



Committee on Transportation and Infrastructure
U.S. House of Representatives

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Washington, DC 20515

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November 20, 2015

The Honorable Gina McCarthy
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

I write to you today to request information related to the Environmental Protection Agency's (EPA) Section 404(c) permitting process and its use of Section 404(c) "veto" authority. In recent years, the EPA has taken a number of actions related to Section 404(c) permits that have raised concerns for those who are pursuing activities dependent on such permits. I am therefore requesting a prompt response to the questions presented in this letter.

Since 2007, the EPA has utilized its Section 404(c) "veto" authority both retroactively and more recently preemptively. In 2007, the United States Army Corps of Engineers (Corps) issued a Clean Water Act Section 404 permit in connection with the Arch Coal, Mingo Logan, Inc., Spruce No. 1 Surface Mine, located in Logan County, West Virginia. Prior to the issuance of the permit, Arch Coal conducted an extensive 10-year environmental review, in which the EPA was a full participant. After discussions with the Corps, EPA agreed to all the terms and conditions and Mingo Logan was issued a Section 404 permit. Subsequently, the mine operated pursuant to and in full compliance with its Section 404 authorization.

Without alleging any violation of the permit, on April 2, 2010, EPA Region III published a Proposed Determination to prohibit the authorized discharges to certain waters associated with the Spruce project site. These prohibitions effectively eliminated 88% of Mingo Logan's operation, and marked the first time EPA had retroactively revoked a Section 404 permit. The notice was followed by public comment and hearings, and Mingo Logan challenged in federal district court the EPA's unlawful attempt to revoke its permit more than 3 years after it had been issued by the Corps.

In 2012, the U.S. District Court for the District of Columbia (D.C.) unequivocally held that EPA lacked the authority to veto a Section 404 permit it had been issued by the Corps, and therefore did not address the scientific merits of EPA's decision. In 2013, the D.C. Circuit reversed the district court's ruling and upheld EPA's authority to revoke a Section 404 permit whenever the

requisite determination is made that the permit will result in unacceptable impacts, including after a permit has been issued. Mingo Logan is now appealing the merits of EPA's decision.

Subsequent to its revocation of Mingo Logan's Section 404 permit, it appears as though EPA is beginning to establish a pattern of abusing the Section 404 process to block proposed development projects. For instance, in respect to the Pebble Mine project in Alaska, EPA bypassed the Section 404 permit process by predetermining the merits of the project before the projects' proponents could even file an application for a Section 404 permit. Instead, EPA based its opposition to the project on highly questionable and unrealistic hypothetical assumptions. Similarly, EPA decided to oppose a road construction project in Marquette County, Michigan before the county had even filed its Section 404 permit application, effectively blocking the project. In both cases, EPA preemptively vetoed a permit before a permit application was even filed, much less evaluated.

This pattern of events is troubling. While publicly EPA has stated the agency will use this new "veto" authority only "rarely," I am trying to gain a better understanding of what the agency means by this, and how the agency's actions will impact the many activities dependent on Section 404 permits. Therefore, please respond to the following questions:

Question 1: Has EPA produced any guidance on the appropriate criteria that must be met and circumstances that must be present before Section 404(c) "veto" authority can be exercised either prior to the submission of an application for a Section 404 permit or after the Corps' issuance of a Section 404 permit? Please provide any such guidance, even if it is only informal. Additionally, please describe in detail the criteria and circumstances that EPA was referencing when it stated that it would use its new "veto" authority only "rarely."

Question 2: In 1972, during deliberations in Congress on the Clean Water Act, Senator Edmund Muskie noted that there are three essential elements to the Clean Water Act—"uniformity, finality, and enforceability." Do you agree that finality is an important consideration for permits? If not, why not? How do the assertions made by EPA regarding the scope of its authority to act retroactively under Section 404(c) comport with the notion of permit finality?

Question 3: If EPA—who is not the permitting authority in the case of Section 404—can at any time retroactively veto the duly authorized specification of a disposal site, can it really be said that Section 404 permits are *ever* final? What assurances can EPA give to regulated entities that their Clean Water Act permits will not be subsequently invalidated during the course of their operations? What assurances can EPA give to investors in projects that require a Section 404 permit, besides the nebulous response that, because EPA has not up to this point done something often, it will probably not do so with respect to a given project?

Question 4: By taking preemptive action to veto a permit, are you concerned EPA has essentially unilaterally espoused to itself local "zoning" powers? What impact will this have over state, private, and tribal lands and their use throughout the United States? How do EPA's actions with respect to the Marquette County road construction project comport with EPA's statements that it will exercise its alleged preemptive Section 404(c) authority "rarely?"

Question 5: With EPA's new Clean Water Act jurisdiction rule, the agency is claiming authority over additional waters. In light of this, more projects will undeniably require Section 404

permits, including smaller projects such as farming and home building. What impact do you think EPA's Section 404(c) will have on such individuals and economic sectors?

Question 6: How do you think EPA's actions will impact the ability of state and local governments to exercise their inherent authority over land use management and planning? How will it impact the ability of state and local governments and other project sponsors to create critical infrastructure? How does this response take into account situations like the Marquette County road construction project?

Question 7: How do you ensure the regulated community will receive due process and have their projects fairly considered under the Section 404 program?

Question 8: Studies have clearly shown that even a slight increase in uncertainty causes an exponential reduction in capital investments. How do you intend to instill certainty and reliability in the Clean Water Act permitting process?

Please provide your written responses within 30 days of the date of this letter.

If there are any questions about this request, please contact Geoff Bowman of the Subcommittee on Water Resources and Environment at (202) 226-4360.

Thank you for your prompt attention to this matter.

Sincerely,



Bob Gibbs
Chairman
Subcommittee on Water Resources and Environment