Client Alert

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DC Circuit Holds That EPA Has Authority to Retroactively Veto An Existing Clean Water Act Section 404 Permit

On April 23, 2013, the United States Court of Appeals for the District of Columbia held that section 404(c) of the Clean Water Act (CWA) authorizes the Environmental Protection Agency (EPA) to retroactively veto portions of a section 404 dredge and fill permit issued by the US Army Corps of Engineers (Corps). The three-judge panel unanimously reversed a district court decision ruling that EPA exceeded its authority when it retroactively withdrew from Mingo Logan Coal Co.'s existing permit the specification of certain areas as disposal sites. This landmark ruling reduces the certainty otherwise afforded by section 404 permits and vests EPA with broad authority over the section 404 program, allowing for more EPA involvement in the permitting process for both nationwide and individual permits.

In 2007, the Corps issued Mingo Logan a section 404 permit for the Spruce No. 1 surface coal mine in Logan County, West Virginia, authorizing Mingo Logan to discharge dredged or fill material into stream segments. Almost three years after the Corps issued the permit, EPA withdrew the specification of two stream segments and their tributaries as disposal sites for dredged or fill material — roughly 88 percent of the total discharge area authorized by the permit. Mingo Logan challenged in district court EPA's withdrawal of specification, and the district court held that EPA had exceeded its authority under section 404(c) of the CWA by attempting to retroactively withdraw the specification.

On appeal, EPA argued that section 404(c) authorizes it to unilaterally modify or revoke a permit issued by the Corps at any time after permit issuance. The court agreed, holding that section 404 imposes no temporal limit on EPA's authority to withdraw specification, but instead expressly empowers EPA "to prohibit, restrict or withdraw the specification '*whenever*' [EPA] makes a determination that the statutory 'unacceptable adverse effect' will result." Writing for the three-judge panel, Judge Karen LeCraft Henderson analyzed EPA's interpretation of section 404(c) under *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 US 837 (1984). Focusing on the word "whenever," the court concluded that section 404(c) unambiguously means that EPA can withdraw specification any time it concludes that discharges would have significant adverse impacts. Thus, the court held that EPA did not exceed its statutory authority in withdrawing specification for the Spruce No. 1 mine. The court rejected Mingo Logan's arguments that section 404's statutory structure and legislative history require that EPA invoke section 404(c) before the Corps issues a permit and that "whenever" is an ambiguous term.

The DC Circuit reversed the district court insofar as it held that EPA lacks statutory authority under CWA section 404(c) to withdraw a disposal site specification post-permit.[1] By holding that EPA has authority to retroactively veto section 404 permits issued by the Corps, this ruling creates uncertainty for section 404 permittees. It also arguably provides EPA with expansive authority over the section 404 program and could embolden EPA to become more involved in the dredge and fill permitting process, both for nationwide and individual permits.

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[1] Because the district court did not address the merits of Mingo Logan's Administrative Procedure Act (APA) challenge to EPA's withdrawal of specification, the D.C. Circuit remanded to the district court to address the merits of that challenge.

Contacts

Robert M.Rolfe rrolfe@hunton.com	**Craig A. Bromby** cbromby@hunton.com
Deidre G. Duncan dduncan@hunton.com	**Andrew J. Turner** aturner@hunton.com
Virginia S. Albrecht valbrecht@hunton.com	**Karen C. Bennett** kbennett@hunton.com
George P. Sibley ksibley@hunton.com	**Karma B. Brown** kbbrown@hunton.com
Mark G. Weisshaar mweisshaar@hunton.com	**Thomas J. (TJ) Mascia** tmascia@hunton.com
Brooks M. Smith bsmith@hunton.com	**Kerry L. McGrath** kmcgrath@hunton.com