ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5150

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MINGO LOGAN COAL COMPANY,

Plaintiff-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

On Appeal from the District Court for the District of Columbia,
Case No. 1:10-cv-00541 (Hon. Amy Berman Jackson, Judge)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEE

Kathryn Kusske Floyd
Jay C. Johnson
DORSEY & WHITNEY LLP
1801 K Street, NW
Washington, DC 20006
202-442-3000
kusske.floyd.kathryn@dorsey.com
johnson.jay@dorsey.com

Counsel for Amici Curiae

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici curiae* states as follows:

A. Parties and *Amici*. Except for Industrial Minerals Association—North America, which is not appearing as an *amicus* in this Court, all parties and *amici* appearing before the district court and this Court are listed in the brief for Appellant Environmental Protection Agency.

B. Rulings Under Review. References to the rulings at issue appear in the brief for Appellee Mingo Logan Coal Company.

C. Related Cases. References to related cases appear in the brief for Appellee Mingo Logan Coal Company.

DISCLOSURE STATEMENTS

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, *amici curiae* respectfully submits the following corporate disclosure statements:

The Chamber of Commerce of the United States of America is the world's largest business federation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Association of Manufacturers is the nation's largest industrial trade association. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

American Road and Transportation Builders Association is membership association whose members include public agencies and private firms and organizations. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Association of American Railroads is a trade association representing freight and passenger railroads. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Association of Home Builders is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building

industry. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

American Farm Bureau Federation is the nation's largest general farm organization. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Council of Coal Lessors is a national trade association of companies, individuals and trusts that own and lease coal reserves and coal infrastructure assets to coal mining companies. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Associated General Contractors of America the leading association for the construction industry. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Mining Association is an incorporated national trade association. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Stone, Sand and Gravel Association is the world's largest mining association by product volume. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Furthermore, pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* state that (1) no party's counsel authored this brief in whole or in part,

and (2) no party contributed money that was intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

TABLE OF CONTENTS

DISCLOSURE STATEMENTS i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTRODUCTION 1

INTERESTS OF *AMICI CURIAE* 3

Chamber of Commerce of the United States of America 3
National Association of Manufacturers 4
American Road and Transportation Builders Association 4
Association of American Railroads 5
National Association of Home Builders 6
American Farm Bureau Federation 7
National Council of Coal Lessors, Inc. 7
Associated General Contractors of America 8
National Mining Association 9
National Stone, Sand and Gravel Association 10

ARGUMENT 11

A. Regulatory costs help determine whether investments are made............12
B. EPA's actions in this case have greatly increased uncertainty. 14
1. EPA's action in this case was unprecedented. 14
2. EPA's action in this case makes investment less likely.................16
3. EPA's action in this case causes harm throughout the economy...19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837(1984) 11, 22

Coeur D'Alene Lake v. Kiebert
790 F. Supp. 998 (D. Idaho 1992) 16

James City County v. EPA,
758 F. Supp. 348 (E.D. Va. 1990) 15

Rapanos v. United States,
547 U.S. 714 (2006) 12

STATUTES AND OTHER AUTHORITIES

33 C.F.R. Part 323 13

33 C.F.R. Part 325 13

33 C.F.R. § 325.2(b)(1) 13

33 C.F.R. § 325.3(d) 13

33 U.S.C. § 1342 10

33 U.S.C. § 1344 .... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22

33 U.S.C. § 1344(a) 1

33 U.S.C. § 1344(c) 7, 11, 13, 14, 15, 17, 22

33 U.S.C. § 1344(p) 16

CWA 404(q) Memorandum of Agreement Between the Environmental
Protection Agency and the Department of the Army (Aug. 11, 1992),
available at *www.epa.gov/wetlands/regs/dispmoa.html* 13

Federal Rule of Civil Procedure 29(b) 3

Senate Consideration of the report of the Conference Committee, s. 2770, 93rd Cong. 1st Sess., Oct. 4, 1972, *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* 16

INTRODUCTION

Many valuable investment projects involve activities that require federal Clean Water Act ("CWA") permits. At issue in this case are those permits issued pursuant to Section 404(a) of the CWA by the U.S. Army Corps of Engineers ("Corps") to authorize the "discharge of dredged or fill material into navigable waters at specified disposal sites." Under its Section 404 program, the Corps permits thousands of projects each year for activities ranging from construction and transportation to agriculture and manufacturing, thereby facilitating investments worth hundreds of billions of dollars to the U.S. economy. The regulatory process for obtaining a Section 404 permit from the Corps is painstakingly detailed in the Code of Federal Regulations, and well-established in practice. This certainty enables investors to reasonably account for permitting costs when deciding whether it makes sense to move forward with a planned project.

An adverse ruling in this case would change all of that. The U.S. Environmental Protection Agency ("EPA") has for the first time ever exercised what it claims is its plenary authority to invalidate—***at any time***—an existing Section 404 permit by withdrawing the underlying specification of a disposal site. In so doing, EPA has injected a new and untenable level of uncertainty into the investment planning process for the thousands of project proponents requiring Section 404 permits. Effectively, EPA is preventing those permits, which are issued by another

federal agency, from ever being final. When project proponents are faced with such uncertainty, particularly when that uncertainty calls into question the reliability of lawfully issued federal permits, they will make fewer investments. Decreased investment in Section 404 permit-dependent projects will not only directly harm the vast array of industries whose operations require Section 404 permits, but will also result in less growth in numerous other sectors of the economy, since projects that require a Section 404 permit frequently provide substantial downstream economic benefits. The impact of the ruling in this case will therefore be felt throughout the U.S. economy.

Amici are filing this brief to urge affirmance of the district court's thoughtful opinion, and to give voice to a sampling of the range of interests that would be adversely impacted by EPA's unabashed attempt to carve out a role for itself as unfettered overseer of every Section 404 permit, in direct contradiction to the statutory language and well-established regulatory scheme of Section 404. As the district court rightly recognized, if EPA can at any time unilaterally modify or vacate Section 404 permits issued by the Corps of Engineers, it will put project proponents in an "untenable position," and will call into serious question the reliability of a permitting scheme that undergirds hundreds of billions of dollars worth of U.S. investments. An interpretation of the Clean Water Act that undermines permit finality in this manner should be rejected as *per se* unreasonable.

INTERESTS OF *AMICI CURIAE*

The industry groups participating as *amici* in support of Appellee represent a wide swath of American industry—from agriculture to manufacturing, from road builders to home builders, and virtually everything in between.[1] As more specifically described below, all of these businesses regularly depend on Section 404 permits, and on a consistent, predictable process for obtaining them.

Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million American businesses and professional organizations of every size and in every sector and geographic region of the United States. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases of vital concern to the Nation's business community, including in this Court.

[1] Pursuant to Circuit Rule 29(b), *amici* are filing this brief with the consent of all parties. *See* Notice of Intention to Participate as *Amici Curiae* and Representation of Consent (filed June 12, 2012).

National Association of Manufacturers

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. Manufacturers are impacted both directly and indirectly by federal policies governing issuance of Section 404 permits pursuant to the Clean Water Act. Not only do many manufacturers require such permits in order to expand operations and infrastructure that add much-needed jobs, but many facilities that provide energy to the manufacturing sector, including power plants, require Section 404 permits for their basic operations. Any proposed policies that add uncertainty to the operation of these facilities raise energy costs, which disproportionately affect the manufacturing sector.

American Road and Transportation Builders Association

The American Road and Transportation Builders Association ("ARTBA")'s membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. ARTBA's industry generates more than $380 billion annually in U.S. economic

activity and sustains more than 3.3 million American jobs. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities that require compliance with the Clean Water Act. As part of the highway construction process, ARTBA members are actively involved in the restoration and preservation of wetlands. In the 40 years since the Clean Water Act's passage, ARTBA has actively worked to achieve the complementary goals of improving our nation's transportation infrastructure and protecting essential water resources. In doing so, ARTBA is proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the natural environment. If the Clean Water Act processes ARTBA members have come to rely upon are disturbed by EPA's unprecedented modification of a previously issued Section 404 permit, it will be difficult, if not impossible, for ARTBA members to rely upon Clean Water Act permits to both build transportation improvements and accomplish environmental objectives through mitigation.

Association of American Railroads

The Association of American Railroads ("AAR") is a trade association whose membership includes freight railroads that operate 80 percent of the line-haul mileage, employ 94 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States, as well as passenger railroads

that operate intercity passenger trains and provide commuter rail service. As a group, the railroad industry in the United States operates over approximately 140,000 miles of right-of-way. The railroads engage in numerous construction projects, including the construction of rail yards and right-of-way. Section 404 permits commonly are required for those projects, and AAR members depend on the stability and predictability of the Corps' permitting process.

National Association of Home Builders

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or re-modelers, and its builder members construct about 80 percent of all new homes each year in the United States. NAHB is a vigilant advocate in the nation's courts and frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and business interests of its members. NAHB's organizational policies have long supported that its members have access to a predictable, cost-effective, timely and efficient system of permitting under Section 404 of the Clean

Water Act. Any decision by EPA that vitiates a Section 404 permit after it has been validly issued by the Corps of Engineers undermines this objective.

American Farm Bureau Federation

The American Farm Bureau Federation ("Farm Bureau") is the nation's largest general farm organization, representing over 6.2 million member families in all 50 states and Puerto Rico. Farm Bureau was established in 1919 to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau is an advocacy organization that regularly represents its members' interests before Congress, federal regulatory agencies and the courts. Many of Farm Bureau's members currently posses Clean Water Act permits, and these landowners will be directly affected by the uncertainty caused by EPA's actions in this case, and by EPA's broader assertion that Section 404(c) of the Clean Water Act grants it plenary authority to modify a previously issued Section 404 permit.

National Council of Coal Lessors, Inc.

The National Council of Coal Lessors, Inc. ("NCCL") is a national trade association of companies, individuals and trusts that own and lease coal reserves and coal infrastructure assets to coal mining companies. The size of the membership companies ranges from large publicly traded companies to small family entities. These companies provide the reserve base, and essential asset to mining compa-

nies, which the mining companies mine, process and sell. The members generally collect revenues based on a percentage of the sales price of the final saleable product. The members of NCCL do not typically obtain Section 404 permits, but without the permits obtained by lessees, the assets purchased and owned by NCCL members have no value. Additionally, in many instances, the members purchase and leaseback, at the request of the mining companies, the reserve base for a mine prospect in order to provide the mining company with the necessary capital to build and equip the mine. As a critical part of the due diligence leading to these transactions, NCCL members require proof of the existence of all permits to mine the coal prior to funding. If EPA is able to alter or invalidate existing permits, this method of funding will cease to exist and many projects will have to look for other financing sources, which may not be available in today's financial markets.

Associated General Contractors of America

Established in 1918, the Associated General Contractors of America ("AGC") is the leading association for the construction industry. Operating in partnership with its nationwide network of 95 chartered Chapters, AGC provides a full range of services satisfying the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest. AGC is also a full service national trade association that represents nearly 30,000 leading firms in the construction industry—including general contractors, specialty

contractors and service providers and suppliers. AGC members play a powerful role in sustaining economic growth, in addition to producing structures that add to productivity and the nation's quality of life. AGC is participating in this case because its members recognize that EPA's actions will inhibit their ability to play that role by making it more difficult for the industry to acquire and retain the Section 404 permits that are frequently required for significant construction projects.

National Mining Association

The members of the National Mining Association ("NMA") produce most of America's coal, metals and industrial minerals. The domestic mining industry produces vital resources needed to fuel, feed and build our nation. In 2010, the U.S. mining industry produced $100 billion of mineral, metal and fuel products. These products were in turn used to create more than $2 trillion worth of consumer and industrial goods and generate half of the nation's electricity. As happened in this case, opening a mine often requires the mining company to obtain a Section 404 permit from the Corps of Engineers. EPA's unprecedented action to invalidate the Section 404 permit at issue here has created a dramatic increase in regulatory risk for NMA's members.

National Stone, Sand and Gravel Association

The National Stone, Sand and Gravel Association ("NSSGA") is the world's largest mining association by product volume. Its member companies produce more than 90% of the crushed stone, and 70% of the sand and gravel, consumed annually in the United States. In 2010, the industry contributed $40 billion to the country's GDP and employed 106,700 workers. The aggregate reserves mined by NSSGA members are largely located within or near aquatic areas, requiring the acquisition of permits under both Section 402 and Section 404 of the Clean Water Act (as well as related state approvals).[2] As discussed below, a survey of NSSGA members demonstrates the industry's critical reliance on the certainty of these permits in negotiating contracts to supply materials for infrastructure and many other applications. EPA's actions threaten that certainty, thereby putting private contracts at risk, making financing more expensive—or even unattainable—and causing future investments in aggregate mining to decline.

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[2] A report issued by the American Geological Institute in coordination with the U.S. Geologic Survey notes that while aggregate resources are "widespread, they are not universally available for use." [Doc. 29-3, American Geological Institute Awareness Services, "Aggregate and the Environment" 19 (2007)]. Because "sand and gravel are the products of erosion of bedrock and the subsequent transport, abrasion and deposition of the particles," gravel is "abundant near present and past rivers and streams, alluvial basins, and in previously glaciated areas." *Id.* Thus, aggregate mining is particularly likely to require a Section 404 permit.

ARGUMENT

The district court ruled in favor of Appellee on two alternative grounds. First, the court found, "without venturing beyond the first step of analysis called for by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837(1984)," that the Clean Water Act "does not give EPA the power to render a permit invalid once it has been issued by the Corps." [Doc. 87, Mem. Op. at 2]. Alternatively, the court held that even if the statute were to be viewed as ambiguous, thereby necessitating analysis under the second step described by the Supreme Court in *Chevron*, "EPA's interpretation of the statute to confer this power on itself is not reasonable." *Id*.

Amici agree that the plain language and structure of the Clean Water Act preclude EPA's attempt to invalidate an already-issued permit using Section 404(c), obviating any need to resort to step two of the *Chevron* analysis. Regardless, EPA's interpretation is so problematic from a practical standpoint, as *amici* illustrate below, that it readily qualifies as unreasonable under the second step of the *Chevron* analysis.[3]

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[3] *Amici* supporting Appellant contend that the district court erred because Section 404(c) does not require consideration of the "economic concerns cited by the industry amici briefs." Br. of *Amicus* West Virginia Highlands Conservancy, *et al.* at 19; *see id*. at 17-20. But Section 404(c) is just one piece of a larger puzzle. The district court set aside EPA's post-permit action because it violated the overall statutory scheme established by Congress in the Clean Water Act, and because, even if the statute were judged to be ambiguous, it would be "unreasonable to sow

A. Regulatory costs help determine whether investments are made.

Before making any new investment—in a manufacturing facility, road or rail infrastructure, mining operation, or any other project—a project proponent will always compare the investment's expected costs and benefits. Of course, a project's costs and benefits are frequently surrounded by some degree of uncertainty, including uncertainty about the costs and delays that are inherent in any regulatory review process.[4] Project proponents take these risks into account in deciding whether and when to make an investment. Naturally, investments that involve greater uncertainty are less attractive. If the uncertainty is great enough, the project proponent will delay an investment, or even forgo it entirely.

This investment calculation is thoroughly documented in the report authored by University of California Berkeley Professor David Sunding that *amici* submitted in the district court. *See* [Doc. 87, Mem. Op. at 31] (citing information submitted by *amici*). In his report, Professor Sunding outlines how, when the costs and benefits of a project are uncertain, project proponents require a greater expected rate of return. [Doc. 27-3, Sunding Report at 6-7]. This rate of return is referred to

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a lack of certainty into a system that was expressly intended to provide finality." [Doc. 87, Mem. Op. at 31].

[4] In *Rapanos v. United States*, 547 U.S. 714, 721 (2006), the plurality observed that "[t]he average applicant for an individual [Section 404] permit spends 788 days and $271,596 in completing the process," while "the average applicant for a nationwide [Section 404] permit spends 313 days and $28,915—not counting costs of mitigation or design change."

as the "hurdle rate" for a project. *Id*. As Professor Sunding explains, increased uncertainty about the future—including uncertainty regarding future regulatory actions—increases the hurdle rate, and makes investment less likely. *Id*. at 7-8.

The Corps of Engineers has been permitting projects under Section 404 of the CWA for more than four decades. It has promulgated detailed regulations that describe the substantive and procedural requirements for obtaining a Section 404 permit. Just as important, the Corps has set forth regulations that explain the circumstances under which a permit may be modified, suspended or revoked—circumstances which include the Corps' consideration of, among other things, the extent of the permittee's compliance with the permit terms and conditions, and the extent to which a change in the permit would adversely impact the permittee's plans, investments or actions. *See* 33 C.F.R. Parts 323, 325.

EPA's role in the Corps' Section 404 permitting process is also well-defined (*see, e.g.*, 33 C.F.R. §§ 325.2(b)(1); 325.3(d)), as is the process by which EPA can exercise its authority to withdraw a specification under Section 404(c) ***before*** final issuance of a permit (*see* CWA 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992), available at *www.epa.gov/wetlands/regs/dispmoa.html*). This authority over site specification does not extend to the permit itself—only the Corps issues, modifies, suspends, or revokes permits under CWA Section 404. The existing combina-

tion of clear regulations and longstanding practice minimizes the amount of uncertainty that parties face when requesting a Section 404 permit from the Corps and allows parties to understand the rules under which they are operating.

B. EPA's actions in this case have greatly increased uncertainty.

1. EPA's action in this case was unprecedented.

When EPA chose to effectively modify a Section 404 permit more than four years ***after*** the Corps issued it, its action dramatically changed the calculus for every entity that currently holds, or needs to acquire, a Section 404 permit. As EPA acknowledged when it instituted the Section 404(c) process against Mingo Logan's permit for the Spruce No. 1 Mine, the agency had "never before used its Section 404(c) authority to review a previously permitted project . . . ." [AR011906; *see* AR000001]. Now, EPA is actively taking the position that it can "withdraw ***any*** specification" at ***any*** time, even after the Corps issues a permit, simply by making "the requisite adverse-effect determination." EPA Br. at 28; *see id*. at 30. Permit holders and prospective permit applicants who previously looked to the Corps' regulations as the exclusive framework under which Section 404 permits could be suspended, modified or revoked are thus facing an expansive new threat to the reliability of their permits. If EPA's interpretation is allowed to stand, EPA will be able to unilaterally block lawful activity authorized by another federal agency, vitiating a valid permit without regard for how long the permit has been in

place, whether the permittee is in compliance, or what impact its action will have on the permitted activities.

Perhaps recognizing the significance of such a dramatic change in the regulatory regime, and in spite of its initial acknowledgement that its action in this case was unprecedented, EPA now argues that there were other instances in which it used its Section 404(c) power after the relevant permit issued. In the district court, EPA cited just one example that it claimed qualified as a post-permit action. *See* [Doc. 87, Mem. Op. at 29 n.14]. As the district court pointed out, however, the specification at issue in that case was actually intended for a "new modified permit" that had not yet issued. *Id.* In this appeal, EPA claims that there were actually two instances in which it used Section 404(c) to invalidate an already-issued permit, but their alleged second example is similarly uncompelling.[5] *See* EPA Br. at 44. Far from demonstrating the reasonableness of its position, EPA's repeated reinterpretation of its past actions merely underscores the precedent-setting nature of the action at issue in this case.

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[5] In addition to the action it identified in the district court, EPA is apparently counting the circumstances at issue in *James City County v. EPA*, 758 F. Supp. 348 (E.D. Va. 1990), as a post-permit Section 404(c) action. There, however, EPA in fact acted before the Corps issued a permit, prompting the permit applicant to sue the agency. The district court set aside EPA's action and directed the Corps to issue the permit. *Id.* at 353. The Fourth Circuit ultimately set aside the district court's order, but at no point was the Court of Appeals faced with a situation in which EPA had claimed the power to somehow withdraw a specification even after a permit had issued.

2. EPA's action in this case makes investment less likely.

EPA's unprecedented move to invalidate the permit at issue in this case will require dramatic adjustments to the cost-benefit analysis for future permit applicants. The CWA—and in particular, Section 404(p) of the Act—is designed to provide permittees with finality.[6] "[O]nce a Section 404 permit has been issued, the permittee's obligation to comply with the [Act's] regulatory scheme . . . is determined by referring to the terms and conditions of the Section 404 permit." [Doc. 87, Mem. Op. at 16] (quoting *Coeur D'Alene Lake v. Kiebert*, 790 F. Supp. 998, 1007-08 (D. Idaho 1992)). Thus, as the district court explained, the Clean Water Act "expressly provides that discharges made pursuant to a permit are lawful." *Id.* Until now, investors have been able to rely on that finality in their cost-benefit analysis and planning requirements for projects needing Section 404 permits. EPA's action in this case, however, has undermined this fundamental principle, "leav[ing] permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance: the permit." *Id.* at 31.

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[6] As the district court noted, "finality" was in fact one of the "three essential elements" of the legislation creating the Section 404 permitting system. Mem. Op. at 21 (quoting *Senate Consideration of the report of the Conference Committee*, s. 2770, 93rd Cong. 1st Sess., Oct. 4, 1972, *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 162 (1973)).

The increased uncertainty about the reliability of any Section 404 permit will lead potential permit applicants to raise their investment threshold by setting a higher hurdle rate to account for the risk that EPA will act under Section 404(c) to negate a permit after it issues. Professor Sunding demonstrates that this deterrence effect will be substantial, even if the risk that EPA will exercise its purported authority against any given permit is relatively small. For example, if a project proponent faces a one percent chance that EPA would act under Section 404(c) after the permit issues, it would decrease the expected cost-benefit ratio for the project by 17.5%. [Doc. 27-3, Sunding Report at 9]. A two percent chance that EPA would take adverse action—not an unrealistic assumption for a large or controversial project—would decrease the project's cost-benefit ratio by ***30%***. *Id.* These types of substantial changes in the profile of a project will undoubtedly dissuade numerous businesses from pursuing investments that require them to acquire a Section 404 permit. *Id.*

Even if a project proponent decides to move forward in the face of increased uncertainty, EPA's action in this case could still have a serious adverse impact on the ability to obtain necessary financing. In his report, Professor Sunding shows how banks could account for increased uncertainty by setting higher interest rates on loans for projects that require a Section 404 permit. [Doc. 27-3, Sunding Report at 10]. Bond rating agencies may similarly take into account the new regula-

tory risks created by EPA when evaluating a proposed bond issuance. *Id.* As a result, borrowing will become more expensive for businesses whose projects require them to obtain a Section 404 permit. For project proponents that were already situated on the margin between investing and saving, this additional expense could be the difference between moving forward with a project and declining to risk their capital.[7]

The experience of the aggregate mining industry illustrates how these economic theories operate in practice. In response to a recent survey, one NSSGA member reported that the sequence for opening a "Greenfield" (*i.e.*, new) crushed limestone operation could take most of a decade and cost $50 million dollars. Typically, an operator will strategically defer most of this $50 million expense during the permitting process by purchasing "options" to buy or mine the property from a variety of landowners, and maintaining these options through payments to the landowners. A yearly option like this could cost roughly 5% of the value of the property to be purchased, but it allows a prudent operator to avoid expending the entire purchase price of the land years before the mine is permitted. If the requisite permits can be eviscerated by EPA even after issuance, the financial risk that exists

[7] For project proponents that are not still deterred from investing by higher interest rates, banks may still "ration" their credit by declining to grant a loan at all. [Doc. 27-3, Sunding Report at 10]. As Professor Sunding notes, this sort of rationing can be "an equilibrium outcome" even in the absence of a credit shortage.

during the permitting process will continue even after the Corps issues its permit, and this system of deferring risk and expenses until a permit issues will cease to be beneficial. Moreover, capital lenders will no longer consider the investment secure enough to justify their loans. In this way, the prospect of an EPA post-permit veto could make it impossible for aggregate operators to obtain financing.[8]

3. EPA's action in this case causes harm throughout the economy.

Investors and project proponents that rely on the relative certainty of the Corps' Section 404 permitting process are not the only ones harmed by EPA's alleged authority to withdraw a specification after a permit issues. Because such a wide variety of activities are permitted under Section 404, the adverse impacts on industry would cause a chain reaction of injury throughout the economy.

Professor Sunding's report documents the potential direct and indirect impacts of EPA's actions. For example, the report explains that each dollar spent on new housing construction produces approximately three dollars in total economic

[8] Other responses to the NSSGA survey also reflect the broad impact from even the threat of a post-permit veto. As one NSSGA member noted, "[t]he threat of an EPA veto would impact the company by having to rethink our permitting strategy. We may pass on permitting future reserves because of the possibility of a veto and the legal cost to defend our permits." Another member noted that "million dollar decisions are made when researching and finally deciding to construct, start up and run a mining operation: engineering costs and construction costs, equipment costs, labor, permits, fees, etc. and a myriad of other costs. Revocation of an existing permit could shut a company's doors because of the catastrophic loss of revenue." [AR 002382].

activity, and that $1 billion in residential construction creates approximately 10,000-11,000 new jobs. [Doc. 27-3, Sunding Report at 3, 5]. Therefore, in the context of construction alone, upsetting the Section 404 permitting scheme in the manner proposed by EPA would have negative impacts on job creation and investment in multiple other industries. Moreover, investments that require a Section 404 permit frequently are the type of projects that spur other investment, or offer benefits to consumers and the public. *Id.* at 3-6. These benefit-generating projects can include private sector activities, such as projects that increase the supply of housing or commercial space, produce the food that we consume, or involve the manufacture of important everyday products, and public sector activities, such as the construction of libraries and schools and infrastructure projects, that reduce costs throughout the economy and contribute to our overall quality of life.[9] *See id.* If the initial investment in the Section 404 permit-dependent project does not occur, these multiplying downstream benefits will also be lost.

In another example, a 2007 study for the Florida Department of Transportation documents the economic impacts of closing permitted aggregate operations in the Lake Belt region of Miami- Dade County Florida, which supplies much of the aggregate for road construction in the State. The study concluded that "the sudden

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[9] The evidence shows, for example, that transportation infrastructure projects frequently have large benefit-cost ratios, meaning that the total benefits to society greatly exceed the project costs. [Doc. 27-3, Sunding Report at 3].

cessation of production would damage the economy of Florida and, even after alternative supplies develop, the losses would continue having an adverse effect on economic activity and the number of family wage jobs available in the State for a decade in all likelihood." [Doc. 29-4, Lampl Herbert Consultants, Strategic Aggregates Study: Sources, Constraints, and Economic Value of Limestone and Sand in Florida, prepared for Fla. Dep't of Transp. (2007)]. This is precisely the sort of ripple effect that Professor Sunding's study warns about.

Additionally, the increased uncertainty and risk caused by EPA's actions in this case have an adverse impact on landowners whose property may include Corps-jurisdictional wetlands or waters. In a competitive land market, land prices will reflect the returns that could be generated if the land were dedicated to its highest and best use. [Doc. 27-3, Sunding Report at 11]. For undeveloped land, this price reflects the amount that developers would be willing to pay to acquire the land for a project. *Id.* Because EPA's action has, at the very least, lowered the expected returns from a project that requires a Section 404 permit, a purchaser would consequently not be willing to pay as much for the land in the event of an adverse ruling in this case. *Id.* This will reduce the equilibrium market price of land, harming both landowners who might be interested in selling their land, and long-term landholders such as farmers, whose land is their primary asset. *Id.*

* * *

This case is not just about an isolated instance of EPA exercising authority under CWA Section 404(c) after the Corps has already issued a permit. Nor is this case just about EPA's actions with respect to the mining industry. Rather, this case is about whether or not EPA has the underlying authority to vitiate a Section 404 permit—the touchstone of CWA compliance for regulated industries—***after*** it issues, effectively toppling the entire Section 404 permitting program. This program, as illustrated by the *amici* on this brief, is the foundation for projects and investments that comprise a sizeable portion of the U.S. economy. Every project proponent that is contemplating an investment contingent on a Section 404 permit would have to recalculate the costs and benefits of investing, and many would undoubtedly decide that the inability to ever fully rely on a Section 404 permit tips the scales against investing. An interpretation of Section 404(c) that fundamentally flies in the face of the important concept of permit finality and so dramatically changes the way project proponents view their investments, thereby threatening significant harm throughout nearly every sector of the U.S. economy, should not be considered reasonable under step two of the Supreme Court's *Chevron* framework.

CONCLUSION

For all of the reasons stated above, *amici* urge the Court to affirm the district court's ruling granting summary judgment to Appellee.

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Respectfully submitted,

/s/ Jay C. Johnson
Kathryn Kusske Floyd
Jay C. Johnson
DORSEY & WHITNEY LLP
1801 K Street, NW, Suite 750
Washington, DC 20006
202-442-3540 (telephone)
kusske.floyd.kathryn@dorsey.com
johnson.jay@dorsey.com

Of Counsel:

Robin S. Conrad
Rachel Brand
Sheldon Gilbert
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
202-463-5337 (telephone)

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Lawrence R. Liebesman
Holland & Knight LLP
800 17th Street NW, Suite 1100
Washington, DC 20006
202-955-3000 (telephone)

Counsel for Amicus Curiae National Stone, Sand & Gravel Association

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), counsel for *amici curiae* hereby certifies that the foregoing brief contains 4,653 words, as calculated by Microsoft Word's word count function. The brief is written in Times New Roman 14-point font, which complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5).

/s/ Jay C. Johnson
Jay C. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2012, I served the foregoing Brief of *Amici Curiae* in Support of Appellee on counsel for all parties using the Court's Appellate ECF system.

/s/ Jay C. Johnson
Jay C. Johnson