No. 13-599

In The

Supreme Court of the United States

MINGO LOGAN COAL COMPANY,

Petitioner,

v.

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 *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. AUGELLO*
THOMAS J. WARD
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15TH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 266-8490
jaugello@nahb.org
* *Counsel of Record*

December 16, 2013

TABLE OF CONTENTS

Page*(s)*

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE DECISION BELOW NEGATIVELY IMPACTS NAHB'S MEMBERS AND HOUSING AFFORDABILITY 4

II. THE COURT OF APPEALS IMPROPERLY FOUND THAT DISPOSAL SITES CAN ONLY BE WITHDRAWN "POST-PERMIT" 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page*(s)*

Cases

Edwards v. Aguillard, 482 U.S. 578 (1987) 13

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 13

Mingo Logan Coal Co. v. U.S. Envtl Prot. Agency, 714 F.3d 608 (D.C. Cir. 2013).... 3, 13, 17

Mingo Logan Coal Co. Inc. v. U.S. Envtl Prot. Agency, 850 F.Supp.2d 133 (D.D.C. March 23, 2012)... 14

NAHB v. Defenders of Wildlife, 551 U.S. 644 (2007) 1

Ohio Oil Co. v. Detamore, 165 Ind. 243, 73 N.E. 906 (Ind. 1905) 7

Rapanos v. U.S., 547 U.S. 715 (2006).................... 7

TABLE OF AUTHORITIES

Page*(s)*

STATUTORY & CONSTITUTIONAL PROVISIONS

Statutes

33 U.S.C. § 419 13

33 U.S.C. § 1341(a)(1) 8

33 U.S.C. § 1341(c) 14

33 U.S.C. § 1344(b)(1) 9

33 U.S.C. § 1344(c) 13

33 U.S.C. § 1344(e) 7

Regulations

33 C.F.R. Part 205 (1972) 13, 14

33 C.F.R. Part 325 7

33 C.F.R. § 325.2(e) 7

33 C.F.R. § 325.7(a) 8

33 C.F.R. § 330 7

33 C.F.R. § 332.4(c)(1) 10

TABLE OF AUTHORITIES (*cont.*)

Page*(s)*

33 C.F.R. § 337.9 17

40 C.F.R. Part 230... 9

40 C.F.R. § 230, subpart H 9

40 C.F.R. § 230.10(a)... 9

40 C.F.R. § 230.10(b)... 8

40 C.F.R. § 230.10(c) 8

40 C.F.R. § 230.10(d)... 9

40 C.F.R. § 230.80(a).. 16

40 C.F.R. § 230.80(b).. 17

40 C.F.R. § 230.93(c)(1)....................................... 10

40 C.F.R. § 231.1(a).. 17

Other

Nat'l Ass'n of Home Builders, *Survive and Thrive in Building: Fundamentals of Business Management* (NAHB BuilderBooks.com 2012) 4

TABLE OF AUTHORITIES (*cont.*)

Page*(s)*

Nat'l Ass'n of Home Builders, *Advice and Recommendations of the Nat'l Ass'n of Home Builders Regarding the Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category; Proposed Rule* 67 Fed. Register, June 24, 2002 (Dec. 20, 2002), *available at* http://www.nahb.org/fileUpload_details.aspx?contentID=10535&fromGSA=1 6

Margaret "Peggy" Strand, Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the §404 Program*, 40 Envtl. L. Rep. News & Analysis 10372 (April 2010) 8

Heather Taylor, *Characteristics of New and First-Time Home Buyers*, Special Studies (Sept. 1, 2010), http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=143996&channelID=311 5

Craig Vogt, Inc., *Beneficially Using Dredged Materials to Create / Restore Habitat and Restore Brownfields, and Team Collaborative Efforts that Have Achieved Success, Examples / Case Studies* (2010) http://www.glc.org/dredging/pdf/Final-report-Beneficial-use-of-dredged-material-and-collaboration.pdf... 15

TABLE OF AUTHORITIES (*cont.*)

Page*(s)*

U.S. Army Corps of Eng'rs, *Continued Use of Puget Sound Dredged Disposal Analysis Program (PSDDA) Dredged Material Disposal Sites*, http://www.nws.usace.army.mil/Portals/27/ docs/civilworks/dredging/ESA/PSDDABE .032305.doc.pdf 16

U.S. Army Corps of Eng'rs, et al., *Final Environmental Impact Statement, Unconfined Open-Water Disposal Sites for Dredged Material, Phase I (Central Puget Sound)* (1988), http://www.nws.usace.army.mil/Portals/27/ docs/civilworks/dredging/PSDDA%20PH% 20I%20EIS%20for%20web.pdf 15

U.S. Army Corps of Eng'rs, *Wetland Delineations*, http://www.spk.usace.army.mil/Missions/ Regulatory/Jurisdiction/Wetland Delineations.aspx 8

U.S. Envtl Prot. Agency, *Advanced Identification (ADID)*, http://water.epa.gov/type/wetlands/ outreach/fact28.cfm 16

TABLE OF AUTHORITIES (*cont.*)

Page*(s)*

Washington State Dep't of Natural Resources, *Washington State's Dredged Materials Management Program*, http://www.dnr.wa.gov/publications/aqr_1_fact_sheet3_09.pdf 15

Ocean Disposal; Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, CT, 70 Fed. Reg. 32498 (2005) . 15

INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *Amici Curiae* brief in support of Petitioners.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 130,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. Furthermore, 13 percent of NAHB's builder members consider their primary or secondary activity to be land development.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act (CWA) case, *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007).

The CWA provides authority for the U.S. Army Corps of Engineers and the Environmental

---

[1] Under Rule 37.6 of the Rules of this Court, a*mici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than a*mici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. The parties have given consent and the letters of consent to file this brief are filed with the Court.

Protection Agency to require *amici's* members to obtain CWA permits for both their dredge and fill activities, and their point source discharges. CWA permits are often difficult and expensive to obtain. Furthermore, NAHB's members rely on them to lawfully operate their businesses and when making important investment decisions. Thus, NAHB is concerned with any ruling that allows the government to confiscate (due to no fault of the permittee) a section 404 permit.

SUMMARY OF ARGUMENT

The importance of a Clean Water Act (CWA) section 404 permit to the business operations of NAHB's members cannot be overstated. Once approved, a section 404 permit authorizes land developers and builders to convert "wet" land for the beneficial purpose of home construction without fear of unpredictable liability. Of equal importance, they give all potential lenders and investment sources proof that a development project has overcome an important regulatory hurdle and that the permitting process will not further erode project cash flow or profits. As stated by one of NAHB's members, an approved section 404 permit is the cornerstone of every residential land development project confronted with wetland restrictions. Allowing the Environmental Protection Agency (EPA) to confiscate a section 404 permit would negatively impact the established system of permitting in the form of increased costs, project delays and project uncertainty. NAHB's members and housing affordability would suffer as a result.

Moreover, the Court of Appeals has created this uncertainty by, inconsistent with this Court's precedent, failing to read section 404(c) in context when it determined that Congress unambiguously expressed its intent. *Mingo Logan Coal Co. v. U.S. Envtl Prot. Agency*, 714 F.3d 608, 612 (D.C. Cir. 2013). This defiance of precedent led the court to incorrectly conclude that Congress clearly provided the EPA with authority to veto section 404 permits authorized by the U.S. Army Corps of Engineers (Corps).

ARGUMENT

I. THE DECISION BELOW NEGATIVELY IMPACTS NAHB'S MEMBERS AND HOUSING AFFORDABILITY.[2]

In the residential land development context an approved CWA section 404 permit is near-sacred. For many developers it signifies the end of the arduous regulatory process and green light for active construction. It announces to all potential lenders and investment sources proof of a projects chances for success. In other words, an approved section 404 permit serves as a catalyst, positively affecting other key components of a successful development project. As discussed below, the ultimate permit that emerges from the complex 404 process is an integrated whole. Tampering with any part of it can destroy the entire edifice and strand the builder's investment.

Consider, for example, the typical NAHB small-volume builder[3] with a vision for a new residential community.[4] Following completion of a preliminary

---

[2] Footnote citations, rather than traditional in-text citations, have been used throughout section I to make the residential land developer scenario easier to read.

[3] According to NAHB, a small-volume builder constructs 25 or fewer homes a year. These builders comprise most (about 70%) of NAHB's builder members, and two-thirds of them build fewer than 10 homes a year. Nat'l Ass'n of Home Builders, *Survive and Thrive in Building: Fundamentals of Business Management* 3 (NAHB BuilderBooks.com 2012) (last visited 12.12.13).

[4] Over 80 percent of NAHB's members are classified as "small businesses" and meet the federal definition of a "small entity," as defined by the U.S. Small Business Administration.

market feasibility study the builder eyes a 60-acre site located outside a major metropolitan area. His goal is to develop 25 single-family detached homes which will be marketed to first-time home buyers.[5]

Before purchasing the site, the builder hires a development engineer and land-use attorney to conduct an exhaustive due-diligence review. The review reveals that the proposed development should not face any zoning roadblocks but that the site is pock-marked with several shallow water features. A jurisdictional determination (JD) request is submitted to the Corps. The Corps responds several months later with a preliminary JD noting that the site contains a total of five acres of jurisdictional wetlands.

In response the builder hires a site planner to determine how he can maximize development on the site while at the same time minimizing impacts to the jurisdictional wetlands. He finds that he can avoid disturbing three acres of wetlands, but the remaining two must be filled in order to maintain a viable project. Avoiding the three acres means he will lose the value of that land. Filling the two acres means he will have to secure an individual permit pursuant to section 404 of the CWA, which is also an expense.

---

[5] First-time home buyers are, on average, 34 years old, have an average household income of $67,342, and purchased a home with an average market value of $184,091. Heather Taylor, *Characteristics of New and First-Time Home Buyers*, Special Studies (Sept. 1, 2010), *available at* http://www.nahb.org/generic.aspx? sectionID=734&genericContentID=143996&channelID=311 (last visited 12.12.13).

With the regulatory costs quickly adding up, the builder introduces a financial professional to his project team to help forecast the additional soft costs (regulatory fees, further investigation) hard costs (additional labor, materials, mitigation), and to develop a schedule to complete each task while still producing a positive cash flow. His finance expert concludes, through an updated feasibility study, that the project will remain viable only insofar as a portion of the regulatory costs can be added to the final home sale prices.[6] Although this may place the homes out of reach for many first-time home buyers, the builder decides to press forward with development financing.

To finance the project the builder seeks a combined land acquisition (to purchase the site) and development (to ready the land for building) loan.[7] After submitting his loan application, disclosures, proof of financial capacity and project feasibility study, the bank issues a loan commitment letter. The lender also demands several loan closing

---

[6] Regulatory costs can have a significant effect on housing affordability. For every $1,000 increase in the cost of a median-priced home, 424,413 households are priced out and developers are required to pay additional carrying costs. Nat'l Ass'n of Home Builders, *Advice and Recommendations of the Nat'l Ass'n of Home Builders Regarding the Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category; Proposed Rule* 67 Fed. Register, June 24, 2002 (Dec. 20, 2002), *available at* http://www.nahb.org/fileUpload_details.aspx?contentID=10535&fromGSA=1 (last visited 12.12.13).

[7] A construction loan for actually building the homes will come later on in the process.

conditions. They include an acceptable appraisal, source of down-payment and closing funds, proof of title insurance and regulatory and environmental clearances. Thus, the builder must secure a standard individual permit[8] pursuant to section 404 of the CWA before the loan funds will be released.

It is at this critical juncture in the land development process that the builder must "fish or cut bait."[9] He understands that securing a section 404 permit is an extremely expensive proposition[10] and that there is no guarantee that a permit will be granted. However, he has already made a sizable and irreversible capital outlay. Furthermore, his nearly 40 years of development experience working

---

[8] Permits issued by the Corps fall into two categories: individual and general. Individual permits are granted on a case-by-case basis and involve a costly review process, often requiring extensive documentation regarding the specific site, public notice and comment, and sometimes a public hearing. *See* 33 C.F.R. pt. 325. In contrast, general permits, also referred to as Nationwide Permits (NWP(s)) are granted on a national, regional or statewide basis, cover entire "categor[ies] of activities" and often allow parties to proceed with much less red tape than is involved in obtaining individual permits. *See* 33 U.S.C. § 1344(e); 33 C.F.R. § 325.2(e); *Id.* pt. 330.

[9] *See Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N.E. 906, 909 (Ind. 1905) (standing for the proposition that one must commit to what he or she is doing, or give it up entirely).

[10] In *Rapanos v. U.S.*, 547 U.S. 715, 721 (2006), the plurality observed that "[t]he average applicant for an individual 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 …. [O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits."

with the Corps and EPA has taught him that an approved section 404 permit is nearly bulletproof. He believes it may only be modified, suspended or revoked by the Corps under a narrow set of circumstances. These circumstances are tempered by the extent of his compliance with the permit terms and conditions and the extent to which a permit withdrawal would adversely affect his plans, investments and actions reasonably taken in reliance on the permit.[11] Confident in the reliability of an approved section 404 permit, he presses forward.

The section 404 permit application process requires input from a variety of disciplines. Steering a team of consultants, including a hydrologist, geologist and soil scientist, the builder prepares a wetland delineation[12] and secures a CWA section 401 water quality certification from the state.[13] He then moves on to the three-step mitigation sequence required for demonstrating compliance with the

---

[11] 33 C.F.R. 325.7(a).

[12] The average response time on a wetland delineation request associated with a section 404 permit is several months or longer. To expedite the process Corps districts encourage residential developers to hire private consultants to determine the exact boundaries and types of wetlands present on their project site. Margaret "Peggy" Strand, Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the §404 Program*, 40 Envtl. L. Rep. News & Analysis 10372 (April 2010); U.S. Army Corps of Eng'rs, *Wetland Delineations*, *available at* http://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/WetlandDelineations.aspx (last visited 12.12.13)

[13] 33 U.S.C.§ 1341(a)(1); 40 C.F.R. § 230.10(b)-(c)

section 404(b)(1) Guidelines.[14] Step one is avoidance. It requires that the applicant prove no practicable alternative to the proposed discharge exists.[15] Following an evaluation of potential alternative sites for the project the builder concludes that high operational costs, scarcity of available land and logistical considerations leave him with no practicable alternative to filling the wetlands. With this he records why the discharge will not cause significant degradation of the jurisdictional waters. Step two requires the applicant to minimize potential adverse impacts on the aquatic environment caused by the discharge.[16] Consistent with this requirement the builder proposes to time-limit his fill activities to avoid critical amphibian spawning periods and the Atlantic flyway migration season. Compensatory mitigation is step three of the sequence.[17] Here the builder proposes to create two acres of on-site, in-kind wetlands to compensate for the functions and values lost as a result of his proposed fill activity.

In addition to his proposed compensatory mitigation, the builder's application includes a map and detailed description of his proposed residential land development plan. It shows the location of 25 single-family homes, entry road, septic system, village green, parking lot, major plantings and other site improvements along with the two acres of

---

[14] 40 C.F.R. pt. 230; 33 U.S.C. § 1344(b)(1)

[15] 40 C.F.R. § 230.10(a)

[16] *Id.* at § 230.10(d)

[17] *Id.* at § 230, subpart H

wetland impacts. The Corps and EPA jointly review the proposal and suggest changes in the land design to reduce the environmental impacts. Some disposal sites for wetland fill suggested by the builder are rejected while others are minimized and new ones proposed. The builder reviews the suggestions, makes further modifications consistent with the local land use requirements and financial and operational realities of the project, and re-submits the application. This back-and-forth continues on for several months.

Ultimately the permit is issued with compensatory mitigation included as an enforceable condition.[18] The permit specifies, in exacting detail, where the permittee may place fill material, and that the permittee must create a three-acre wetland onsite and purchase three-acres of mitigation bank credits. The Corps explains that the three-to-one replacement basis is designed to achieve functional equivalence between the impact and mitigation site. Furthermore, the permit dictates that mitigation bank credits must be purchased, and on-site mitigation must be implemented, in advance of the permitted impact.

Following the section 404 permitting process the builder's residential land development plan bears little resemblance to the original. In order to limit his fill activities to two acres he must re-route the access road to avoid a wet meadow, place additional plantings adjacent to the road to filter runoff,

---

[18] For individual permits, mitigation plans must be approved before the permit can be issued. 33 C.F.R. § 332.4(c)(1); 40 C.F.R. § 230.93(c)(1)

incorporate pervious surfaces throughout, reposition all of the homes closer to the front of the lots to increase wetland buffers, design the garages to be incorporated as part of the first story of the homes instead of as a separate structure and reduce the total number of homes from 25 to 23. The residential land development plan is now intimately entwined with the wetland mitigation plan. Any modification in one of the plans has the potential to destroy the other.

With the section 404 permit in hand the builder's lender releases a portion of the loan funds consistent with the loan disbursement schedule. The income stream enables him to exercise his option to purchase the property, acquire the mandated wetland bank credits and contract with a consulting team to commence the on-site wetland mitigation project. He then draws on a portion of the equity in his business to increase his marketing budget, mobilize land clearing equipment and place an advance order on construction materials. In four months' time the builder is neck deep in debt he has leveraged nearly all of his assets and exhausted three of five draws on his land acquisition and financing loan. However, he has successfully completed all mitigation requirements and is ready to "move-dirt" and commence fill activities.

If EPA were to initiate a section 404(c) proceeding at *this* juncture and withdraw the underlying specification of any disposal sites located on the builder's newly acquired property the results would be disastrous. The permit is an integral part of the whole. Stripping away a disposal site (i.e. "vetoing" the permit) might prohibit the builder from

constructing several homes, force a re-route of the access road and cause several site amenities to be scrapped. In turn, the builder would have no choice but to revise his land development plan. This would take several months and inch him closer to the balloon payment due date on his land acquisition and development loan. Marketing materials would need to be modified, mitigation expenditures would be lost and future investors would be scared away. Like a house of cards, his project and investments would crumble before his eyes.

As illustrated, an EPA veto of an approved section 404 permit can have a disastrous impact on a typical residential development. Therefore, NAHB asks the Court to review this case and determine whether the EPA has such authority.

II. THE COURT OF APPEALS IMPROPERLY FOUND THAT DISPOSAL SITES CAN ONLY BE WITHDRAWN "POST-PERMIT."

Based on its reading of CWA section 404(c), the court below held that EPA may veto a Corps approved permit. Section 404(c) provides, in part, that

> 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 withdrawal of specification) as a disposal site, whenever he determines, . . . 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.

33 U.S.C. §1344(c).

In analyzing 404(c), the Court of Appeals erroneously conflated *permitting* with *specification*. This led the court to improperly conclude that the "EPA's power to withdraw [a disposal site] can *only* be exercised post-permit." *Mingo Logan*, 714 F.3d at 613. However, in reaching this conclusion, the Court of Appeals did not review the full history of the CWA, current practice or the EPA's regulations. Thus, the court violated this Court's precedent by failing to read section 404(c) "in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (". . . [I]n determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, and the specific sequence of events leading to passage of the statute.").

Prior to the enactment of the CWA in 1972, the Corps already had specified a number of multi-user disposal sites. These designations were completed pursuant to the Corps' authority under the Rivers and Harbors Act. 33 C.F.R. pt. 205 (1972); 33 U.S.C. § 419. These existing sites were located around the country, including the Chesapeake Bay, New York Harbor and the Great Lakes. For these multi-user sites, the Corps established different conditions with which permittees who wished to use them had to

comply. 33 C.F.R. pt. 205 (1972). Moreover, in 1972 Congress enacted section 401(c) which authorized the Corps to ". . . permit the use of spoil disposal areas under [its] jurisdiction by Federal licensees or permittees." 33 U.S.C. §1341(c). Therefore, when section 404(c) was enacted, multiuser disposal sites already existed. And, as shown by section 401(c), Congress knew it.

Reading section 404(c) in light of this history, the District Court explained that in its view only one reading of section 404(c) made sense:

> [T]hat Congress intended the term "withdraw" to pertain to specifications that were already in existence in 1972, at the time section 404(c) was enacted. . . . As part of the 1972 amendments, Congress enacted section 401(c), which reaffirmed the Corps' authority over those disposal sites and authorized it to use those sites in its section 404 permit system. Thus, the term "withdraw" could be read as simply giving EPA the authority to withdraw the specification of those sites that it had never been given the opportunity to review before the Corps could lock them in under section 404 permits.

Mingo Logan Coal Co. Inc. v. U.S. Envtl Prot. Agency, 850 F.Supp.2d 133, 153 n.6 (D.D.C. March 23, 2012) (internal citations omitted). In contrast, the Court of Appeals determined that EPA can only withdraw a disposal site post-permit. This

interpretation fails to read section 404(c) in light of its history and does not address the District Court's reasoning.

Moreover, such muti-user disposal sites are still used across the country.[19] For example, in the Puget Sound there are 50 miles of navigation channels, about 50 miles of ship berths and more than 200 small boat harbors that must be periodically dredged to maintain their usefulness for commercial and recreational navigation.[20] Under the Washington State Dredge Material Management Program (DMMP)[21] there are eight approved disposal sites in the Puget Sound. They were approved by an inter-

---

[19] *See* generally, Craig Vogt, Inc., *Beneficially Using Dredged Materials to Create/Restore Habitat and Restore Brownfields, and Team Collaborative Efforts that Have Achieved Success, Examples/Case Studies* (2010) (providing examples of long term beneficial use disposal sites), http://www.glc.org/dredging/pdf/Final-report-Beneficial-use-of-dredged-material-and-collaboration.pdf (last visited 12.12.13); *Ocean Disposal; Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, CT*, 70 FR 32498, 32499 (2005) (providing an example of a section 404 disposal site in the Long Island Sound).

[20] U.S. Army Corps of Eng'rs, et al., *Final Environmental Impact Statement, Unconfined Open-Water Disposal Sites for Dredged Material, Phase I (Central Puget Sound)* S-1 (1988), http://www.nws.usace.army.mil/Portals/27/docs/civilworks/dredging/PSDDA%20PH%20I%20EIS%20for%20web.pdf (last visited 12.12.13).

[21] "The [DMMP] exists to facilitate navigation and maritime commerce, while guaranteeing protection of Washington's aquatic environment." Washington State Dep't of Natural Resources, *Washington State's Dredged Materials Management Program*, http://www.dnr.wa.gov/publications/aqr_1_fact_sheet3_09.pdf (last visited 12.12.13).

agency group consisting of the Corps, EPA, Washington Department of Ecology and the Washington Department of Natural Resources. U.S. Army Corps of Eng'rs, *Continued Use of Puget Sound Dredged Disposal Analysis Program (PSDDA) Dredged Material Disposal Sites*, 1, http://www.nws.usace.army.mil/Portals/27/docs/civilworks/dredging/ESA/PSDDABE.032305.doc.pdf (last visited 12.12.13). The disposal sites are used by various governmental and private parties responsible for dredging projects in the region. Before a dredging project is authorized to use one of these multiuser sites it must obtain a section 404 permit. *Id.* at 13. This demonstrates that specification of disposal sites and section 404 permitting are not always completed in the same process. Furthermore, because these sites are currently specified, the EPA could withdraw a site for all future use. Therefore, no new permittee could incorporate the site into its permit. This illustrates that EPA's power to withdraw a disposal site can be exercised *pre-permit*.

Finally, EPA's and the Corps' regulations also recognize that certain disposal sites are created independent of a permit. Pursuant to 40 C.F.R. § 230.80(a) the EPA, in conjunction with the permitting authority, "may identify sites which will be considered as (1) possible future disposal sites . . .." Under the EPA's "advanced identification of disposal areas" (ADID)[22] program the classification of a disposal site as suitable does not constitute a

---

[22] U.S. Envtl Prot. Agency, *Advanced Identification (ADID)*, http://water.epa.gov/type/wetlands/outreach/fact28.cfm (last visited 12.12.13).

permit. 40 C.F.R. § 230.80(b). That, of course, is a separate process. Furthermore, EPA's regulations also provide that "[t]he Administrator may also prohibit the specification of a site . . . with regard to any existing or potential disposal site before a permit application has been submitted . . .." 40 C.F.R. § 231.1(a). Thus, even the Agency understands that its 404(c) withdrawal authority can be exercised pre-permit. Finally, the Corps' regulations provide that "District engineers should identify and develop dredged material disposal management strategies that satisfy the long-term (greater than 10 years) needs for Corps projects." 33 C.F.R. § 337.9. These regulations, again, illustrate that disposal management and section 404 permitting are not one and the same.

Therefore, if section 404(c) is read in light of the CWA's history, current practices and the agency's regulations it is simply not true that EPA's power to withdraw a disposal site can "*only* be exercised post-permit." *Mingo Logan*, 714 F.3d at 613. By failing to read section 404(c) in context, the D.C. Circuit has violated Supreme Court precedent, and improperly provided EPA with the authority to confiscate existing permits—a power that Congress did not confer. The Court should grant certiorari to correct this mistake.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

JEFFREY AUGELLO*
THOMAS J. WARD
Counsel of Record
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 266-8490
jaugello@nahb.org

December 16, 2013