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 OF AMICI CURIAE NATIONAL STONE, SAND, AND GRAVEL ASSOCIATION, AND ASSOCIATIONS IN CALIFORNIA, TEXAS, ILLINOIS, GEORGIA AND NEW JERSEY IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Stone, Sand, and Gravel Association ("NSSGA") is the world's largest mining association by volume. NSSGA represents the crushed stone, sand, and gravel industries. Collectively, the aggregates industry produces the primary ingredients of cement and pavement for projects ranging from interstate highways and bridges, to dams, runways, skyscrapers, and waste water collection and treatment systems.[2]

The decision of the District of Columbia Circuit conferring on EPA the breathtaking, unilateral authority to nullify a permit issued by the Army Corps of Engineers – retroactively and without consideration of economic reliance factors – is a seismic change with powerful economic shockwaves. EPA's assertion of a new power to undo final actions

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[1] Letters of consent have been filed with the Court. Counsel of record received notice of the intent to file this brief at least 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than the *amici curiae,* their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Aggregates are the basic building blocks of transportation and infrastructure, comprising 94% of asphalt pavement and 80% of concrete. *See What is NSSGA?*, Nat'l Stone, Sand, & Gravel Ass'n, http://www.nssga.org/communications/whoweare.cfm (last visited Dec. 9, 2013). As the primary ingredient of concrete and pavement, aggregates are essential to public infrastructure, highways, bridges, dams, and mass transit facilities. *Id.*

of other agencies is so disruptive of the clarity, finality and certainty of the Clean Water Act permit process that NSSGA has taken the unusual step of participating as amicus curiae at all stages of this litigation – in the district court and the court of appeals. The decision of the D.C. Circuit is so alarming that, in this Court, State Aggregate Associations representing industries in California, Texas, Illinois, Georgia and New Jersey have joined NSSGA in filing this brief.[3]

Clean Water Act Section 404 permits are critical to amici and their members. Given their long experience with the lengthy, comprehensive and costly process of obtaining a permit, NSSGA and the state aggregates associations are well suited to explain to this Court the practical ramifications of the new EPA power that the D.C. Circuit has unleashed. In an effort to be even more helpful in assisting the Court's understanding of the real-world consequences of EPA's retroactive veto of permits issues by the Corps, NSSGA conducted two surveys of its members. Results from the first survey were described in NSSGA's amicus brief in the district court. As the district court noted, that data helped inform its comprehension of the issues. JA207. The second survey – commenced following the D.C. Circuit decision – is described in this brief. *See infra* at 8-11. Together, the surveys demonstrate that even the mere "threat" of retroactive veto power will

[3] The state association *amici* are: the California Construction and Industrial Materials Association, the Texas Aggregate and Concrete Association, the Illinois Association of Aggregate Producers, the Georgia Construction Aggregates Association, and the New Jersey Concrete and Aggregate Association.

chill future investments in operations that are vital to public infrastructure and the innumerable businesses that rely on a steady supply of aggregates. That supply is critical to addressing urgent infrastructure needs.[4] Accordingly, amici submit this brief to underscore the exigencies that require review and reversal in this case so that the deleterious effects of the decision below will cease.

REASONS FOR GRANTING THE PETITION

Mingo Logan's petition for a writ of certiorari explains why the Clean Water Act cannot be read to confer on EPA unilateral authority to countermand – on an ex post facto basis – a final decision issued by another agency (indeed, the very agency expressly given the primary role in the permit process). Neither the statutory language and structure, nor its legislative history, nor its stated policy supports the decision below. There is no rational basis for concluding that Congress created a lengthy, expensive, extensive, comprehensive permitting process in which the Corps has principal, and final, decision-making authority, if EPA was to be free at any time thereafter to override the Corps' considered decision.

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[4] In 2013, the American Society of Civil Engineers assigned the U.S. highway system a "D" letter grade, stating, "42 percent of America's major urban highways remain congested, costing the economy an estimated $101 billion in wasted time and fuel" each year. *Am. Soc'y of Civil Engineers*, *"2013 Report Card for America's Infrastructure,"* 7 (Mar. 2013), http://www.infrastructurereportcard.org/a/documents/2013-Report-Card.pdf.

In this brief, amici will not revisit the compelling legal reasons for reversal that the petition addresses. This brief will focus, instead, on the powerful practical reasons why this Court's review is needed now. The mere existence of EPA's new "retroactive veto" threatens economic havoc for the communities that amici and their members serve nationwide. What permit is safe if EPA can nullify retroactively – over the objection of every other agency involved in the permit process, and without considering economic reliance factors – "the most heavily studied and scrutinized mining operation in the history of a state which has a long history with the coal mining industry"? JA948.

To help this Court understand the real world ramifications of the decision below, NSSGA canvassed its members on the practical impact of EPA's unprecedented retroactive veto.[5] Accordingly, amici can report on the disruptive consequences to the industry and to the nation's infrastructure and economy that will exist until the decision below is reversed.

[5] NSSGA conducted a similar survey among its members before filing its *amicus curiae* brief in the district court in this case. The district court opinion acknowledged NSSGA's contribution to the resolution of the issues in this case. JA207.

I. EPA'S RETROACTIVE VETO POWER UPHELD BY THE COURT OF APPEALS UNDERMINES NSSGA MEMBERS' CRITICAL RELIANCE ON CLEAN WATER ACT PERMITS.

A. The Economic and Logistical Realities of the Aggregates Industry Require Finality and Certainty for Clean Water Act Permittees.

Waterways and wetlands regulated by the *Clean Water Act* ("CWA"), 33 U.S.C. §§1251, et seq., are critical to the aggregates industry. Access to these aquatic systems, where aggregate is abundant, ensures a stable supply of aggregates for the myriad public works and other projects they make possible. JA228–29.

"[A]ggregate producers expend tremendous amounts of time and money" well before commencing a mining operation, "locating potential aggregate resources and determining their quantity and quality," expending "large amounts of money and effort determining the feasibility of production; identifying potential environmental impacts from production;" confirming that their operations comply with applicable laws; "and obtaining the necessary permits to extract, process and transport the aggregate."[6] As this Court has recognized, obtaining the required CWA permits is no small undertaking: "The average applicant for [a section

[6] *William H. Langer, Lawrence J. Drew, & Janet S. Sachs, Am. Geological Inst., Aggregate and the Environment*, 24 (2007).

404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).[7]

Opening a new crushed limestone operation can take nearly a decade and cost more than $50,000,000. Throughout this process, operators incur additional expenses to satisfy the permit and zoning requirements of states, counties, municipalities, and other governmental agencies. Of necessity, operators must hedge against the possibility of permit denial by deferring most of these massive expenses until after receiving a final permit.[8] Lenders withhold financing until after the operator has successfully received a valid permit because only then is the investment considered "secure." But the security that lenders require would evaporate if a permit can be unilaterally and unexpectedly revoked despite the operators' compliance with the permit's conditions.

On top of the enormous capital investments required to open a new facility and obtain the

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[7] *Citing Sunding & Zilberman*, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74–76 (2002).

[8] Operators strategically defer expenses by purchasing options to buy or mine the property from landowners and maintaining the option to buy or lease the proposed mine property through payments to the landowners during the permit approval process.

required approvals, operators typically forgo other supply options, close and reclaim other existing sites, and develop markets and outlets. And vertically-integrated companies must purchase, secure, or develop operations that will use the mined material—activities that take years to plan, fund, and implement. Accordingly, EPA's retroactive veto not only introduces an unprecedented degree of financial risk to operators, but threatens a wide spectrum of business investments that all rely on the finality of CWA permits. [9]

These concerns are not mere pessimistic conjecture. Professor David Sunding has calculated that if investors believe there is a 1% annual risk that EPA will revoke a permit, "the expected benefit-cost ratio of projects involving discharge permits decreases by 17.5%." JA224. A 2% risk of revocation reduces the benefit-cost ratio by 30%. JA224. Even "small changes in the threat of permit revocation can lead to dramatic reductions in private investment." JA223–24.

Having surveyed NSSGA members on this subject, amici can confirm the real-world impact of Professor Sunding's calculations. The economic ramifications are not alarmist hyperbole or overheated rhetoric. They are real.

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[9] *See, e.g.,* JA207 ("EPA brushed [NSSGA's] objections away by characterizing them as hyperbole, but even if the gloomy prophesies are somewhat overstated, the concerns the amici raise supply additional grounds for finding EPA's interpretation to be unreasonable").

B. A Survey of NSSGA Members Regarding EPA's Retroactive Veto Reveals Members' Grave Concerns.

Following the court of appeals decision in this case, NSSGA conducted a second survey of its member companies to follow-up on the earlier survey about which NSSGA advised the district court. *See* JA207. To gather empirical data and gauge the industry's reaction to EPA's new veto authority, the survey posed two primary inquiries:

> (i) Whether the threat of an EPA retroactive veto would have a "chilling effect" on business decisions.
>
> (ii) Whether EPA's retroactive veto power would impact the ability of the responding company to meet contractual obligations, including commitments with public agencies.

The response was overwhelming. The mere threat of EPA possessing a retroactive veto of duly issued CWA permits was more than just costly to operations. As the survey results confirm in the strongest terms, this retroactive veto power has the potential to produce protracted litigation over failures to meet contractual obligations, cause widespread layoffs, deter investment (if not making them outright impossible), increase financing costs, and trigger a dramatic shortage of the ingredients that make public and private infrastructure possible. To make matters worse, all of these negative consequences come at a time when substantial

remediation to and investment in the national infrastructure has never been more critical.

The first-hand experience of NSSGA members confirms the extensive, costly nature of the permit process. Obtaining the necessary permits for a quarry operation can take a decade. The costs of environmental studies often exceed $1,000,000, with a major portion consumed by obtaining the requisite permits from the Corps.

One operation in North Carolina has been in the permit process for more than eight years, including more than forty meetings with various regulatory agencies. Despite expenditures of several million dollars, "not a single shovel of dirt has been moved on the project" because several required permits have not yet been issued.

Another example is an operation in Texas, where 3,000 of the total 4,300 acres were purchased for more than $20,000,000. The only way a company will invest this amount of money is if the regulatory approval is secure from a post-permit veto. Because the costs required by the Corps' permitting process can run into the millions of dollars, which are paid up front and cannot be recovered, the risk of losing an already issued permit to a retroactive EPA veto "would keep most producers from entering the process."

The harm wrought by EPA's retroactive veto does not end there. Many aggregate operations rely on distribution yards located along rivers or coastal areas, often in large ports where the local Port

Authority also must obtain permits from the Corps. The Port Authority may then impose its own requirements on aggregate operators, including financial commitments to the Port Authority, city, or county in order to obtain the required permits. If EPA invalidates the aggregate operator's permit, that would be considered a default of the operator under its commitments to the Port Authority, city or county, and would result in potentially enormous financial penalties, as well as the loss of the property rights the operator acquired. Loss of these permits would "cause an end to a distribution system that has served this nation for several centuries."

Other survey responses were equally as pointed:

- "If we build the new road, build our new plant, and then the agencies decide to revoke our wetlands permit, we will have wasted more money than a year's worth of sales at that one plant."

- "Revocation of an existing permit could shut a company's doors because of the catastrophic loss of revenue."

- "An after-the-fact veto by the EPA would put in jeopardy large or long term aggregate commitments and obligations that we have made to our customers. This could literally shut this operation down."

- "[The EPA's retroactive veto] means that projects could be stopped mid-stream after

> significant monies have been spent to permit and mine the site. It will result in job losses and increased difficulty in today's lending environment. It could easily bankrupt most projects if the permit is revoked."

In sum, these survey responses reveal that even the risk of an EPA retroactive veto of a Corps Section 404 permit would have a major "chilling" effect on critical planning and investments needed to ensure a steady and stable supply of aggregates for vital public infrastructure projects.

C. EPA's Unfettered Post-Permit Veto Authority Creates An Open-Ended Risk That Does Not Account For Economic Reliance Factors.

The concern with EPA's new veto power is not simply that it is retroactive. Another disturbing departure from settled practice is the fact that – in contrast to the Corps – EPA does not consider economic reliance factors in deciding whether to exercise its veto authority.

The Corps' permit regulations carefully limit the factors that would even trigger consideration of such drastic action as permit modification, suspension or revocation.[10] Regulations require that

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[10] These factors include "the extent of the permittees compliance with the terms and conditions of the permit, whether or not the circumstances related to the authorized activity have changed . . . and any significant objections to the

the Corps must first determine if the "public interest" may require modification and if so, that the Corps must consult with the permittee to determine if the "terms and conditions" can be modified by mutual consent *See* 33 C.F.R. §325.7(b). If a permittee fails or refuses to comply with a permit modification, the Corps will still not suspend or revoke a permit without providing additional notice and an opportunity to meet and confer *See id.* §325.7(b)–(d). Most significantly, the Corps must consider "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." 33 C.F.R. § 325.7(a) (emphasis added).

Under the permit system that the Corps has administered for years, aggregate operators and their investors could rely on the fact that the Corps will not take such extreme action if the permittee complies with permit conditions and there are no significant changes to site conditions or project impacts.[11] In contrast, EPA's power to set aside a Corps permit has none of these essential limitations. Under the decision below, the industry faces the risk that EPA can nullify a permit "whenever" it

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authorized activity which were not earlier considered . . . ." 33 C.F.R. § 325.7(a).

[11] Under the Corps' Standard Operating Procedures, the Districts are encouraged to work with permittees on time extensions and permit modifications and the Corps coordinates on permit modifications with resource agencies. Updated *Standard Operating Procedures for U.S. Army Corps of Engineers Regulatory Program* (July 1, 2009), *available at* http://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/eis/Regulatory%2040P5/6202009pdf.

determines that that the Corps' fully valid permit – with which the permittee has complied – "will have an unacceptable adverse effect." Such an unfettered power, that does not even consider economic consequences, creates an unacceptable open-ended risk for aggregate operators and their investors.

The Court need not look any further than the facts of this case to see the magnitude of harm EPA's newly-conferred retroactive power creates, especially in circumstances where the Corps carefully weighed EPA's request for permit modification. From 2005 through 2007, EPA declined to exercise its statutory pre-permit authority over specifications while Mingo Logan's section 404 permit was being considered by the Corps. JA180–82. Instead, more than two years after the Corps issued a permit, EPA changed its mind and adopted its current position. JA183. EPA did so over the objection of every other government agency involved in the Spruce No. 1 Mine. JA183. Indeed, in response to EPA's effort to convince the Corps to suspend Mingo Logan's permit, the Director of the West Virginia Department of Environmental Protection wrote: *"[T]his is the most heavily studied and scrutinized surface mining coal operation in the history of a state which has a long history with the coal mining industry."* JA946–48 (emphasis added).

After the Corps declined EPA's request to suspend Mingo Logan's permit, JA183 (citing A.R. 12781–88), EPA unilaterally withdrew two "specifications" as "disposal site[s] for dredged or fill material in connection with the construction of the Spruce No. 1 Surface Mine." JA183. Although Mingo Logan was in compliance with its permit, EPA

invalidated petitioner's authority to use roughly 88% of the total discharge area authorized by the Corps' section 404 permit. JA184.[12]

These circumstances show that the decision below is contrary to Justice Scalia's condemnation of government actions that "alter future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 214, 220 (1988) (Scalia J., concurring). This Court has also noted that retroactive government action, such as EPA's veto, is acutely problematic in cases of "contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. See, e.g., *U.S. v. Chambers*, 291 U.S. 217, 223–24 (1934); *Gulf, Colorado, & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 506 (1912).

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[12] This Court has recognized the primary authority of the Corps in the section 404 permit process. In *Coeur Alaska v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009), the Court held that the Corps, not EPA, had authority to approve a permit to discharge slurry of crushed rock and water. *Id.* at 277. "Under this framework, the Corps of Engineers, and not the EPA, has authority to permit [the applicant's] discharge of the slurry" under CWA section 404. *Id.* The Court noted that the opposite conclusion – that the Corps' authority would not extend to fill material the EPA regulates elsewhere – would result in conflicting assertions of regulatory authority and produce "numerous difficulties" for the regulated industry. *Id.* at 276.

II. THERE IS NO MERIT TO EPA'S CONTENTION THAT THE INDUSTRY EXAGGERATES THE IMPACT OF THIS UNPRECEDENTED RETROACTIVE VETO OF PERMITS ISSUED BY THE CORPS.

As a rhetorical device to mask the sweeping implications of its new-found authority, EPA claims that its retroactive veto of the permit with which petitioner complied is a "case-specific determination," and that the ex post facto nullification "represents a unique set of circumstances . . . [because] the project has a long history of controversy." JA868.

EPA's attempt to downplay its assertion of extraordinary authority rings hollow because – as EPA concedes – nothing limits its authority except the agency's view of its own discretion. EPA admits that its "section 404(c) authority does not require a finding that the particular circumstances are unique, rather it requires a finding of unacceptable adverse impacts to protected areas." JA868. No matter how thorough the Corps' permitting process was, nothing prevents EPA from renewing some concern that was rejected in the interagency process – at any site with existing permits – as a pretext to halt an ongoing aggregates operation. Exercise of this veto power would be devastating to the companies affected, their lenders, and the projects that rely on a steady supply of aggregate for important public works.

The deleterious effect of a possible shutdown of aggregate mining operations in an area could be dramatic. In 2007, the Florida Department of

Transportation ("FDOT") commissioned a study to evaluate the importance of lime rock from the Lake Belt Region of Miami-Dade County to the FDOT's construction and maintenance program. JA231. The study examined the economic fallout from a potential mine closure – threatened by a pending federal lawsuit brought by environmental groups – that could shut down production in the Lake Belt Region. JA230–38. The study concluded that "the sudden cessation of production would damage the economy of Florida," by "having an adverse effect on economic activity and the number of family wage jobs available in the state." JA236. These economic harms would "continue for a decade in all likelihood," even "after alternative supplies develop" to replace the sudden loss of production from the Lake Belt Region. JA236.

The FDOT study contemplated even worse consequences. It noted that "the most ominous scenario would be one where a complete closure of the Lake Belt happens suddenly and the marketplace has little time to adjust." JA237. In that event, "the burden of shortage of crushed stone would fall on the construction industry," with "[a]nnual losses to the economy exceed[ing] $28.6 billion, cost[ing] over a quarter of a million jobs and reduc[ing] labor income statewide by $11.2 billion." JA237.

As the FDOT study confirms, an unexpected shutdown of aggregate operations would have an immediate and long-lasting detrimental effect on the local economy. Given that economic reality, there is ample basis for concern that EPA's broad

unprecedented power to halt ongoing projects would wreak havoc on innocent communities and on operators that took financial risks to commence aggregate operations, relying in good faith on costly section 404 permits and complying with the terms of the permits.

Congress did not vest such unfettered discretion in a single agency where the economic harm of an adverse decision costs tens of billions of dollars, hundreds of thousands of jobs, and has a lasting effect for at least a decade. EPA's assertion of power in this case – in direct tension with decisions of this Court – ignores the importance of regulatory predictability, certainty, and finality that protect "substantial past investment incurred in reliance upon" an agency's previous position. *Bowen*, 488 U.S. at 220 (Scalia, J., concurring).

III. THE SUPPORT OF STATE AGGREGATE ASSOCIATIONS UNDERSCORES THE IMPORTANCE OF GRANTING REVIEW IN THIS CASE.

State Aggregate Associations in California, Texas, Illinois, Georgia, and New Jersey join NSSGA in this brief to demonstrate the state-specific impacts of EPA's unprecedented power upheld by the Court of Appeals. They agree on three fundamental points: (1) that their member companies require regulatory certainty and clarity on environmental permitting matters; (2) that granting EPA this uncabined power would significantly deter member companies – along with their lenders and investors – from investing in mining projects that support

infrastructure development; and (3) if operators are unable to rely on the validity of issued permits, investment in the industry will decrease, the availability of aggregate products will decrease, and prices will escalate, jobs will be lost, and the economy will suffer.

The descriptions of aggregate operations in these states illustrate the importance of aggregate-dependent activities threatened by EPA's unprecedented power.

The California Construction and Industrial Materials Association. The Association's members produce sand, gravel, crushed stone and ready-mixed concrete in more than 750 facilities that employ thousands of workers throughout the State. The construction materials industry is a multi-billion dollar component of California's economy. The production of construction materials has been as high as 244 million tons of aggregate in 2004. A State Commission has concluded that the State must invest $295 billion in transportation infrastructure over the next 16 years to maintain the system and accommodate future growth. Securing permits for mine sites is essential in meeting this demand.

The Texas Aggregate & Concrete Association ("TACA"). The aggregates, concrete, and cement industries comprise nearly $6.5 billion in Texas. TACA's 200 member companies employ hundreds of thousands of Texans at aggregate, concrete, and cement plants. These companies provide necessary services and materials that are an

integral component of residential, commercial, and municipal infrastructure. As one of the largest and fastest-growing states, the demand for aggregate and concrete in Texas will only continue to increase.

The Illinois Association of Aggregate Producers. The Association represents 96 producers operating sand pits, gravel pits, and stone quarries in 70 Illinois counties, as well as 137 additional companies that supply producers with essential goods and services. Illinois mines produced 68,400 metric tons of sand, gravel, and crushed stone in 2012.

Georgia Construction Aggregate Association. The industry directly employs approximately 1,000 persons in Georgia and its "multiplier effect" creates a significant number of additional jobs and economic activity through purchases of goods, products and services from local and regional suppliers. Historically, Georgia has been among the top five aggregate producers in the country. Aggregate operations require extensive capital investment and to be economically viable must operate over long time horizons.

New Jersey Concrete and Aggregate Association. The Association represents more than 125 members in the State who manufacture and produce ready-mixed concrete, sand and gravel for the construction industry. Its members employ more than 7,500 people in New Jersey.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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