Court Rejects EPA's Attempt to Expand Clean Water Act Powers

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Each year, the U.S. Army Corps of Engineers' Section 404 Clean Water Act (CWA) permitting program authorizes approximately $220 billion worth of economic investment in numerous industries, including construction, agriculture, mining and transportation. On March 23, 2012, Judge Amy Berman Jackson of the United States District Court for the District of Columbia issued an opinion in *Mingo Logan Coal Co., Inc. v. U.S. EPA* that thoroughly rejected an effort by the U.S. Environmental Protection Agency (EPA) to nullify an already-issued Section 404 permit. The court held that EPA's interpretation of the CWA was contrary to the statute's plain meaning and that, even if the statute's meaning were ambiguous, that EPA's understanding of it was unreasonable. In both substance and tone, the decision stands as a firm judicial rebuke of EPA's efforts to expand the scope of its authority under the Clean Water Act.

Judge Jackson's decision arose out of a dispute that originated in January 2007, when the Corps of Engineers, after a lengthy environmental review, issued a CWA Section 404 permit that authorized the discharge of dredged or fill material from a mining operation into certain West Virginia streams. Four years later, EPA—purporting to act under CWA Section 404(c)—withdrew the Corps' specification of those same streams as disposal sites, and thereby called into question the validity of the entire permit. The permit holder, Mingo Logan Coal Company, filed a lawsuit in federal court challenging EPA's action.

The focus of Judge Jackson's ruling was on the text of the relevant CWA provisions. According to EPA, Section 404(c) grants it authority to withdraw the specification of a disposal site "whenever" it sees fit, including after a permit has been issued on the basis of that specification. But as Judge Jackson pointed out, this interpretation does not fit with the rest of the statute. EPA's actions were particularly inconsistent with CWA Section 404(p), which "expressly provides that discharges made pursuant to a permit are lawful." The court accordingly rejected EPA's reading of Section 404(c)'s "veto" provision as inconsistent with the CWA.

Even though Judge Jackson's interpretation of the CWA was enough to rule in favor of the plaintiff, her opinion went on to examine the reasonableness of EPA's claim that Section 404(c) gives it the authority to withdraw a specification after a permit issues. The court described EPA's absolutist position as "illogical and impractical" because "[i]t posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration." In addition, the court observed that EPA's expansive view of Section 404(c) would "sow a lack of certainty into a system that was expressly intended to provide finality." This uncertainty motivated a number of amici to submit briefs explaining that "lenders and investors would be less willing to extend credit and capital if every project involving waterways could be subject to an open-ended

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risk of cancellation." Judge Jackson found that the danger of such economic harm bolstered the unreasonableness of EPA's position.

Judge Jackson's rejection of EPA's attempt to veto an already-issued Section 404 permit is important, first and foremost, because it emphasizes the importance of finality for Clean Water Act permit holders. Once a permit issues, the holder's sole responsibility is compliance with its terms. The decision is also noteworthy, however, in its broader criticism of EPA. Judge Jackson described EPA's attempt to increase its Section 404(c) powers as "stunning," and repeatedly criticized the agency's expansive reading of its statutory authority. Thus, Judge Jackson's strongly worded opinion could represent a step toward reigning in the agency's overreaches in other areas as well.

Dorsey & Whitney LLP attorneys Kathryn Kusske Floyd and Jay C. Johnson filed a brief on behalf of a coalition of amici curiae from various industries in Mingo Logan Coal Co., Inc. v. U.S. EPA.

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