

NO LONGER MINE: AN EXTENSIVE LOOK AT THE ENVIRONMENTAL PROTECTION AGENCY'S VETO OF THE SECTION 404 PERMIT HELD BY THE SPRUCE NO. 1 MINE

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I. INTRODUCTION

Over the past few years, mountaintop mining has become a vehemently debated environmental issue in the United States. This style of mining removes the tops of mountains in order to recover coal and places the soil and rock from the top of the mountain, known as overburden, into valley fills.¹ The process not only impairs the aesthetics of the region but can also impact the environment by burying streams, decreasing water quality, and leading to the decline of certain species in the area.² Despite the environmental impacts, the citizens of communities where mountaintop mines are located often depend on these businesses for their livelihood. The line between protecting the environment and maintaining economic security is thin, especially in the current economic downturn.

When a mining company plans to place overburden into valleys where streams and wetlands are located, the company must acquire a section 404 permit under the Clean Water Act.³ Acquiring a section 404 permit, as well as the other permits needed in order to establish a new mine, can take several years and involves complex environmental impact studies. Once these permits are acquired, the mining company will usually be considered in compliance with state and federal environmental statutes as long as it does not violate the terms of the various permits it holds.

However, a provision currently exists which allows the U.S. Environmental Protection Agency (EPA) to veto a section 404 permit issued by the U.S. Army Corps of Engineers (Corps).⁴ The EPA can veto a section 404 permit before the

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1. *Mid-Atlantic Mountaintop Mining*, U.S. EPA, <http://www.epa.gov/region3/mtntop/#what> (last updated Sept. 1, 2011).

2. *Id.*

3. Federal Water Pollution Control Act, 33 U.S.C. § 1344 (2006). This statute is commonly referred to as the Clean Water Act.

4. *Id.*

application for the permit has been submitted, during the application process, or after the permit has been approved.⁵ The EPA rarely uses its veto power under section 404(c); however, it recently used its veto power over a section 404 permit issued four years earlier for the Spruce No. 1 Mine in Logan County, West Virginia.⁶ This decision has been controversial and has called into question the ability of permit holders to rely on already issued permits. The EPA has not abused its powers under section 404(c) by vetoing the already issued permit; however, changes must be made to section 404 to limit the EPA's ability to veto existing permits, to encourage the agency to act before a permit is issued, and to instill trust in the current permitting system.

This Comment will focus on section 404 of the Clean Water Act and specifically discuss the veto provision contained in the section and its application to the Spruce No. 1 Mine permit. Part II will explain the section 404 permitting process and discuss the EPA's veto power under the provision, with a detailed history of the previous vetoes executed by the agency. Part III will examine the recent veto of the section 404 permit for the Spruce No. 1 Mine in West Virginia. Part IV will argue that the EPA properly used its section 404(c) veto power on the Spruce No. 1 Mine permit under the current version of the law and describe how the veto process should be altered to encourage the agency to veto permits before they are issued and provide reassurance to businesses and entities currently holding permits.

II. BACKGROUND

Today's Federal Water Pollution Control Act,⁷ more commonly known as the Clean Water Act (CWA), is derived from the 1899 Rivers and Harbors Act and the 1948 Federal Water Pollution Control Act.⁸ The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁹ Under the CWA, discharging any pollutant¹⁰ into the waters of the United States without a permit is generally unlawful.¹¹ Two main permits are available for discharging pollutants into the waters of the United States: section 402 National Pollutant Discharge Elimination System (NPDES) permits, which

5. 33 U.S.C. § 1344(c).

6. Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV, 76 Fed. Reg. 3126 (Jan. 19, 2011).

7. 33 U.S.C. §§ 1251-1387 (2006).

8. JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT 5 (2005).

9. 33 U.S.C. § 1251(a) (2006).

10. A pollutant is any "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2006).

11. 33 U.S.C. § 1311(a) (2006).

focus on the discharge of pollutants from point sources, and section 404 dredged and fill material permits.¹²

This article focuses on CWA section 404 permits, which allow for the discharge of dredged or fill material into navigable waters at specified sites.¹³ Dredged material is any material created through a dredging operation, “mechanized land clearing, ditching, channelization or other excavation.”¹⁴ Fill material includes the use of fill for construction purposes of structures or infrastructures in water, site-development, causeways, roadways, dams, dikes, artificial islands, seawalls, and levees.¹⁵ It also includes the “placement of overburden, slurry, or tailings or similar mining-related materials.”¹⁶

A. The 404 Permitting Process

The 404 permitting process begins when a permit applicant submits an application.¹⁷ After the application is completed, the Secretary of the Army Corps of Engineers must publish notice within 15 days and provide an “opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”¹⁸ The disposal site of the dredged or fill material must be specified in every permit by the Secretary through applying guidelines established by the EPA.¹⁹ The fundamental basis of these guidelines is to only allow the discharge of dredged or fill material at sites where the applicant can show that the “discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”²⁰

Four basic guidelines are used for the specification of a disposal site. First, no practicable alternative can be available that would cause less of an impact on the aquatic system.²¹ A practicable alternative is an alternative that is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”²² The second guideline requires that the proposed discharge will not violate state water quality standards, toxic effluent standards, the Endangered Species Act or regulations to protect marine sanctuaries under the Marine Mammal Protection Act.²³ The third guideline requires the

12. See 33 U.S.C. §§ 1342 & 1344 (2006).

13. 33 U.S.C. § 1344 (2006).

14. 40 C.F.R. § 232.2 (2010).

15. *Id.*

16. *Id.*

17. 33 U.S.C. § 1344(a).

18. *Id.*

19. 33 U.S.C. § 1344(b).

20. 40 C.F.R. § 230.1(c) (2010).

21. 40 C.F.R. § 230.10(a) (2010).

22. 40 C.F.R. § 230.10(a)(2).

23. 40 C.F.R. § 230.10(b).

discharge not to “cause or contribute to significant degradation of the waters of the United States.”²⁴ The fourth and final guideline requires appropriate and practicable mitigation steps be taken to minimize the adverse impacts of the discharge.²⁵

If the guidelines prohibit the specification of a certain site, the Secretary can specify a different site for a permit “through the application . . . of the economic impact of the site on navigation and anchorage.”²⁶

B. EPA’s Veto of a Section 404 Permit

Under CWA section 404(c), the Administrator of the EPA “may prohibit the specification (including the withdrawal of the specification) of any defined area as a disposal site.”²⁷ This action is more commonly referred to as the agency’s veto power since the EPA has typically only used its section 404(c) powers on unresolved permit applications.²⁸ The Administrator can only prohibit or withdraw a specification when he has determined “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.”²⁹ Before that determination can be made, the Administrator must consult with the Secretary on the issue.³⁰ The Administrator then must make his findings and reasoning behind the veto determination public and in writing.³¹ The agency’s use of its veto power under section 404(c) is very rare and has only been invoked thirteen times in the history of the agency.³²

Several steps must be taken to complete a section 404(c) veto of a Corps permit. First, the Regional Administrator must give notice of his intent to publish a proposed determination to withdraw, prohibit, deny, or restrict the specification of a defined area for discharged dredged or fill material to the Corps and the permit applicant or holder.³³ Withdrawing a specification removes the “designation [of an] area already specified as a disposal site by the U.S. Army Corps of

24. 40 C.F.R. § 230.10(c).

25. 40 C.F.R. § 230.10(d).

26. 33 U.S.C. § 1344(b) (2006).

27. 33 U.S.C. § 1344(c).

28. *Questions and Answers – Spruce Mine Final Determination*, U.S. EPA, 2, http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/FINAL_Spruce_404c_QA_011311.pdf (last visited Feb. 14, 2011).

29. 33 U.S.C. § 1344(c).

30. *Id.*

31. *Id.*

32. *Questions and Answers*, *supra* note 28.

33. 40 C.F.R. § 231.3(a)(1) (2010).

Engineers.”³⁴ Preventing an area from being specified as a present or future disposal site is known as prohibition of the specification.³⁵

Next, a notice of the proposed determination is printed in the *Federal Register*, which invites comments on the proposal.³⁶ The notice must contain an announcement of and the facts pertaining to the proposal to withdraw, prohibit, deny or restrict the specification; the location and characteristics of the disposal site; the nature of the discharge; the permit applicant’s identity; the procedure for requesting a public hearing; contact information for additional information on the proposal; and any statement or information that is deemed necessary or proper by the Regional Administrator.³⁷

The third step is the public comment period, which normally lasts from thirty to sixty days, and usually includes a public hearing.³⁸ After the conclusion of the comment period, the Regional Administrator must decide whether to withdraw the proposed determination or prepare a recommended determination and send it, along with the administrative record, to the Assistant Administrator for Water and Waste Management.³⁹ Within thirty days of the receipt of the recommended determination, the Assistant Administrator must contact the Corps and the permit applicant or holder and give them fifteen days to notify the Assistant Administrator of their intent to take corrective action.⁴⁰ Within sixty days of receipt of the recommended determination, the Assistant Administrator must make the “final determination affirming, modifying or rescinding the recommended determination.”⁴¹ To complete the veto process, the final determination is published in the *Federal Register* to announce the agency’s action.⁴²

C. EPA’s Previous Use of Its Section 404(c) Veto Power

The EPA had previously used its veto power under section 404(c) only twelve times before issuing the veto for the Spruce No. 1 Mine permit. The EPA first vetoed a section 404 permit in 1981, when it blocked a permit that had been issued to allow the City of North Miami to fill in wetlands to create a recreational area.⁴³ The initial permit was modified after it was issued to allow garbage to be

34. 40 C.F.R. § 231.2(a) (2010).

35. 40 C.F.R. § 231.2(b).

36. 40 C.F.R. § 231.3(b).

37. 40 C.F.R. § 231.3(b)(1)-(7).

38. 40 C.F.R. § 231.4 (2010).

39. 40 C.F.R. § 231.5 (2010).

40. 40 C.F.R. § 231.6 (2010).

41. *Id.*

42. *Id.*

43. *Final Determination of the Administrator Concerning North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act*, U.S. EPA, 2 (Jan. 19, 1981), <http://water.epa.gov/lawsregs/guidance/wetlands/upload/NorthMiamiFD.pdf>.

the fill material for the project.⁴⁴ The EPA initiated the section 404(c) process after it was notified of the change in fill material.⁴⁵ In the final determination, the EPA restricted the use of the specification covered by the initial Corps permit and denied the use for specification of an area covered by a permit application.⁴⁶

In 1984, the EPA issued its second veto under section 404(c) for the M.A. Norden site located in Mobile, Alabama.⁴⁷ The final determination of the veto prohibited the placement of fill material in a wetland in order to create a foundation to build a fiber recycling plant based on unacceptable adverse effects to wildlife at the site and to the shellfish beds and fishery areas in Mobile River and Mobile Bay.⁴⁸ This permit was vetoed during the application process, before a permit for the site had been issued.⁴⁹

In 1985, the EPA issued two final determinations to veto permits before they were issued. First, it prevented the placement of fill material to construct dikes for duck hunting and mariculture impoundments at the Jack Maybank site in Jehossee Island, South Carolina.⁵⁰ The agency then used its section 404(c) powers later that year when the Corps was ordered by the U.S. District Court for the Eastern District of Louisiana to complete a contested flood control project in Jefferson Parish, Louisiana.⁵¹ The judgment in the case was stayed to allow the EPA to initiate a veto under section 404(c), and the agency's final determination restricted the use of the site for the disposal of any discharge of fill or dredged material, except for the completion of the modified version of the Corps flood control project, discharges necessary for the maintenance of a gas pipeline, and habitat enhancement.⁵²

The next two final determinations issued by the EPA dealt with the disposal of fill material in wetland areas to construct buildings. In 1986, the agency prohibited the filling of thirty-two acres of wetlands for a shopping mall at the Sweedens Swamp site in Attleboro, Massachusetts, after the Corps informed the agency that it intended to approve the requested permit.⁵³ The EPA based its final determination for the site on unacceptable adverse effects caused by the project on wildlife and the availability of an alternative site for the project that would not

44. *Id.* at 3.

45. *Id.*

46. Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act, 46 Fed. Reg. 10,203 (Feb. 2, 1981).

47. Final Determination of the Administrator Concerning the M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act, 49 Fed. Reg. 29,142 (July 18, 1984).

48. *Id.* at 29,143.

49. *Id.*

50. Final Determination Concerning the Jack Maybank Site Pursuant to Section 404(c) of the Clean Water Act, 50 Fed. Reg. 20,291, 20,292 (May 15, 1985).

51. Final Determination of the Assistant Administrator Concerning the Bayou Aux Carpes Site Pursuant to Section 404(c) of the Clean Water Act, 50 Fed. Reg. 47,267, 47,268 (Nov. 15, 1985).

52. *Id.*

53. Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site, 51 Fed. Reg. 22,977, 22,978 (June 24, 1986).

destroy wetlands.⁵⁴ Though the developer had designed a mitigation plan to lessen the adverse effects of the project, the agency refused to let the project continue on the site by ruling that mitigation is not a remedy for adverse effects when a reasonable alternative exists.⁵⁵

In 1988, the EPA vetoed a section 404 permit for the Russo Development Corporation site in Carlstadt, New Jersey.⁵⁶ The Corps notified the EPA that it intended to issue a section 404 permit for 52.5 acres of property which had previously been filled without a permit.⁵⁷ The filled property already had six warehouses built upon it.⁵⁸ The Corps also planned to issue a permit for another five unfilled acres of wetland owned by the corporation.⁵⁹ The final determination denied legal authorization for the existing fill and prohibited the planned disposal of fill material due to the adverse effects the project had on the habitat of various types of wildlife in the area that were declining in population.⁶⁰

The next veto issued by the EPA prohibited the rockplowing of three separate wetland properties in Dade County, Florida.⁶¹ Rockplowing is a process where a bulldozer pulls a plow over the land to break up rocks in order to prepare a surface that can be used for agricultural purposes, destroying the wetland.⁶² The Corps intended to issue a permit to allow the properties to be rockplowed. Citing adverse effects to wildlife, the EPA restricted the specification of the sites to prevent them from being used as discharge sites for dredged and fill material through rockplowing.⁶³

The next four vetoes prevented various waterways from being dammed to build reservoirs and lakes. In 1989, the EPA restricted the specification of Hurricane Creek in Alma, Georgia, from being dammed with fill material to create Lake Alma.⁶⁴ The permit application for Lake Alma stated that the project was designed to create a recreational lake and reservoir.⁶⁵ Other types of filling activities were still allowed at the site.⁶⁶

54. *Id.*

55. *Id.*

56. Final Determination of the Assistant Administrator for Water Concerning the Russo Development Corporation Site; Carlstadt, NJ, 53 Fed. Reg. 16,469 (May 9, 1988).

57. *Id.* at 16,470.

58. *Id.*

59. *Id.*

60. *Id.*

61. Final Determination of the Assistant Administrator for Water Concerning Three Wetland Properties Owned by Henry Rem Estate, Marion Becker, et. al. and Senior Corporation, 53 Fed. Reg. 30,093, 30,094 (Aug. 10, 1988).

62. *Id.* at 30,093.

63. *Id.*

64. Final Determination Concerning the Proposed Lake Alma Recreational Lake Project on Hurricane Creek, Alma, Bacon County, GA, 54 Fed. Reg. 6749 (Feb. 14, 1989).

65. *Id.* at 6750.

66. *Id.*

The next water supply veto was for the Ware Creek Water Supply Impoundment in James City County, Virginia.⁶⁷ The proposed reservoir was stopped by the EPA because the agency refused to allow dredged or fill material to be placed in a wetland area to construct dams and a lake, citing adverse effects on wildlife and available alternatives to increase the water supply in the area.⁶⁸ This veto was challenged by James City County, and the U.S. District Court for the Eastern District of Virginia ordered the Corps to issue a section 404 permit for the project.⁶⁹

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court because no evidence was presented of the available alternative water supply sources the EPA referred to in its veto reasoning.⁷⁰ The appellate court, however, found that the district court should have remanded the case back to the EPA to consider whether the effects on wildlife alone could justify the veto.⁷¹ The EPA issued a new final determination on March 27, 1992, supporting its veto by stating that the proposed dam and reservoir project would cause a direct loss of wetlands and alter downstream habitats.⁷² The EPA restricted the disposal of fill and dredge material in Ware Creek for the purpose of building the water supply dam and reservoir.⁷³ James City County challenged the second veto, and the district court ordered the Corps to issue the permit.⁷⁴ The EPA once again appealed; however, this time the appellate court reversed the district court and determined that the EPA did not act in an arbitrary or capricious manner when issuing the veto.⁷⁵ The court found that the EPA had evidence from the administrative record to base “its veto decision on several factors including harm to existing fish and wildlife species, damage to the ecosystem, destruction of wetlands, and inadequate mitigation.”⁷⁶

In 1990, the EPA vetoed the issuance of a 404 permit for the use of dredge or fill material to create a water supply impoundment on the Big River in Kent

67. Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Prospective Ware Creek Water Supply Impoundment in James County, VA, 54 Fed. Reg. 33,608 (Aug. 15, 1989).

68. *Id.*

69. James City Cnty. v. U.S. EPA, 758 F. Supp. 348 (E.D. Va. 1990).

70. James City Cnty. v. U.S. EPA, 955 F.2d 254, 259 (4th Cir. 1992).

71. *Id.*

72. *Final Determination on Remand of the U.S. Environmental Protection Agency's Assistant Administrator For Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Ware Creek Water Supply Impoundment, James City County, West Virginia*, U.S. EPA, 46 (Mar. 27, 1992), <http://water.epa.gov/lawsregs/guidance/wetlands/upload/WareCreek-RemandFD.pdf>.

73. *Id.*

74. James City Cnty. v. U.S. EPA, 1992 WL 315199 (E.D. Va. 1992).

75. James City Cnty. v. U.S. EPA, 12 F.3d 1330 (4th Cir. 1993).

76. *Id.* at 1339.

County, Rhode Island.⁷⁷ The agency prohibited the use of the disposal site to build a dam out of fill and dredged material based on the loss of habitat area for wildlife and the decreased recreation opportunity the project would create.⁷⁸ The agency also based its decision on the fact that there were practicable alternatives available to address the community's water supply issues.⁷⁹

The last final determination to address the proposed construction of a reservoir vetoed a permit for the Two Forks Water Supply Impoundment, located in Jefferson and Douglas Counties, Colorado.⁸⁰ The permit application proposed to place dredge and fill material in the South Platte River to create a dam and reservoir.⁸¹ The EPA found that the specification site would create unacceptable adverse effects on fishery and recreational areas and prohibited the specification of waters in the South Platte River as a disposal site for fill or dredged material.⁸²

In 2008, the EPA issued a final determination to prevent a proposed Corps civil works project.⁸³ The Yazoo Backwater Area Pumps Project was a Corps project in Issaquena County, Mississippi, that was designed to reduce flooding concerns in the area.⁸⁴ The EPA prohibited the use of the wetland area as a disposal site for discharge of dredged and fill material during the construction of the pump project. The agency found that the project would create unacceptable adverse effects on fish and wildlife due to the alteration of the depth, frequency, and duration of inundation of the wetland area, severely harming the biological functions of the wetland area.⁸⁵

Only one of the EPA's previous twelve vetoes has been used after the issuance of a section 404 permit.⁸⁶ Even in that instance, the veto came only when the permit was being modified to allow garbage to be the fill material for the project.⁸⁷ The remainder of the EPA's section 404 vetoes have been exercised before the permits for the project had been issued.

77. Final Determination of Assistant Administrator for Water Pursuant to Section 404(c) of Clean Water Act Concerning Proposed Big River Water Supply Impoundment in Kent County, RI, 55 Fed. Reg. 10,666 (Mar. 22, 1990).

78. *Id.*

79. *Id.*

80. Final Determination of the Assistant Administrator of Water Pursuant to Section 404(c) of the Clean Water Act Concerning Two Forks Water Impoundments in Jefferson and Douglas Counties, CO, 56 Fed. Reg. 76 (Jan 2, 1991).

81. *Id.* at 77.

82. *Id.*

83. Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, 73 Fed. Reg. 54,398 (Sept. 19, 2008).

84. *Id.* at 54,399.

85. *Id.* at 54,400.

86. See *Final Determination of the Administrator Concerning North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act*, U.S. EPA, 2 (Jan. 19, 1981), <http://water.epa.gov/lawsregs/guidance/wetlands/upload/NorthMiamiFD.pdf>.

87. *Id.* at 3.

III. RECENT DEVELOPMENTS

The Spruce No. 1 Mine, located in Logan County, West Virginia, is one of the largest surface mining operations ever authorized in the Appalachian Mountains region.⁸⁸ The section 404 permit for the Spruce No. 1 Mine has been highly contested for several years now. The former owner of the mine, Hobet Mining Inc., applied for a nationwide permit⁸⁹ under section 404(e) to dispose of overburden from mountaintop mining operations into streams in the valley areas of the site in March 1997.⁹⁰ The Corps initially proposed to approve the permit in 1999; however, an injunction was issued to prevent the permit's final approval.⁹¹ The Corps then withdrew its authorization for the mine under the nationwide permit.⁹² Hobet Mining responded by applying for an individual permit for the mine under section 404(a).⁹³ The Corps and EPA once again reviewed the application for the permit, this time taking seven years to approve the permit, only granting approval after receiving water quality certification for the permit from the West Virginia Department of Environmental Protection (WVDEP) and after completing an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act.⁹⁴ In 2005, while the Corps was still reviewing the permit application, Mingo Logan replaced Hobet Mining as the applicant for the permit.⁹⁵

Even though the EIS clearly showed that the EPA had several concerns with the permit, the EPA did not invoke its section 404(c) power before the Corps issued a permit for the mine in January 2007.⁹⁶ The 2007 permit allowed Mingo Logan to deposit dredged and fill material into 8.11 acres of water and required the company to create fifteen acres of streams and wetlands.⁹⁷ The permit allowed Mingo Logan to build six valley fills and several sedimentation ponds in Seng Camp Creek, Pigeon Roost Branch, Oldhouse Branch, and their tributaries through placing overburden⁹⁸ from mining operations in the waterways.⁹⁹

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88. Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for the Specification (Including Withdrawal of Specification), of an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, WV, 75 Fed. Reg. 16,788 (Apr. 2, 2010).
89. Nationwide permits are given to projects that have minimum impacts on the aquatic environment. The permitting process is streamlined and involves less paperwork than the normal permitting process. 33 C.F.R. § 330.1(b) (2010).
90. Complaint at 4–5, *Mingo Logan Coal Co. v. U.S. EPA*, No. 1:10-cv-00541, 2010 WL 1456165 (D.D.C. Apr. 2, 2010).
91. *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999).
92. Complaint, *supra* note 90, at 6.
93. *Id.*
94. *Id.* at 6–7.
95. *Id.* at 6.
96. *Id.* at 8.
97. *Id.* at 9.
98. Overburden is excess rock, soil, and earth that is removed to reach a mineral deposit. 36 C.F.R. § 6.3 (2010).

As Mingo Logan was preparing the site for mining activities, the permit once again faced litigation when a lawsuit was filed challenging the issuance of the section 404 permit and requesting an injunction.¹⁰⁰ To lower the cost of litigation and prevent a major delay, Mingo Logan agreed to limit its mining activities to a specific area and to give the plaintiffs twenty days' notice before conducting mining activities outside the specific area in exchange for the withdrawal of the plaintiff's motion for a temporary restraining order.¹⁰¹ The Corps received several stays during the course of the litigation in order to allow the EPA the opportunity to review the Spruce No. 1 permit and take a course of action.¹⁰²

The EPA asked the Corps to suspend the permit for the Spruce No. 1 Mine on September 3, 2009.¹⁰³ The Corps will only suspend permits when the public interest requires that it do so.¹⁰⁴ When asked by the Corps to comment on the EPA's request, the WVDEP defended the permit by confirming that the permit met all the water quality standards and emphasizing the previous scrutiny the permit underwent before it was issued.¹⁰⁵ The Corps announced on September 30, 2009, that no grounds existed under 33 C.F.R. 325.7 to revoke or suspend the permit.¹⁰⁶

The EPA responded to the Corps' refusal to revoke the permit by initiating its veto process under section 404(c).¹⁰⁷ In a press release on March 26, 2010, the EPA announced its proposal to veto the permit and stated that the agency had used its veto power "in just 12 circumstances since 1972 and never for a previously permitted project."¹⁰⁸ On April 2, 2010, the proposed determination was published in the *Federal Register*.¹⁰⁹ The proposed determination included plans to restrict the use of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and their tributaries as disposal sites for fill material under the permit.¹¹⁰ At the time of the

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99. Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for the Specification (Including Withdrawal of Specification), of an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, WV, 75 Fed. Reg. 16,788, 16,789 (Apr. 2, 2010).
 100. Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Eng'rs, No. 3:05-0784, 2009 WL 3424175, at *1 (S.D. W.Va. Oct. 21, 2009).
 101. Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Eng'rs, No. 3:05-0784, 2010 WL 1633315, at *1 (S.D. W.Va. Apr. 22, 2010).
 102. *Id.* at *2-3.
 103. Complaint, *supra* note 90, at 11.
 104. 33 C.F.R. 325.7(c) (2010).
 105. Letter from Scott G. Mandirola, Acting Dir., W. Va. Dep't of Env'tl. Prot., to Colonel Robert Peterson, Dist. Eng'r, Huntington Dist., U.S. Army Corps of Eng'rs (Sept. 25, 2009), available at <http://www.wvcoal.com/docs/Spruce/WV%20DEP%20Response%20Spruce%20Fork%2092509.pdf>.
 106. Complaint, *supra* note 90, at 12-13.
 107. *Id.* at 13.
 108. EPA Proposes Veto of Mine Permit Under Clean Water Act, EPA 2010 NEWS RELEASES (Mar. 26, 2010), <http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/d19f832b77dbb0af852576f200567ba5!OpenDocument>.
 109. Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for the Specification (Including Withdrawal of Specification), of an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, WV, 75 Fed. Reg. 16,788 (Apr. 2, 2010).
 110. *Id.*

proposed determination, the valley fill in Seng Camp had already been partially constructed.¹¹¹

The proposed determination requested public comments and provided the EPA's basis for the proposed determination,¹¹² which included preserving the current high quality of the streams in the project area,¹¹³ protecting the projected twenty million salamanders that would be buried under the fill material,¹¹⁴ avoiding the adverse impacts to fish downstream,¹¹⁵ avoiding harm to the bird population from the loss of forest since a large proportion of the population breeds in the area,¹¹⁶ protecting the already declining population of the Cerulean warbler in the area,¹¹⁷ and preventing the loss of habitat and food for bats, which were already facing a decline in the area due to white nose syndrome.¹¹⁸ The basis also included a variety of impacts to the water quality in the area, including an increase of selenium in the water (which can have toxic effects),¹¹⁹ high levels of total dissolved solids in the streams,¹²⁰ and the possible growth of toxic golden algae.¹²¹ The proposed determination also addressed the current mitigation plan for the permit and listed the areas of the plan that needed to be improved or included in order for the mitigation plan to offset the impacts of the permit.¹²² Comments on the proposed determination were due on June 1, 2010.¹²³

On the same day the proposed determination was published in the *Federal Register*, Mingo Logan filed a complaint against the EPA in the U.S. District Court of the District of Columbia.¹²⁴ Mingo Logan claimed that the EPA was acting outside of its authority under section 404(c) of the CWA because it was attempting to revoke a permit that had already been issued.¹²⁵ The EPA filed a motion to dismiss on June 7, 2010.¹²⁶ The motion was denied as moot on March 1, 2011, based on the filing of an amended complaint by Mingo Logan.¹²⁷ Several mining

111. *Id.* at 16,789.

112. *Id.* at 16,789-90.

113. *Id.* at 16,798.

114. *Id.* at 16,799.

115. *Id.*

116. *Id.*

117. *Id.* at 16,800.

118. *Id.*

119. *Id.* at 16,801.

120. *Id.*

121. *Id.* at 16,803.

122. *Id.*

123. *Id.* at 16,789.

124. Complaint, *supra* note 90, at 1.

125. *Id.* at 14-18.

126. EPA's Memorandum in Support of Its Motion to Dismiss at 1, *Mingo Logan Coal Co. v. U.S. EPA*, No. 1:10-cv-00541, 2010 WL 3416348 (D.D.C. June 7, 2010).

127. Docket, *Mingo Logan Coal Co. v. U.S. EPA*, No. 1:10-cv-00541 (D.D.C. 2011).

associations and environmental organizations have filed *amici curae* briefs.¹²⁸ As of the date of publication, no final decision has been rendered in the case.

On January 13, 2011, the EPA announced that it would be using its section 404(c) authority to stop the disposal of mining waste at the Spruce No. 1 Mine.¹²⁹ The final determination was published on January 19, 2011, in the *Federal Register*.¹³⁰ It prevented fill from being placed in 6.6 miles of stream consisting of the Pigeonroost Branch, Oldhouse Branch, and their tributaries.¹³¹ The EPA chose not to withdraw the specification of the permit that covered Seng Camp Creek since the creek was more prone to human disturbances and fill material had already been discharged in its waters.¹³²

The streams protected by the veto provided an “important habitat for 84 taxa of macroinvertebrates, up to 46 species of amphibians and reptiles, 4 species of crayfish, and 5 species of fish, as well as birds, bats, and other mammals.”¹³³ The final determination stated that the placement of fill material in the waterways would cause adverse effects on downstream wildlife “through the removal of functions performed by the buried streams” and by creating a pollution source that would “contribute contaminants to downstream waters.”¹³⁴ This pollution would have an adverse effect on the twenty-six species of fish living in the Spruce Fork, which is downstream of the Pigeonroost and Oldhouse branches.¹³⁵ The final determination also prohibited Mingo Logan from using Pigeonroost and Oldhouse branches as disposal sites in “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.”¹³⁶

In response to the EPA’s final determination to veto the already issued permit at the Spruce No. 1 Mine, Representative David McKinley, along with four initial co-sponsors,¹³⁷ introduced House Bill 457 on January 26, 2011.¹³⁸ This bill would prevent the EPA from vetoing section 404 permits after the permits have been

128. *Id.*

129. *EPA Halts Disposal of Mining Waste to Appalachian Waters at Proposed Spruce Mine*, EPA 2011 NEWS RELEASES (Jan. 13, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/6b9ecfafebce79a5852578170056a179!OpenDocument>.

130. Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV, 76 Fed. Reg. 3126 (Jan. 19, 2011).

131. *Id.* at 3127.

132. *Id.* at 3126.

133. *Id.* at 3127.

134. *Id.* at 3128.

135. *Id.*

136. *Id.*

137. Rep. McKinley is a Republican from West Virginia. The original co-sponsors of the bill were Rep. Nick J. Rahall II (D-W. Va.), Rep. Shelley Moore Capito (R-W. Va.), Rep. Bob Gibbs (R-Ohio), and Rep. Bill Johnson (R-Ohio).

138. H.R. 457, 112th Cong. (2011).

issued by the Corps.¹³⁹ Senator Joe Manchin introduced a similar bill, entitled the “EPA Fair Play Act,” on February 3, 2011, with seven initial co-sponsors.¹⁴⁰ A bill entitled the “Mining Jobs Protection Act” was also introduced in both the House and the Senate.¹⁴¹ Since that time, several other bills have been introduced, including two bills that have passed the House of Representatives. House Bill 1 includes an amendment that would prohibit the EPA Administrator from using funds to revoke section 404 permits that have already been issued,¹⁴² and House Bill 2018, known as the “Clean Water Cooperative Federalism Act of 2011,” would prohibit the EPA from vetoing permits if the state where the discharge of waste originates does not agree with the EPA that the discharge will cause an unacceptable adverse effect.¹⁴³

IV. ANALYSIS

The EPA acted within its legal authority by vetoing an already issued permit under section 404(c); however, this power must be limited to encourage the agency to take action against permits before they are issued, to avoid abuse of the veto power, and to give permit applicants and holders confidence in the permitting process.

A. The Validity of Vetoing Already Issued Section 404 Permits

Even though the Spruce No. 1 Mine veto was the first veto of a permit that had already been issued and was not up for modification, the EPA acted within its power under section 404(c). The fact that the agency did not abuse its veto power is apparent from a careful reading of section 404(c), the *Code of Federal Regulations* guidelines controlling the section 404(c) process, and the EPA’s past history of vetoing an already issued permit for the City of North Miami.

1. Section 404(c)

The plain meaning of section 404(c) clearly allows the EPA to veto already issued permits. The EPA is “authorized to prohibit the specification (including the withdrawal of a specification) of any defined area as a disposal site.”¹⁴⁴ The phrase

139. *Id.*

140. S. 272, 112th Cong. (2011). Sen. Manchin is a Democrat from West Virginia. The initial co-sponsors of the bill were Sen. John Boozman (R -Ark.), Sen. John Hoeven (R-N.D.), Sen. Mary L. Landrieu (D-La.), Sen. Lisa Murkowski (R -Alaska), Sen. Rob Portman (R-Ohio), Sen. John D. Rockefeller IV (D-W. Va.), and Sen. Roger F. Wicker (R-Miss.).

141. S. 468, 112th Cong. (2011); H.R. 960, 112th Cong. (2011).

142. H.R. 1, 112th Cong. (2011).

143. H.R. 2018, 112th Cong. (2011).

144. 33 U.S.C. § 1344(c) (2006).

“including the withdrawal of the specification” was included to allow the EPA to veto already issued permits. Since the term withdrawal is not defined in the statute itself, one must look to the dictionary definition of the term: “the act of taking back or away; removal.”¹⁴⁵ The inclusion of the term *withdrawal* clearly gives the EPA the power to veto already issued and approved permits. Clarification of the term *withdrawal* can also be found in regulations written to outline the section 404(c) process.

2. Regulations Concerning the Section 404(c) Veto Process

Regulations addressing the section 404(c) procedure in the *Code of Federal Regulations* also allow the EPA to veto already issued permits under section 404(c). In a definitions section for section 404(c), the *Code of Federal Regulations* defines the phrase “withdraw specification” as “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.”¹⁴⁶ “Prohibit specification” is also defined in the section to refer to preventing the present or future disposal of fill material at a specific site.¹⁴⁷

In the regulation section that discusses proposed determinations for section 404 permit vetoes, a comment is included that implies that the EPA’s veto power can be used on already issued permits. The comment in 40 C.F.R. § 231.3(a)(2) states that when issuing a proposed determination for a permit application that is pending, the section 404 referral process should be exhausted before a section 404(c) veto process should be initiated.¹⁴⁸ This statement implies that there are situations when the veto process can be initiated after the permit has been approved and issued.

The purpose and scope of the regulations on section 404(c) procedures also states that the veto process can be used over specifications already made by the Corps.¹⁴⁹ The regulation goes on to state that a prohibition of the specification of a disposal site is used when the EPA wishes to veto a permit application that has yet to be submitted or approved.¹⁵⁰ Regardless of whether the veto process is initiated before, during, or after the application process, the EPA cannot exercise its veto power under section 404(c) unless it determines that the fill material will have an “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife or recreational areas.”¹⁵¹ This determination feasibly could occur after a permit has been issued, especially when the actual use of the

145. BLACK’S LAW DICTIONARY 1739 (9th ed. 2009).

146. 40 C.F.R. § 231.2(a) (2010).

147. 40 C.F.R. § 231.2(b).

148. 40 C.F.R. § 231.3(a)(2) (2010).

149. 40 C.F.R. § 231.1(a) (2010).

150. *Id.*

151. *Id.*

permit creates unacceptable adverse effects that could not be predicted before the project began.

The regulations created to address section 404(c) procedures clearly recognize the EPA's power to veto permits that have already been issued by the Corps.

3. North Miami Permit Veto

Also important to note is the fact that the EPA vetoed a previously issued permit the very first time it exercised its veto power under section 404(c). Permit No.75B-0869, issued by the Corps on March 15, 1976, authorized fill material to be placed over 291 acres in North Miami in order to build a public golf course, tennis courts, and a clubhouse.¹⁵² The EPA did not take any action against the permit until it was modified to have solid waste and garbage used as the fill material for the project, which the agency determined would create high levels of ammonia, contaminating the lakes being built in the disposal area.¹⁵³ The permit did not initially indicate that solid waste and garbage would be the fill material for the project.¹⁵⁴ After the permit was issued the Corps decided to modify the permit to allow the project to operate as a sanitary landfill.¹⁵⁵ When the EPA was made aware of the modification, it decided to veto the permit.¹⁵⁶

The North Miami permit veto demonstrates a situation where the use of the veto process after the issuance of a permit was necessary for the EPA. The agency could not foresee the unacceptable adverse effects to shellfish beds, fishery areas, wildlife, and recreational areas at the time the permit was approved since the permit did not reference the use of solid waste or garbage as fill material for the project.¹⁵⁷ This sequence of events is similar to the course of action that took place with the Spruce No.1 Mine permit. Though the permit had been initially approved by the EPA and issued by the Corps, new studies and data from the active part of the mine demonstrated unacceptable adverse impacts on fishery areas and wildlife that could not have been predicted at the time that the permit was issued.¹⁵⁸

152. Proposed Determination to Prohibit, or Deny Specification or Use for Specification, of an Area as a Disposal Site, 45 Fed. Reg. 51,275, 51,276 (Aug. 1, 1980).

153. *Id.*

154. *Final Determination of the Administrator Concerning North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act*, U.S. EPA, 2 (Jan. 19, 1981), <http://water.epa.gov/lawsregs/guidance/wetlands/upload/NorthMiamiFD.pdf>.

155. Proposed Determination to Prohibit, or Deny Specification or Use for Specification, of an Area as a Disposal Site, 45 Fed. Reg. at 51,276.

156. *Id.*

157. *Final Determination of the Administrator*, *supra* note 154.

158. *Final Determination of the Assistant Administrator for Water Pursuant to 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV*, 76 Fed. Reg. 3126, 3127 (Jan. 19, 2011).

The EPA has the power to veto already issued permits under section 404(c). The plain language of the statute, the regulations addressing the section 404(c) process, and the EPA's previous veto of an issued permit in North Miami all clearly demonstrate that the EPA did not abuse its power when it vetoed the Spruce No. 1 Mine permit.

B. Problems with the EPA's Veto Power Under Section 404

The EPA's ability to veto already issued permits is problematic in several ways. First, the current language of the statute does not encourage the EPA to act against the issuance of a permit during the application stage since the agency can always rely on a post-issuance veto. Second, the EPA could abuse its power under section 404(c) by allowing environmentally unfriendly projects to receive permits and then exercising its power to veto the permit after the permit holder has contributed thousands of dollars and resources to the project. Finally, permit holders will lose faith in the permitting process if holders are frequently losing their approved permits pursuant to an EPA veto.

Allowing the EPA to veto a permit after it has already been issued fails to encourage the EPA to closely scrutinize a permit during the application process. The post-approval veto is essentially a fallback plan that the agency can rely upon if it misses an unacceptable adverse effect during its review of the permit or fails to convince the Corps to revoke the permit after it has been issued. Removing the ability to veto a permit after it has been issued or requiring stricter criteria to veto a permit after it has been approved will encourage the agency to act in opposition to a permit during the application stage, before significant resources and money have been poured into the project that requires the permit.

Having the ability to veto a permit after it has been approved can also lead to abusive action by the agency. When the political affiliation of the executive branch changes, the policy of the agency can change as well. This shift can cause an agency to act in a retrospective manner and revoke permits issued under the previous administration by using the section 404(c) process. Permit holders could face the possibility of losing their permit with every presidential election. The agency could also use its veto power as leverage when dealing with entities that are frequently troublesome for the agency or that are particularly unfriendly towards the environment.

The EPA, like many other agencies, frequently has close working relationships with local governments and private interests. These relationships can place the agency under intense pressure from government officials or environmental agencies to revoke permits for projects that these groups view to be disadvantageous. The entire permitting process can be a "world of bargaining, negotiation, compromise, and . . . prompts a search for influential and fleeting

pressure points.”¹⁵⁹ This influence, if misused, can lead to an abusive use of the agency’s veto power.

Finally, the EPA’s ability to veto previously approved permits can cause permit holders to distrust the entire permitting process and the EPA as a whole. The veto of an already issued permit places every section 404 permit in jeopardy and leads to a shocking regulatory uncertainty for all businesses that have these permits. Individuals, businesses, and other entities that need permits for projects may choose to run the risk of getting caught without a permit rather than go through the permitting process simply to have their permit revoked a few years after it had been approved even though penalties for operating without a permit can be up to \$25,000 per day.¹⁶⁰ The financial risk of backing a project that requires a section 404 permit will likely increase if a possibility exists that a permit could be revoked even though the permit holder has met all of the terms of the permit.

The ability to veto a permit after it has been issued causes permit holders to distrust the permitting system and the EPA. The veto power can also be abused by the agency to remove permits after the agenda of the agency has changed and fails to encourage the agency to scrutinize permits during the application process. In order to address these problems, the statute needs to be amended to make vetoes of permits that have already been issued more difficult to achieve.

C. Possible Remedies for Section 404(c)

The problems caused by the EPA’s ability to veto permits after they have been issued must be carefully addressed. Simply placing an outright ban on vetoes after a permit has been issued would likely go too far and prevent the agency from acting in situations when there was no possible way to foresee the unacceptable adverse impacts on the environment during the permit application. However, discovering that the project has caused unacceptable adverse effects after the permit has been put to use should not be the only factor necessary to veto an issued permit. An agency decision to veto a previously issued permit should occur only in the most extreme circumstances and should require that the agency balance both environmental and economic factors.

In order to remedy the problem, section 404(c) should be amended to allow the EPA to veto or prohibit the specification of certain sites at any time before or during the permit application process when it finds that unacceptable adverse effects on shellfish beds, fishery areas, wildlife, or recreational areas will occur.

159. 2 WILLIAM H. RODGERS, JR., *RODGERS ENVIRONMENTAL LAW* § 4:12 (1986).

160. 33 U.S.C. § 1319(d) (2006). “In determining the amount of civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” *Id.*

After a permit has been issued, the EPA should only be able to veto the permit in the most extreme circumstances. Such circumstances should include when the permit holder fraudulently withheld known unacceptable adverse effects to the environment from the agency during the permit application process or when the actual use of the permit creates unacceptable environmental conditions that were truly unforeseeable at the time the permit was issued.

When vetoing a permit after it has been issued, the agency should also be forced to consider the economic impact of the permit revocation. Though the EPA is not currently required to balance economic factors when determining whether to exercise its veto power,¹⁶¹ the agency should be required to consider economic factors when vetoing a permit that has already been issued and put to use. The legislative history of the CWA states that an argument of economic hardship “alone is not sufficient to override the requirements of fresh water lakes and streams.”¹⁶² However, the legislative history also states that Congress expected the Administrator to be prompt when using his or her veto power over a permit, implying that the veto power should be exercised before a permit is issued in order to provide sufficient time to find and develop alternative disposal sites and methods.¹⁶³ By failing to exercise its veto power early in the permitting process and allowing a permit to be issued, the agency has essentially waived its ability to not consider economic factors when making the veto decision.

Several economic factors exist that could be considered when the EPA determines whether to veto an already issued permit. The economic factors present will vary depending on the project type and scale. One factor that should always be considered is the permit holder’s expenses made in reliance on the permit. These expenses include any funds already invested in the project that cannot be recovered without having a valid permit. Other factors that may also be considered depending on the nature of the project include the potential impact the project would have had on the local economy as well as any expenses the local government incurred in bringing the project to the area.

V. CONCLUSION

The veto of the Spruce No. 1 Mine’s section 404 permit was made within the powers granted to the EPA under section 404(c). Though the EPA did not abuse its power in this instance, section 404(c) needs to be amended to limit the agency’s ability to veto already issued permits in the future. If the statute is not amended, permit holders will lose trust in the EPA and the section 404 permitting process. The agency may abuse its veto power by using it when the agency’s policy

161. *Creppel v. U.S. Army Corps of Eng’rs*, 1988 WL 70103, at *7 (E.D. La. June 29, 1988).

162. LIBRARY OF CONG., A LEGISLATIVE HISTORY OF THE WATER CONTROL POLLUTION ACT AMENDMENTS OF 1972, 178 (1973).

163. *Id.* at 177-78.

objectives change or after failing to closely scrutinize permits during the application process if its veto power is not limited. Section 404(c) should be revised to only allow the agency to veto already issued permits in the most extreme circumstances. The revised section should also require the agency to consider economic factors when vetoing an already issued permit since the agency failed to act promptly to veto the permit before its issuance.