

EPA's Attempt to Expand Authority over Dredge-and-Fill Permitting Rejected

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On March 23, the U.S. District Court for the District of Columbia rejected the Environmental Protection Agency's (EPA) unprecedented attempt to retroactively veto a "dredge-and-fill" permit issued by the Army Corps of Engineers (Corps) under section 404 of the Clean Water Act - a significant win for the coal mining industry. This just days after the Supreme Court ruled unanimously in [Sackett v. EPA](#) that EPA's issuance of Clean Water Act compliance orders is judicially reviewable under the Administrative Procedure Act.

At issue in *Mingo Logan v. EPA* was whether EPA has the authority under section 404(c) of the Clean Water Act to withdraw the specification of disposal sites after the Corps issues a permit under section 404(a). Mingo Logan Coal Company (Mingo Logan), a subsidiary of Arch Coal, had been authorized by a Corps-issued permit to discharge fill material from its coal mine into nearby streams. But, nearly three years after the permit issued, EPA attempted to withdraw the specification of the streams as disposal sites, effectively invalidating the permit. Mingo Logan filed suit, asking the district court to declare that EPA exceeded its statutory authority.

Under section 404(a), the Corps is empowered to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. EPA also has the option of playing a role in this process, as it can prohibit the specification of any defined area as a disposal site pursuant to section 404(c). In this case, EPA took the expansive and novel position that section 404(c) grants it plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps, *and to do so at any time*. The district court strongly disagreed, remarking that "[t]his is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute."

According to the district court, EPA is limited to stepping in and vetoing the use of certain disposal sites at the start of the permitting process, thereby blocking the Corps' initial issuance of a section 404 permit. This ruling is significant because, otherwise, mining companies holding section 404 permits issued by the Corps would never have real certainty that their permits are ever final. The district court, acknowledging the practical consequences of that outcome, reasoned that not nullifying EPA's overreach could have "a significant economic impact on the construction industry, the mining industry, and other aggregate operators, because lenders and investors would be less willing to extend credit and capital if every construction project involving waterways could be subject to an open-ended risk of cancellation."

Though this is a victory for the coal mining industry, EPA's unauthorized action stalled the development of Mingo Logan's coal mining project and, according to a company official, delayed the creation of 200 additional jobs and resulted in 80 lost jobs in West Virginia. Despite the district court's ruling, the possibility remains that EPA will appeal the court's decision, as environmentalist groups are urging.