No. 13-599

IN THE

Supreme Court of the United States

MINGO LOGAN COAL COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL MINING ASSOCIATION, AMERICAN EXPLORATION & MINING ASSOCIATION, ALABAMA COAL ASSOCIATION, COLORADO MINING ASSOCIATION, ILLINOIS COAL ASSOCIATION, OHIO COAL ASSOCIATION, PENNSYLVANIA COAL ALLIANCE, TEXAS MINING AND RECLAMATION ASSOCIATION, UTAH MINING ASSOCIATION, AND WEST VIRGINIA COAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

This brief is submitted on behalf of the National Mining Association ("NMA"), American Exploration & Mining Association, Alabama Coal Association, Colorado Mining Association, Illinois Coal Association, Ohio Coal Association, Pennsylvania Coal Alliance, Texas Mining And Reclamation Association, Utah Mining Association, and West Virginia Coal Association.[1]

INTEREST OF AMICI CURIAE

Amici are national and state mining associations that broadly represent the mining industry in the United States.[2] Amici have a strong interest in this case. The question presented is whether the Environmental Protection Agency ("EPA") has authority unilaterally and retroactively to withdraw a permit duly issued by the Army Corps of Engineers (the "Corps") under § 404 of the Clean Water Act ("CWA" or the "Act") to discharge dredge and fill materials into navigable waters. One principal purpose of the § 404 permitting scheme is to ensure that a proposed activity affecting the navigable waters will be conducted in an environmentally responsible manner. But a complementary and equally important purpose of the scheme is to assure a permit holder that it can operate without fear of liability so long as it stays within the strictures of its permit. Amici's members

---

[1] All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

[2] A full list and description of amici appears in the appendix to this brief.

and other companies rely on the regulatory certainty that the § 404 permitting scheme promises because the immense amount of capital required to obtain the necessary permits and operate their businesses can be raised only if investors can be assured that their investment will not be rendered worthless on a regulatory whim. Yet that is exactly what the decision below would allow.

In the present case, after nearly a decade of extensive environmental review and significant capital investment, and with the consent of EPA, the Corps issued petitioner Mingo Logan a permit to operate a West Virginia mine. But when a new presidential administration took office and after Mingo Logan had been legally operating under the permit for three years, EPA not only changed its mind but for the first time since the CWA was enacted nullified the permit retroactively. In doing so, EPA effectively eliminated 88% of Mingo Logan's operation. The decision below sustaining EPA's asserted authority, if left unreviewed, will have a significant negative impact on amici's members' and others' ability to raise capital for environmentally responsible, job-creating projects. Investors are obviously unlikely to risk their capital if they know a permit is only as permanent as the current election cycle.

INTRODUCTION

With very few exceptions, the CWA requires any party that seeks to discharge a pollutant into "navigable waters" to first obtain a permit. Particularly relevant here, § 404 of the Act requires parties to obtain a permit from the Corps for "the discharge of dredged or fill material into the navigable waters at

specific disposal sites." 33 U.S.C. § 1344(a). The § 404 permitting process serves two functions. On the one hand, the permitting process allows the government to evaluate the environmental impacts of business activities before they proceed, and prohibit those activities if they will have unacceptable adverse impacts on navigable waters. On the other hand, the process offers parties that have obtained a permit the promise of regulatory certainty and a defense from liability so long as they operate according to the permit's terms. That regulatory certainty—the promise that a permit-compliant operation is a lawful operation—in turn affords investors the peace of mind they need to commit the immense amount of capital required to develop projects such as environmentally responsible mining operations subject to § 404, not to mention the expense required to go through the permitting process in the first place.

It is undisputed that only the Corps has the authority to issue a § 404 permit. Likewise, only the Corps has the authority to modify or revoke a § 404 permit, and even then only under the limited circumstances clearly defined in the Corps' regulations. By contrast, no regulations address EPA's purported authority to effectively modify or revoke a permit. Rather, EPA's role has always been subsidiary—its function under § 404(c) has been to review and, if appropriate, disqualify certain areas from serving as disposal sites *before* a permit is issued.

Until now. In this case, EPA has claimed a much more expansive role under § 404(c), i.e., the broad authority to retroactively nullify, at any time, a permit already duly issued by the Corps. That as-

serted authority is not only contrary to § 404's terms, but also conflicts with one of the CWA's fundamental purposes: finality. If EPA possesses the authority it now claims, then the very regulatory finality and certainty Congress sought to establish through the permitting process does not—and cannot—exist.

Of particular importance to amici is the fact that, if left unreviewed, the court of appeals' approval of EPA's unprecedented assertion of authority will have severe negative impacts on the ability of amici's members to obtain the substantial capital investments required to develop projects subject to § 404, including obtaining the investment needed to complete the arduous and expensive process of obtaining the § 404 permit itself. If a permit may last only as long as the administration under which it was issued, investors will not be willing to risk their capital for the decades-long, capital-intensive projects in which amici's members engage.

The present case demonstrates the point. Mingo Logan and its predecessor company invested millions of dollars in the permitting process and the Spruce No. 1 coal mine itself, with the clear understanding that once it obtained a permit, it could legally operate the Spruce mine in accordance with the permit's terms. Pet. 5-6. Not surprisingly, the permit that the Corps issued—after a lengthy process, and with EPA's consent—reflected that understanding: it recited the Corps' narrow authority to modify or revoke the permit (C.A. App. 986), and made no mention of any EPA authority to do so. Yet after a change in administration, and after EPA's unsuccessful effort to convince the Corps to revoke the permit, EPA as-

serted authority under § 404(c) to effectively invalidate the permit itself by "withdrawing" two of the disposal sites specified in the permit. C.A. App. 775. If allowed to stand, EPA's action would force the Spruce mine to decrease operations by 88% (Pet. App. 28-29), an outcome that would halt operations at any U.S. mining project. If that is what the § 404 permitting process will look like going forward, capital investment in job-creating projects across the U.S. economy will be subject to significant new risk, and lengthy, capital-intensive projects such as those in the mining industry are unlikely to ever get off the ground.

Certiorari should be granted.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Contradicts § 404's Core Purpose Of Providing Certainty And Thereby Facilitating Development Of Capital-Intensive Projects

1. No one disputes that the Corps is the sole agency empowered to grant a permit under § 404. *See* 33 U.S.C. § 1344(a). And because only the Corps issues the permits, it has always been understood that only the Corps may modify, suspend, or revoke such permits, and that it may do so only under a narrow set of defined circumstances. 33 C.F.R. § 325.7.

EPA, meanwhile, has always played an important, but secondary, role in the § 404 scheme. Specifically, EPA may consult with the Corps during the permitting process (33 C.F.R. pt. 325), and works "in conjunction with" the Corps to establish guide-

lines for the selection of disposal sites. 33 U.S.C. § 1344(b). The Corps, applying those guidelines, must "specify" particular disposal sites for each permit *before* the permit issues, and before a required public notice period. *Id.* § 1344(a). The Corps' authority to "specify" disposal sites is "[s]ubject to subsection (c)," which allows EPA to "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site … whenever [EPA] determines … that the discharge of such materials into such area will have an unacceptable adverse effect" on particular environmental elements. *Id.* § 1344(c).

This scheme reflects' Congress's intent to establish well defined roles for both the Corps and EPA in the § 404 permitting process. Consistent with that intent, EPA had until this case only initiated its authority under subsection (c) to prohibit the pre-permit specification—or to withdraw an approved specification—*before* the Corps' issued a permit. EPA had never attempted to reopen the Corps' specification process *after* the permit is granted—and the permittee has been operating pursuant to its terms—to revoke a pre-permit specification, thereby retroactively invalidating the permit itself.

This uniform and longstanding practice makes perfect sense in light of the fundamental purpose of the § 404 permitting process—to grant entities regulatory certainty once the Corps, in consultation with EPA, has determined that "the discharge of dredged or fill material into the navigable waters at specified disposal sites" will not have adverse environmental consequences. 33 U.S.C. § 1344(a). Indeed, the

point of governmental permitting schemes generally is to assure the permit-holder that it may do what the permit says it may do. For example, if an activist organization is granted a permit to hold a large demonstration in a public place, the organization would not expect its members to be arrested for unlawful assembly so long as they demonstrated in compliance with the permit.

Section 404 is no different. According to the CWA's chief congressional proponent, Senator Muskie, the "three essential elements" of § 404 are "uniformity, *finality*, and enforceability." 118 Cong. Rec. 33,692 at 33,693 (1972) (emphasis added). The finality purpose of § 404 is expressed in its plain terms, which provide that "[c]ompliance with a permit issued pursuant to this section … shall be deemed compliance [with several substantive provisions of the Act] for purposes of sections 1319 and 1365 of this title"—i.e., the provisions authorizing civil and criminal actions by the government (§ 1319) and citizen suits (§ 1365). As this Court has recognized in the context of a similar provision in § 402, such language operates "to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

2. The regulatory certainty that Congress sought to establish through the permitting process is essential to assuring that the laudable goals of the CWA do not unduly deter needed investment in capital-

intensive sectors, such as mining. No one would invest the millions or billions of dollars required to initiate and develop a mining project without the assurance that a permit-compliant operation would be a lawful one for the duration of the permit. And to the extent a permit could be withdrawn or amended at all, the basis for doing so must be narrow, and set forth in detail in advance. The Corps' regulations concerning reopening or revoking § 404 permits do just that. EPA, in contrast, has no such regulations.

To take one example, consider a major project being pursued by Twin Metals Minnesota, an NMA member that is in the process of developing an environmentally responsible underground copper, nickel, platinum, palladium and gold mining project in northeastern Minnesota.[3] Twin Metals reports to NMA that its estimated preliminary investment costs—including the costs associated with evaluating environmental impacts and obtaining a permit—will range from $350 million to $600 million. Once a permit specifying the prerequisites for regulatory compliance is obtained, Twin Metals expects a further investment of $1.5 to $3 *billion* for construction and ramp up of the project. Similarly, another NMA member reports a project that began in 2008 but that is not expected to complete the § 404 permitting process until the end of 2015, and foresees a total project budget of $710 million. It is not difficult to understand why investors would be hesitant to provide that sort of capital, particularly for the types of long-term projects typical in the mining industry,

[3] *See* http://www.twin-metals.com/.

without the assurance that the permit means what it says—that the project will be allowed to go forward so long as it operates in compliance with the permit.

There is more than just anecdotal evidence that economic investment would be jeopardized if EPA could retroactively revoke a site specification after a permit is issued. An expert report prepared in this case by UC Berkeley Professor David Sunding explains that "EPA's precedential decision to revoke a valid discharge authorization alters the incentives to invest in projects requiring a permit under Section 404." C.A. App. 221. In particular:

> Project development usually requires significant capital expenditure over a sustained period of time, after which the project generates some return. Actions like the EPA's that increase uncertainty, raise the threshold for any private or public entity to undertake the required early-stage investment. For this reason, the EPA's action has a chilling effect on investment in activities requiring a 404 authorization across a broad range of markets.

Id. Further, increasing the level of uncertainty and reducing the reliability of § 404 permits "can also reduce investment by making it more difficult to obtain project financing," as "lenders and bondholders will require higher interest rates to compensate for increased risk, and some credit rationing may also result." *Id.*

As Professor Sunding explains, even a very small increase in the risk of permit revocation can translate into a very large and pernicious effect on in-

vestment. C.A. App. 223. "The reason is that firms cannot directly control the probability of having a permit revoked when revocation is not based on the firm's own compliance, and this fact introduces a new source of risk that makes investing in sectors of the economy that rely on discharge permits relatively unattractive." *Id.* For example, assuming a project discount rate of 5%, Professor Sunding estimates that:

- A 1% chance per year of permit revocation decreases the expected cost-benefit ratio of projects involving discharge permits by 17.5%. C.A. App. 224.
- A 2% chance per year of permit revocation decreases the expected cost-benefit ratio of such projects by 30%. *Id.*
- A 5% chance per year of permit revocation decreases the expected cost-benefit ratio of such projects by 52.5%. *Id.*

Introducing such uncertainty into the § 404 permitting process, as the decision below does, will have broad effects on the U.S. mining industry, which includes operations in all 50 states, ranging from coal and hardrock mining operations to rare earth minerals projects. As of 2011, the total direct and indirect economic impact of U.S. mining was valued at $232 billion. In each state, mining typically directly produces thousands of high-paying jobs and indirectly provides employment opportunities for thousands more. Mining operations themselves create hundreds of millions of dollars worth of mineral, metal, and fuel products, and indirectly generate millions

more in revenue from suppliers and other industries. Perhaps most importantly, U.S. mining operations produce the raw materials critical to the very foundation of our entire economy, from materials used in housing, automobiles, computers, and defense systems, to the coal and uranium that generate a substantial percentage of our nation's electricity. Nearly all of these operations require § 404 permits, and the vast majority are expected to last for decades and require substantial up-front capital investment. Given the serious adverse consequences for capital investment resulting from the decision below, that decision threatens to jeopardize the continued existence of the U.S. mining industry as a whole.

Congress could not have intended these results. At the very least, an exercise in statutory interpretation should not be allowed to have such profound effects on the U.S. economy without this Court's review.

B. The Decision Below Is Contrary To The Statutory Text, Structure, And History

The decision below not only interprets § 404 to conflict with its purpose, but also with its text, structure, and history. Section 404(c) grants EPA authority to withdraw a "specification" of a disposal site, which occurs *before* a permit is issued. The court of appeals' basic mistake was to conflate "specification" and "permit," and thereby equate the modest authority to withdraw a pre-permit "specification" with the extreme and unprecedented power to retroactively nullify a validly issued permit itself.

The extraordinary nature of the authority EPA is claiming, along with the dire consequences that would result if EPA were correct, suggests that a clear congressional statement should be required to support EPA's position. That is particularly true when, as here, EPA's position is at odds with the statute's purposes. "Congress ... does not … hide elephants in mouseholes" (*Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001)), but even less does it enact provisions that, solely by implication, are supposed to eviscerate the *expressly stated purpose* of the regulatory scheme at issue.

Section 404 certainly reflects no clear statement of Congress's intent to authorize EPA to nullify permits duly and finally issued by the Corps. To the contrary, the statutory language, structure, and history are consistent with the statutory purpose of creating finality through the permitting process. Construed in light of that purpose, as it must be, *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 618-19 (2010), § 404 authorizes EPA to preclude the Corps from specifying a particular area as a disposal site *before* the Corps issues a permit, but grants EPA no authority to deny or withdraw a specification—and, thus, to effectively revoke the permit—once the Corps has already acted.

As explained earlier, there is no dispute that the statute grants the Corps sole authority to issue permits. 33 U.S.C. § 1344(a). The statutory question is whether § 404(c) then grants a separate agency, EPA, the authority to later nullify permits the Corps has already issued. The court of appeals' decision

relies on the parenthetical language authorizing EPA "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site … whenever [EPA] determines" that "the discharge of such material into such area will have an unacceptable adverse effect on" particular environmental elements. *Id.* § 1344(c). Read in context, that language does not confer to EPA the power it now claims.

In particular, as the petition explains in detail (Pet. 11-20), subsection (c) does not allow EPA to withdraw a "*permit*," but to withdraw the "*specification*" of a given disposal site. 33 U.S.C. § 1344(c). And under § 404, the "specification" process occurs and is completed only *before* a permit issued. Pet. 15-17. Section 404(a) directs the Corps to issue permits as to "specified disposal sites," "after notice and opportunity for public hearings." 33 U.S.C. § 1344(a)). And § 404(b) says that "each such disposal site shall be specified for each such permit by the [Corps]" through the application of guidelines established by EPA. *Id.* § 1344(b)). Such specification of disposal sites necessarily occurs *before* a permit is issued—if it were otherwise, there would be no opportunity for a public hearing, as § 404(a) requires. Thus, under the statute, the Corps determines whether a particular site is an appropriate disposal site through the application of EPA guidelines, and if it concludes that the site is appropriate, it specifies the disposal site for the proposed permit, subject to public hearing. *Id.*

Section 404(c), in turn, essentially allows EPA to veto the Corps' specification decision, either by pro-

hibiting the Corps from making a particular specification in the first place, or by withdrawing a specification that the Corps has already made. But again, the specification decision to which subsection (c) is directed occurs before the permit is issued. As Senator Muskie explained, the EPA has authority to asses environmental impact "*prior to* the issuance of any permit to dispose of spoil," and "no permit may issue" if EPA determines that the disposal would "adversely affect municipal water supplies." 118 Cong. Rec. at 33,699 (emphasis added). Nothing in the statute suggests that EPA has authority *after* a permit issues to retroactively nullify it.

Indeed, at the time the CWA was being drafted, Congress considered but *expressly rejected* a proposal to make EPA the primary issuer of § 404 permits. Pet. 20-21. Rather, Congress determined that, with respect to dredge and fill material, the Corps—which for nearly a century before the CWA's enactment had experience with dredge and fill activities under the Rivers and Harbors Acts of 1890, 1899, and 1905 (Pet. 4)—had the expertise needed to be the primary regulator under § 404.

The structure of the statute confirms the point. Subsection (b)'s directive that "each such disposal site shall be specified for each such permit by the [Corps]" does not stand alone, but is made "*[s]ubject to subsection (c)*," i.e., subject to the provision allowing EPA to prohibit or withdraw particular specifications. 33 U.S.C. § 1344(b) (emphasis added). And as explained, the specification discussed in subsection (b) by necessity occurs before a permit is issued. The "subject to subsection (c)" language makes clear that

subsection (c) is an exception to the Corps' otherwise plenary authority to specify disposal sites *before* issuing permits. It would make no sense to specifically subject the Corps' pre-permit specification authority to EPA's § 404(c) veto if that veto applied post-permit, at a point when the Corps indisputably has no specification authority at all.

If EPA's authority concerning site specification is instead understood as ending when the specification process is finally concluded—which is to say, before the permit is issued—then the veto makes perfect sense, as does the public hearing process discussed above. Most importantly to amici, the statute thus construed would be entirely consistent with its basic objective of providing permit-holders with the regulatory finality they need to pursue and maintain investment in the long-term, capital-intensive projects in which amici's members are typically engaged.

CONCLUSION

For the foregoing reasons, and the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

December 2013

APPENDIX

APPENDIX: LIST AND DESCRIPTION OF *AMICI CURIAE*

The **National Mining Association** ("NMA") is U.S. mining's advocate in Washington, D.C. and beyond. NMA is the only national trade organization that represents the interests of mining before Congress, the administration, federal agencies, the judiciary and the media—providing a clear voice for U.S. mining. NMA's mission is to build support for public policies that will help America fully and responsibly utilize its coal and mineral resources. NMA has a membership of more than 300 corporations and organizations involved in various aspects of mining.

American Exploration & Mining Association ("AEMA") (formerly Northwest Mining Association) is a 2,400 member national association representing the minerals industry with members residing in 42 U.S. states, seven Canadian provinces or territories, and 10 other countries. AEMA represents the entire mining life cycle, from exploration to reclamation and closure, and is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands. Its membership represents every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. Its broad-based membership includes many small miners and exploration geologists as well as junior and large mining companies. More than 80% of AEMA's members are small businesses or work for small businesses. Most of its members are individual citizens.

The **Alabama Coal Association** ("ACA") was formed in 1972 to promote cooperation and mutual interest among the mining industry and the general public in the State of Alabama. The ACA provides services to coal mining operators and represents each member by a Board of Directors & staff with governmental bodies, environmental & safety organizations and other regulatory agencies affected within the coal mining industry.

The **Colorado Mining Association** is an industry organization, founded in 1876, whose more than 900 members include individuals and organizations engaged in the production of coal, metals, agricultural and industrial minerals throughout Colorado and the west; as well as those who provide equipment, services, supplies and other support to the industry. Mining contributes $7 billion to Colorado's Gross Domestic Product.

The **Illinois Coal Association** is a professional trade organization responsible for the promotion of the Illinois coal industry. In 2012 its members produced 48.5 million tons of coal with 5,000 workers. The coal industry has a major impact on the Illinois economy, especially in the rural downstate areas.

The **Ohio Coal Association** ("OCA") is a nonprofit trade association representing the interests of Ohio's underground and surface coal mining producers. OCA represents nearly all of Ohio's coal producers and more than 50 Associate Members, which include suppliers and consultants to the mining industry, coal sales agents and brokers, and allied industries. OCA is committed to advancing the devel-

opment and utilization of Ohio coal as an abundant, economic and environmentally sound energy source.

The **Pennsylvania Coal Alliance** ("PCA") is an initiative of Pennsylvania's bituminous coal mining operators, their employees, and industry suppliers to educate the public and policymakers about the benefits of the coal industry in Pennsylvania. Pennsylvania is the fourth largest coal producing state and coal continues to be, and will continue to be, a major source of fuel and jobs across the Commonwealth. PCA member companies produce nearly 80 percent of the bituminous coal mined annually in Pennsylvania, which totaled nearly 60 million tons in 2012. PCA is committed to promoting and advancing the Pennsylvania coal industry and the economic and social benefit to the employees, businesses, communities, and consumers who depend on affordable, reliable, and increasingly clean energy from coal.

The **Texas Mining and Reclamation Association** is a Texas non-profit trade organization of approximately 120 mining, electric utility, and supplier companies supporting coordinated, consistent federal, state, and local policies to promote the economic recovery of Texas's mineable resources (coal, uranium, sand gravel, and others) while protecting and enhancing the environment.

The **Utah Mining Association** ("UMA"), founded in 1915, is a Utah-based non-profit, non-partisan trade association that provides full-time professional industry representation before the Utah State Legislature, various governmental regulatory agencies on the federal, state, and local levels, other associations, and business and industry groups. UMA's 116 cor-

porate members represent every facet of the mining industry, including geology, exploration, mining, engineering, power generation, equipment manufacturing, legal and technical services, and sales of equipment and supplies.

The **West Virginia Coal Association** is a nonprofit corporation. Its members include dozens of companies that mine coal or own coal properties in West Virginia. Together these companies mine the majority of coal produced in West Virginia. These same companies must obtain many permits to conduct mining activities, including permits from the Army Corps of Engineers to discharge fill material under Section 404 of the Clean Water Act.