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Retroactive Environmental Justice: *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*

INTRODUCTION

In 2011, for the first time, the Environmental Protection Agency (EPA) vetoed a Clean Water Act (CWA) section 404 permit after the permit had been issued.¹ EPA had doubted the legitimacy of the permitted mining operation as far back as the Bush administration,² when it criticized the operation for its potential harmful impacts on downstream water quality in a comment letter addressed to the U.S. Army Corps of Engineers (Corps).³ The mining company challenged EPA's veto in court, and, in *Mingo Logan Coal Co. v. EPA*, the D.C. Circuit upheld the agency's authority to veto permits after they have been issued.⁴

Although EPA's decision to veto the permit was based on the mine's adverse effects on wildlife,⁵ the veto will also impact public health and business concerns, and serve as an impetus for Congress to control EPA's interference with surface coal mining permits. Though EPA's veto will impact these sectors to differing degrees, the health impacts from surface coal mining are so drastic that they outweigh industry's reliance interest in the section 404 permit model, and thus justify the D.C. Circuit's holding. While Congress's

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1. Holly Doremus, *EPA Vetoes Mountaintop Removal Mining Permit*, LEGAL PLANET (Jan. 13, 2011), <http://legal-planet.org/2011/01/13/epa-vetoes-mountaintop-removal-mining-permit>.

2. See Ken Ward Jr., *Appeals Court Backs EPA's Veto of Spruce Mine*, CHARLESTON GAZETTE (Apr. 23, 2013), <http://www.wvgazette.com/News/201304230092>.

3. Ward, *supra* note 2.

4. See *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 616 (D.C. Cir. 2013).

5. See EPA, FINAL DETERMINATION OF THE U.S. EPA PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 1, 45, 47, 49, 50, 73 (2011) [hereinafter EPA FINAL DETERMINATION], available at http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-_1_Mine_Final_Determination_011311_signed.pdf. EPA concluded that the discharge of dredged or fill material to Pigeonroost Branch and Oldhouse Branch would have an unacceptable adverse effect on both wildlife within the Spruce No. 1 Mine project area and wildlife downstream of the mine. Within the project area, the EPA found that the headwater stream ecosystems would be completely buried under tons of excess spoil, and thus would impact macroinvertebrates, amphibian, fish, and water-dependent bird populations. Meanwhile, the effects downstream included increased salinity levels, which would lead to a loss of macroinvertebrate and salamander communities. In turn, this would have a substantial effect on both aquatic and terrestrial vertebrate populations that rely on these communities as a food source. *Id.*

expected response influences this balancing, it is not strong enough to outweigh the benefits of the EPA's decision.

I. BACKGROUND

A. *The Clean Water Act*

Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶ To achieve this purpose, the Act prohibits discharge of pollutants, except as in compliance with section 404 and other permitting schemes under the Act.⁷ Section 404 vests the Secretary of the EPA, acting through the Corps, with the authority to issue permits for the discharge of dredged or fill material at “specified disposal sites.”⁸ Disposal sites are chosen by applying guidelines developed by the EPA.⁹ Section 404(c), however, also limits the Corps’ authority to specify a disposal site.¹⁰ After consulting with the Secretary, the EPA Administrator may veto the Corps’ disposal site specification, “including the withdrawal of specification,” “whenever he determines” that the discharge of such material will have an “unacceptable adverse effect” on the environment, wildlife, or water supplies.¹¹

B. *Mountaintop Removal Mining and EPA’s Final Determination*

Mountaintop removal mining (MTR) is a form of surface coal mining that involves blasting five hundred or more feet off the top of a mountain to expose the coal seams beneath.¹² The practice has been common across Appalachia since the 1970s and is regulated under CWA section 404.¹³ In January 2007, the Corps issued a section 404 permit to the Mingo Logan Coal Company (Mingo Logan) that authorized the Spruce No. 1 Mine to discharge fill material into three streams—Seng Camp Creek, Pigeonroost Branch, and Oldhouse Branch.¹⁴ The Spruce No. 1 Mine is one of the largest surface mining operations to exist in Appalachia—in fact, it is “enormous.”¹⁵ Though the

6. 33 U.S.C. § 1251(a) (2012).

7. *Id.* § 1311(a).

8. *Id.* § 1344(a), (d).

9. *Id.* § 1344(b).

10. *Id.* § 1344(b), (c).

11. *Id.* § 1344(c).

12. See Julia Fox, *Mountaintop Removal in West Virginia: An Environmental Sacrifice Zone*, 12 *ORG. & ENV'T* no. 2, June 1999, at 163, 165; *Mid-Atlantic Mountaintop Mining*, EPA, <http://www.epa.gov/Region3/mtntop> (last visited Apr. 17, 2014) [hereinafter *Mid-Atlantic Mountaintop Mining*].

13. See Fox, *supra* note 12, at 165; M.A. Palmer et al., *Mountaintop Mining Consequences*, 327 *SCIENCE* 148, 148 (2010); *Mid-Atlantic Mountaintop Mining*, *supra* note 12.

14. *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 136 (D.D.C. 2012), *rev'd*, 714 F.3d 608 (D.C. Cir. 2013).

15. See Doremus, *supra* note 1 (elaborating on the vast size of the project area, which, if complete, would “disturb approximately 2,278 acres (about 3.5 square miles) and bury approximately 7.48 miles

permit expressly indicated that the Corps retained the authority to “reevaluate its decision on [the] permit at any time,” it made no such mention of EPA’s power.¹⁶

In September 2009, EPA requested that the Corps suspend, revoke, or modify the Spruce No. 1 permit due to “new information and circumstances” that had arisen since the original granting of the permit.¹⁷ The Corps rejected EPA’s request, but in March 2010, EPA’s regional director issued a public notice of its proposal to withdraw or restrict the use of Pigeonroost Branch, Oldhouse Branch, and certain tributaries as disposal sites.¹⁸ After a public comment period, the EPA published its Final Determination in January 2011 to formally withdraw the sites, which would prevent coal companies from discharging any fill material there.¹⁹ EPA, backed by the U.S. Fish and Wildlife Service, supported its Final Determination with a comprehensive ecological assessment of the project area.²⁰ The findings demonstrated that Spruce Mine would significantly damage downstream water quality and therefore have “unacceptable adverse effects on wildlife.”²¹ EPA also noted that Mingo Logan did not “adequately” consider less damaging alternatives, and thus failed to mitigate the Spruce Mine’s impact.²²

C. Procedural History

Mingo Logan filed an action in the D.C. District Court alleging that EPA’s decision was arbitrary and capricious, and therefore in violation of the Administrative Procedure Act.²³ Nonetheless, the court did not address the merits of this challenge. Rather, the court only reached the issue of whether EPA has authority under CWA section 404(c) to withdraw a disposal site specification post-permit.²⁴ The court held that EPA exceeded its section 404(c) authority when it invalidated the existing permit that the Corps had issued.²⁵

On appeal, the D.C. Circuit found that the language of section 404(c) “unambiguously expresses the intent of Congress.”²⁶ The court found that the CWA grants EPA a “broad environmental ‘backstop’ authority” over selecting

of streams beneath 110 million cubic yards of excess spoil”); *Spruce No. 1 Mine*, EPA, <http://www.epa.gov/Region3/mntop/spruce1.html> (last visited Apr. 17, 2014).

16. *Mingo Logan*, 850 F. Supp. 2d at 137.

17. *Id.*

18. *Id.*

19. *Id.*; 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, 3127 (Jan. 19, 2011).

20. 76 Fed. Reg. at 3127–28.

21. *Id.*

22. *Id.* at 3128; see Doremus, *supra* note 1.

23. *Mingo Logan*, 850 F. Supp. 2d at 134.

24. *Id.* at 153.

25. *Id.* at 133, 137.

26. *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 612 (D.C. Cir. 2013).

discharge sites.²⁷ It further found that because section 404(c) authorizes EPA to withdraw specification “*whenever*” the Administrator determines that “unacceptable adverse effects” will ensue, section 404 “imposes no temporal limit” on that authority.²⁸ The D.C. Circuit thus unanimously reversed the District Court’s decision and remanded the issue of the substantive validity of EPA’s veto.²⁹

Following the D.C. Circuit decision, Mingo Logan filed a petition for writ of certiorari in the U.S. Supreme Court.³⁰ The company argued that EPA’s purported authority is “essentially uncabined” and that the D.C. Circuit “reversed only by reading section 404(c) in a vacuum.”³¹ The Supreme Court denied Mingo Logan’s petition on March 24, 2014.³²

II. ANALYSIS

A. Public Health Concerns

In addition to the wildlife impacts noted in EPA’s Final Determination, MTR mining also presents serious public health concerns. Recent studies like those the EPA relied upon in its Final Determination have shown that MTR mining profoundly alters the water quality of Appalachian watersheds.³³ Groundwater samples from domestic supply wells have been found to have higher levels of mine-derived chemical constituents than well water unaffected by MTR mining.³⁴ One sample found that out of seventy-eight MTR mining streams in West Virginia, seventy-three had selenium levels that exceeded the 2.0 micrograms per liter threshold for toxic bioaccumulation.³⁵ Thus, human contact with these streams, as well as drinking water and water supplies that come from these streams, can lead to serious public health concerns. In fact, West Virginia has implemented state advisories regarding human consumption of selenium in fish from water downstream of MTR mining operations.³⁶

MTR mining also threatens human health through its production of airborne toxins.³⁷ Researchers have identified lung cancer and chronic respiratory, cardiovascular, and kidney disease as the most prevalent health

27. *Id.*

28. *Id.* at 613.

29. *Id.* at 616.

30. See Petition for Writ of Certiorari, *Mingo Logan Coal Co. v. EPA*, No. 13-599 (U.S. Nov. 13, 2013), 2013 WL 6057039.

31. *Id.* at *i.

32. *Mingo Logan Coal Co. v. EPA*, 82 U.S.L.W. 3318 (U.S. Mar. 24, 2014), *denying cert. to* 714 F.3d 608 (D.C. Cir. 2013).

33. See Palmer et al., *supra* note 13, at 148; see also EPA FINAL DETERMINATION, *supra* note 5, at 90.

34. Palmer et al., *supra* note 13, at 148.

35. *Id.*

36. *Id.*

37. *Id.*

disparities in Appalachian coal mining regions.³⁸ Moreover, mortality rates for these health disparities are “disproportionately elevated” when compared to non-coal mining regions in Appalachia.³⁹ Although EPA does not directly consider these effects in its section 404 analyses, deciding to revoke MTR mining permits will mitigate these health impacts. Thus, by authorizing EPA to retroactively withdraw section 404 permits, the D.C. Circuit’s decision will allow for a healthier Appalachia, on both an ecological and human level.

Similarly, these findings have instigated congressional action, including the introduction of the Appalachian Communities Health Emergency Act.⁴⁰ The Act would require the Secretary of Health and Human Services to determine whether MTR mining imposes health risks to individuals in surrounding communities.⁴¹ Until the Secretary makes such a determination, the Act would prohibit the issuance of any new permits and the expansion of existing permits.⁴² Though proponents agree that these health effects warrant a moratorium on MTR mining operations,⁴³ a moratorium is unlikely because of the need for more definitive information,⁴⁴ and the business uncertainties that MTR mining officials already face as a result of the D.C. Circuit’s decision.

B. Business Uncertainties

Despite the positive environmental and human health consequences of the EPA’s veto, the Appalachian community may experience a blow to its economy, at least in the short term. In addition to the Corps’ regulation, modification, and revocation, section 404 permit holders now face EPA as an obstacle in post-permit operations. Given that “the text of CWA 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit,” the D.C. Circuit’s holding creates a cloud of uncertainty for MTR mining operations.⁴⁵ First, project financing will be more difficult to obtain. Since every project could be subject to “an open-ended risk of cancellation,”⁴⁶ banks will offer higher interest rates.⁴⁷ Because it will be more difficult to obtain sufficient financing, project delays will be more common. Moreover, investors

38. Michael Hendryx & Melissa M. Ahern, *Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost*, 124 PUB. HEALTH REP. 541, 547 (2009).

39. EPA FINAL DETERMINATION, *supra* note 5, at 96.

40. See Appalachian Communities Health Emergency Act, H.R. 3224, 113th Cong. (2013).

41. *Id.*

42. *Id.*

43. See BRIGID BOETTLER & STEPHEN LESTER, CTR. FOR HEALTH, ENV’T & JUSTICE, THE HEALTH IMPACTS OF MOUNTAINTOP REMOVAL MINING 1–2 (2013), available at http://www.chej.org/wp-content/uploads/MTR_Mining_Final_April_18_2013.pdf.

44. See *id.* at 4 (stating that recent research suggests “significant possible associations between MTR mining and health disparities in Central Appalachia”).

45. See *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 615 (D.C. Cir. 2013).

46. Petition for Writ of Certiorari, *supra* note 30, at *30.

47. See Brief of Nat’l Ass’n of Mfrs. et al. as Amici Curiae in Support of Petitioners, *Mingo Logan Coal Co. v. EPA*, No. 13-599 (U.S. Dec. 16, 2013), 2013 WL 6678599, at *14.

will be reluctant to seriously consider projects.⁴⁸ Even if investors decide to support a project subject to a section 404 permit after assessing the costs and benefits, they will demand greater levels of return to protect against risk.⁴⁹ Thus, MTR mining operations will experience an increase in permitting costs as a whole.

Due to the future uncertainty in the permitting system, the estimated \$220 billion generated each year from the section 404 permits the Corps issues is likely to be affected.⁵⁰ Hence, project proponents and opponents alike have the potential to be harmed. While those involved in MTR mining operations will be directly impacted through decreases in project revenue and job creation, others will be affected by downstream economic activity. A wide variety of industries must obtain section 404 permits, including residential and commercial construction, manufacturing, and agricultural operations.⁵¹ These projects generate benefits for the public⁵² and often serve as a catalyst for investments other than MTR mining. Granting EPA the authority to retroactively veto section 404 permits, therefore, will have a widespread effect that reaches far beyond the MTR mining industry.

C. Congress's Response

The D.C. Circuit's holding may also encourage Congress to limit EPA's authority to veto section 404 permits. In fact, both the House of Representatives and the Senate have introduced legislation in response to the court's decision.⁵³ Representatives Nick Rahall (West Virginia) and John Mica (Florida) introduced the Clean Water Cooperative Federalism Act of 2013, which would require EPA to obtain state agreement to veto a section 404 permit.⁵⁴ Similarly, the Coal Jobs Protection Act introduced by Senator Mitch McConnell (Kentucky) and Representative Shelley Moore Capito (West Virginia) effectively serves as an attempt to "rein the EPA in" by prohibiting the use of 2011 guidance on MTR mining to review section 404 permits.⁵⁵ The Act would

48. See *id.* at *12 ("Uncertainty is the archenemy of project development.").

49. See *id.* at *13 ("When uncertainty exists on the future benefits and cost of a project, firms and public agencies often use risk-adjusted hurdle rates.").

50. See *id.* at *9; see also Jeremy P. Jacobs & Manuel Quinones, *Mining Company Requests Supreme Court Review of EPA Veto Case*, GREENWIRE (Nov. 14, 2013), <http://www.eenews.net/greenwire/stories/1059990470> ("[T]he D.C. Circuit's opinion . . . gives EPA the 'power to eviscerate' established permits, upon which \$220 billion each year is contingent.").

51. Petition for Writ of Certiorari, *supra* note 30, at *31.

52. See *id.* at *32 ("[E]very \$1 spent on such projects generates roughly \$3 of downstream economic activity.").

53. See Manuel Quinones, *Legislation in Both Chambers Would Streamline Permits, Limit Guidance Documents*, GREENWIRE (May 7, 2013), <http://www.eenews.net/eedaily/stories/1059980677>; see also Andrea Vittorio, *Bill Introduced to Limit EPA Authority Over Clean Water Permits, Certifications*, 44 ENV'T REP. 1469, 1469 (2013).

54. Vittorio, *supra* note 53, at 1469.

55. Quinones, *supra* note 53.

also require the Administrator to consider the impact on employment levels and economic activity before issuing a regulation.⁵⁶

Nevertheless, simply because such bills may prove to be favorable in one chamber does not mean they will ultimately become law.⁵⁷ “Openly amending” the CWA to impose limits on EPA’s authority to veto section 404 permits is not a sound route, as a presidential veto would be likely.⁵⁸

CONCLUSION

The D.C. Circuit’s decision providing EPA with the authority to retroactively revoke section 404 permits will not only affect environmental concerns, but human health and industry concerns as well. As a result of increased fears in the MTR mining world regarding costs and uncertainties of future projects, Congress will be emboldened to ensure that EPA does not use its authority frivolously. Indeed, Congress has already attempted to do so. However, EPA has rarely used its veto authority, so it is doubtful that EPA would use its power to bring a complete halt to MTR mining operations.⁵⁹ Because EPA will exercise its power with caution so as to avoid an amended section 404, the MTR mining industry need not be overly concerned with the future of its business model. The D.C. Circuit’s holding thus weighs in favor of environmental concerns and serves as a powerful example of environmental justice efforts vis-à-vis an administrative agency.

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56. See Coal Jobs Protection Act of 2013, H.R. 1829, 113th Cong. (2013).

57. See Vittorio, *supra* note 53, at 1469 (statement of Ed Hopkins) (“I don’t think that a majority of the Senate is ready to overturn the Clean Water Act.”).

58. See Doremus, *supra* note 1.

59. See Ward, *supra* note 2 (indicating that EPA has only used its veto authority thirteen times in over forty years).

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.