

United States Senate
WASHINGTON, DC 20510

August 29, 2013

The Honorable Nancy K. Stoner
Acting Assistant Administrator
U.S. Environmental Protection Agency
Office of Water
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Dear Acting Assistant Administrator Stoner:

We are troubled by the Environmental Protection Agency's (EPA) position in *Mingo Logan Coal Company v. United States Environmental Protection Agency* that EPA may veto a Clean Water Act (CWA) section 404 permit essentially whenever it pleases.¹ As you are likely aware, the Corps and EPA worked closely with the Mingo Logan Coal Company (Mingo Logan) throughout the multi-year Section 404 permitting review and National Environmental Policy Act (NEPA) environmental impact study (EIS) of the Spruce mine. After concluding this careful review, the Corps issued a Section 404 permit to Mingo Logan in 2007, authorizing the company to discharge dredged and/or fill material into waters of the United States during mining activities.²

In 2009, EPA alleged that “new information and circumstances” justified the Corps’ reconsideration of the Section 404 permit and requested that the Corps “suspend, revoke or modify the permit issued” to Mingo Logan.³ The Corps declined EPA’s request because “there were ‘no factors that currently compelled it to consider permit suspension, modification, or revocation.’”⁴ Likewise, in considering a contemporaneous third-party challenge to the Section 404 permit, a federal court recognized that EPA “[did] not provide substantial new information concerning the Spruce No. 1 permit.”⁵

Less than one year later, however, EPA proposed to unilaterally revoke Mingo Logan’s Section 404 permit by withdrawing and prohibiting certain disposal site specifications and claimed it was authorized to do so under CWA section 404(c).⁶ EPA finalized its revocation of Mingo Logan’s Section 404 permit on January 13, 2011.⁷ EPA’s revocation came despite the significant resources Mingo Logan had invested in applying for and obtaining the Section 404 permit, the company’s faithful compliance with the permit’s terms, and the Corps’ position that permit revocation was not warranted.

¹ *Mingo Logan Coal Co. v. U.S. EPA*, 714 F.3d 608 (D.C. Cir. 2013).

² *See id.* at 610.

³ *Id.* at 610-611 (quoting Letter from EPA, Region III to Corps, Huntington Dist., at 1 (Sept. 3, 2009)).

⁴ *Mingo Logan*, 714 F.3d at 611 (quoting Letter from Corps, Huntington Dist. to EPA, Region III, at 2 (Sept. 30, 2009) (internal brackets omitted)).

⁵ *OVEC v. USACE*, Nos. 3:05-0784 and 3:06-0438 slip op. at 3 (S.D. W. Va. Sep. 15, 2009).

⁶ *Mingo Logan*, 714 F.3d at 611.

⁷ *Id.*

We would like to better understand the circumstances behind this issue and we therefore request the following information:

- 1) Any correspondence from EPA or Corps personnel questioning whether EPA had the authority to exercise 404(c) after the Corps issued the Section 404 permit.
- 2) Any correspondence from EPA or Corps personnel who expressed any concern over whether new information existed regarding the Section 404 permit.
- 3) Any correspondence from EPA or Corps personnel who expressed any concern over EPA's decision to exercise 404(c) after a Section 404 permit had been issued.
- 4) Any and all correspondence from environmental groups or other third-parties urging or requesting EPA to utilize Section 404(c) for the Spruce mine.
- 5) Any correspondence from EPA requesting that the Corps support EPA's decision to exercise Section 404(c) after the permit had been issued.
- 6) Any correspondence from the Corps concerning whether to support EPA's decision to exercise Section 404(c) after the permit had been issued.

Please provide responses to the above requests no later than September 10, 2013. If you have questions regarding the requests, please feel free to have your staff contact Brandon Middleton with the Senate Committee on Environment and Public Works at 202-224-6176.

Sincerely,



David Vitter
U.S. Senator



Joe Manchin
U.S. Senator

CC:

Brigadier General Margaret W. Burcham
Colonel Steven McGugan

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