its own statutory authority. This Court has accorded *Chevron* deference to EPA's interpretation of its authority to oversee Clean Water Act § 402 permits issued by States. *NRDC v. EPA*, 859 F.2d at 186-87. And both the Supreme Court and this Court routinely grant *Chevron* deference in similar circumstances.[14] In sum, this Court owes deference to EPA's interpretation of § 404(c).

2. The Corps' role in § 404 does not diminish the deference owed to EPA's interpretation of § 404(c).

The district court did not accord *Chevron* deference to EPA's interpretation of § 404(c) for three reasons. First, that provision requires EPA to consult with the Corps before withdrawing specification of a fill disposal site. **[**Doc. 87, 26**]**. Second, "the administration of section 404 as a whole is plainly entrusted to both

---

[14] *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (deferring to the Corps' expansive interpretation of the term "navigable waters" under § 404(a) of the Clean Water Act); *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985) (deferring to EPA's narrow interpretation of a limitation on its authority under § 301(*l*) of the Act); *Bldg. Owners & Mgrs. Ass'n Int'l v. FCC*, 254 F.3d 89, 93-94 & n.5 (D.C. Cir. 2001) (deferring to agency's expansive interpretation of its statutory authority); *see also Indep. Petroleum Ass'n v. Dewitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002) (*Chevron* deference not diminished by "risk of agency self-aggrandizement").

agencies." [Doc. 87, 26]. Third, the Corps disagreed with EPA in this case that new information justified reconsideration of the Spruce permit under the 404(b)(1) Guidelines. [Doc. 87, 27 n.11]. None of those reasons are relevant to the question whether EPA is entitled to *Chevron* deference when interpreting the scope of its § 404(c) authority.

The district court first noted that EPA must consult with the Corps before making individual determinations under § 404(c). [Doc. 87, 26]. But a statutory requirement to consult with another agency does not make *Chevron* deference inappropriate. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665-66 (2007) (according *Chevron* deference to administering agencies' interpretation of a statutory provision requiring consultation with other agencies). Moreover, the question presented in this case has nothing to do with EPA's obligation to consult with the Corps.

The district court next pointed out that EPA and the Corps jointly administer § 404. [Doc. 87, 26-27]. That is true. But a court may accord *Chevron* deference to an agency's interpretation of one portion of a statute even where other portions are administered jointly or solely by

another agency.[15] When deciding whether to accord *Chevron* deference, this Court looks solely to the statutory provision in question, whether that provision is an entire section, a subsection, or only a paragraph of the U.S. Code. In this case, it is beside the point whether EPA is entitled to deference for its interpretation of § 404 in its entirety. Instead, the relevant question is whether EPA is owed *Chevron* deference for its interpretation of § 404(c). And it is. EPA should receive the same *Chevron* deference when interpreting § 404(c) that the Corps receives when interpreting § 404(a). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

Finally, the district court noted that EPA and the Corps disagreed in this case about whether the Corps should modify, suspend, or revoke the Spruce permit. **[**Doc. 87, 27 n.11**]**. Congress plainly envisioned that

---

[15] *See USPS v. Postal Regulatory Comm'n*, 599 F.3d 705 (D.C. Cir. 2010) (deference owed to Commission's interpretation of 39 U.S.C. § 404(e)(3) against the background of a clear grant of rulemaking authority to the U.S. Postal Service in 39 U.S.C. § 401(a)(2) to interpret other provisions in the same statutory section); *compare Gonzales v. Oregon*, 546 U.S. 243, 255-69 (2006) (according Attorney General no deference for interpretation of provision that fell outside of "his functions" under the Controlled Substances Act), *with John Doe, Inc. v. DEA*, 484 F.3d 561, 570 (D.C. Cir. 2007) (*Chevron* deference owed to Attorney General's interpretation of Controlled Substances Act provision relating to "his functions").

sort of disagreement when it enacted a statute authorizing EPA to "withdraw[ ]" an action taken by the Corps. 33 U.S.C. § 1344(c). But the agencies' disagreement does not extend to the issue presented by this appeal: the scope of EPA's authority under § 404(c). EPA and the Corps agree on that issue. "[W]hen two agencies, each examining statutes they are charged with administering, agree as to the interplay of the statutes, there is no more reason to mistrust their congruent resolutions than there is to mistrust action taken by a single agency." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 3306 v. FLRA*, 2 F.3d 6, 10 (2d Cir. 1993). If anything, the Corps' agreement strengthens the case for deference to EPA's interpretation.[16]

---

[16] *See Coeur Alaska*, 557 U.S. at 274-275 (deferring to EPA regulation reflecting shared interpretation of EPA and the Corps that §§ 402 and 404 create mutually exclusive permitting schemes); *Trans Union LLC v. FTC*, 295 F.3d 47, 50 (D.C. Cir. 2002) (according *Chevron* deference to agency's regulations interpreting statute administered by six other agencies, where agencies agreed on uniform interpretation); *Public Citizen v. Foreman*, 631 F.2d 969, 975-76 (D.C. Cir. 1980) (finding it "highly significant" that two agencies agreed on interpretation of first agency's regulation that limited scope of second agency's authority); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 446 (4th Cir. 2003) ("the resolution among agencies of the line dividing their responsibilities is just the type of agency action to which the courts must defer").

Even if the Corps disagreed with EPA about the latter's § 404(c) authority, EPA's interpretation would receive *Chevron* deference because it is the agency charged with administering § 404(c). In *United States Postal Service v. Postal Regulatory Commission*, 599 F.3d 705 (D.C. Cir. 2010) (*USPS*), this Court considered the Postal Regulatory Commission's interpretation of its power to review United States Postal Service activities. The relevant statute required the Commission to review "each nonpostal service offered by the Postal Service . . . and determine whether that nonpostal service shall continue." 39 U.S.C. § 404(e)(3). This Court accorded *Chevron* deference to the Commission's expansive construction of the term "nonpostal service" over the Postal Service's objection because the relevant statutory provision "was clearly delegated to the Commission to implement and thereby to interpret." 599 F.3d at 710. As *USPS* demonstrates, judicial deference is not diminished when an administering agency's statutory interpretation negatively affects the interests of other agencies.[17]

---

[17] *See also Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 & n.10 (D.C. Cir. 2003) (EPA owed *Chevron* deference under § 401 of the Clean Water Act when interpreting whether FERC could amend hydroelectric license without state water quality certification); *Dep't of* *(cont'd)*

The authorities cited by the district court, **[**Doc. 87, 26-27**]**, do not support its decision not to accord *Chevron* deference to EPA's interpretation of § 404(c). None of those authorities addressed a situation where:

- Congress expressly delegated authority to one agency to interpret the relevant statutory provision;[18]
- only one agency had authority to act under that provision;[19] and
- every agency involved in implementing the provision agreed with the acting agency's statutory interpretation.[20]

Health & Human Servs. Family Support Admin. v. FLRA, 920 F.2d 45, 48 (D.C. Cir. 1990) ("we must defer to the FLRA's interpretation of its own statute as against competing executive branch interpretations").

[18] *Cf. Salleh v. Christopher*, 85 F.3d 689 (D.C. Cir. 1996) (neither agency was delegated authority to interpret the entirety of relevant subsection).

[19] *Cf. Grant Thornton, LLP v. Office of the Comptroller of the Currency*, 514 F.3d 1328, 1331 (D.C. Cir. 2008) (four federal agencies); *Collins v. NTSB*, 351 F.3d 1246, 1252 (D.C. Cir. 2003) (two federal agencies and multiple state agencies); *Salleh*, 85 F.3d at 690-691 (two federal agencies).

[20] *Cf. Grant Thornton*, 514 F.3d at 1331 (no evidence of common interpretation); *Collins*, 351 F.3d at 1253 (same); *Salleh*, 85 F.3d at 691 (noting conflict between agencies and distinguishing *Molineaux v. United States*, 12 F.3d 264, 266-67 (D.C. Cir. 1994), where no conflict existed).

This case has all three characteristics. They provide ample grounds for according *Chevron* deference to EPA's interpretation of § 404(c). If this Court determines that the text of § 404(c) is ambiguous, it should uphold EPA's interpretation of the statute as reasonable and permissible.

III. EPA'S ACTION WAS NOT ARBITRARY OR CAPRICIOUS.

The district court did not reach Mingo Logan's alternative argument that EPA's Final Determination was arbitrary and capricious. **[**Doc. 87, 8**]**. Therefore, one appropriate course for this Court is to remand for the district court to examine the administrative record in the first instance. *See, e.g.*, *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 815 (D.C. Cir. 1987). However, this Court has the discretion to consider an issue not passed upon by the district court. *See Gas Appliance Mfrs. Ass'n, Inc. v. Dep't of Energy*, 998 F.2d 1041, 1045 (D.C. Cir. 1993). If this Court decides to address Mingo Logan's arbitrary-and-capricious claim, it should uphold EPA's Final Determination.

EPA's Final Determination may be set aside as arbitrary and capricious only if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important

aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's scientific judgments receive particular deference from this Court. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1006 (D.C. Cir. 1997). And all of EPA's factual conclusions are reviewed to determine whether there is "substantial evidence" in the administrative record to support them. *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Gov'rs of Fed. Reserve Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Scalia, J., joined by R.B. Ginsburg, J.). Under the APA's arbitrary-and-capricious standard of review, "substantial evidence" is the most stringent standard that can apply to questions of evidentiary sufficiency for factual determinations. *See Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999). That standard is more deferential even than the "clearly erroneous" standard for appellate review of trial court findings. *See id.* at 162, 164. EPA's action passes muster under this highly deferential standard of review.

EPA issued the Final Determination after concluding that the discharge of Mingo Logan's overburden into the specified streams would have an unacceptable adverse effect on wildlife. **[**AR10151-52, 10175**]**. EPA's regulations state that "significant loss of or damage to . . . wildlife habitat" is an "unacceptable adverse effect" under § 404(c). 40 C.F.R. § 231.2(e). The agency determined that discharge of Mingo Logan's overburden would fill 6.6 miles of streams containing and supporting "diverse and healthy wildlife communities and their habitat." **[**AR10151**]**. EPA also separately concluded that the proposed discharges would "critically degrade the chemical and biological integrity of downstream waters." **[**AR10110**]**.

In terms of direct impacts within the specified disposal sites, EPA found that Mingo Logan's activities would "bury much of Pigeonroost Branch and Oldhouse Branch, including all wildlife living in these streams, their tributaries, and associated riparian areas," and "eliminate habitat for wildlife that depend upon those streams." **[**AR10149**]**. The agency specifically identified several species that would be affected, including fish, salamanders, macroinvertebrates, and water-dependent birds. **[**AR10149-51**]**. Based in significant part on

new site-specific information, EPA found that Pigeonroost Branch, Oldhouse Branch, and their tributaries are "some of the last, rare and important high quality streams in the watershed," so their destruction would constitute an adverse impact "that the aquatic ecosystem cannot afford." **[**AR10152**]**.

EPA also independently found that Mingo Logan's proposed fill discharges would have "unacceptable adverse effects on wildlife in downstream waters." **[**AR10175**]**. Based in significant part on new site-specific information, EPA concluded that the proposed discharges would convert the specified streams from "sources of freshwater dilution" to "sources of pollution" for downstream waters. **[**AR10152**]**. The agency also relied on new scientific information regarding the effect of the "destruction or modification of headwater streams" on "the integrity of downstream waters." **[**AR10122**]**. Specifically, EPA found that Mingo Logan's discharges of fill material would increase the concentrations of selenium and total dissolved solids in downstream waters to levels that would be harmful to wildlife dependent on those waters for survival. **[**AR10153-175**]**; *see* **[**AR10568-70**]**.

EPA thoroughly explained its decision to act under § 404(c) to withdraw specification of disposal sites for fill material in this rare instance. Its decision was reasonable and should be upheld.[21]

CONCLUSION

The district court's decision should be reversed. This Court should either uphold EPA's Final Determination or remand for the district court to consider whether EPA's action was arbitrary or capricious.

---

[21] The United States continues to defend the Corps' decision to issue the Spruce permit in 2007. *See supra*, at **[**13-14**]** (discussing the *OVEC* case). That position is not inconsistent with the United States' position in this case. Congress established a statutory framework that gives EPA and the Corps distinct authorities and allows each agency to make an independent judgment about the propriety of specifying a particular disposal site. Moreover, the factors that the Corps considers when specifying a disposal site—the 404(b)(1) Guidelines and other factors applicable to all Corps permit actions, *see* 33 C.F.R. § 320.4(a)—do not completely coincide with the factors that EPA considers when determining whether to withdraw specification of a site, *see* 40 C.F.R. § 231.2(e). Both agencies acted reasonably here in light of their respective authorities. If EPA's Final Determination is upheld, the Spruce permit will remain in effect with respect to two of the original six specified disposal sites, and Mingo Logan will still be able to discharge fill into those two sites under the terms of the permit. **[**AR10101 n.1, 10102, 10108 n.1**]**.

Respectfully submitted,

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

July 18, 2012
90-5-1-4-18793

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 12,240 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Century Schoolbook, 14-point.

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

July 18, 2012

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

Statutes

Regulations

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

* * *

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

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.

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) 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.

* * *

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the

laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist . . . .

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

33 U.S.C. § 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary **(1)** through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and **(2)** in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) 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.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

* * *

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a

means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such state, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

* * *

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

* * *

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

* * *

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the

Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such

proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

* * *

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

* * *

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

33 U.S.C. § 1361. Administration

(a) Authority of Administrator to prescribe regulations

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

33 U.S.C. § 1364. Emergency powers

(a) Emergency powers

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

33 C.F.R. § 325.7. Modification, suspension, or revocation of permits.

(a) General. The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this part, and not as modifications under this section.

(b) Modification. Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement

cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted but the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR part 326. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

(c) Suspension. The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested),

the district engineer will take action to reinstate, modify, or revoke the permit.

(d) Revocation. Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

40 C.F.R. § 231.1 Purpose and scope.

(a) The Regulations of this part include the procedures to be followed by the Environmental Protection agency in prohibiting or withdrawing the specification, or denying, restricting, or withdrawing the use for specification, of any defined area as a disposal site for dredged or fill material pursuant to section 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. 1344(c). The U.S. Army Corps of Engineers or a state with a 404 program which has been approved under section 404(h) may grant permits specifying disposal sites for dredged or fill material by determining that the section 404(b)(1) Guidelines (40 CFR Part 230) allow specification of a particular site to receive dredged or fill material. The Corps may also grant permits by determining that the discharge of dredged or fill material is necessary under the economic impact provision of section 404(b)(2). Under section 404(c), the Administrator may exercise a veto over the specification by the U.S. Army Corps of Engineers or by a state of a site for the discharge of dredged or fill material. The Administrator may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state. The Administrator is authorized to prohibit or otherwise restrict a site whenever he determines that the discharge of dredged or fill material is having or will have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery areas

(including spawning and breeding areas), wildlife, or recreational areas. In making this determination, the Administrator will take into account all information available to him, including any written determination of compliance with the section 404(b)(1) Guidelines made in 40 CFR part 230, and will consult with the Chief of Engineers or with the state.

(b) These regulations establish procedures for the following steps:

(1) The Regional Administrator's proposed determinations to prohibit or withdraw the specification of a defined area as a disposal site, or to deny, restrict or withdraw the use of any defined area for the discharge of any particular dredged or fill material;

(2) The Regional Administrator's recommendation to the Administrator for determination as to the specification of a defined area as a disposal site.

(3) The Administrator's final determination to affirm, modify or rescind the recommended determination after consultation with the Chief of Engineers or with the state.

(c) Applicability: The regulations set forth in this part are applicable whenever the Administrator is considering whether the specification of any defined area as a disposal site should be prohibited, denied, restricted, or withdrawn. These regulations apply to all existing, proposed or potential disposal sites for discharges of dredged or fill material into waters of the United States, as defined in 40 CFR 230.2.

40 C.F.R. § 231.2 Definitions.

For the purposes of this part, the definitions of terms in 40 CFR 230.2 shall apply. In addition, the term:

(a) *Withdraw specification* means to remove from designation any area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the section 404 program, or any portion of such area.

* * *

(e) *Unacceptable adverse effect* means 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. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 CFR part 230).

40 C.F.R. § 231.3 Procedures for proposed determinations.

(a) If the Regional Administrator has reason to believe after evaluating the information available to him, including any record developed under the section 404 referral process specified in 33 CFR 323.5(b), that an "unacceptable adverse effect" could result from the specification or use for specification of a defined area for the disposal of dredged or fill material, he may initiate the following actions:

(1) The Regional Administrator will notify the District Engineer or the state, if the site is covered by an approved state program, the owner of record of the site, and the applicant, if any, in writing that the Regional Administrator intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, whichever the case may be, of any defined area as a disposal site.

(2) If within 15 days of receipt of the Regional Administrator's notice under paragraph (a)(1) of this section, it has not been demonstrated to the satisfaction of the Regional Administrator that no unacceptable adverse effect(s) will occur or the District Engineer or state does not notify the Regional Administrator of his intent to take corrective action to prevent an unacceptable adverse effect satisfactory to the Regional Administrator, the Regional Administrator shall publish notice of a proposed determination in accordance with the procedures of this section. Where the Regional Administrator has notified the District Engineer under paragraph (a)(1) of this section that he is considering exercising section 404(c) authority with respect to a particular disposal site for which a permit application is pending but for which no permit has been issued, the District Engineer, in accordance with 33 CFR 325.8, shall not issue the permit until final action is taken under this part.

COMMENT: In cases involving a proposed disposal site for which a permit application is pending, it is anticipated that the procedures of the section 404 referral process will normally be exhausted prior to any final decision of whether to initiate a 404(c) proceeding.

(b) Public notice of every proposed determination and notice of all public hearings shall be given by the Regional Administrator. Every public notice shall contain, at a minimum:

(1) An announcement that the Regional Administrator has proposed a determination to prohibit or withdraw specification, or to deny, restrict, or withdraw the use for specification, of an area as a disposal site, including a summary of the facts on which the proposed determination is based;

(2) The location of the existing, proposed or potential disposal site, and a summary of its characteristics;

(3) A summary of information concerning the nature of the proposed discharge, where applicable;

(4) The identity of the permit applicant, if any;

(5) A brief description of the right to, and procedures for requesting, a public hearing; and

(6) The address and telephone number of the office where interested persons may obtain additional information, including copies of the proposed determination; and

(7) Such additional statements, representations, or information as the Regional Administrator considers necessary or proper.

* * *

(d) The following procedures for giving public notice of the proposed determination or of a public hearing shall be followed:

(1) Publication at least once in a daily or weekly newspaper of general circulation in the area in which the defined area is located. In addition the Regional Administrator may (i) post a copy of the notice at the principal office of the municipality in which the defined area is located, or if the defined area is not located near a sizeable community, at the principal office of the political subdivision (State, county or local, whichever is appropriate) with general jurisdiction over the area in which the disposal site is located, and (ii) post a copy of the notice at the United States Post Office serving that area.

(2) A copy of the notice shall be mailed to the owner of record of the site, to the permit applicant or permit holder, if any, to the U.S. Fish and Wildlife Service, National Marine Fisheries Service and any other interested Federal and State water pollution control and resource agencies, and to any person who has filed a written request with the Regional Administrator to receive copies of notices relating to section 404(c) determinations;

(3) A copy of the notice shall be mailed to the appropriate District and Division Engineer(s) and state;

(4) The notice will also be published in the Federal Register.

40 C.F.R. § 231.4 Public comments and hearings.

(a) The Regional Administrator shall provide a comment period of not less than 30 or more than 60 days following the date of public notice of the proposed determination. During this period any interested persons may submit written comments on the proposed determination. Comments should be directed to whether the proposed determination should become the final determination and corrective action that could be taken to reduce the adverse impact of the discharge. All such comments shall be considered by the Regional Administrator or his designee in preparing his recommended determination in § 231.5.

(b) Where the Regional Administrator finds a significant degree of public interest in a proposed determination or that it would be otherwise in the public interest to hold a hearing, or if an affected landowner or permit applicant or holder requests a hearing, he or his designee shall hold a public hearing. Public notice of that hearing shall be given as specified in § 231.3(c). No hearing may be held prior to 21 days after the date of the public notice. The hearing may be scheduled either by the Regional Administrator at his own initiative, or in response to a request received during the comment period provided for in paragraph (a) of this section. If no public hearing is held the Regional Administrator shall notify any persons who requested a hearing of the reasons for that decision. Where practicable, hearings shall be conducted in the vicinity of the affected site.

(c) Hearings held under this section shall be conducted by the Regional Administrator, or his designee, in an orderly and

expeditious manner. A record of the proceeding shall be made by either tape recording or verbatim transcript.

(d) Any person may appear at the hearing and submit oral or written statements and data and may be represented by counsel or other authorized representative. Any person may present written statements for the hearing file prior to the time the hearing file is closed to public submissions, and may present proposed findings and recommendations. The Regional Administrator or his designee shall afford the participants an opportunity for rebuttal.

* * *

(f) The Regional Administrator or his designee shall allow a reasonable time not to exceed 15 days after the close of the public hearing for submission of written comments. After such time has expired, unless such period is extended by the Regional Administrator or his designee for good cause, the hearing file shall be closed to additional public written comments.

40 C.F.R. § 231.6 Administrator's final determinations.

After reviewing the recommendations of the Regional Administrator or his designee, the Administrator shall within 30 days of receipt of the recommendations and administrative record initiate consultation with the Chief of Engineers, the owner of record, and, where applicable, the State and the applicant, if any. They shall have 15 days to notify the Administrator of their intent to take corrective action to prevent an unacceptable adverse effect(s), satisfactory to the Administrator. Within 60 days of receipt of the recommendations and record, the Administrator shall make a final determination affirming, modifying, or rescinding the recommended determination. The final determination shall describe the satisfactory corrective action, if any, make findings, and state the reasons for the final determination. Notice of such final determination shall be published as provided in § 231.3, and shall be given to all persons who participated in the public hearing.

Notice of the Administrator's final determination shall also be published in the Federal Register. For purposes of judicial review, a final determination constitutes final agency action under section 404(c) of the Act.

40 C.F.R. § 231.7 Emergency procedure.

Where a permit has already been issued, and the Administrator has reason to believe that a discharge under the permit presents an imminent danger of irreparable harm to municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas) wildlife, or recreational areas, and that the public health, interest, or safety requires, the Administrator may ask the Chief of Engineers to suspend the permit under 33 CFR 325.7, or the state, pending completion of proceedings under Part 231. The Administrator may also take appropriate action as authorized under section 504 of the Clean Water Act. If a permit is suspended, the Administrator and Regional Administrator (or his designee) may, where appropriate, shorten the times allowed by these regulations to take particular actions.

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov