

# The EPA's Growing Influence Over State and Federal Section 404 Permits

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# CWA Section 404 and EPA's "Backstop" Authority

- U.S. Army Corps of Engineers has authority to issue discharge permits, and EPA has "broad environmental backstop authority" – rarely used until recently
- 1980 – 2011: EPA issued only thirteen final determinations overturning Corps siting decisions
- Prior to 2012: EPA had never overturned a decision after a permit had already been issued

# CWA Section 404 and EPA's "Backstop" Authority

- *Mingo Logan I* (D.D.C. 2012): Plaintiff argued EPA lacked authority under CWA to revoke a valid § 404 permit; court ruled in P's favor
- *Mingo Logan II* (D.C. Cir. 2013): Overruled *Mingo I*, upholding EPA's authority to withdraw specification of disposal sites "whenever" EPA determines (after notice/comment) unacceptable adverse effect
  - D.C. Cir. interpreted authority as broad enough to include both pre-permit and post-permit determinations
  - Mingo Logan's attempt to obtain rehearing was denied, and its request for *certiorari* was also denied by SCOTUS

# Substantive Limits on EPA's Authority

- *Mingo Logan III* (D.D.C. 2014): On remand, court determined that EPA's determination was reasonable and supported by the record
  - Substantial new information was not required to justify its decision, and the agency was entitled to deference
  - Mitigation must be considered
  - Obligation to consider unacceptable adverse effects may include water quality decisions within purview of the state

## **Substantive Limits on EPA's Authority**

- On appeal, DC Circuit Court held EPA is not generally exempt from considering costs but Mingo Logan failed to raise the argument
- Judge Kavanaugh issued strong dissent recommending vacature – unless Congress directs the agency to ignore costs, settled law and common sense require it
- Downstream water quality may be considered where it connects adverse effects to impacts on the specific resources to be considered- municipal water supplies, shellfishing areas or fisheries, wildlife or recreational areas
- EPA'S Reliance on scientific studies developed post-permit upheld

# Temporal Limits on EPA's Authority

- *Pebble Limited Partnership v. EPA*: EPA proposed to use § 404(c) authority to place entire watershed in Southwest Alaska off-limits to § 404 permitting
  - Area included one of the world's largest copper deposits and site of the Pebble Limited Partnership Project ("PLP"), a mine development project in the pre-permitting stage
  - Proposed determination based on EPA-led Watershed Assessment covering nearly 20,000 square miles and completed prior to permit application or Environmental Impact Statement

# Temporal Limits on EPA's Authority

- *Pebble Limited Partnership v. EPA*: PLP challenged EPA's first ever proposed veto prior to a permit application
  - No permit application → § 404(c) veto not invoked
  - Where there is no application, EPA cannot make required regulatory findings regarding unacceptable adverse effect
  - CWA § 101(b): Congressional intent that states retain responsibility for land/water use planning
  - *Solid Waste Agency of N. Cook County. v. Army Corps of Engineers* (SCOTUS 2001): Land use is a traditional state power

# Temporal Limits on EPA's Authority

- *Pebble Limited Partnership v. EPA*: Motion to dismiss granted for lack of final agency action, but PLP filed a separate suit alleging violations of Federal Advisory Committee Act (FACA)
  - On November 25, 2014, court granted preliminary injunction restraining EPA from further action on § 404(c) veto until FACA lawsuit completed



# Judicial Review of EPA Veto of State Permits

- CWA Section 404(j) allows states to issue Section 404 permits under approved programs
- Section 404(j) also provides EPA with authority to veto a state permit whenever the state fails to revise a permit to address EPA's concerns
- EPA veto transfers permitting authority from the state to the U.S. Army Corps of Engineers
- Marquette County challenged EPA's veto of a state issued permit and the District Court granted EPA's Motion to Dismiss – not final agency action reviewable under the APA.
- Court ignored *Hawkes*, finding ability to apply for a Corps permit evidence that EPA's veto action is not final agency action

# Judicial Review of EPA Veto of State Permits

- Marquette County Motion to Amend based on *Hawkes* (2016)
- Pacific Legal Foundation files *amicus curiae* brief in support

# Does EPA have a Mandatory Duty to Veto a Corps Section 404 Permit?

- *Coastal Conservation League v. U.S. Army Corps of Engineers* (D.S.C. 2016): Environmental groups challenged Corps' issuance and EPA's failure to object to issuance of § 404 permit for paving a road
  - Plaintiffs cite § 404(c) to suggest EPA has mandatory duty to veto when sister agency (USFWS) provides evidence of significant adverse effects
  - Plaintiffs argue EPA has ultimate responsibility under CWA to implement § 404, and failure to block permit is dereliction of duty

# Does EPA have a Mandatory Duty to Veto a Corps Section 404 Permit?

- *Coastal Conservation League v. U.S. Army Corps of Engineers* (D.S.C. 2016):
  - Plaintiffs rely on holding of *National Wildlife Federation v. Hanson* (4<sup>th</sup> Cir. 1988), but misconstrue (Corps has nondiscretionary duty to regulate dredge/fill material, and EPA has ultimate responsibility for making wetlands determinations)
  - Unlikely that D.S.C. will agree that *NWF* stands for proposition that EPA has mandatory authority to veto
  - Operative language of § 404: EPA “is authorized”/”whenever he determines = discretionary authority

# **EPA's Authority Provides Enormous Leverage over Project Development**

- Permitting agencies do not like to stand up to EPA's veto threat
- Tendency to bend to EPA demands to avoid time and resources required to go through the process
- EPA 's involvement increases time and costs as applicants try to meet ever-changing, and often unclear demands
- Extraordinary mitigation demands
- Threatens investment