



D.C. Circuit Holds EPA can Invalidate a Clean Water Act Section 404 Permit After it is Issued

04.25.2013 | By [Mary Lynn K. Coffee](#), [Paul S. Weiland](#)

In a ruling that adds to the complexity of the federal regulatory landscape, the United States Court of Appeals for the District of Columbia held that the Environmental Protection Agency ("EPA") has the authority to retroactively disapprove dredge and fill permits issued by the U.S. Army Corps of Engineers ("Corps") under section 404 of the Clean Water Act. As a result of the decision, even after a regulated entity lawfully obtains a section 404 permit from the Corps, at any time during the life of that permit EPA can exercise its authority – independent from the Corps – to revoke the permit. The decision further complicates the already byzantine process of obtaining authorizations necessary for public works and private development projects.

Under section 404, any person seeking to discharge dredged or fill material into waters within the Corps' jurisdiction must secure a permit. Subsection 404(a) provides that the Secretary of the Army, who acts through the Corps, "may issue permits ... at specified disposal sites" for the dredging or filling of navigable waters. Subsection 404(c) states that EPA "is authorized to prohibit the specification ... of any defined area as a disposal site...." Thus, the Corps can issue a permit and identify where the waste can be disposed of, but EPA can veto the disposal site.

In 2007, the Corps issued a section 404 permit to Mingo Logan Coal Company (Mingo Logan). The permit allowed Mingo Logan to dispose of mountaintop mining waste into waters within the Corps' jurisdiction. Although Mingo Logan had never exercised its permit rights to dispose of such waste, EPA wrote the Corps in 2009 requesting that the Corps revoke the permit. EPA cited new information about alleged adverse environmental impacts that would occur if Mingo Logan disposed of mountaintop mining waste into navigable waters. The Corps decline to revoke the permit. In response, EPA issued a Final Determination in 2011 pursuant to subsection 404(c), stating Mingo Logan could not dispose of mountaintop mining waste at

the sites specified in the permit, effectively invalidating the permit issued by the Corps.

Mingo Logan filed suit challenging EPA's determination. The lower court overturned EPA's action, rejecting the idea that EPA could retroactively disapprove a permit issued by the Corps. The court noted the practical effect of EPA's legal position was that EPA could unilaterally revoke or modify a section 404 permit duly issued by the Corps at any time. EPA appealed. The D.C. Circuit opined that section 404 imposes no temporal limit on EPA's authority to prohibit specification of a disposal site or to withdraw the Corps' specification of a disposal site. It held that Congress evinced a clear intent to allow EPA to act "at any time" to preclude discharges of fill at a specified disposal site "in the event that the discharge would cause an unacceptable adverse effect on identified environmental resources." The court rejected Mingo Logan's contrary interpretation of the statute as unpersuasive.

The effect of this decision is to expand EPA's authority to veto the issuance of, and to withdraw properly issued, dredge and fill permits. For parties seeking to obtain or currently holding such permits, the decision clarifies that, until project completion, EPA has continuing jurisdiction to oversee activities covered by the permit and to revoke the permit. It remains to be seen whether EPA will respond to the decision by engaging in increased oversight and seeking after-the-fact concessions from project proponents to avoid permit revocation.