

No. 13-599

In the Supreme Court of the United States

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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 OF *AMICI CURIAE* STATE OF WEST
VIRGINIA AND 26 OTHER STATES IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED

The Clean Water Act (“CWA” or “Act”) vests full authority in the Army Corps of Engineers (“Corps”) to issue permits for discharge of fill material into the waters of the United States. *See* 33 U.S.C. § 1344(a); *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261, 273-77 (2009). The Act unambiguously grants the Corps—not the Environmental Protection Agency (“EPA”)—the authority to lead the permitting process. The Corps is empowered to issue, modify, and revoke permits, as well as to ensure compliance, while EPA may take no such actions. *See* 33 U.S.C. §§ 1344(a), (c), (s); 33 C.F.R. § 325.7. EPA’s authority is limited to prohibiting or withdrawing from a permit application the Corps’ designation of sites for fill discharge—the “specification”—if EPA determines that the discharge would have certain “unacceptable” environmental consequences. 33 U.S.C. § 1344(c). In this case, EPA purported to exercise its section 404(c) power to withdraw disposal site specifications covering most of Mingo Logan’s operations *nearly four years after the Corps issued the 404 permit*. EPA’s post-permit veto is an affront to the Act’s carefully crafted procedures promoting finality, and will chill billions of dollars in public and private construction projects for the foreseeable future.

The question presented is whether, under section 404(c) of the Clean Water Act, EPA has the uncabined authority to withdraw disposal site specifications years after the Corps has issued a permit, thereby effectively nullifying a permit properly issued by the Corps.

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**INTRODUCTION AND
INTEREST OF *AMICI CURIAE*¹**

The D.C. Circuit’s decision—granting EPA power under the Clean Water Act to veto a 404 permit “whenever”—threatens public works projects in every State and fundamentally alters the way water pollution is regulated in this country. From coast to coast, highways, bridges, hydroelectric dams, and water reservoirs—just to name a few—are all at increased risk of cancellation by a federal agency that often vacillates with the political winds. In addition, the permitting processes that have long been the primary responsibility of the Corps and the States are now subject at *any* time to being overruled by EPA.

Amici States submit this brief to stress these troubling nationwide impacts of the lower court’s decision and emphasize the importance of this Court’s review. *Amici* are a bipartisan majority of States from all parts of the country with diverse needs and varying priorities—the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin, and Wyoming. Although this case specifically involves a private coal mine, *amici* are uniformly concerned about the serious effects of this

¹ At least 10 days before the due date for this brief, counsel of record for all parties received notice of *amici*’s intention to file this brief.

case on public works projects in their States and around the country. All twenty-seven States agree that Congress could not have intended to give EPA such sweeping powers and that, at the very least, a decision of this magnitude deserves this Court's close attention.

REASONS FOR GRANTING THE PETITION

Of the 60,000 section 404 permits issued by the Corps each year, many concern public works projects. For activities ranging from construction to transportation, to agriculture and manufacturing, most State and local governments are required to obtain 404 permits from the Corps and have relied for years on its established permitting procedures.² Corps regulations detail the process for obtaining a 404 permit and, significantly, the standards for modification or suspension of a permit. This certainty has enabled elected officials and citizens to confidently plan, commit resources to, and depend upon the completion of public works projects.

The D.C. Circuit's decision grants EPA new and effectively uncabined power over the 404 permitting process. In a first-of-its-kind ruling, the court concluded that EPA has "a broad veto power" with respect to 404 permits. Pet. App. 10. Specifically, the court held that the Clean Water Act grants EPA

² Two states—Michigan and New Jersey—issue certain section 404 permits themselves under delegated authority, *see* 33 U.S.C. § 1344(g), (h). *See also* 40 C.F.R. § 233.70 (Michigan's section 404 program effective Oct. 16, 1984); *id.* § 233.71 (New Jersey's section 404 program effective Mar. 2, 1994). This brief focuses on the effect of the D.C. Circuit's decision on 404 permitting by the Corps. But to the extent EPA asserts its 404(c) veto authority over permitting by the delegated States, the arguments here apply with equal force, as evidenced by the State of Michigan's participation in this brief. *See* 40 C.F.R. § 231.1(a) ("Under section 404(c), the Administrator may exercise a veto over the specification by the U.S. Army Corps of Engineers or by a state of a site for the discharge of dredged or fill material.").

the power to nullify a duly-issued 404 permit “at *any* time” because section 404(c) authorizes the agency to withdraw a permit specification “whenever” it finds an “unacceptable adverse effect.” Pet. App. 10.

The nationwide implications of this decision justify review by this Court. *First*, the D.C. Circuit’s decision threatens every ongoing and future public works project that requires a 404 permit. EPA’s newfound ability to veto a 404 permit at *any* time eliminates the relative certainty previously afforded to States by the Corps and its established procedures. The ever-present specter of EPA intervention heightens the fear that a shift in the political winds will make worthless years of planning and spent resources, and creates a disincentive to future public investment. These practical consequences alone—affecting billions of taxpayer dollars and millions of Americans throughout the country—merit scrutiny by this Court.

Second, the D.C. Circuit’s decision fundamentally alters the regulation of water pollution in this country. For decades, those seeking to discharge material into the nation’s waterways have generally been required to first obtain a 404 permit from the Corps for fill material and a 402 permit from the appropriate State for all other pollutants. The grant of “any time” 404 veto authority to EPA drastically changes that entire regime. EPA’s vastly increased power undermines the role of the Corps in 404 permitting and gives EPA a potential end run around the States’ 402 permitting authority. These sweeping changes—which implicate longstanding

state rights and responsibilities—further warrant certiorari.

**I. THE D.C. CIRCUIT’S DECISION
THREATENS EVERY ONGOING AND
FUTURE PUBLIC CONSTRUCTION
PROJECT THAT REQUIRES A 404 PERMIT.**

A. By granting EPA effectively uncabined power to veto a 404 permit at *any* time, the D.C. Circuit’s decision dramatically changes the status of every public works project throughout the nation that has been issued such a permit. As described in more detail below, the Corps has issued 404 permits to numerous publicly funded and ongoing infrastructure works, including important highways, bridges, hydroelectric dams, and water reservoirs. Prior to the D.C. Circuit’s decision, the States had relative certainty that, if the permits were followed, they and their citizens could count on the federal government not to capriciously interfere with the project. Resources could be spent and decisions could be made in reasonable reliance on the Corps’s permits. Although the Corps could modify or suspend a permit, that authority was sharply circumscribed by regulations requiring consideration of “the extent of the permittee’s compliance with the [permit’s] terms” and “the extent to which modification, suspension, or other action would *adversely affect plans, investments, and actions the permittee has reasonable made or taken in reliance on the permit.*” 33 C.F.R. § 325.7(a) (emphasis added).

EPA’s newfound ability to veto a 404 permit “whenever” it finds an “unacceptable adverse effect,”

Pet. App. 10, eliminates the certainty previously afforded to States. In the D.C. Circuit's brave new world, any ongoing public works project that involves a duly-issued 404 permit could be brought to a halt by EPA at any time, regardless of compliance and no matter how many public dollars, work hours, and materials have been expended. So long as 404-authorized work still needs to be done, EPA can effectively revoke the permit and stop construction in its tracks. This is particularly a risk for large scale public works projects that require years to complete and are sometimes controversial.

For all of the real-world projects highlighted below and many others, the States now have significantly greater reason to fear that a shift in the political winds will squander years of planning and spent resources. Communities and individuals that have counted on these improvements and made choices in reliance on the projects now find themselves on considerably less sure footing.

1. Thousands of important planned and partially completed state transportation projects across the nation face a more uncertain future. For example, the State of Washington is currently undertaking the State Route 520 Bridge Replacement and HOV Project, which aims to provide a new transportation corridor through Seattle at a cost estimated to exceed \$4 billion. See Wash. State Dep't of Transp., *SR 520—I-5 to Medina*, <http://www.wsdot.wa.gov/Projects/SR520Bridge/I5ToMedina/Default.htm> (*SR 520 Project*). Washington seeks to upgrade a key regional route for commuters and freight that is

utilized daily by more than 115,000 vehicles and more than 190,000 people. *SR 520 Project*. Funded by a combination of state and federal funds, the project will replace part of a nearly fifty-year-old floating bridge, expand the highway from four to six lanes, and take steps toward future light rail. *SR 520 Project*. Construction of the West Connection Bridge began in July 2013, and the West Approach Bridge North Project is slated to begin in 2014. *SR 520 Project*. Assuming later stages of the project are fully-funded, it is expected to be completed in 2018. The Washington State Department of Transportation was required to obtain and did receive 404 permits from the Corps, each of which could now be pulled by EPA “whenever” it finds an “unacceptable adverse effect.” See Wash. State Dep’t of Transp., *SR 520 Bridge Program: I-5 to Medina Project Permitting Update*, <http://www.wsdot.wa.gov/Projects/SR520-Bridge/I5ToMedina/I5toMedinaPermitting.htm>,

Two critical new bridges being jointly constructed by Indiana and Kentucky are similarly situated. The Louisville-Southern Indiana Ohio River Bridges Project is a multibillion-dollar project involving the construction of a new Interstate-65 bridge with six northbound lanes, the rehabilitation of the current Kennedy Bridge (I-65) with six southbound lanes, the reconfiguration of the “Spaghetti Junction” (I-64, I-65, and I-71), and the construction of the new East End bridge. See The Ohio River Bridges, *The Project Overview*, <http://kyinbridges.com/downtown-crossing/overview> (*Ohio River Bridges Project*); *The Ohio River Bridges, Kentucky Public Transportation Infrastructure Authority Approves Financing for Ohio*

River Bridges Project, <http://kyinbridges.com/kentucky-public-transportation-infrastructure-authority-approves-financing-for-ohio-river-bridges-project/> (*Ohio River Bridges Funding*). One new bridge will connect downtown Louisville, Kentucky, and Jeffersonville, Indiana, and the other will connect Prospect, Kentucky, and Utica, Indiana. *Ohio River Bridges Project*. The project is intended to increase cross-river mobility and stimulate the economy of the entire Louisville-Southern Indiana region. *Ibid.* Construction began in July 2013, with completion set for December 2016. The Ohio River Bridges, *Progress in the River and On Shores*, <http://kyinbridges.com/progress-in-the-river-and-on-shores/>. The cost is expected to total approximately \$2.5 billion, representing the largest transportation project ever constructed between the two States. *Ohio River Bridges Funding*. The Corps has verified the project may proceed under nationwide 404 permits.³

A third such project is beginning in Alabama near Birmingham, the State's most populous city. The State is preparing to construct a new 52-mile highway—the Northern Beltline—that will run along the northern rim of Birmingham, connecting

³ The CWA provides for two types of section 404 permits: individual permits that authorize specific activities on a case-by-case basis, 33 U.S.C. § 1344(a), and general nationwide permits that provide standing authorization for all activities that fit the description in the permit, *id.* § 1344(e). EPA's 404(c) veto authority extends to site specifications in the context of permitted activity under section 404. See 33 U.S.C. § 1344(c).

Interstate 459 to Interstate 59. See Ala. Dep't of Transp., *Birmingham Northern Beltline*, <http://www.betterbeltline.org/>. The first segment of construction is expected to begin in early 2014 and require five to six years to complete. *Ibid.* In total, officials anticipate the project will take at least 30 years and cost up to \$5.45 billion to complete. See Ala. Dep't of Transp., *Bentley: Northern Beltline to be built 'the most environmentally responsible way possible'*, <http://www.betterbeltline.org/news.php?id=2>. The construction phase alone is expected to create more than \$7 billion in economic activity for the Alabama economy, including the generation of thousands of direct and indirect jobs and millions in state and local tax revenue. See Univ. of Ala., Cent. for Bus. and Econ. Research, Univ. of Ala., *Socioeconomic Indirect and Cumulative Impact Components for the Northern Beltline* (June 2010), <http://northernbeltline.org/wp-content/uploads/2012/07/finalreport.pdf>. The Corps issued a 404 permit for the first segment of the project on September 30, 2013. See U.S. Army Corps of Eng'rs, Standard Permit No. 2011-01079, Birmingham Northern Beltline (Sept. 30, 2013).

2. Improvements and additions to the nation's many hydroelectric power plants, the construction and modification of which typically requires 404 permits, are also affected. Along the Ohio River, plans are in place for five new hydroelectric projects that will add more than 350 MW of new, renewable generation. See Am. Mun. Power, *Where we've been and where we're going*, <http://amppartners.org/about-amp/history/>; Am. Mun. Power, *Leading the Way in*

Hydropower, <http://amppartners.org/generation-assets/hydroelectric/>. American Municipal Power, Inc. (“AMP”), a Columbus-based nonprofit wholesale power supplier for municipal electric systems, has been developing these state-of-the-art hydroelectric power facilities. The run-of-the-river facilities are being added to existing dams on the Ohio River, and will serve municipalities in Ohio, Pennsylvania, Michigan, Virginia, Kentucky, and West Virginia. *Ibid.* The D.C. Circuit’s decision would permit EPA to effectively stop these projects, so long as the agency could identify some “unacceptable adverse effects.”

One project, at the Smithland Hydroelectric Dam, costs approximately \$450 million and will generate an estimated 76 MW of power. *See* Am. Mun. Power, *Smithland Hydroelectric Project*, <http://amppartners.org/generation-assets/hydroelectric/smithland-project> (AMP *Smithland*); Lindsay Morris, *Hydropower Takes Center Stage for AMP*, Renewable Energy World, <http://www.renewableenergyworld.com/real/news/article/2012/01/hydropower-takes-center-stage-for-amp>. AMP is proceeding under 404 permits issued by the Corps and expects to complete the project in 2015. *Ibid.* Seventy-nine communities are counting on the new improvements. *See* AMP, *Leading the Way in Hydropower*, <http://amppartners.org/generation-assets/hydroelectric/>.

Farther upriver, AMP is undertaking another project at the Captain Anthony Meldahl Dam, about 40 miles east of Cincinnati. *See* AMP, *Meldahl project fact sheet*, <http://amppartners.org/pdf/project->

reports/November_2011_Meldahl_Greenup.pdf (AMP Meldahl). This project has been jointly undertaken with the City of Hamilton, Ohio, which will receive nearly 50% of the plant's output. *See ibid.*; City of Hamilton, *Meldahl Hydroelectric Project*, <http://www.hamilton-city.org/index.aspx?page=653>. Expected to cost approximately \$504 million and maintain a capacity of 105 MW, construction began after AMP received a 404 permit from the Corps in April 2010. Nearly four years in, AMP expects the expansion project to conclude in the summer of 2014. *AMP Meldahl*.

Out west, Puget Sound Energy is currently undertaking a major three-and-a-half year modification of the Snoqualmie Falls hydroelectric facility in northwest Washington State. *See* Puget Sound Energy, *Snoqualmie Falls Hydroelectric Project Upgrade*, <http://www.pse.com/inyourcommunity/king/ConstructionProjects/Pages/Snoqualmie-Falls-Hydroelectric-Project-Upgrade.aspx> (Snoqualmie Falls Upgrade). The Corps approved the project under three nationwide 404 permits in May 2009, *see Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1162-64 (9th Cir. 2012) (affirming 404 permits), and work is expected to continue through 2013. *See Snoqualmie Falls Upgrade*. The updates to the facility are expected to boost generating capacity to 54 megawatts and cost approximately \$250 million. Hydroworld.com, *U.S. approves \$250 million in improvements to 54.4-MW Snoqualmie Falls*, <http://www.hydroworld.com/articles/2009/06/u-s--approves-250.html>. More than one million customers rely on

Puget Sound Energy for electricity. *See* Puget Sound Energy, *Electric Supply*, <http://pse.com/aboutpse/EnergySupply/Pages/Electric-Supply.aspx>.

3. Finally, the construction of vital water reservoirs is directly impacted. Many rural areas must obtain 404 permits to construct reliable water supplies. These projects typically involve the purchase of large parcels of land and the creation of a large impoundment dam to collect water from several smaller streams or rivers. Without such reservoirs, these communities must rely on disparate and often unreliable local water sources, such as small rivers, which remain subject to unpredictable droughts and other unfavorable climate conditions.

Just one example is the ongoing construction of the Hard Labor Creek Regional Reservoir Project in northeast Georgia. *See* Hard Labor Creek Regional Reservoir, *Project Summary*, <http://hardlaborcreek.com/content/view/14/2/>. After a lengthy permitting process, the Corps issued a 404 permit for the construction of the reservoir in 2004. *Ibid.* When completed in 2015, the reservoir will provide more than 41.4 million gallons of water supply per day for the residents of surrounding counties and municipalities. *Ibid.* The project is crucial because population projections suggest that existing water supply resources will be depleted due to anticipated growth. *See* Hard Labor Creek Regional Reservoir, *FAQs*, <http://hardlaborcreek.com/content/blog/category/7/31/>. So far, \$77.6 million has been spent on the project, which the Hard Labor Creek

Regulation Reservoir Management Board estimates will ultimately cost \$170 million. *See ibid.*

B. Worse even than the impact on ongoing projects, however, is the effect on *future* public works projects across the country. An EPA with uncabined veto authority will be a significant disincentive to public sector investment in projects that would require a 404 permit. State and local officials may reasonably conclude that certain projects—especially those that require years of planning and large financial outlays, and those that may be controversial for one reason or another—are not worth the greatly increased risk of a post-permit veto under the D.C. Circuit’s new regime. The potential costs may simply be too great to justify gambling finite resources and taxpayer dollars on EPA’s inevitably shifting political preferences.

Moreover, EPA could assert that the D.C. Circuit’s decision allows not only *post*-permit vetoes but also *pre*-permit vetoes—as it appears to be set to do in Alaska. EPA was petitioned to issue a 404(c) veto of the potential Pebble Mine for copper and gold in southwest Alaska *before* the mine’s developers even applied for a 404 permit. *See EPA, Bristol Bay Assessment Fact Sheet*, <http://www2.epa.gov/sites/production/files/documents/bba-update-revjune2013.pdf>. The agency is currently weighing whether it will anticipatorily prohibit or restrict section 404

disposals in the Bristol Bay region, an area the size of West Virginia. *See ibid.*⁴

C. The bottom line is that the D.C. Circuit's decision threatens every ongoing and future public construction project that requires a 404 permit, and therefore warrants review. Billions of taxpayer dollars, innumerable work hours and material resources, much-needed jobs, and the reliance interests of millions of Americans are now at greater risk. The D.C. Circuit has shifted to EPA—an unelected federal agency—profound and unprecedented influence over questions of state planning and infrastructure. Before it is enshrined as the law of the land, a decision of such consequence deserves a hard look by this Court.

⁴ Alaska has vigorously objected to EPA's actions, which raise a number of serious questions. *See* State of Alaska, Dep't of Natural Res., Bristol Bay Watershed Assessment Update, <http://dnr.alaska.gov/mlw/mining/largemine/pebble/bbwa>. *First*, the D.C. Circuit's decision concerns only post-permit vetoes. *See* Pet. App. 10 (discussing EPA's "broad veto power extending beyond permit issuance"). *Second*, to respond to the novel Pebble Mine petitions, EPA has invented an assessment process that is neither codified in federal regulations nor supported by the text of the Clean Water Act. *Third*, EPA's process threatens to preempt a number of long-established state and federal environmental procedures that would ordinarily occur after a permit application is submitted. *See* Alaska Stat. § 46.03.100; Alaska Admin. Code tit. 18, § 83 (establishing state-issued section 402 permitting program under the Alaska Pollutant Discharge Elimination System Program).

II. THE D.C. CIRCUIT'S DECISION FUNDAMENTALLY ALTERS THE WAY WATER POLLUTION IS REGULATED IN THIS COUNTRY.

For decades, water pollution in this country has been regulated, according to Congress's instruction, in a specific and orderly fashion. Those seeking to discharge materials into the nation's waterways have been required to first apply for and obtain the appropriate permit under the Clean Water Act. For the discharge of fill material, the Corps generally must issue a 404 permit. For all other pollutants, a 402 permit generally must be obtained from the relevant State. With limited exceptions, EPA's role in these processes has been largely ancillary.

The D.C. Circuit's decision fundamentally alters this settled structure. As described more fully below, the court's grant to EPA of unbounded 404 veto authority undermines both the 404 and 402 permitting processes, as well as the States' primary authority to set water quality standards. Such a sudden and seismic shift in the law cannot be correct, and at a minimum warrants this Court's examination.

A. The D.C. Circuit Has Undercut the Corps's Primary Role in 404 Permitting.

Section 404 of the Act leaves no doubt that the Corps—not EPA—has central responsibility in permitting for discharge of fill material. It is the Corps—not EPA—that is empowered by the Act to issue permits under section 404(a). 33 U.S.C.

§ 1344(a). It is the Corps—not EPA—that ensures permit compliance. *Id.* § 1344(s).

It is also the Corps—not EPA—that has long exercised the authority to revoke or modify section 404 permits once they are issued. 33 C.F.R. § 325.7. Corps regulations set forth a five factor balancing test that considers, among other things, “any significant objections to the authorized activity which were not earlier considered.” *Id.* § 325.7(a). Significantly, the Corps also considers, as noted earlier, “the extent to which modification, suspension, or other action would adversely affect plans, investments, and actions the permittee has reasonably made or taken in reliance on the permit.” *Ibid.* Thus, while the Corps may address certain newfound environmental information, it also takes into account the permitted party’s settled, investment-backed expectations.

As the petition explains, Pet. 15, EPA’s role is limited to veto power during the permit process over the disposal sites specified by the Corps for incorporation into a permit. Section 404(b) directs the Corps to specify disposal sites “for each . . . permit” by applying guidelines developed by EPA, and section 404(c) in turn allows EPA to prohibit, deny, restrict, or withdraw such “specifications.” 33 U.S.C. 1344(c). Congress’s deliberate use of the word “specifications” rather than “permits” must be respected. *See Duncan v. Walker*, 533 U.S. 167, 173-74 (2001) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusions.” (internal quotation marks and citation omitted)). “Specification” is merely the act of describing a location to put dredged or fill material, and it occurs as one step on the way to the issuance of a “permit.” Once a permit issues, the specifications of disposal sites merge into the permit itself. In sum, EPA has authority to review and disagree with certain Corps actions during the permit process, but that authority ceases once the Corps issues the final permit.

This long-accepted process of interagency dialogue has ensured the certainty and finality of 404 permits reflected in other parts of the statute and the legislative history. Section 404(p), for instance, provides that regulated entities are not liable under the Act so long as they abide by a Corps-issued permit. *See* 33 U.S.C. § 1344(p). Section 404(q) mandates that the Corps and EPA must minimize delay in issuing permits, requiring that all permit applications be resolved within 90 days, “to the maximum extent practicable.” *Id.* § 1344(q). Finally, the chief sponsor of the 1972 amendments to the Clean Water Act, Senator Edmund Muskie, stressed “finality” as one the “three essential elements” of his legislation. Pet. App. 10 (quoting 118 Cong. Rec. 33,693 (1972)). To that end, he expressly noted that EPA could only withdraw specification of discharge sites “*prior to* the issuance of any permit to dispose of spoil.” Pet. App. 48 (quoting 118 Cong. Rec. at 33,699 (1972)) (emphasis added).

The D.C. Circuit has disrupted this carefully calibrated permitting regime by erroneously holding that EPA has the power to nullify a duly-issued permit “at any time.” Pet. App. 10. Purporting to employ a textual analysis, the court focused myopically on statute’s use of the word “whenever” and dramatically expanded EPA’s authority. *Ibid.* But as this Court has often said, statutory language “cannot be construed in a vacuum,” but rather “must be read in [its] context and with a view to [its] place in the overall statutory scheme.” *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989). That scheme places the Corps—not EPA—in the primary role. See *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261, 273-77 (2009).

B. EPA’s Uncabined Veto Authority Undermines the States’ Water Quality Standards and Section 402 Permit Decisions.

The D.C. Circuit’s decision also threatens the role the States play in setting water quality standards and issuing section 402 permits. In passing the Clean Water Act, “Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement of land and water resources.’” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67 (2001) (quoting 33 U.S.C. § 1251(b)). This policy is exemplified by section 303 of the Act, which grants the States

primary responsibility for setting water quality standards, and section 402, which authorizes the States to take the lead with respect to the discharge of pollutants not covered by section 404. *See* 33 U.S.C. § 1342(a). As shown by EPA's actions in this very case, however, the D.C. Circuit's grant of expansive 404 veto power to EPA gives the agency a potential end run around the States' 303 and 402 authority.

1. Section 303 of the Clean Water Act makes the States chiefly responsible for setting water quality standards within their borders. *See* 33 U.S.C. §§ 1251(b), 1313; *see also* *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980) ("Congress did place primary authority for establishing water quality standards with the states."); *Natural Res. Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1401 (4th Cir. 1993) ("At the outset it is important to note, as the district court correctly found, that states have the primary role, under § 303 of the CWA (33 U.S.C. § 1313), in establishing water quality standards.")

EPA reviews the standards, but may assume the role of promulgating water quality standards only in limited circumstances. The agency must determine that a State's proposed new or revised standard does not measure up to the Clean Water Act's requirements, and the State must refuse to accept EPA-proposed revisions. 33 U.S.C. § 1313(c)(3). Or EPA must determine, in the absence of a State acting, that a new or revised standard is necessary. *Am. Paper Inst., Inc. v. E.P.A.*, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. § 1313(c)(3)-(4)); *see*

Natural Res. Defense Council, 16 F.3d at 1399 (“EPA sits in a reviewing capacity of the state-implemented standards, with approval and rejection powers only.”); *Defenders of Wildlife v. E.P.A.*, 415 F.3d 1121, 1124 (10th Cir. 2005) (“The EPA’s role in formulating these water quality standards is limited. . . . EPA’s sole function, in this respect, is to review those standards for approval.”).

2. Under section 402, States may choose to establish a National Pollution Discharge Elimination System (“NPDES”) program and take primary responsibility for safeguarding its water quality standards from the discharge of pollutants not covered by section 404. *See* 33 U.S.C. § 1342(a). Unlike 404 permits, NPDES permits are issued by EPA unless a State has an approved program. *See id.* § 1342(b). But once EPA approves a state permitting program, the State possesses the primary authority to issue NPDES permits, while EPA retains only limited authority to review the state’s action. *Id.* § 1342(d). Forty-six States maintain EPA-approved NPDES permit programs. *See* EPA, NPDES State Program Status, <http://cfpub.epa.gov/npdes/statestats.cfm>.

In approved jurisdictions, EPA has the power to stop the State from issuing an NPDES permit, but that authority ends once the State properly issues the permit. Before issuing an NPDES permit, the State must submit a draft to EPA, which may object. *Ibid.* If the State does not respond to an EPA objection within certain specified timeframes, EPA assumes the authority to issue the permit. *See id.* § 1342(d)(4). But if EPA does *not* timely object, the

State may proceed to issue the permit and EPA has no right to revoke it. *Id.* § 1342(d)(2).

If EPA is dissatisfied with a State's administration of its NPDES program, the Clean Water Act provides the agency specific recourse. EPA may, after a public hearing and compliance with other procedural steps, withdraw approval of a State's NPDES program. *Id.* § 1342(c)(3).

3. The D.C. Circuit's grant of expansive 404 veto authority to EPA, however, gives the agency a potential end run around the States' 303 and 402 authority. Without any temporal limit on EPA's section 404(c) veto power, a new administration could use that power to effectively override settled water quality standards and NPDES permits.

Indeed, that is precisely what happened here. West Virginia has had an EPA-approved NPDES program since 1982, *see* 47 Fed. Reg. 22,363 (Mar 24, 1982), and issued Mingo Logan a 402 permit under that program for its Spruce No. 1 coal mine, Pet. App. 27. EPA raised water quality concerns during the pendency of Mingo Logan's 402 permit application and during a subsequent modification, but ultimately withdrew those objections, allowing the West Virginia Department of Environmental Protection ("WVDEP") to issue the permit and the modification. *See* Pet. 23-24; C.A. App. 1087-1107. Later, WVDEP modified and reissued the 402 permit to Mingo Logan several times, each time without EPA objection. Pet. App. 24; C.A. App. 638. Notably, the 402 permit issued by WVDEP included several restrictions to ensure the water quality at and below

Mingo Logan’s mine would be protected. C.A. App. 1087-1107; *see generally* Br. of *Amicus Curiae* Randy Huffman at 5–6, *Mingo Logan Coal Co. v. EPA*, No. 12-5150 (D.C. Cir. Oct. 17, 2012).

But when the administration changed, EPA reasserted essentially the same objections in the form of its present veto of Mingo Logan’s 404 permit. *See* C.A. App. 288 (EPA explaining that its veto is justified by purported concerns about “on-site and downstream water quality”); Pet. App. 28. This is a patent effort to circumvent West Virginia’s primacy under sections 303 and 402 to set and protect water quality standards within its borders. Though the agency’s window under the Act to object to West Virginia’s water quality determinations and 402 permits has long closed, it is now trying to backdoor those objections through the 404 process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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