No. 13-599

IN THE
Supreme Court of the United States

MINGO LOGAN COAL COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR JOY GLOBAL INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Robert A. Long, Jr.
Counsel of Record
E. Donald Elliott
George Frampton Jr.
Kristen E. Eichensehr
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
rlong@cov.com
(202) 662-6000

December 2013 *Counsel for Amicus Curiae*

QUESTION PRESENTED

Whether the Environmental Protection Agency has authority under Section 404(c) of the Clean Water Act, 33 U.S.C. § 1344, to withdraw disposal site specifications years after the Army Corps of Engineers ("Corps") has issued a permit to discharge dredged or fill material into navigable waters, and thereby effectively nullify a permit properly issued by the Corps.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

Joy Global Inc. ("Joy Global") is a leading manufacturer and servicer of high productivity mining equipment for the extraction of coal and other minerals and ores.[1] Joy Global's equipment is used worldwide to mine coal, copper, iron ore, and other minerals. Joy Global manufactures equipment for both underground and surface mining and provides ongoing services for its equipment.

Joy Global has a direct and substantial interest in the question presented in this case. The court of appeals held that the Environmental Protection Agency ("EPA") is authorized to withdraw site specifications at any time after the Army Corps of Engineers ("Corps") has issued a permit for the discharge of dredged or fill material under Section 404 of the Clean Water Act ("CWA"). If the D.C. Circuit's decision is allowed to stand, EPA will have largely unlimited authority to invalidate Section 404 permits that are necessary for many mining operations. If Joy Global's customers, like Mingo Logan's owner Arch Coal, curtail their mining operations as a result of the D.C. Circuit's decision,

---

[1] Pursuant to Rule 37.6, *amicus curiae* and its counsel affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. Counsel for Mingo Logan has filed a blanket consent to the filing of *amicus* briefs, and the letter from the United States granting consent has been filed with the Clerk.

Joy Global's business will suffer substantial harm due to decreased sales of equipment and services.

STATEMENT

1. Section 404 of the CWA makes the Corps responsible for issuing permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).

The statute gives EPA a subsidiary role in the permitting process. EPA develops guidelines for the Corps to apply in specifying disposal sites, *id.* § 1344(b), and may provide comments to the Corps throughout the permit process, 33 C.F.R. pt. 325. During the permitting process, EPA may also "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" and "deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site" in certain circumstances. 33 U.S.C. § 1344(c). In particular, EPA may prohibit or withdraw a specification, after consultation with the Corp, when it "determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." *Id.*

The Corps is vested with sole authority to modify, suspend, or revoke issued permits, and its authority to do so is limited to particular circumstances and considerations. 33 C.F.R. § 325.7. Before altering an issued permit, the Corps considers a range of factors, including "the extent of the permittee's compliance

with the terms and conditions of the permit," "whether or not circumstances relating to the authorized activity have changed since the permit was issued," and "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." *Id.* The applicable regulations governing permit alteration provide no role for EPA.

Prior to this case, EPA had never attempted to effectively nullify a permit issued by the Corps by unilaterally withdrawing site specifications after the permit was issued. Pet.App.58-59 & n.14.[2]

2. Mingo Logan's predecessor applied for a Section 404 permit for the Spruce No. 1 mine in 1999. C.A.App.17.[3] The permit application marked the start of a years-long environmental review process, involving the Corps, EPA, and West Virginia. Mingo Logan expended millions of dollars on studies, agreed to reduce the scale of the mining operations, decreased the number of acres that would be affected, and committed to create wetlands and enhance streams. *Id.*

After Mingo Logan agreed to a number of measures to address concerns in an Environmental Impact Statement prepared by the Corps, EPA informed the Corps in 2006 that it had "no intention

---

[2] "Pet.App." refers to the Appendix to the Petition for Certiorari filed by Mingo Logan.

[3] "C.A.App." refers to the Joint Appendix filed in the Court of Appeals.

of taking our Spruce Mine concerns any further from a Section 404 standpoint." C.A.App.982. Shortly thereafter, in January 2007, the Corps issued Mingo Logan a permit, effective through 2031, to dispose of material into three streams and their tributaries. C.A.App.984-85. The permit noted *the Corps's* continued authority to modify or revoke the permit pursuant to 33 C.F.R. § 325.7, but said nothing about any power of *EPA* to alter the permit. *See* C.A.App.986.

In September 2009, following a change in Administration, EPA reversed its position and requested that the Corps "use its discretionary authority provided by 33 CFR 325.7 to suspend, revoke or modify" Mingo Logan's permit based on alleged "new information and circumstances." C.A.App.941. The Corps denied EPA's request, concluding that "no factors . . . currently compel [it] to consider permit suspension, modification or revocation." C.A.App.950.

Although the Corps had rejected its request, EPA continued to pursue revocation of Mingo Logan's permit. In April 2010, EPA published a notice of proposed determination requesting comment "[p]ursuant to Section 404(c)" on its "proposal to withdraw or restrict" Mingo Logan's ability to place dredged or fill material into streams encompassed by its permit for the Spruce No. 1 mine. C.A.App.290. Both the Corps and West Virginia objected to EPA's proposed action. The Corps emphasized that EPA had "no basis to take any corrective action regarding the 404 permit [it] issued," C.A.App.937, while West Virginia explained that none of the purportedly new information EPA relied upon would cause the state

to alter the water quality certification it had issued for Mingo Logan's activities at the mine, C.A.App.946.

Notwithstanding the objections of the Corps and West Virginia, in January 2011, EPA issued a Final Determination that purported to "withdraw" the specifications for two of the streams and their tributaries that were listed in Mingo Logan's permit. C.A.App.775.

3. Mingo Logan challenged EPA's purported "withdrawal" of the specifications in the U.S. District Court for the District of Columbia. In March 2012, the district court ruled for Mingo Logan, holding that EPA had "exceeded its authority under Section 404(c) of the [CWA] when it attempted to invalidate an existing permit." Pet.App.21.

The district court held that EPA's interpretation of the statute failed at both steps of the *Chevron* analysis. At *Chevron* step one, the District Court emphasized the breadth of EPA's claimed authority, noting that EPA asserted that it has "plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps—the only permitting agency identified in the statute—and to do so at any time." Pet.App.32. The district court explained that this is a "stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute." *Id.* The district court concluded that the power EPA claimed "is not conferred by section 404(c)," and is "contrary to the language, structure, and legislative history of section 404 as a whole." *Id.*

At *Chevron* step two, the district court concluded that EPA's interpretation "fails because it is illogical and impractical." Pet.App.61. The district court noted that EPA claims that it is "not revoking a permit—something it does not have the authority to do—because it is only withdrawing a specification," but "simultaneously insists that its withdrawal of the specification effectively nullifies the permit." *Id.* The district court further concluded that EPA's interpretation is unreasonable because it would "sow a lack of certainty into a system that was expressly intended to provide finality." Pet.App.62. In particular, EPA's interpretation would "leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their [CWA] compliance: the permit." *Id.*

On appeal, the D.C. Circuit reversed. The court of appeals concluded that the language of Section 404 "imposes no temporal limit on the Administrator's authority to withdraw the Corps's specification." Pet.App.10. In the court of appeals' view, by "[u]sing the expansive conjunction 'whenever,' the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time." *Id.* Therefore, the court of appeals concluded, the statutory text "manifests the Congress's intent to confer on EPA a broad veto power extending beyond the permit issuance," *id.*, and rejected Mingo Logan's arguments based on the structure of the statute and its legislative history, Pet.App.13-14.

ARGUMENT

I. This Court Should Grant Certiorari To Review The D.C. Circuit's Decision On An Important Legal Issue.

The D.C. Circuit has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(b). The D.C. Circuit's decision rests on an erroneous interpretation of the CWA that drastically expands EPA's powers and gives EPA essentially unlimited authority to upset existing investments made in reliance on Section 404 permits. The D.C. Circuit's decision also has broad implications for other CWA provisions that the D.C. Circuit did not consider. *See infra* pp. 13-15.

In addition to the legal importance of the question presented, this case has exceptional practical importance. The D.C. Circuit's decision grants EPA the power to destroy the value of investments made by millions of individuals, companies, and states in reliance on Section 404 permits. As a result, investors will be less willing to make investments that require Section 404 permits because EPA can effectively nullify those permits at any time.

For these reasons, this Court's review is warranted.

II. The D.C. Circuit Erred In Construing Section 404(c).

Section 404(c) of CWA provides:

> (c) Denial or restriction of use of defined areas as disposal sites—The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. § 1344(c).

At *Chevron* step one, the D.C. Circuit held that this section means that EPA has authority to

withdraw a specification at any time, without limitation. The Court explained,

> Section 404 imposes no temporal limit on the Administrator's authority to withdraw the Corps's specification but instead expressly empowers him to prohibit, restrict or withdraw the specification "*whenever*" he makes a determination that the statutory "unacceptable adverse effect" will result. Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/ withdraw a specification at *any* time.

Pet.App.9-10 (internal citation omitted). To support its reading, the D.C. Circuit cited and quoted the *Oxford English Dictionary* definition of "whenever," noting that the dictionary "defin[es] 'whenever,' used in 'a qualifying (conditional) clause,' as: 'At whatever time, no matter when.'" *Id.* at 10 The Court concluded, "the unambiguous language of subsection 404(c) manifests the Congress's intent to confer on EPA a broad veto power extending beyond permit issuance." *Id.*

A. The D.C. Circuit Ignored The Only Definition Of "Whenever" That Comports With Section 404.

The D.C. Circuit's holding is erroneous because it ignores the only definition of "whenever" that makes sense within the context and structure of Section 404. The D.C. Circuit quoted only the first portion of

the *Oxford English Dictionary* definition of "whenever" and ignored the portion of the definition that explains the non-temporal use of "whenever." The full definition reads:

> At any time when; every time that, as often as. In a qualifying (conditional) clause, the meaning becomes: At whatever time, no matter when. Also with the idea of time weakened or lost . . . : In any or every case in which. Also as adv. with loss of relative force: at whatever time (*colloq.*).

Oxford English Dictionary, http://www.oed.com/view/Entry/228204?rskey=2mmPe8&result=2&isAdvanced=false#eid (last visited Dec. 16, 2013) (definition I.1.).

As the full definition indicates, "whenever" can mean "[i]n any or every case in which," a meaning that is divorced from the temporal definition on which the D.C. Circuit relied. Pursuant to this meaning, "whenever" indicates that in any case in which the Administrator determines that there is an "unacceptable adverse effect," the Administrator may prohibit the specification. 33 U.S.C. § 1344(c). The use of "whenever" does not, however, necessarily indicate that the Administrator can act *at any time*, regardless of other limits that are clear in the context of Section 404 or from other statutory provisions. *Cf.* Pet.App.36 ("Using 'whenever' as a conjunction in this manner may be intended simply to convey the meaning that the EPA may act 'at such time as' it makes the necessary determination—in other words, that the determination is the predicate

for action."). In other words, "whenever" is used as an imperative rather than as a timing adverb and plays a function in the statute without giving the Administrator *carte blanche* authority to withdraw or prohibit specifications at any time.[4]

The imperative definition of "whenever" makes sense in the context of Section 404, whereas the temporal definition the D.C. Circuit adopted does not. This Court has instructed that in ascertaining whether a statute reflects an "unambiguously expressed intent of Congress" for purposes of *Chevron*'s first step, courts must "employ[] traditional tools of statutory construction." *Chevron USA Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 & n.9 (1984). Such traditional tools include not just the text of the relevant provision, but also the structure and purpose of the statute. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 35-36 (1990) (identifying the statutory text, object, and structure as among the "traditional tools of statutory construction" (citation and internal quotation marks omitted)); *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (listing "text, structure, purpose, and legislative history" as the "traditional tools of statutory interpretation").

---

[4] Imperative uses of whenever are common outside the CWA context as well. *See, e.g.*, Sup. Ct. R. 8(1) ("*Whenever* a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered." (emphasis added)).

Considering the structure of the CWA shows that the temporal definition conflicts with two other provisions of Section 404, Sections 404(p) and 404(q). 33 U.S.C. § 1344(p-q). These provisions demonstrate Congress's intent to provide regulatory finality.

Section 404(p) establishes a safe harbor for permit holders, clarifying that compliance with a Section 404 permit constitutes compliance with other sections of the CWA. *Id.* § 1344(p). Compliance with an issued permit provides certainty over time because even if regulations change after the permit is issued, the permit continues to provide a safe harbor. *See* 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984) (explaining that, as a general matter, "permits are not modified to incorporate changes made in regulations during the term of the permit" in order to "provide some measure of certainty to both the permittees and [EPA] during the term of the permits"). In other words, compliance with the permit insulates the permit holder from regulatory change and provides certainty on which to base investment and implementation decisions.

Relatedly, Section 404(q) ensures that the certainty engendered by permit issuance occurs promptly. It requires the Corps and EPA to "minimize, to the maximum extent practicable . . . delays in the issuance of permits under this section" and instructs them to "assure that, to the maximum extent practicable, a decision with respect to an application for a permit" will be made within 90 days of the application's publication. 33 U.S.C. § 1344(q). Congress's instruction to "minimize . . . delays" in issuing permits would be rendered meaningless if EPA could nullify issued permits at any time.

As petitioner notes, "A post-permit EPA veto would rob these provisions of their finality-conferring force and fundamentally upend the statutory scheme." Pet. 27. Thus, the context provided by the rest of Section 404 shows the incoherence of the D.C. Circuit's unbounded temporal interpretation of "whenever" in Section 404(c).

B. The D.C. Circuit's Reading Of "Whenever" Conflicts With Other Provisions Of The CWA.

In addition, to conflicting with Section 404 itself, the D.C. Circuit's assumption that "whenever" is temporal rather than imperative also conflicts with other provisions of the CWA. The CWA uses the term "whenever" no fewer than 34 times. It is clear that Congress did not intend for "whenever" to be given its temporal meaning throughout the CWA.

For example, Section 309(a)(1) of the CWA provides:

> *Whenever*, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth

> day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(1) (emphasis added).

Under the D.C. Circuit's interpretation, "[w]henever" as used in this section would mean that the Administrator could take the actions described at any time in the future. In reality, however, the EPA Administrator's authority to act under this section, at least as to civil penalties, is temporally cabined by the five-year statute of limitations period in 28 U.S.C. § 2462. *See United States v. Banks*, 115 F.3d 916, 918 (11th Cir. 1997) ("Because the CWA does not specify a limitations period for enforcement actions under § 309, 33 U.S.C. § 1319, the default limitations provisions of 28 U.S.C. § 2462 apply to the government's actions for civil fines or penalties." (internal footnote omitted)); *see also United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998) (recognizing that "28 U.S.C. § 2462 is the applicable federal statute of limitations to the Government's actions for civil penalties under the [Clean Water] Act"). Thus, "whenever" in Section 309(a)(1) cannot have the temporal meaning the D.C. Circuit ascribed to it.

The D.C. Circuit's decision interpreted "whenever" in Section 404 as granting EPA *carte blanche* to act at any time in the future because Section 404

"imposes no temporal limit on the Administrator's authority." Pet.App.10. Neither, however, does Section 309(a)(1), which courts have held is temporally limited by the default statute of limitations. This example further demonstrates that the court of appeals' interpretation of "whenever" is not required by the plain language and runs counter to the structure and purpose of the statute.

C. The D.C. Circuit's Interpretation Is Also Unreasonable At *Chevron* Step Two.

For the reasons set out in the district court's opinion, the best reading of Section 404(c) is that it unambiguously precludes EPA's reading of the statute at *Chevron* step one. Pet.App.39-54. If however, the Court views the statute as ambiguous, then at *Chevron* step two, EPA's interpretation is unreasonable. *Chevron*, 467 U.S. at 843-44.[5]

As this Court has noted, "[p]erhaps the most telling indication" of a legal problem is "the lack of historical precedent." *Free Enter. Fund v. Publ. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (quoting 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). The power EPA now claims to "withdraw the specification of discharge sites after a permit has been issued is unprecedented in the history of the Clean Water Act." Pet.App. 20-21; *see also* EPA, Press Release, EPA Proposes Veto of Mine Permit Under the Clean

[5] For the reasons explained in Mingo Logan's petition, EPA's interpretation is not entitled to deference. *See* Pet. 22-24.

Water Act (Mar. 26, 2010), http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/d19f832b77dbb0af852576f200567ba5!OpenDocument ("EPA has used its Clean Water Act veto authority in just 12 circumstances since 1972 and never for a previously permitted project."). The fact that EPA did not exercise this "stunning power" for decades after the passage of the CWA casts serious doubt on whether the power exists. Pet.App.32.

EPA's expansive interpretation of its own power is unreasonable in the broader context of the CWA. The CWA gives the Corps authority to issue Section 404 permits. 33 U.S.C. § 1344(a). EPA has recognized that the Corps is "solely responsible for making final permit decisions." C.A.App.267 (Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992)). As Mingo Logan's petition explains, the primacy of the Corps in the permitting process would make it passing strange for Congress, by using the single word "whenever," to authorize EPA—as a subordinate agency in the permitting process—"to retroactively vitiate the permit by simply reasserting views that did not prevail in the inter-agency process" where EPA concedes that the Corps has final authority. Pet. 13.

Moreover, the Corps has authority not just to issue permits, but also to modify, suspend, or revoke permits in particular, limited circumstances. 33 C.F.R. § 325.7. The Corps's regulations governing termination take into account specific factors, including:

> the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and 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.

Id. § 325.7(a). These carefully circumscribed termination procedures are rendered meaningless if EPA can withdraw a specification after a permit is issued. For example, while the Corps considers a request for permit revocation in light of "any significant objections to the authorized activity *which were not earlier considered*," *id.* (emphasis added), EPA claims authority to withdraw a specification, and in effect invalidate a permit, on grounds that *were* earlier considered in the permit issuance process.

EPA's claimed power undermines the balanced procedures and predictability embodied in the CWA permitting process. For this reason, as the district court noted, EPA's interpretation of Section 404(c) is "illogical and impractical." Pet.App.61.

III. The D.C. Circuit's Holding Imperils Large Numbers Of Existing And Future Investments.

The D.C. Circuit's decision that EPA has sweeping power to effectively invalidate Section 404 permits has enormous ramifications. For an individual company, the costs of obtaining a Section 404 permit are substantial. In *Rapanos v. United States*, a plurality of this Court observed that "[t]he average applicant for an individual [Section 404] permit spends 788 days and $271,596 in completing the process." 547 U.S. 715, 721 (2006) (plurality op.). Those figures are just averages; in this case, Mingo Logan spent millions of dollars in order to obtain its permit and substantially decreased the proposed scope of its mining operations at the relevant site. C.A.App.17 (¶¶ 23-24).

The economy-wide costs of obtaining Section 404 permits are also significant. The Corps "processes approximately 60,000 permit actions per year." EPA, *Clean Water Act: Section 404(c) "Veto Authority,"* at 1, *available at* http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf (citing Corps permit data 1988-2010, U.S. Army Corps of Engineers Headquarters, Regulatory Branch). Put another way, from 1972 through 2011, "the Corps is estimated to have authorized more than two million activities in waters of the U.S. under the Clean Water Act Section 404 regulatory program." *EPA Mining Policies: Assault on Appalachian Jobs—Part II Before the Subcomm. on Water Res. and the Environment, Transportation and Infrastructure Comm.*, 112th Cong. 71, 74 (2011)

(testimony of Nancy K. Stoner, Acting Assistant Admin., Office of Water, U.S. EPA).

Considered in monetary terms, "'[O]ver $1.7 billion is spent *each year* by the private and public sectors obtaining wetlands permits.'" *Rapanos*, 547 U.S. at 721 (alteration in original) (emphasis added) (quoting David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 81 (2002)). For individuals and companies that pursue and succeed in obtaining a Section 404 permit, the amounts expended to secure the permit are sunk costs.

The mining sector and companies and individuals that depend upon it are particularly susceptible to the negative effects and uncertainty created by EPA's revocation of the Mingo Logan permit and the disruptive precedent it sets for other Section 404 permits.

As Mingo Logan's petition for certiorari explains, Pet. 5, surface mining frequently requires Section 404 permits. Surface mining involves the removal of soil and rock to access coal deposits, and some of the removed soil and rock is often placed in areas adjacent to the mined area. Such adjacent areas may contain streams that constitute "navigable waters" for purposes of the CWA and therefore bring the mining project under the jurisdiction of the Corps. *See* 33 U.S.C. § 1362(7). Mining companies and enterprises that service the mining industry are therefore particularly subject to the uncertainty created by EPA's unprecedented assertion of authority. The effect of EPA's revocation on Mingo

Logan in this case shows the extreme potential for disruption of investments: The branches for which EPA purported to withdraw the specification "make up roughly eighty eight percent of the total discharge area authorized by the permit." Pet.App.29.

The costs of EPA's claimed authority extend beyond permit holders. "[O]ver $220 billion of investment *annually* is conditioned on the issuance" of Section 404 permits. C.A.App.216 (David Sunding, The Brattle Grp., Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal, at 1 (May 30, 2011)) (emphasis added).

Companies such as Joy Global are likely to suffer from the uncertainty created by upending expectations of finality and reliance on Section 404 permits. Many types of mining equipment, such as longwall mining systems, electric rope shovels, and dragline shovels, cannot or cannot easily be moved to other locations if a company loses its permit to operate after installation of the equipment in a particular mine. Moreover, mining equipment is costly to mine operators, who recover the cost of the equipment from the mine's production over time. EPA's claimed authority to revoke site specifications creates the risk that companies will be unable to recover or recoup money spent on equipment. Therefore, mining companies are likely to delay, reduce, or forgo investments in mining equipment, such as the equipment produced by Joy Global, due to the uncertainty about their ability to complete costly, long-term projects even after they have received a Section 404 permit.

CONCLUSION

For the reasons stated above and for those stated in Mingo Logan's petition, the Court should grant the petition for certiorari.

Respectfully submitted,

Robert A. Long, Jr.
Counsel of Record
E. Donald Elliott
George Frampton Jr.
Kristen E. Eichensehr
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
rlong@cov.com
(202) 662-6000

December 2013 *Counsel for Amicus Curiae*