

# Client Alert

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## **Court Finds That EPA Exceeded Its Authority in Attempting to “Veto” a Section 404 Permit After the Permit’s Issuance by the Corps of Engineers**

On March 23, 2012, the United States District Court for the District of Columbia granted plaintiff’s motion for summary judgment in *Mingo Logan Coal Co. v. U.S. Env’tl. Prot. Agency*. Plaintiff was represented by Hunton & Williams. In a precedent-setting opinion, the court held that the Environmental Protection Agency (EPA) exceeded its authority under Section 404(c) of the Clean Water Act (CWA) when it attempted to “veto” Mingo Logan’s existing Section 404 permit by withdrawing the specification of certain areas as disposal sites after the U.S. Army Corps of Engineers (Corps) had issued the permit. EPA had never before invoked Section 404(c) to essentially modify or revoke a permit that had been duly issued by the Corps. This landmark decision has important implications for all entities regulated under Section 404. Had EPA’s action stood, all Section 404 permits would be perpetually subject to unilateral action by EPA regardless of whether the Corps had decided to take any action to suspend, modify or revoke the permit in accordance with the balancing of multiple criteria listed in the Corps’ regulations.

In 2007, after a 10-year permitting process, in which EPA participated fully, the Corps issued Mingo Logan a Section 404 permit for the Spruce No. 1 mountaintop coal mine in Logan County, West Virginia, authorizing Mingo Logan to discharge dredged or fill material into stream segments, including Pigeonroost and Oldhouse Branches. Almost two years after the Corps issued the Section 404 permit, EPA requested that the Corps suspend, modify or revoke the permit because EPA claimed that new information had arisen or that the Corps had failed to fully consider certain issues that had been raised during the permitting process. The Corps rejected EPA’s request, finding no grounds to suspend, modify or revoke the permit. Over a year later, EPA issued a Final Determination withdrawing the specification of Pigeonroost Branch, Oldhouse Branch and their tributaries as disposal sites — roughly 88 percent of the total discharge area authorized by the permit. Mingo Logan asked the district court to declare that EPA lacks the authority to modify or revoke Mingo Logan’s Section 404 permit, that its attempt to modify the permit was unlawful and that the permit remains valid and operative.

The district court found that EPA exceeded its Section 404(c) authority and vacated EPA’s Final Determination withdrawing the specifications. EPA argued that Section 404(c) grants it plenary authority to withdraw a specification and that such withdrawal effectively modifies or revokes a permit that has been duly issued by the Corps. The court analyzed whether Congress had unambiguously and directly spoken to the precise question at issue by examining Section 404’s text, structure, purpose and legislative history. The court found that Section 404(c) does not clearly grant EPA the authority to exercise a post-permit veto. Fundamentally, the court observed that Section 404(c) never mentions the term “permit,” a mechanism of central importance to the CWA scheme, and that the phrase “withdrawal of specification” does not provide EPA with any express authority to undermine an existing permit.

Although the court found the language of Section 404(c) to be awkward, once the court examined the statute as a whole, it found no ambiguity regarding Congress’s intent. The court noted that Congress gave exclusive permitting authority to the Corps in Section 404(a) and that Congress declared in Section

404(p) that a permit would provide legal protection for those discharging in compliance with the permit's terms. In addition, in Section 404(q), Congress directed that EPA resolve its disputes with the Corps expeditiously prior to permit issuance — a direction that would be undermined by EPA's claimed ability to invoke later disputes to overturn a final, issued permit. The court found that all these sections, taken together, demonstrate that EPA's purported retroactive veto cannot be squared with the statutory scheme. The court found additional, substantial support in the legislative history and concluded that "while EPA is correct that Congress expected it to fulfill its unique role as the steward of the environment when carrying out its functions under section 404, it is also clear from the forward looking language in the legislative history that Congress anticipated that EPA would act before a permit was issued, and indeed, that it would not unnecessarily slow down the process while doing so."

Beyond that, the court held that even if the statute left a question as to Congress's intent, EPA's interpretation of the statute was not reasonable. EPA claimed it was not revoking a permit because it was only withdrawing a specification. Yet, EPA simultaneously claimed that the withdrawal of the specification effectively nullifies the permit. This "non-revocation revocation," the court explained, would leave the permittees in the position of not being able to rely on the permit and would cause substantial practical uncertainty. Indeed, the court noted that eliminating finality from the Section 404 permit process would have a significant economic impact on industry groups because lenders and investors would be less willing to extend credit and capital if every construction project involving jurisdictional waters could be "subject to an open-ended risk of cancellation." Moreover, the court noted that EPA's interpretation of Section 404(c) was inconsistent with joint agency agreements implementing the CWA. For all these reasons, the court found EPA's interpretation of Section 404(c) to be unreasonable.

As the court noted, EPA's veto in this case has caused consternation and anxiety for members of the business community because it threatens the finality of their wetland and stream permits. The court's decision curbs EPA's claim of this extraordinary power and instead directs EPA to exercise its authority during the permit process before the Corps has made its permitting decision. Thereafter, the Corps alone will control the administration and enforcement of the issued permit.

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