

**Shifting Regulation for Mountaintop Mining  
Valley Fills and the Confusion it Creates:  
The Spruce No. 1 Mine—Inception to Current Litigation**

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I. Introduction

Although coal is mined in twenty-four U.S. states, one of the “principle coal basins” is in the Appalachian region,<sup>1</sup> primarily in Virginia and West Virginia. The steep topography of this area requires miners to implement surface mining techniques known as mountaintop mining (MTM). Appalachian coal seams are layered horizontally on the slopes of the mountains and, in order to expose these deposits, the top of the mountain is removed.<sup>2</sup> Once removed from the mountain, the soil swells creating excess material.<sup>3</sup> This excess material, known as overburden, cannot be put back into the mountain at the mine’s completion while maintaining the mountains original contour.<sup>4</sup> Instead, the miners create valley fills. Mountaintop mining valley fills (MTMVF) are the preferred method to get rid of mining overburden because they are both easy and relatively inexpensive to create.<sup>5</sup> The overburden is placed into adjacent valleys, often directly on top of intermittent or perennial streams.<sup>6</sup> Due to the many potential environmental impacts of MTMVF, including burying headwater streams, decrease in water quality, and decline

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<sup>1</sup> Stephen C. Braverman & Michael R. Braverman, *Regulation of Surface Coal Mining: The End of a Thirty-Year Balancing Act?*, NAT. RESOURCES & ENV'T, Summer 2012, at 28, 28-9, 33-5.

<sup>2</sup> *Id.* at 33.

<sup>3</sup> Benjamin Diamond, *Recent Developments in Mountaintop Removal Mining: West Virginia Rivers are not the Coal Industry’s Private Dump*, 6 ENVTL. LAW. 891, 891 (2000).

<sup>4</sup> *Id.*; See *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012).

<sup>5</sup> Jeffery W. Lilly, *Regulatory Violations in the Mining Industry: Mountaintop Removal Mine Valley Fills Violate the Federal Clean Water Act*, 100 W. VA. L. REV. 691, 692-702 (1998).

<sup>6</sup> Braverman, *supra* note 1, at 33.

in animal and plant species,<sup>7</sup> federal and state governments have enacted laws to regulate the creation of MTMVF.

Overlap in state and federal law makes MTMVF regulations confusing<sup>8</sup> to both the mine companies attempting to create the valley fills as well as the environmental groups trying to prevent them. Although there have been some attempts to clarify regulations, “[t]he cumulative impact of years of litigation and shifting regulatory actions have created a far less efficient and predictable permitting process.”<sup>9</sup> Through a case study analysis of the Spruce No. 1 Mine, from inception to current litigation, this paper gives a brief overview of some of the back and forth regulatory changes that have affected the process of obtaining a permit for MTMVF.

## II. Spruce No. 1 Mine

If a mining company intends to create valley fills, they must first apply for and obtain a section 404 permit pursuant to the Clean Water Act (CWA).<sup>10</sup> The permit program regulates Mountaintop mining and subsequent valley fill operations at multiple stages of the process. In order to properly understand the controversy in *Mingo Logan Coal Co. v. EPA*,<sup>11</sup> it is important to first look at the development of the Spruce No. 1 Mine before the issuance of a 404 permit by the Army Corps of Engineers (Corps).

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<sup>7</sup> Amy Oxley, Comment, *No Longer Mine: An Extensive Look at the Environmental Protection Agency's Veto of the Section 404 Permit Held by the Spruce No. 1 Mine*, 36 S. ILL. U. L.J. 139, 139–143, 148–154 (2011).

<sup>8</sup> See Benjamin Diamond, *supra* note 3, at 893.

<sup>9</sup> Braverman, *supra* note 1, at 35.

<sup>10</sup> 404 permits are issued by the Army Corp of Engineers and, if obtained, allow the mining company to discharge “dredge and fill material into navigable waters at specified sites.” Amy Oxley, *supra* note 7, at 141. The disposal sites, where the valley fill will be created, are subject to guidelines created by the EPA to protect against “unacceptable adverse effect” on the environment. *Id.*

<sup>11</sup> 850 F. Supp. 2d 133 (D.D.C. 2012).

Located in Logan County, West Virginia, the Spruce No. 1 Mine, owned by Mingo Logan Coal Company,<sup>12</sup> is one of the largest Appalachian surface mine operations in existence.<sup>13</sup> In order to create valley fills at the Spruce No. 1 site, Mingo had to acquire both a Surface Mining Control and Reclamation Act (SMCRA)<sup>14</sup> permit and CWA permit.<sup>15</sup> Although West Virginia issued a SMCRA permit, problems arose through the CWA permitting process. Claiming that the valley fills would have minimal adverse environmental effects,<sup>16</sup> Mingo originally applied for a nationwide permit<sup>17</sup> instead of an individual permit.<sup>18</sup> The Corps, responsible for the issuance of 404 permits under the CWA, proposed to approve the permit without first conducting an Environmental Impact Statement (EIS).<sup>19</sup> Litigation soon arose claiming that the Corps was not complying with the procedural requirements of the CWA in its issuance of several nationwide permits (including the Mingo permit) which allowed for mountaintop mining and valley fills for West Virginia mines.<sup>20</sup> Once the federal district court enjoined these permits, the Corps withdrew its authorization for a nationwide permit.<sup>21</sup> Mingo was left to consider alternative means of acquiring a permit.

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<sup>12</sup> Prior to 2005, Spruce No. 1 Mine was owned by Hobet Mining, Inc. Amy Oxley, *supra* note 7, at 148.

<sup>13</sup> *Id.*

<sup>14</sup> SMCRA was enacted 1977 as a response to severe environmental impacts of surface mining activities. Its purpose is “to create a nationwide program that would protect the environment from detrimental effects of surface coal mining.” Benjamin Diamond, *supra* note 3, at 893. A Department of Interior office called the Office of Surface Mining Reclamation and Enforcement (OSM) was created to “implement and enforce SMCRA.” *Id.*

<sup>15</sup> *Id.* at 895.

<sup>16</sup> *Id.*

<sup>17</sup> The Corps can issue two types of 404 permits: a nationwide permit and an individual permit. One of these, as well as a water-quality certification pursuant to Section 401, is needed before valley fill construction can begin. Jeffery W. Lilly, *supra* note 5, at 695.

<sup>18</sup> Mark A. Chertok, *Federal Regulations of Wetlands*, ST051 A.L.I.-A.B.A. 933, 1005 (2012).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Amy Oxley, *supra* note 7, at 148.

### III. Permitting Process

The process of obtaining a 404 permit can be lengthy.<sup>22</sup> The Spruce mine application is a prime example of how regulations affecting the environmental review of a fill permit can cause delays in the permit process. Also, for this case, shifting regulations result in a post-permit controversy over the environmental impacts of the proposed valley fills.

After litigation and environmental concerns caused Mingo to lose their nationwide 404 permit, they applied for an individual permit<sup>23</sup> to allow the discharge of material from the Spruce No. 1 Mine into several areas, including streams and valleys.<sup>24</sup> In compliance with the requirements of the CWA,<sup>25</sup> the Corps conducted an EIS in order to ascertain the impacts of the proposed discharge.<sup>26</sup> The EIS illustrated multiple environmental concerns with issuing a permit for the proposed site.<sup>27</sup> The continual back and forth between the Corps and the EPA, attempting to resolve problems explained in the EIS, caused the main delay during the permitting process. It took five years from the time the preliminary EIS draft was proposed<sup>28</sup> until the final copy was published.<sup>29</sup> In this case, the EPA was concerned enough over the environmental impacts of the proposed discharge and valley fills that they made sure to comment on every proposed EIS published by the Corps. In the beginning stages of the inquiry, the EPA was concerned because the EIS was not presenting sufficient information needed to determine the full environmental

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<sup>22</sup> Timothy J. Hagerty, *Non-Rapanos Litigation Updated: Selected Highlights*, ST047 A.L.I.-A.B.A. 289, 291–93 (2012).

<sup>23</sup> Amy Oxley, *supra* note 7, at 148.

<sup>24</sup> *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 135 (D.D.C. 2012).

<sup>25</sup> The EPA created specific guidelines that must be met in order for the Corps to issue a 404 permit. Section 404 (b)(1) guidelines are: (1) there are no practicable alternatives available with less environmental impact, (2) state water-quality standards and not violated, (3) the discharge cannot significantly harm US waters, and (4) minimization and mitigation for environmental harm. Amy Oxley, *supra* note 7, at 141-42.

<sup>26</sup> Timothy J. Hagerty, *supra* note 22, at 291.

<sup>27</sup> Amy Oxley, *supra* note 7, at 148.

<sup>28</sup> The preliminary EIS draft was published for comment in 2001 and the final EIS was not published until 2006. *Mingo*, 850 F. Supp. 2d at 135–36.

<sup>29</sup> *See id.*

impacts of the project.<sup>30</sup> Throughout the entire process the EPA, although still apprehensive, made it explicitly clear that they were willing to work with the Corps as well as Mingo in order to resolve possible adverse environmental impacts in a manner that worked for all three parties.<sup>31</sup> These communications continued even after the final EIS was published, and in December, the EPA notified the Corps that, in regards to the 404 permit, the EPA was not going to take the Spruce No. 1 Mine issue any further.<sup>32</sup> Throughout this entire process the EPA made no effort to use its CWA “veto”<sup>33</sup> power.<sup>34</sup>

On January 22, 2007, the Corps finally issued the 404 permit to Mingo.<sup>35</sup> This permit authorized the discharge of dredge and fill materials<sup>36</sup> into over eight acres of water in the form of stream segments.<sup>37</sup> The permit also allowed for the creation of six valley fills and several sedimentation ponds.<sup>38</sup> Concurrent with CWA guidelines, Mingo was also required to have several restoration and mitigation efforts.<sup>39</sup> The permit, although mentioning the Corps’ ability to reevaluate the decision at any time, did not mention whether or not the EPA has authority to do the same.<sup>40</sup> It was not until two years after the permit was issued that the EPA stepped in, asking the Corps to use their discretionary authority<sup>41</sup> to “suspend, revoke, or modify the

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<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> Hagerty, *supra* note 22, at 291.

<sup>33</sup> Under Section 404 (c) of the CWA, the EPA is authorized to prohibit or withdraw specifications for any area defined as a disposal site. Amy Oxley, *supra* note 7, at 142. Although used rarely, this authority is permitted if the EPA believes that designating a site as a disposal area will have “unacceptable adverse effects” on the environment. Chertok, *supra* note 18, at 943.

<sup>34</sup> Hagerty, *supra* note 22, at 291.

<sup>35</sup> *Id.*

<sup>36</sup> Dredge and fill material is defined as “any material created through a dredging operation” such as mining excavation. Amy Oxley, *supra* note 7, at 141; 40 C.F.R. § 232.2 (2010).

<sup>37</sup> Amy Oxley, *supra* note 7, at 148.

<sup>38</sup> *Id.*

<sup>39</sup> Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133, 136 (D.D.C. 2012).

<sup>40</sup> *Id.*

<sup>41</sup> 33 C.F.R. § 325.7; Chertok, *supra* note 18, at 1005.

permit.”<sup>42</sup> Despite EPA claims of new information regarding downstream impacts of the valley fills, the Corps rejected this request stating that there were no grounds to alter the permit.<sup>43</sup>

During this time, there was a lot of regulatory uncertainty due to recent alterations of the process used for reviewing the environmental impacts of mountaintop mining and valley fills. It is important to understand how these uncertainties may have caused the after-the-fact environmental effects that EPA was claiming. In June of 2009, two years after the permit was issued and several months before the EPA made its request, the EPA, Corps, and Department of Interior entered into a Memorandum of Understanding on Implementing the Interagency Plan on Appalachian Surface Coal Mining (MOU).<sup>44</sup> This MOU created the Enhanced Coordination Process (EC Process) and Multi-Criteria Integrated Resource Assessment (MCIR Assessment).<sup>45</sup> The MCIR Assessment was used to determine if pending 404 permits would require additional scrutiny under the new EC Process or if the (previously used) standard review process would suffice.<sup>46</sup> Using the MCIR Assessment the EPA, not the Corps, would use the CWA 404 guidelines to determine which of the applications needed “further review and coordination.”<sup>47</sup> The EPA would then instruct the Corps on the review process to which it should subject each application.<sup>48</sup>

The EPA made its delayed request for the Corps to suspend the Mingo permit on September 3, 2009, in the midst of these regulatory alterations.<sup>49</sup> At this time the EPA

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<sup>42</sup> *Id.* at 1005 (citing *Mingo*, 850 F. Supp. 2d at 136).

<sup>43</sup> *Id.*

<sup>44</sup> Memorandum of Understanding on Implementing the Interagency Plan on Appalachian Surface Coal Mining (June 11, 2009) (available as administrative record in Nat’l Mining Ass’n); Nat’l Mining Ass’n v. Jackson, 768 F. Supp. 2d 34 (D.D.C. 2011); Braverman & Braverman, *supra* note 1, at 34.

<sup>45</sup> Braverman & Braverman, *supra* note 1, at 34.

<sup>46</sup> MOU, *supra* note 44.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.*

<sup>49</sup> Hagerty, *supra* note 22, at 291.

distinguished seventy-nine pending 404 applications for heightened review through the EC Process instead of the traditional review process.<sup>50</sup> The EC Process, explained as a mere coordination effort, is seen rather as a means for the EPA to expand its role in issuing 404 permits.<sup>51</sup> Although adhered to during the time period of the Mingo permit, in 2011, the EC Process and MCIR Assessment were invalidated by a federal district court.<sup>52</sup> The implementation of this new process, followed by its eventual revocation exemplifies the regulatory confusion in the MTMVF permitting process.

The EPA used similar regulatory guidelines and processes, found in the 2009 MOU, to make its final decision to veto the Spruce No. 1 mine.<sup>53</sup> Shortly after the Corps refused to modify or revoke the Spruce permit, the EPA announced a proposal to use their 404(c) power to veto it.<sup>54</sup> The proposal announced the EPA's intent to withdraw the specification of several Spruce sites as disposal areas, claiming that they would have too adverse an environmental impact.<sup>55</sup> The Final Determination, issued January 13, 2011, withdrew specification for approximately eighty-eight percent of the area authorized for disposal by the permit.<sup>56</sup> Since the withdrawal in essence invalidates the permit, it is viewed as a veto of that permit.<sup>57</sup>

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<sup>50</sup> Braverman & Braverman, *supra* note 1, at 34.

<sup>51</sup> The CWA gives the Corps power to issue permits for dredge and fill material under Section 404. Benjamin Diamond, *supra* note 3. The EPA has the power to issue permits for the disposal of other pollutants under Section 402. Hagerty, *supra* note 22, at 178.

<sup>52</sup> On October 6, 2011, a federal district court ruled that the EPA exceeded its authority under the CWA and violated the Administrative Procedure Act by adopting the EC Process and MCIR Assessments. Braverman & Braverman, *supra* note 1, at 34; National Mining Association v. Jackson, 816 F. Supp. 2d. 37 (D.D.C. 2011).

<sup>53</sup> Taylor Kuykendall, *Ruling Against EPA Encourages Mine Association*, REG.-HERALD (Jan. 19, 2011), <http://www.register-herald.com/local/x233319435/Ruling-against-EPA-encourages-mine-association/print>.

<sup>54</sup> Amy Oxley, *supra* note 7, at 149.

<sup>55</sup> Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133 (D.D.C. 2012).

<sup>56</sup> Hagerty, *supra* note 22, at 291.

<sup>57</sup> Mingo, 850 F. Supp. 2d. at 151.

#### IV. *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*

Shortly after the EPA's 2010 proposed withdrawal was known, Mingo filed a complaint against the EPA in the District Court of the District of Columbia.<sup>58</sup> Primarily, the suit claimed that the EPA did not have the authority to veto a permit already issued by the Corps.<sup>59</sup> The court denied the EPA's motion to dismiss the case based on an amended complaint by Mingo.<sup>60</sup> The final complaint raised multiple issues, two of which are important for this paper:<sup>61</sup> (1) the EPA's power to veto already issued permits; and (2) the scope of the EPA's power under section 404(c) of the CWA.<sup>62</sup>

The court used a two-step analysis, known as the *Chevron*<sup>63</sup> test, to evaluate Mingo Logan's claims.<sup>64</sup> This test "governs a court's review of an agency's interpretation of a statute it is charged with administering."<sup>65</sup> First, the court determines whether Congress has ever expressly discussed the question at hand thereby illustrating its intent.<sup>66</sup> Second, if Congress has been silent or ambiguous on the issue, the court must then look to the agency's interpretation to determine if it was based on "a permissible construction of the statute."<sup>67</sup>

When applying the *Chevron* test to the EPA's interpretation of its veto power under section 404(c) of the CWA, the court determined that Congress did not expressly grant the EPA

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<sup>58</sup> Amy Oxley, *supra* note 7, at 150.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Two other issues that were raised: (1) Whether or not the EPA's veto usurped W. Virginia's regulatory authority under section 402 of the CWA and under SMCRA and (2) whether the EPA properly demonstrated the adverse environmental impacts for which it was basing the veto. Braverman & Braverman, *supra* note 1, at 34.

<sup>62</sup> *Id.*

<sup>63</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>64</sup> Braverman & Braverman, *supra* note 1, at 34.

<sup>65</sup> Hagerty, *supra* note 22, at 292.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 292.

the authority to make a post-permit veto.<sup>68</sup> According to the court, the EPA's claim of a continual revocation authority no matter the status of the permit is not mentioned anywhere in the CWA.<sup>69</sup> Due to ambiguous language of the CWA, the court then looked to the second part of the *Chevron* analysis.<sup>70</sup> The court found the EPA's interpretation to be not only "illogical and impractical,"<sup>71</sup> but also inconsistent with a previous Memorandum of Agreement between the EPA and the Corps, granting the Corps sole responsibility of 404 permits.<sup>72</sup>

On March 23, 2012, Judge Amy Berman Jackson granted Mingo's motion for summary judgment, ruling that the EPA exceeded its authority by attempting to invalidate the permit through withdrawing specifications of disposal sites.<sup>73</sup> Based on the *Chevron* analysis the court decided that "neither the statute nor the Memorandum of Agreement between the EPA and the Corps makes any provision for a post-permit veto, and the EPA had resorted to 'magical thinking' to justify its action revoking the permit . . . ."<sup>74</sup>

## V. Future Litigation

The court's decision in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency* is seen as finally resolving the "previously open question about the relationship between the EPA and the Corps in administering CWA Section 404 permits."<sup>75</sup> As of this decision, the EPA has no authority over 404 permits after the Corps issues the permit. Some view this decision as a serious loss to the EPA, but others point out that the decision does not benefit mining much

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<sup>68</sup> Hagerty, *supra* note 22, at 292

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Braverman & Braverman, *supra* note 1, at 34 (citing *Mingo Logan Coal Co. v. EPA*, 850 F. Supp. 2d 133, 151 (D.D.C. 2012)).

<sup>72</sup> Hagerty, *supra* note 22, at 292.

<sup>73</sup> Braverman & Braverman, *supra* note 1, at 34.

<sup>74</sup> Theodore L. Garrett, *In Brief*, ABA ENV'T TRENDS, 2012, at 10, 11 (citing *Mingo*, 850 F. Supp. 2d. at 152).

<sup>75</sup> Jeff Kray, *Federal Court Rejects After-the-Fact EPA Veto of Army Corps of Engineer's Water Quality Permit*, MARTEN LAW (Apr. 16, 2012), <http://www.martenlaw.com/newsletter/20120416-water-quality-permit-veto-rejected>.

either.<sup>76</sup> The decision creates great security that an existing permit, obtained by mining companies, cannot be vetoed by the EPA.<sup>77</sup> Still, the EPA believes its interpretation of the CWA is accurate and has therefore filed an appeal with the Court of Appeals for the District of Columbia Circuit.<sup>78</sup>

If the EPA loses on appeal, they may redouble their efforts to make sure an environmentally adverse permit does not reach this stage by making more vetoes prior to permits being issued. If, on the other hand, the EPA is successful in its appeal they may be able to use this authority as leverage when communicating with the Corps and applicants in reducing their environmental impacts.

## VI. Conclusion

Regulations involving mountaintop mining valley fills are still changing. The continual changes of regulations—creation and interpretation, enforcement, litigation, and revocation—has created a field of regulations which are unclear to both the mining companies wanting to create MTMVF and environmental organization seeking to stop them.<sup>79</sup> The upcoming appeal may provide some clarity as to the process of obtaining a permit as well as the proper authority of all the agencies involved.

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<sup>76</sup> Braverman & Braverman, *supra* note 1, at 34

<sup>77</sup> *Id.*

<sup>78</sup> Chertok, *supra* note 18, at 1005.

<sup>79</sup> *See* Diamond, *supra* note 3, at 893.