ARTICLES

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Justice Ginsburg Is Right: The EPA's Veto Authority Under the Clean Water Act Is "Hardly Reassuring" Against Evasive Polluters

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> *Coal has always cursed the land in which it lies. When men begin to wrest it from the earth it leaves a legacy of foul streams, hideous slag heaps and polluted air. It peoples this transformed land with blind and crippled men and with widows and orphans. It is an extractive industry, which takes all and restores nothing. It mars but never beautifies. It corrupts but never purifies.*
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> - Harry Caudill[1]

INTRODUCTION

On January 13, 2011, the U.S. Environmental Protection Agency ("EPA") made history.[2] The EPA issued its thirteenth veto in nearly half a century to shut down portions of the largest mountaintop removal mining project ever authorized in West Virginia, the Spruce No. 1 Mine.[3] This thirteenth veto was different from its twelve predecessors: it came two and a half years *after* the U.S. Army Corps of Engineers ("Corps") issued the Mingo Logan Coal Company a section 404 permit to discharge fill from the Spruce No. 1 Mine.[4] Mingo Logan immediately brought suit against the EPA, arguing that section 404(c) of the Clean Water Act ("CWA"), which gives the EPA its veto power, cannot be invoked after the Corps issues a permit.[5] The district court

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1 HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS, A BIOGRAPHY OF A DEPRESSED AREA x (1st ed. 1963).

2 *Stopping a Massive Mountaintop Removal Coal Mine*, EARTHJUSTICE, http://earthjustice.org/cases/2014/stopping-a-massive-mountaintop-removal-coal-mine (last visited Nov. 14, 2015).

3 U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA, 10 (2011), http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-_1_Mine_Final_Determination_011311_signed.pdf [hereinafter FINAL DETERMINATION].

4 Mingo Logan Coal Co. v. EPA (*Mingo Logan I*), 850 F. Supp. 2d 133, 137 (D.D.C. 2012). Section 404(a) of the Clean Water Act ("CWA") authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (2012).

5 *Mingo Logan I*, 850 F. Supp. 2d at 137. Section 404(c) of the CWA authorizes the EPA to issue a veto of a specified disposal site "whenever [it] determines . . . that the discharge

agreed and vacated the EPA's veto.[6] On appeal, the D.C. Circuit reversed and held that the EPA can veto a permit at any time because the EPA is the final authority on the discharge of mining waste.[7] On remand, the veto was upheld as reasonable and supported by the record.[8]

When the EPA initially issued its veto, West Virginia Senator Joe Manchin declared the decision "fundamentally wrong," "an unprecedented act," and "an irresponsible regulatory step."[9] The Senator's reaction is not surprising. The coal industry provides forty percent of electricity in the United States and plays an important part in West Virginia's economy.[10] Since the mid-1880s, the coal industry in Appalachia has produced over 12 billion tons of coal.[11] As demand for Appalachia's low sulfur coal increased, mining companies developed cheaper methods of extracting coal.[12]

One such method is called mountaintop removal mining, which involves removing the top of a mountain to expose and recover the coal within.[13] To expose a coal seam, "[mountains] are filled with as much as ten times the explosives used in the Oklahoma City bombing [and] then detonated in series."[14] This process produces excess dirt and rock ("spoil") that cannot be returned to the mined area.[15] Typically, mining

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of [dredged and/or fill] material[] 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) (2012).

6 *Mingo Logan I*, 850 F. Supp. 2d at 153.

7 Mingo Logan Coal Co. v. EPA (*Mingo Logan II*), 714 F.3d 608, 613 (D.C. Cir. 2013).

8 Mingo Logan Coal Co. v. EPA (*Mingo Logan III*), 70 F. Supp. 3d 151, 170 (D.D.C 2014).

9 John M. Broder, *Agency Revokes Permit for Major Coal Mining Project*, N.Y. TIMES (Jan. 13, 2011), http://www.nytimes.com/2011/01/14/science/earth/14coal.html.

10 Robert Johnson, *Wait Until You See What Our Coal Addiction Is Doing to West Virginia*, BUSINESS INSIDER, (Feb. 14, 2014, 10:04 AM), http://www.businessinsider.com /west-virginia-coal-mining-2014-2.

11 Paul A. Duffy, *How Filled Was My Valley: Continuing the Debate on Disposal Impacts*, 17 NAT. RESOURCES & ENV'T. 143, 143 (2003).

12 *Id.* at 144.

13 CLAUDIA COPELAND, CONG. RESEARCH SERV., RS21421, MOUNTAINTOP MINING: BACKGROUND ON CURRENT CONTROVERSIES 1 (2015); *see also* Johnson, *supra* note 10 (providing images of the process and effects of mountaintop removal mining in West Virginia).

14 Sam Evans, *Voices From The Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 521, 524 (2010).

15 COPELAND, *supra* note 13, at 1.

companies place the spoil in adjacent valleys, burying streams and creating valley fills.[16]

Mountaintop removal mining significantly harms the environment.[17] In West Virginia, for example, mining companies extract coal from the oldest mountains in the world, which are "home to 255 species of birds, 78 types of mammals, 58 different reptiles, and 76 various amphibians."[18] The overall effects of mountaintop removal mining include: large scale deforestation, permanent losses of streams, reduction of species in mined areas, and increases in minerals that cause deformities in aquatic life found downstream of mined areas.[19] Studies additionally show higher incidences of chronic illnesses, birth defects, and mortality among individuals living in coal-mining areas compared to individuals living in non-coal-mining areas.[20]

To operate a mountaintop removal mine, a company must comply with the CWA.[21] Known as the "cornerstone" of the CWA, section 301

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16 *Id.*

17 In 2005, several agencies, including the EPA and the Corps, conducted a study on mountaintop mining in Appalachia and concluded the following: approximately seven percent of forest area "has been or may be affected by recent and future (1992–2012) mountaintop mining"; species such as songbirds and salamanders have left mined areas; "1200 miles of headwater streams (or 2% of the streams in the study area) were directly impacted by [mountaintop removal mining]"; and streams in mined areas show an increase of minerals and more pollutant-tolerant macroinvertebrates and fish. *See* U.S. ENVTL. PROT. AGENCY, MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 4 (2005).

18 Johnson, *supra* note 10.

19 *See* Diana Kaneva, *Let's Face Facts, These Mountains Won't Grow Back: Reducing the Environmental Impact of Mountaintop Removal Coal Mining in Appalachia*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 931, 933 (2011) (noting that mountaintop mining has destroyed 300 square miles of forest as of 2007); *see also* M.A. Palmer et al., *Mountaintop Mining Consequences*, 327 SCI. 148, 148 (2010) (explaining that streams below valley fills show increases in pH, electrical conductivity, and total dissolved solids, which corresponds to deformities in fish and reproductive failure in fish and birds).

20 *See, e.g.*, Michael Hendryx & Melissa M. Ahern, *Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost*, 124 PUB. HEALTH. REP. 541, 542, 547 (2009) (showing mortality rates increases); *Chronic Illness Linked to Coal-Mining Pollution, Study Shows*, SCIENCEDAILY, Mar. 27, 2008, http://www.sciencedaily.com /releases/2008/03/080326201751.htm ("[A]s coal production increases, so does the incidence of chronic illness."); Melissa M. Ahern, et al., *The Association Between Mountaintop Mining and Birth Defects Among Live Births in Central Appalachia, 1996–2003*, 111 ENVTL. RESEARCH 838, 838–46 (2011) (noting increased birth defects).

21 *See* Chantz Martin, Comment, *The Clean Water Act Suffers a Crushing Blow: The U.S. Supreme Court Clears the Way for the Mining Industry to Pollute U.S. Waters [*Coeur Alaska, Inc. v. Southwest Alaska Conservation Council*, 129 S. Ct. 2458 (2009)]*, 49 WASHBURN L.J. 933, 940–41 (2010). Typically, mining operations require a section 402

deems it unlawful to discharge a pollutant except when that discharge complies with CWA sections 301, 306, 402, and 404, among others.[22] Sections 301 and 306 instruct the EPA to establish effluent limitations and standards of performance, respectively, for certain categories of discharges.[23] Under section 402, the EPA may "issue a permit for the discharge of any pollutant" that complies with any applicable effluent limitation or standard of performance.[24] Under section 404, the Corps may "issue permits . . . for the discharge of dredged or fill material into navigable waters at specified disposal sites."[25]

In 2009, it was an open question as to whether EPA pollution-control standards promulgated pursuant to sections 301 and 306 applied to section 404 discharges of dredged or fill material. The Supreme Court answered this question in the negative in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*.[26] In this case, Coeur Alaska, Inc. operated a froth-flotation mine that discharged slurry into a lake and claimed that it did not have to comply with an EPA standard of performance because slurry qualified as fill material under section 404.[27] The discharge was lawful, the argument went, because fill material was not subject to EPA standards of performance.[28] The Court agreed.[29] In a dissenting opinion, Justice Ginsburg voiced concerns, stating industries might attempt to "gain immunity" from pollution-control standards by turning their pollutants into fill.[30] In response, Justice Breyer contended that the EPA's veto authority would safeguard against such a result.[31] Justice Ginsburg found this solution "hardly reassuring."[32]

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permit to discharge pollutants from a point source within the mine and a section 404 permit to discharge fill material. *See* Kaneva, *supra* note 19, at 944.

22 33 U.S.C. § 1311(a) (2012); *see also* Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs (*SEACC II*), 486 F.3d 638, 644–45 (9th Cir. 2007), *rev'd sub nom*. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) (internal quotation marks omitted).

23 33 U.S.C. §§ 1311, 1316 (2012).

24 *Id.* § 1342(a).

25 *Id.* § 1344(a).

26 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 286 (2009).

27 *Id.* at 268.

28 *Id.*

29 *Id.* at 286.

30 *Id.* at 302 (Ginsburg, J., dissenting).

31 *Id.* at 293 (Breyer, J., concurring).

32 *Id.* at 303 n.5 (Ginsburg, J., dissenting).

The purpose of this paper is to examine this debate between Justice Breyer and Justice Ginsburg—whether the EPA's veto authority is an effective safeguard against evasive polluters—in light of the D.C. Circuit's expansive interpretation of the EPA's veto authority in *Mingo Logan v. EPA* ("*Mingo Logan II*").

The paper is divided into four parts. Part one describes the permitting process, which explains sections 301, 306, 402, and 404 of the CWA and the definition of fill material adopted in 2002. Part two reviews *Coeur Alaska*, including the parties' arguments before the Court, the majority opinion, Justice Breyer's concurring opinion, and Justice Ginsburg's dissenting opinion. Part three discusses the facts and outcome of *Mingo Logan II*. Part four analyzes the significance and limitations of *Mingo Logan II* on the Justice Breyer and Justice Ginsburg debate, concluding that competing considerations reduce the effectiveness of the EPA's veto. This finding confirms Justice Ginsburg's assertion that the EPA's veto authority is "hardly reassuring" to thwart polluters evading pollution-control standards.

I
THE PERMITTING PROCESS OF THE CWA

In 1972, Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[33] One particular aim of the CWA is to eliminate "the discharge of pollutants into the navigable waters" of the United States.[34] With these goals in mind, the CWA provides two permitting regimes, discussed *infra*, that companies must comply with in order to operate mountaintop removal mines.

A. Sections 301, 306, 402, and 404 of the CWA

The "cornerstone" of the CWA is section 301, which declares it "unlawful" to discharge a pollutant except when that discharge complies with CWA sections 301, 306, 402, and 404, among others.[35] Section 301 instructs the EPA to adopt stringent effluent limitations for the discharge of pollutants from point sources, and once this limitation is promulgated, section 301(e) requires its application to all

33 33 U.S.C. § 1251 (2012).

34 *Id.* § 1251(a)(1).

35 *Id.* § 1311(a); *see also SEACC II*, 486 F.3d at 644–45 (internal quotation marks omitted).

discharges.[36] This scheme also exists in section 306 in which the EPA promulgates standards of performance that apply to all discharges.[37]

These effluent limitations and standards of performance are implemented through section 402 of the CWA, the National Pollutant Discharge Elimination System ("NPDES") permit program, which authorizes the EPA to "issue a permit for the discharge of any pollutant[] or combination of pollutants."[38] The NPDES program is the "linchpin" of the CWA for it transforms applicable pollution-control standards into obligations for each discharger who holds a section 402 permit.[39] Mountaintop removal mining projects require section 402 permits for discharges of pollutants "from a point source within the min[e]."[40] A mountaintop removal mining project, however, could not obtain a section 402 permit for the discharge of spoil into valley fills because "valley fills would have a hard time meeting th[e] standard[s]" set forth in sections 301 and 306.[41] For these discharges, the CWA sets forth an additional permitting program under section 404, which "operates as an exception to section 402."[42]

A section 404 permit allows for the discharge of dredged or fill material.[43] Specifically, section 404(a) authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into navigable

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36 33 U.S.C. § 1311(b), (e) (2012). Effluent limitations are restrictions on "quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters." *Id.* § 1362(11) (2012).

37 33 U.S.C. § 1316(b), (e) (2012). Standard of performance "means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." *Id.* § 1316(a)(1).

38 33 U.S.C. § 1342(a) (2012). The CWA defines "the discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source" and "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(12), (6).

39 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 300 (2009) (Ginsburg, J., dissenting).

40 Kaneva, *supra* note 19, at 944.

41 Evans, *supra* note 14, at 539.

42 *Id.*

43 33 U.S.C. § 1344(a) (2012).

waters at specified disposal sites."[44] Section 404(b)(1) requires the Corps to apply guidelines developed by the EPA to determine whether to issue a section 404 permit.[45] These guidelines require the Corps to determine the effects of the proposed discharge on the "physical, chemical, and biological components of the aquatic environment."[46] Section 404(c) subjects the Corps' permitting authority to EPA oversight.[47] Specifically, section 404(c) states:

> 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.[48]

In other words, the EPA can veto a specified disposal site whenever it determines that the discharge of fill material will have unacceptable adverse effects.

The EPA takes several steps to issue its veto.[49] First, the Regional Administrator notifies the District Engineer that it intends to issue a proposed determination to prohibit or withdraw a specified site.[50] If the District Engineer does not show that corrective action will be taken, the Regional Administrator publishes the proposed determination.[51] Individuals may comment on the proposed determination, and the Regional Administrator may hold a public hearing.[52] After the comment period, the Regional Administrator prepares a recommended

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44 *Id.*

45 *Id.* § 1344(b)(1).

46 40 C.F.R. § 230.11 (2015).

47 33 U.S.C. § 1344(c) (2012).

48 *Id.*

49 *See generally* Amy Oxley, *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 (2011).

50 40 C.F.R. § 231.3(a)(1) (2015).

51 *Id.* § 231.3(a)(2).

52 *Id.* § 231.4(a)–(b).

determination to prohibit or withdraw a specified site.[53] The Administrator then reviews the recommended determination and consults the Chief Engineer and permittee concerning corrective action.[54] Finally, the Administrator makes "a final determination affirming, modifying, or rescinding the recommended determination."[55]

B. The Definition of Fill Material

Whether a discharge falls under the section 402 or section 404 permitting regime depends on whether that discharge meets the fill definition adopted in 2002. The CWA does not define "fill material," and, for much of section 404's history, the Corps and the EPA defined fill material differently.[56] In 1977, the Corps adopted a primary purpose test which defined fill material as:

> [A]ny material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.[57]

This definition remained until 2002.[58] The EPA, on the other hand, adopted an effects-based test in 1980, defining fill material as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose."[59]

In 2002, the Corps and the EPA adopted the EPA's effects-based test, defining fill material as follows:

> [T]he term fill material means material placed in waters of the United States where the material has the effect of: (i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States . . . [e]xamples of such fill material include, but are not limited to: rock,

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53 *Id.* § 231.5(a).

54 *Id.* § 231.6.

55 *Id.*

56 *See generally* Nathaniel Browand, *Shifting the Boundary Between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material*, 31 B.C. ENVTL. AFF. L. REV. 617 (2004).

57 33 C.F.R. § 323.2(e) (2001).

58 Browand, *supra* note 56, at 625.

59 *Id.* at 626.

> sand, soil, clay plastics, construction debris, wood chips, overburden from mining or excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.[60]

Significantly, the lawfulness of the 2002 fill definition is an open question.[61] In *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, a mining company sought a section 404 permit to build fills and sediment ponds where it intended to dump excess mining spoil.[62] The EPA and the Corps changed the definition of fill material "a few days before" the district court rendered its opinion.[63] Notwithstanding the rule change, the district court granted an injunction to prevent the Corps from issuing the permit, holding that the "issuance of . . . permits solely for waste disposal" is unlawful and that the 2002 fill definition "exceed[ed] the agencies' statutory authority granted by the CWA."[64] On appeal, the Fourth Circuit vacated and reversed the district court, holding the fill definition was not limited to beneficial use and that the district court "reached beyond the issues" when it declared the 2002 fill definition illegal.[65]

Additionally, in *Coeur Alaska*, the parties did not challenge the validity of the fill definition.[66] At oral argument, the Justices demonstrated an interest in the issue. For example, in questioning the Solicitor General, Justice Souter stated, "I find it very difficult to get a handle on this case without dealing with [the validity of the fill definition]."[67] Additionally, Justice Ginsburg asked both the Solicitor General and Petitioners about the primary purpose test that existed prior to 2002. To the Solicitor General, she asked: "How could the [fill definition] be settled, because isn't it a fact that before 2002 if the

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60 33 C.F.R. § 323.2 (e)(1) (2002). Commenters contend that the Bush Administration's political agenda motivated this change. *See, e.g.*, Kaneva, *supra* note 19, at 951; Evans, *supra* note 14, at 541–54; Matt Wasson, *Obama Administration Can Still Protect Streams from Mountaintop Removal Mining, Despite Setback in DC Court*, HUFFINGTON POST, Aug. 8, 2012, http://www.huffingtonpost.com/matt-wasson/mountaintop-removal-mining_b_1738551.html. Others explain that a circuit court split motivated the agencies. *See, e.g.*, Martin, *supra* note 21, at 942 n.91; Browand, *supra* note 56, at 632.

61 *See* Evans, *supra* note 14, at 548.

62 Kentuckians for Commonwealth, Inc. v. Rivenburgh (*Rivenburgh II*), 317 F.3d 425, 430–31 (4th Cir. 2003).

63 *Id.* at 438.

64 Kentuckians for Commonwealth, Inc. v. Rivenburgh (*Rivenburgh I*), 204 F. Supp. 2d 927, 945–46 (S.D. W. Va. 2002), *rev'd* 317 F.3d 425 (4th Cir. 2003).

65 *Rivenburgh II*, 317 F.3d at 439, 442.

66 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 276 (2009).

67 Oral Argument at 7, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) (Nos. 07-984, 07-990), 2009 WL 62119 at *7.

primary purpose was disposing of waste that the 402 permit applied?"[68] To Petitioner, she commented: "[U]ntil 2002 . . . if the only reason of raising the elevation of the lake was to dispose of waste, you didn't get a 404 permit."[69] Ultimately, this issue was not before the Court, and the majority opinion indicated that Respondent, in a subsequent action, "could claim that the fill regulation as interpreted is an unreasonable interpretation of § 404."[70]

II
THE PERMITTING PROCESS IN THE SUPREME COURT: *COEUR ALASKA*

Coeur Alaska is not a case about coal mining; rather, it involves a gold mining company seeking a section 404 permit for a discharge that is simultaneously subject to a standard of performance under section 306. Significantly, *Coeur Alaska* raises concerns about whether the EPA's veto is a sufficient safeguard against polluters seeking a section 404 permit to circumvent pollution-control standards imposed on section 402 permitees.

A. Factual Background

Forty-five miles south of Juneau, Coeur Alaska, Inc. planned to reinvigorate the Kensington Gold Mine by constructing a froth-flotation mill facility.[71] This process involves transporting ore-bearing rock from the mine to a mill and, once at the mill, churning, crushing, and grinding the rock.[72] The finely-ground rock is then fed into a tank in which chemicals and air attach to gold deposits, lifting them to the surface.[73] After the gold deposits are skimmed off the top of these tanks, the tailings—residual rock—remain as waste.[74] Coeur Alaska initially proposed to dispose of the tailings via a "dry tailings facility" in which the mine would deposit the tailings on nearby wetlands.[75]

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68 *Id.* at 7–8.

69 *Id.* at 20.

70 *Coeur Alaska*, 557 U.S. at 276.

71 Brief for Petitioner Coeur Alaska, Inc. at 5, *Coeur Alaska*, 557 U.S. 261 (Nos. 07-984, 07-990), 2008 WL 4278528 at *5.

72 *SEACC II*, 486 F.3d 638, 641 (9th Cir. 2007).

73 *Id.*

74 *Coeur Alaska*, 557 U.S. at 267.

75 *SEACC II*, 486 F.3d at 641.

When the price of gold dropped, Coeur Alaska sought a different disposal option: discharging the tailings directly into nearby Lower Slate Lake.[76] The plan involved piping 210,000 gallons of wastewater, including 1,440 tons of tailings, each day in the form of slurry, which resulted in raising the elevation of the lake to fifty feet and killing the entire population of the lake's fish and nearly all aquatic life.[77] Once operations ended, Coeur Alaska would reclaim the lake and restore the fish population.[78]

Early on, the EPA recognized the adverse effects of discharging waste from mines using this froth-flotation technique.[79] Pursuant to sections 301 and 306, in 1982, the EPA issued effluent limitations and standards of performance for sources within the ore-mining category, including gold mining.[80] Specifically, for gold mines using froth-flotation, the EPA issued a zero-discharge standard.[81] In other words, the EPA categorically precluded gold mines using froth-flotation from discharging processed wastewater into navigable waters of the United States.[82]

Concluding that the slurry raised the elevation of the lake and thus fell within section 404 of the CWA, the Corps disregarded the EPA performance standard and issued Coeur Alaska a section 404 permit to discharge slurry into Lower Slate Lake.[83]

B. Procedural Background

The Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") brought suit against

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76 Brief for Petitioner Coeur Alaska, Inc., *supra* note 71, at *6.

77 *Coeur Alaska*, 557 U.S. at 296–97 (Ginsburg, J., dissenting).

78 Brief for Petitioner Coeur Alaska, Inc., *supra* note 71, at *6. Respondents argued that "[t]he discharge would kill all fish in Lower Slate Lake . . . [and] [w]hether aquatic life would be able to repopulate . . . is uncertain." Brief for Respondents Se. Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation, *Coeur Alaska*, (Nos. 07-984, 07-990), 2008 WL 4892761 at *4 [hereinafter Brief for Respondent SEACC].

79 Brief for Respondent SEACC at 8, *Coeur Alaska*, 557 U.S. 261 (Nos. 07-984, 07-990), at *8.

80 Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (U.S. Envtl. Prot. Agency 1982) (to be codified at 40 C.F.R. pt. 440).

81 40 C.F.R. § 440.104(b)(1) (1988).

82 *Id.*

83 *Coeur Alaska*, 557 U.S. at 268.

the Corps in the District Court of Alaska.[84] Coeur Alaska, Inc. and the State of Alaska intervened.[85] SEACC argued that, because the section 404 permit did not comply with the EPA's restriction on froth-flotation mines it violated sections 306(e) and 311(e) of the CWA. Or, in the alternative, the regulation defining fill material was contrary to the CWA.[86] Coeur Alaska and the State of Alaska claimed that the discharge of slurry from the mine was not subject to pollution-control standards because it met the fill definition and thus fell under the section 404 permitting regime, not section 402.[87]

The district court agreed with Coeur Alaska and the State. The court addressed SEACC's first argument in a footnote, explaining that sections 301 and 306 were inapplicable if slurry fell within the 2002 fill definition.[88] The court then focused on SEACC's second argument and held that the fill definition was not contrary to the CWA because Congress "clearly and unequivocally" gave the agencies authority to issue regulations necessary to execute the CWA and thus are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[89] The district court also explained that plaintiffs incorrectly overlooked statements in the adoption statement of the fill definition, which stated that "slurry" and "tailings" fell within the definition of fill material.[90] Accordingly, the district court granted summary judgment in favor of Coeur Alaska and the State of Alaska.[91]

The Ninth Circuit reversed the district court on two grounds.[92] First, the Ninth Circuit held that the plain language of the CWA requires that

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84 Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs (*SEACC I*), No. 1:05-CV-00012-JKS, 2006 WL 5483382 (D. Alaska Aug. 3, 2006), *rev'd*, 479 F.3d 1148 (9th Cir. 2007).

85 *Id.* at *1.

86 *Id.* at *2–3.

87 *Id.*

88 *Id.* at *3 n.35.

89 *Id.* at *4. When interpreting a statute entrusted to an agency, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. requires courts to conduct a two-step analysis: first, a court examines "whether Congress has directly spoken to the precise question at issue," and if so, the court "give[s] effect to the unambiguously expressed intent of Congress;" if the "statute is silent or ambiguous with respect to the specific issue," courts then defer to the agency as long as its interpretation is "based on a permissible construction of the statute." 467 U.S. 837, 843 (1984).

90 *SEACC I*, 2006 WL 5483382, at *5.

91 *Id.*

92 *SEACC II*, 486 F.3d at 644.

the EPA pollution-control standards trump section 404.[93] After finding that the regulations were "at odds" with each other, the Ninth Circuit analyzed the language of sections 301 and 306. Section 301(e) "applies effluent limitations established by the EPA to *all* discharges," and section 306(e) "prohibits *any* discharge that does not comply with performance standards promulgated by the EPA."[94] Here, the Ninth Circuit found that sections 301 and 306 are blanket prohibitions and that no language in the CWA indicates an exception for section 404.[95]

Second, the Ninth Circuit held that neither the Corps nor the EPA intended for the "regulatory definition of 'fill material' to replace the performance standard for froth-flotation mills."[96] The court relied on the following three conclusions to support this finding: (1) the EPA issued its performance standard precluding froth-flotation without making an exception for section 404 discharges; (2) in adopting the fill definition, the agencies did not intend to change their long-standing practice in which the EPA regulates discharges subject to effluent limitations; and (3) the Corps communicated to Coeur Alaska during the permitting process that section 404 does not regulate froth-flotation discharges.[97] Accordingly, the Ninth Circuit found that the Corps violated the CWA by issuing a permit to Coeur Alaska for discharges prohibited under an EPA performance standard pursuant to sections 301 and 306 of the CWA.[98]

C. The Supreme Court's Decision

Petitioners' and Respondents' arguments before the Court both employed a *Chevron* framework, but Petitioners focused on section 404 and Respondents focused on section 306.[99] Specifically, Petitioner Coeur Alaska, Petitioner State of Alaska, and Federal Respondents argued the following: (1) the plain language of section 404 gives the Corps a clear mandate to issue permits for material that falls within the fill definition; (2) the plain language does not place any qualification on this authority; and (3) the section 404(b)(1) guidelines do not require

93 *Id.*
94 *Id.* at 642.
95 *Id.* at 648.
96 *Id.*
97 *Id.* at 649–53.
98 *Id.* at 655.
99 *Id.* at 640–43.

section 404 permits to comply with EPA's effluent limitations.[100] As Solicitor General Garre stated in oral argument, "fill material trumps effluent."[101] Alternatively, Petitioners and Federal Respondents contended that if the Court found section 404 ambiguous, the agencies' past practice indicated that fill material had never been subject to effluent limitations.[102]

Respondent SEACC focused on section 306, contending that its plain language categorically bars discharges not in compliance with a standard of performance.[103] From this, Respondent SEACC argued that a discharge subject to a standard of performance, such as the slurry from the Kensington Mine, must fall within section 402 because section 404 does not provide for compliance with section 306.[104] Alternatively, Respondent SEACC argued that if the Court found section 306 ambiguous, the agencies' intent—which aimed to keep discharges subject to effluent limitations within the EPA's control—should govern.[105]

The Court agreed with Petitioners. Justice Kennedy authored the majority opinion in which Chief Justice Roberts and Justices Thomas,

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100 Brief for Petitioner Coeur Alaska, Inc., *supra* note 71, at *11–12 ("Section 404, however, gives the Corps a clear mandate and unambiguous instructions with respect to the issuance of permits for the discharge of fill material, and there is no dispute here that the Corps followed the commands of Section 404 to the letter."); Brief for Petitioner State of Alaska at 20, *Coeur Alaska*, (Nos. 07-984, 07-990), 2008 WL 4278529 at *20 ("The plain language of Section 404 authorized the Corps to grant the permit at issue."); Brief for the Federal Respondents Supporting Petitioners at 14, *Coeur Alaska*, (Nos. 07-984, 07-990), 2008 WL 4278530 at *14 ("The Act and the Section 404(b)(1) Guidelines require that discharges of fill material comply with toxic effluent limitations promulgated under Section 307, but they do *not* require compliance with other effluent limitations.").

101 Oral Argument, *supra* note 67, at 5.

102 Brief for Petitioners Coeur Alaska, Inc., *supra* note 71, at *14 ("[T]he regulatory history further demonstrates that the Fill Rule applies to '*any* mining-related material that has the effect of fill when discharged.'"); Brief for Petitioners State of Alaska at 23, *Coeur Alaska*, (Nos. 07-984, 07-990), 2008 WL 4278529 at *23 ("[F]ormal agency regulations have consistently provided that: (1) discharges of fill material do not require EPA permits; (2) all such discharges are subject instead to the Corps' authority under Section 404; and (3) such permits may be granted without strict adherence to EPA-promulgated effluent limitations."); Brief for the Federal Respondents Supporting Petitioners at 17, *Coeur Alaska*, (Nos. 07-984, 07-990), 2008 WL 4278530 at *17 ("The Ninth Circuit's selective reliance on statements from the preamble to the fill rule and on other regulatory history cannot trump the . . . agencies' controlling construction of that text.").

103 Brief for Respondent SEACC, *supra* note 78, at *20–21.

104 *Id.* at *21.

105 *Id.* at *23.

Breyer, and Alito joined, as well as Justice Scalia in part.[106] Justice Scalia wrote an opinion concurring in part and in judgment,[107] Justice Breyer wrote a concurring opinion,[108] and Justice Ginsburg wrote a dissenting opinion in which Justices Stevens and Souter joined.[109]

1. The Opinion of the Court

The Court reversed the Ninth Circuit on two grounds.[110] First, the Court found that the Corps had authority to issue a section 404 permit for the slurry discharge.[111] Relying on the plain language of section 404 and EPA regulations, the Court concluded that section 404 does "not limit [the Corps'] power," and EPA regulations do not preclude discharges subject to an EPA standard of performance.[112]

Second, the Court analyzed the statutory text, the agencies' regulations, and the EPA's interpretation of those regulations to conclude that section 306 does not apply to section 404 discharges.[113] The Court found that the statutory text and formal agency regulations were ambiguous and did not resolve the tension between the sections.[114] Accordingly, the Court employed *Chevron* Step Two and deferred to a 2004 Memorandum written by the Director of the EPA's Wetlands, Oceans, and Watersheds to the Director of the EPA's Office of Water.[115] The 2004 Memorandum interpreted a formal EPA regulation, clarifying that effluent limitations did not apply to the tailings in Lower Slate Lake for the Kensington Mine.[116] From here, the Court provided factors as for why the Memorandum should receive deference, including that the Kensington Mine was not a "project that smuggle[d] a discharge of EPA-regulated pollutants into a separate discharge of Corps-regulated fill material."[117] Concerns for such

106 *Coeur Alaska*, 557 U.S. at 265–91.

107 *Id.* at 295–96 (Scalia, J., concurring in part and in judgment).

108 *Id.* at 291–94 (Breyer, J., concurring).

109 *Id.* at 296–304 (Ginsburg, J., dissenting).

110 *Id.* at 290–91.

111 *Id.* at 277, 286.

112 *Id.* at 276.

113 *Id.* at 277.

114 *Id.* at 281–82 ("On the one hand, [section] 306 provides that a discharge that violates an EPA new source performance standard is 'unlawful' . . . [and] [o]n the other hand, [section] 404 grants the Corps blanket authority to permit the discharge of fill material . . . .").

115 *Id.* at 282.

116 *Id.* at 284.

117 *Id.* at 285.

projects arose in both Justice Breyer's concurrence and Justice Ginsburg's dissent, highlighting a potential loophole in the permitting process and demonstrating a need for adequate safeguards.

2. Justice Breyer's Concurrence and Justice Ginsburg's Dissent

Justice Breyer and Justice Ginsburg separately discussed the potential for polluters to evade pollution control standards. Justice Breyer found that subjecting section 404 permits to performance standards would be "unnecessarily strict," and CWA "safeguards" prevent polluters from "turning a 'pollutant' governed by [section] 306 into 'fill' governed by [section] 404."[118] Namely, the EPA's veto is one such safeguard.[119]

Justice Ginsburg disagreed, contending that the majority's interpretation of the CWA's permitting scheme provides an "escape hatch" to "[w]hole categories of regulated industries" that may "gain immunity" so long as the pollutant "contains sufficient solid matter to raise the bottom of a water body."[120] Justice Ginsburg stated that this "loophole" would swallow "standards governing mining activities," citing several EPA performance standards for ore mining and dressing, coal mining, and mineral mining.[121] In response to Justice Breyer's solution, Justice Ginsburg noted that the EPA's veto is rarely used and that the "unacceptable adverse effects" standard is ineffective.[122] Justice Ginsburg pointed to the case at bar as an example, and questioned why destroying an entire population of fish was not "unacceptable" enough to invoke the EPA's veto.[123] Accordingly, Justice Ginsburg characterized the veto as a "hardly reassuring" safeguard against evasive polluters.[124]

III
THE VETO IN THE D.C. CIRCUIT: *MINGO LOGAN II*

In *Mingo Logan II*, the D.C. Circuit ratified the EPA's retroactive use of its veto authority to shut down portions of the Spruce No. 1 Mine.

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118 *Id.* at 292–93 (Breyer, J., concurring).

119 *Id.* at 293.

120 *Id.* at 302–03 (Ginsburg, J., dissenting).

121 *Id.*

122 *Id.* at 303 n.5.

123 *Id.*

124 *Id.*

This expansive interpretation of the EPA's authority has the potential to transform the EPA veto into an effective safeguard against polluters seeking to take advantage of the permitting process.

A. Factual Background

Mingo Logan owned and operated the Spruce No. 1 Mine in West Virginia at the time the EPA issued its Final Determination.[125] As originally proposed, the project required "construct[ing] six valley fills [and] associated sediment structures" to discharge "fill material into the Right Fork of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch and their tributaries."[126] As a result, this discharge would "disturb approximately 2,278 acres (about 3.5 square miles) and bury approximately 7.48 miles of streams beneath 110 million cubic yards of excess spoil."[127] The Spruce No. 1 Mine was one of the largest mountaintop removal mining projects ever authorized in West Virginia.[128]

Mingo Logan applied for section 402 and section 404 permits to operate the Spruce No. 1 Mine. The EPA approved a section 402 permit authorizing Mingo Logan to discharge wastewater from sediment ponds into nearby streams.[129] Mingo Logan sought a section 404 permit to discharge fill into the Right Fork of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch and their tributaries.[130] Beginning in 1998, the Corps and the EPA reviewed Mingo Logan's section 404 permit and communicated about the project's effects on the surrounding habitat.[131] In 2002, the Corps issued a draft Environmental Impact Statement ("EIS") to which the EPA "found gaps in the analyses of the mine and related adverse environmental impacts."[132] In 2006, the Corps issued another draft EIS to which the EPA again expressed concerns about water quality, proposed mitigation efforts, environmental justice, and the cumulative effects of multiple mining operations.[133] Months later, on September 22, 2006, the Corps issued its final EIS to which

125 FINAL DETERMINATION, *supra* note 3, at 6.

126 *Id.*

127 *Id.*

128 *Id.* at 15.

129 *Mingo Logan III*, 70 F. Supp. 3d 151, 154 (D.D.C. 2014).

130 FINAL DETERMINATION, *supra* note 3, at 19.

131 *Id.* at 18.

132 *Mingo Logan III*, at 158.

133 FINAL DETERMINATION, *supra* note 3, at 18–19.

the EPA noted "its concerns had not been adequately addressed."[134] On January 22, 2007, the Corps issued Mingo Logan a section 404 permit despite the EPA's lingering concerns.[135]

Nearly three years later, on September 3, 2009, EPA Region III requested that the Corps use its authority under 33 C.F.R. § 325.7 to "suspend, revoke, or modify" Mingo Logan's section 404 permit, citing new information and recent data that revealed inadequately addressed impacts.[136] When the Corps denied this request, the regional administrator published a proposed determination to veto specification of the Pigeonroost and Oldhouse Branch streams as disposal sites for section 404 discharges, and subsequently solicited and received over 50,000 comments.[137] After this comment period, on September 24, 2010, the regional administrator submitted its recommended determination to EPA headquarters.[138] Though the EPA provided Mingo Logan, the Corps, and other project proponents an opportunity to propose corrective action, Mingo Logan ultimately did not do so.[139]

On January 13, 2011, the EPA issued its Final Determination purporting to veto the "specification of [the] Pigeonroost Branch, Oldhouse Branch and their tributaries . . . as a disposal site for dredged or fill material in connection with construction of the Spruce No. 1 Surface Mine."[140] The EPA based its Final Determination on two grounds: (1) the fill discharge would bury approximately 6.6 miles of high-quality headwater streams, causing unacceptable adverse effects to wildlife habitat; and (2) the fill discharge would transform these streams into sources of pollutants that will impact wildlife downstream.[141]

B. Procedural Background

After EPA Region III published its proposed determination, Mingo Logan filed a fourteen-count complaint in the U.S. District Court for

134 *Id.* at 19.

135 *Mingo Logan III*, at 159.

136 FINAL DETERMINATION, *supra* note 3, at 21.

137 *Id.*

138 *Id.* at 22.

139 *Id.* at 24.

140 *Id.* at 6.

141 *Id.*

the District of Columbia.[142] Once the EPA issued its Final Determination, Mingo Logan amended its complaint and challenged the EPA's veto under the Administrative Procedure Act ("APA").[143] Parties filed cross-motions for summary judgment, and the district court entered an order requiring "argument [solely] on the question of whether the EPA had authority under section 404(c) of the Clean Water Act to withdraw its specification of the disposal site *after* the Corps had already issued a permit under section 404(a) of the Clean Water Act (Count I)."[144]

After hearing argument, the district court granted summary judgment in favor of Mingo Logan and held that the "EPA exceeded its section 404(c) authority."[145] To reach this conclusion, the district court reviewed the EPA's interpretation of section 404(c) under *Chevron*.[146] Under *Chevron* step one, the district court held that the statute's plain language did not "clearly state that the EPA can withdraw its consent at any time, or whenever it sees fit, or even just 'whenever.'"[147] Moreover, as explained by the district court, section 404 as a whole and its legislative history indicated that the EPA could only invoke its veto before the Corps issued a permit.[148] After finding the statute ambiguous, the district court moved to *Chevron* step two and found that the EPA's interpretation of section 404(c) was unreasonable because it "posit[ed] a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration."[149] The court concluded that interpreting section 404(c) to allow the EPA to veto a permit post-issuance would undermine CWA's principles of finality and certainty.[150]

C. The D.C. Circuit Opinion

On appeal, the D.C. Circuit reversed and held that the EPA can invoke its veto authority at "*any* time."[151] Judge Henderson authored the opinion and, under *Chevron* step one, reasoned that the language of

142 *Mingo Logan II*, 714 F.3d 608, 611 (D.C. Cir. 2013).
143 *Id.*
144 *Mingo Logan I*, 850 F. Supp. 2d 133, 137 (D.D.C. 2012) (emphasis added).
145 *Id.* at 137–38.
146 *Id.*
147 *Id.* at 140.
148 *Id.* at 144, 147.
149 *Id.* at 152.
150 *Id.*
151 *Mingo Logan II*, 714 F.3d 608, 613 (D.C. Cir. 2013).

section 404(c) unambiguously "imposes *no* temporal limits on the [EPA's] authority to withdraw the Corp's specification [and] instead expressly empower[s] [the EPA] to prohibit, restrict or withdraw the specification '*whenever*' [the EPA] makes a determination that the statutory 'unacceptable adverse effect' will result."[152] The D.C. Circuit focused on the word, 'whenever,' reasoning that Congress purposefully used "the expansive conjunction" and that, under the dictionary definition, 'whenever' meant "[a]t whatever time, no matter when."[153] The court further explained that the "unambiguous language [of the statute] manifest[ed] the Congress's intent to confer on EPA a *broad* veto power extending beyond the permit issuance."[154]

The court additionally reviewed and rejected Mingo Logan's arguments on statutory language and legislative history. The court did not agree that the language of section 404(c) required that the EPA withdraw a site specification before a permit is issued simply because specification itself occurs before a permit is issued.[155] Additionally, the court rejected Mingo Logan's contention that the EPA's interpretation conflicted with section 404 "as a whole."[156] Here, the court emphasized the plain meaning of section 404(c) and stated not once, but twice, that the EPA has the *final* word on site specification.[157] Lastly, the court found that the legislative history did not foreclose a veto post-issuance.[158] Accordingly, the D.C. Circuit remanded the action to the district court to address the merits of Mingo Logan's APA challenge.[159]

On remand, the remaining issue was whether the EPA's Final Determination withdrawing the Pigeonroost Branch and Oldhouse Branch as disposal sites was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[160] Mingo Logan attacked the sufficiency of EPA's conclusions in its Final Determination, but the district court concluded that the Final Determination "provided a reasonable explanation" for the veto to

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152 *Id.* at 613 (first emphasis added).

153 *Id.*

154 *Id.* (emphasis added).

155 *Id.* at 614.

156 *Id.* at 615 (internal quotation marks omitted).

157 *Id.* at 614.

158 *Id.* at 616.

159 *Id.*

160 *Mingo Logan III*, 70 F. Supp. 3d 151, 161 (D.D.C 2014).

which the court must defer.[161] Accordingly, the district court granted summary judgment in favor of the EPA.[162]

IV
THE SIGNIFICANCE AND LIMITATIONS OF *MINGO LOGAN II* FOR *COEUR ALASKA*

In *Mingo Logan II*, the D.C. Circuit found that section 404(c) imposes no temporal restriction on the EPA and vests final authority in the EPA during the permitting process. This decision supports Justice Breyer's contention found in *Coeur Alaska* that the EPA's veto is an effective safeguard against evasive polluters. At the same time, competing considerations limit the D.C. Circuit's broad interpretation of the EPA's veto authority and, ultimately, outweigh the significance of *Mingo Logan*.

A. The Significance of Mingo Logan II

The literal import of *Coeur Alaska* is that performance standards do not apply to fill material, which may allow companies seeking to discharge pollutants to potentially sidestep EPA performance standards by turning such pollutants into fill material. As a result, the Supreme Court's decision in *Coeur Alaska* favors the mining industry, which is typically subject to EPA effluent limitations and standards of performance.[163] Mining companies might "apply to the Corps to try and discharge chemicals that should be regulated by the EPA" or "strategically think[] of ways to qualify their discharge for the less stringent 404 permits from the Corps."[164]

Despite this concern, *Mingo Logan II* improves the landscape *Coeur Alaska* left behind for the following three reasons. First, the D.C. Circuit opinion validated the EPA's role within the permitting process. Specifically, the court stated section 404 confers on the EPA a "broad veto power extending beyond the permit issuance."[165] Moreover, the court found that section 404 as a whole "makes equally clear . . . that

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161 *Id.* at 162.

162 *Id.*

163 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 302 (2009) (Ginsburg, J., dissenting) (listing effluent limitations and performance standards for ore mining and dressing and mineral mining).

164 Kory R. Watson, Comment, *Fill Material Pollution Under the Clean Water Act: A Need for Legislative Change*, 35 S. ILL. U. L.J. 335, 349 (2011).

165 Mingo Logan Coal Co. v. EPA (*Mingo Logan II*), 714 F.3d 608, 613 (D.C. Cir. 2013).

[the EPA] has, in effect, the *final* say."[166] The court reiterated this conclusion, stating "the statute expressly vests *final* authority over [site specification in the EPA]."[167] At bottom, polluters aiming to manipulate the permitting process must pass muster with the EPA.

Second, the D.C. Circuit emphasized that section 404(c) imposes no temporal restriction on the EPA's authority to veto a specified site.[168] The court based this conclusion on *Chevron* step one, focusing on the word 'whenever' in section 404(c).[169] Specifically, Congress's use of the "expansive conjunction 'whenever' . . . made plain its intent to grant the Administrator authority to [exercise its veto] at *any* time,"[170] confirming that the EPA is not subject to a prescribed timeline. Thus, *Mingo Logan II* opens the proverbial door for the EPA's review of previously issued section 404 permits.

Third, *Mingo Logan II* sends a powerful message to mining companies considering the case's factual background.[171] The Spruce No. 1 Mine was the largest mountaintop removal mine ever authorized in West Virginia.[172] If operated as planned, the Spruce No. 1 Mine would have supported $220 billion worth of economic activity each year.[173] Furthermore, the Final Determination itself "block[ed] an additional $250 million investment and 250 well-paying American jobs."[174] The D.C. Circuit's ratification of the EPA's veto in light of such promising economic returns informs polluters of the economic risks involved with manipulating the permitting process.

By emphasizing the EPA's final authority in the permitting process, confirming the EPA's retroactive use of the veto, and cautioning polluters of economic risks, *Mingo Logan II* challenges Justice

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166 *Id.* at 614.

167 *Id.* (emphasis added).

168 *Id.* at 613.

169 *See id.*; *see also* Jason Bailey, *Clean Water Act, Section 404 Application: May the Odds be Ever in your Favor*, 3 AM. U. BUS. L. REV. 457, 466–68 (2014).

170 *Mingo Logan II*, 714 F.3d at 613.

171 *See* Bailey, *supra* note 170, at 481 (noting the D.C. Circuit opinion leaves business and investors "no safety net if they find themselves in a *Mingo Logan* situation").

172 FINAL DETERMINATION, *supra* note 3, at 10.

173 Bryan Walsh, *Mining: The EPA Vetoes a Mountaintop Removal Mine—and Industry Opponents Fire Back*, TIME, Jan. 13, 2011, http://science.time.com/2011/01/13/mining-the-epa-vetoes-a-mountaintop-removal-mine—and-industry-opponents-fire-back/.

174 *Id.* (quoting Kim Link, a spokeswoman for Arch Coal, the company that now owns the Spruce Mine).

Ginsburg's contention that the EPA veto is not an effective safeguard.[175] The question, however, is whether that challenge is enough to thwart evasive polluters.

B. The Limitations of Mingo Logan II

Notwithstanding the significance of *Mingo Logan II*, competing considerations limit the EPA veto as an effective safeguard against evasive polluters. These limitations include: the EPA's own reluctance to invoke its veto authority, the uncertainty of the CWA's citizen suit provision to compel the EPA to invoke its veto, coal's economic influence at every level of government, changes in Administrations, and current legislative challenges to section 404(c) of the CWA.

1. EPA's Use of its Veto and the CWA's Citizen Suit Provision

Since the CWA's enactment in 1972, the EPA has exercised its veto a total of thirteen times, including its first retroactive veto of the Spruce No. 1 Mine.[176] Moreover, three of those thirteen vetoes occurred within the last twenty-five years.[177] Assuming the Corps reviews 60,000 permits per year, the Corps has evaluated 2.5 million permits since 1972; this means the EPA has used its veto 0.0005% of the time in the past forty-two years.[178] As a result, the EPA's veto is extraordinarily rare. Current EPA Administrator Gina McCarthy confirmed this rarity, stating "[t]his is not something that the agency does very often."[179] Naturally, the EPA's reluctance to use its veto undercuts Justice Breyer's reliance on section 404(c) and reduces the significance of *Mingo Logan II*.

Given the rarity of the EPA veto, a citizen suit provision allowing individuals to compel the EPA to use its veto might strengthen Justice Breyer's position. The CWA's citizen suit provision provides that "any citizen may commence a civil action . . . against the [EPA] where there is alleged a failure of the [EPA] to perform any act or duty under [the

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175 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 303 (2009) (Ginsburg, J., dissenting).

176 *See* U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 404(C) "VETO AUTHORITY" FACT SHEET, http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf.

177 *See id.*

178 *See id.* (60,000 permits per year x 42 years = 2,520,000 permits; (13 vetoes/2,520,000 permits) x 100 = 0.0005%).

179 Kate Sheppard, *Senators Seek to Curb EPA Authority on Mine Waste Disposal*, HUFFINGTON POST, Apr. 15, 2014, http://www.huffingtonpost.com/2014/04/15/epa-clean-water-act-mining_n_5153913.html.

CWA] which is not discretionary."[180] Whether the EPA's veto authority is nondiscretionary is disputed among circuit courts. In *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, in which plaintiffs challenged a proposed highway construction project, the Eleventh Circuit affirmed a lower court's decision to dismiss plaintiffs' claim under the CWA's citizen suit provision.[181] The court explained that the term, 'authorize,' found in section 404(c) suggests a discretionary function and "[b]ecause the [EPA's veto] power is discretionary, the citizen suit provision of the Clean Water Act does not apply."[182] The D.C. Circuit agreed with the Eleventh Circuit in *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, in which plaintiffs challenged the construction of a reservoir.[183] In that case, the D.C. Circuit found that the "veto power . . . is discretionary" and the "EPA cannot be sued under the [citizen suit provision] for failing to veto the issuance of the permit."[184]

Conversely, in *National Wildlife Federation v. Hanson*, in which environmental groups complained about the EPA's failure to invoke its veto authority, the Fourth Circuit found that section 404(c) is not discretionary, stating "[the citizen suit provision] should be interpreted . . . to allow citizens to sue the [EPA] [when] . . . the [EPA] fails to exercise the duty of oversight imposed by section [404(c)]."[185] Although dicta, lower courts have interpreted *Hanson* "to mean that the EPA's section 404(c) oversight duty is nondiscretionary."[186] The

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180 33 U.S.C. § 1365(a)(2) (2012).

181 Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1249 (11th Cir. 1996).

182 *Id.*

183 Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 1, 3 (D.C. Cir. 2007).

184 *Id.* at 4–5. Significantly, the D.C. Circuit found that the CWA citizen suit provision does not preclude suits under the APA. *Id.* at 9. The court explained that the APA does not "bar judicial review of EPA's failure to veto [a] permit simply because that failure constitute[s] alleged inaction." *Id.* The court then concluded that a reviewing court has subject matter jurisdiction over a claim alleging that the EPA wrongly failed to exercise discretion in their favor under section 706(2) of the APA, which permits courts to hold unlawful and set aside agency action found to be arbitrary and capricious. *Id.* at 9–10.

185 Nat'l Wildlife Federation v. Hanson, 859 F.2d 313, 316 (4th Cir. 1988).

186 Christopher D. Eaton, *Judicial Limitation of the EPA's Oversight Authority in Clean Water Act Permitting of Mountaintop Mining Valley Fills*, 2 MICH. J. ENVTL. & ADMIN. L. 225, 254 (2012).

Supreme Court has not decided whether the veto is nondiscretionary.[187] Without such clarity, citizens may or may not be able to compel the EPA to invoke its veto authority, producing another limit on the EPA's use of its veto power.

2. Coal's Economic Influence on the Legislative, Executive, and Judiciary Branches

The coal industry itself is an additional obstacle preventing the EPA from freely invoking its authority under section 404(c).[188] In her dissent, Justice Ginsburg subtly raised such a concern, stating "[g]iven today's decision, it is optimistic to expect that [the] EPA or the courts will act vigorously to prevent evasion of performance standards."[189] Coal's influence on the legislative, executive, and judiciary branches prevents such vigorous action.

The coal industry contributes millions of dollars to state and federal political candidates. In *Let's Face Facts, These Mountains Won't Grow Back: Reducing the Environmental Impact of Mountaintop Removal Coal Mining in Appalachia*, Diana Kaneva detailed the contributions running from coal to state candidates.[190] Citing a report from the Institute on Money in State Politics, Kaneva reported that coal mining contributed "at least $8.57 million to state-level political candidates and party committees" between 1999 and 2005.[191] In West Virginia, the coal industry gave "$2 million to gubernatorial campaigns, $1.5 million to state legislative races, and $529,332 to Supreme Court candidates" during 1996 to 2004.[192] For example, Senator Manchin—the West Virginia Senator who pledged to fight the EPA's veto of the Spruce No. 1 Mine[193]—received $285,000 from the mining industry from 2000 to 2008 to run for Secretary of State and Governor of West

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187 The discretionary nature of the EPA veto arose during an exchange between Justice Scalia and Respondent SEACC's counsel during oral argument in *Coeur Alaska*. In response to one of Justice Scalia's questions concerning the veto, Respondent stated that "the veto authority is a discretionary authority" to which Justice Scalia responded, "right." Oral Argument, *supra* note 67, at 47. This may or may not reflect Justice Scalia's viewpoint on whether the veto is discretionary. In any event, this exchange is not binding on any court and was not pertinent to the issues before the Court in *Coeur Alaska*.

188 Kaneva, *supra* note 19, at 954.

189 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 303 n.5 (2009) (Ginsburg, J., dissenting).

190 Kaneva, *supra* note 19, at 954.

191 *Id.*

192 *Id.*

193 Broder, *supra* note 9.

Virginia.[194] As a result, "running a political campaign against the coal industry in the Appalachian region is an election failure guarantee."[195]

Coal additionally extends its influence at the federal level. The Center for Responsive Politics reported that the coal industry contributed approximately $11 million during the 2014 election cycle with 96% of those contributions delivered to Republican candidates.[196] Arch Coal, the current owner of the Spruce No. 1 Mine, was the sixth highest contributor, giving 89.8% of its $415,575 donation to Republicans.[197] Notably, West Virginia Senator Manchin is the only Democrat "among the top twenty recipients of campaign money from the mining industry," receiving over $600,000.[198] Moreover, Senator Mitch McConnell, the Senate Majority Leader, received the second highest amount of contributions from coal mining.[199] Significantly, Senator McConnell's top priority is to rein in the EPA.[200]

The mining industry also contributes heavily to the executive branch, particularly donating millions of dollars to Republican presidential candidates. In the 2012 election, for example, presidential candidate Mitt Romney raised "more than $600,000 from mining

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194 Pete Quist, *Names in the News: Gov. Joe Manchin*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, (Aug. 8, 2010), http://beta.followthemoney.org/research/institute-reports/names-in-the-news-gov-joe-manchin/.

195 Mark Baller & Leor Joseph Pantilat, *Defender's of Appalachia: The Campaign To Eliminate Mountaintop Coal Mining and the Role of Public Justice*, 73 ENVTL. L. 629, 656 (2007) (quoting an interview with Joe Hecker, the Environmental Enforcement Director at Public Justice).

196 *Coal Mining: Long-Term Contribution Trends*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/industries/totals.php?cycle=2014&ind=E1210 (last visited Nov. 14, 2015).

197 *Coal Mining: Top Contributors to Federal Candidates, Parties, and Outside Groups*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/industries/contrib.php?cycle=2014&ind=E1210 (last visited Nov. 14, 2015).

198 Evan Osnos, *Chemical Valley*, THE NEW YORKER, Apr. 7, 2014, http://www.newyorker.com/magazine/2014/04/07/chemical-valley.

199 *Coal Mining: Top Recipients*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/industries/recips.php?cycle=2014&ind=E1210 (last visited Nov. 14, 2015).

200 Morgan Winsor, *Sen. Mitch McConnell 'Going To War' With Obama Over Coal*, INTERNATIONAL BUSINESS TIMES (Nov. 15, 2014), http://www.ibtimes.com/sen-mitch-mcconnell-going-war-obama-over-coal-1724366; *see also* Ari Phillips, *Mitch McConnell Says His Top Priority Is To 'Get The EPA Reined In*, THINKPROGRESS (Nov. 7, 2014), http://thinkprogress.org/climate/2014/11/07/3590277/mcconnell-priority-rein-epa/.

interests" by August 2012.[201] In the 2008 election, President Barak Obama was not among the list of the top twenty recipients of contributions from coal while Senator John McCain raised $121,276 from the industry.[202]

West Virginia politics is illustrative of coal's influence on presidential elections. Prior to electing President George W. Bush in 2000, the state had not voted for a non-incumbent Republican presidential candidate since 1928.[203] President Franklin D. Roosevelt established Democratic control of the state when he developed relief programs during the Great Depression, and President John F. Kennedy did the same when he promised to introduce aid to combat poverty in Appalachia.[204] In 1999, Karl Rove, Bush's campaign strategist, opened eighteen offices across West Virginia and sought donations from the coal industry, receiving triple the amount from the previous election.[205] Bush's campaign convinced voters that the state's coal industry was under attack by the Clinton Administration, citing President Clinton's support of *Bragg v. Robertson*, in which a West Virginia district court issued an injunction blocking a mountaintop removal mining project.[206] West Virginians grew concerned that the ruling would eliminate jobs and, in the 2000 election, voted for President Bush.[207] West Virginia has voted for a Republican nominee ever since.[208]

Lastly, the judiciary is not wholly immune from the influence of coal mining interests. At the state level, industry "pours money into state Supreme Courts,"[209] rendering it difficult for elected judges to remain completely free from partiality and sympathy.[210] An extreme example

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201 Paul Blumenthal, *Mitt Romney Energy Plan Favors Big Donors in Oil, Gas and Coal Industries*, HUFFINGTON POST (Aug. 24, 2012), http://www.huffingtonpost.com/2012/08/24/mitt-romney-energy-plan_n_1826681.html.

202 Aaron Kierch, *Coal Mining: Background*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/industries/recips.php?cycle=2008&ind=E1210 (last updated June 2015).

203 Osnos, *supra* note 198.

204 *Id.*

205 *Id.*; *see also* Kaneva, *supra* note 19, at 955 (noting that coal mining contributed close to $4 million to George W. Bush's campaign).

206 John Judis, *King Coal*, THE AMERICAN PROSPECT (Dec. 5, 2002), http://prospect.org/article/king-coal-0.

207 *Id.*

208 Betsy Woodruff, *Goodbye West Virginia*, SLATE (Oct. 29, 2014, 8:38 PM), http://www.slate.com/articles/news_and_politics/politics/2014/10/republicans_are_turning_west_virginia _red_how_the_democrats_lost_control.html.

209 Kaneva, *supra* note 19, at 955.

210 *Id.*

of coal's influence on the judiciary came before the Supreme Court in *Caperton v. A. T. Massey Coal, Co.*[211] In this case, a West Virginia jury returned a verdict that found defendant Massey Coal liable for "fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations" and awarded plaintiff Caperton $50 million in damages.[212] After the verdict but before the defendant's appeal, West Virginia held judicial elections, in which Donald Blankenship, the defendant's President, Chief Executive Officer, and Chairman, donated $3 million to then attorney Brent Benjamin's campaign for a position on the West Virginia Supreme Court of Appeals—the court that would hear the appeal of the *Caperton* verdict.[213] Benjamin won the election and, after denying plaintiff's recusal motion, presided over the appeal and reversed the jury verdict.[214] Justice Benjamin denied two subsequent motions requesting his recusal.[215] The Supreme Court remanded the action, finding that the "extraordinary contributions were made at a time when Blankenship had a vested stake in the outcome," and "due process require[d] recusal."[216]

Additionally, at the federal level, the increase of Republican politicians over the last twenty-five years has corresponded to an increase in judicial appointments in federal courts.[217] Republican Administrations "have transformed the judiciary into a much more conservative branch."[218] For example, after the Fourth Circuit overturned two key district court opinions that held valley fills illegal, it gained the reputation "as friendly to the coal industry."[219]

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211 Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

212 *Id.* at 872.

213 *Id.* at 873–74.

214 *Id.* at 874.

215 *Id.* at 875.

216 *Id.* at 872.

217 Baller & Pantilat, *supra* note 195, at 657.

218 *Id.*

219 Evans, *supra* note 14, at 532; *see also* Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 759 (2009) ("The United States Court of Appeals for the Fourth Circuit, the federal circuit court covering Virginia, has a reputation as the most conservative appeals court in the country.").

The industry's ability to contribute funding to individuals at every level of government is "pervasive and disturbing."[220] More importantly, coal industry contributions can potentially influence environmental policies and judicial decisions at the state and federal level, simultaneously solidifying a favorable atmosphere for mining projects and an unfavorable atmosphere for the EPA veto.

3. Changes in Administrations

The political agenda of the Administration in charge may also impact the EPA's veto authority and reduce its ability to prevent polluters seeking to evade CWA sections 301 and 306. The White House not only appoints agency heads but also exerts political pressure on certain agencies to align regulations with party interests.[221] For example, the controversial 2002 fill definition demonstrates how three different Administrations influenced agencies with party political objectives.

The development of the 2002 fill definition began in 1999 when *Bragg* threatened the practice of mountaintop removal mining.[222] In *Bragg*, the district court found, among other things, that the Corps did not have authority to regulate fill material from mountaintop removal mining projects when discharged "for the primary purpose of waste disposal."[223] The Fourth Circuit ultimately reversed the injunction on sovereign immunity grounds, but upheld a settlement agreement between plaintiffs and the Federal defendants in which the Clinton Administration promised to closely examine mountaintop removal mining permits.[224] From here, the Clinton Administration proposed a fill definition that "would allow mining debris to be deposited in streams, but only as part of a comprehensive approach that would

220 Kaneva, *supra* note 19, at 956.

221 For example, a New York Times article published an account from an EPA official that indicated the EPA was "told to take our clean water and clean air cases, put them in a box, and lock it shut." Charles Duhigg, *Clean Water Laws are Neglected, at a Cost in Suffering*, N.Y. TIMES, Sept. 12, 2009, http://www.nytimes.com/2009/09/13/us/13water.html.

222 Bragg v. Robertson (*Bragg I*), 72 F. Supp. 2d 642 (S.D. W. Va. 1999), *rev'd sub nom.* Bragg v. W. Va. Coal Ass'n (*Bragg II*), 248 F.3d 275 (4th Cir. 2001).

223 *Id* at 657.

224 *Bragg II*, 248 F.3d at 286; *see also* Settlement Agreement, Bragg v. Robertson, Civ. No. 2:98-0636 (S.D. W. Va. Dec. 23, 1998) *available at* http://www.epa.gov/region03/r3pol/hsettle.pdf.

address long-term environmental concerns."[225] The proposal failed due to the upcoming election.[226]

During his presidential campaign, President Bush attacked the Clinton Administration for its approval of *Bragg* and promised the coal industry to "expand" and not limit "energy supplies . . . in Appalachia."[227] Shortly after the election, environmentalists brought suit against the Corps in *Kentuckians for the Commonwealth v. Rivenburgh* to challenge the dumping of mining waste into streams.[228] At this time, President Bush revived the Clinton rule but changed "the kinds of materials that could be classified as 'fill.'"[229] Consequently, a few days before the district court rendered the *Rivenburgh* decision, the Bush Administration redefined "mining debris . . . to 'fill' rather than 'waste.'"[230] Though the district court granted plaintiffs' motion for summary judgment, contending that the "rewriting [of the fill definition] exceed[ed] the authority of administrative agencies," the Fourth Circuit reversed, holding that the district "reach beyond the issues" when it declared the fill definition unlawful.[231] Accordingly, mountaintop removal mining "grew exponentially" under President Bush's Administration.[232]

When President Obama entered office, "more than one hundred surface mining permit applications were pending with the Corps."[233] Although in a January 2010 interview EPA Administrator Lisa Jackson mentioned that the EPA was considering a revision of the fill rule and

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225 Joby Warrick, *Appalachia Is Paying Price for White House Rule Change*, WASH. POST, Aug. 17, 2004, at A01, http://www.washingtonpost.com/wp-dyn/articles/A6462-2004Aug16.html.

226 *Id.*

227 Christopher Drew & Richard A. Oppel Jr., *Mines to Mountaintops: Rewriting Coal Policy; Friends in the White House Come to Coal's Aid*, N.Y. TIMES, Aug. 9, 2004, http://www.nytimes.com/2004/08/09/us/mines-mountaintops-rewriting-coal-policy-friends-white-house-come-coal-s-aid.html.

228 Kentuckians for the Commonwealth, Inc. v. Rivenburgh (*Rivenburgh I*), 204 F. Supp. 2d 927 (S.D. W. Va. 2002).

229 Joby Warrick, *supra* note 225.

230 Jessica Adams, Note, *One Little Word Can Make All the Difference: Literal Interpretation Leads to Lake Destruction*, 17 MO. ENVTL. L. & POL'Y REV. 436, 441 (2010).

231 Kentuckians for the Commonwealth, Inc. v. Rivenburgh (*Rivenburgh II*), 317 F.3d 425, 438 (4th Cir. 2003).

232 Laura K. Bomyea, *Dynamite, Disaster and Disappearing Options: How the EPA is Losing the Battle Against Destructive Mountaintop Removal Coal Mining Practices*, 6 ALB. GOV'T L. REV. 224, 233 (2012).

233 *Id.* at 241.

stated her staff was 'working on it now,'"[234] the Obama Administration did not approach the backlog of surface mining permit applications by changing the fill definition.[235] Instead, the Obama Administration—the EPA, the Department of the Interior, and the Corps—initiated the following policies to curb mountaintop removal mining: a 2009 Memorandum outlining Enhanced Coordination Procedures, a 2010 Interim Detailed Guidance Memorandum, and a 2011 Final Detailed Guidance Memorandum to improve agency review of mining projects.[236] As a result, the Administration has slowed issuance of section 404 permits to a "trickle."[237]

The above history of the 2002 fill definition serves to highlight the difficulties of adopting consistent environmental policy regarding mining operations and the CWA. In the same vein, the *Coeur Alaska* Court relied on an EPA memorandum to render its decision that section 306 did not apply to section 404. Given an Administration's influence on an agency's policy and position, it stands to reason that the EPA could simply issue a new memorandum that promulgates a rule that states section 306 does apply to section 404.[238] The ease with which agency policies can be changed renders the EPA's veto vulnerable to the edicts of the Administration in charge.

4. Current Legislative Challenges to the EPA's Veto Authority

An additional limitation of *Mingo Logan II* is current legislative action attempting to curb the EPA's authority under section 404(c). After the EPA issued its Final Determination of the Spruce Mine, the 111th and 112th Congresses introduced bills to delete section 404(c) and remove the EPA's veto authority altogether.[239] Other proposals aimed to reduce the EPA's veto authority by imposing deadlines on the

234 Paul Quinlan, *EPA Loses Enthusiasm for Swift Rollback of Bush 'Fill Rule,'* N.Y. TIMES, Feb. 25, 2011, http://www.nytimes.com/gwire/2011/02/25/25greenwire-epa-loses-enthusiasm-for-swift-rollback-of-bus-27352.html.

235 *Id.* In February 2011, the EPA issued the following statement: "We don't have plans to move forward at this time with guidance or rulemaking on the definition of fill material." *Id.*

236 Bomyea, *supra* note 232, at 242–45.

237 *Id.*

238 David R. Struwe, Casenote, *Muddying the Waters of the Clean Water Act: Applying Chevron Deference to the CWA Pollutant Permit Regulatory Scheme in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 171, 199 (2010).

239 *See* COPELAND, *supra* note 13, at 16.

EPA, elevating the decision to higher agency officials, or precluding retroactive vetoes.[240]

After *Mingo Logan II*, the 113th Congress introduced four bills targeting section 404(c).[241] Two bills, H.R. 524 and S. 830, aimed to prohibit the EPA from issuing vetoes retroactively.[242] The third bill, S. 2156, sought to limit section 404(c) actions by precluding the EPA from issuing vetoes retroactively and invalidating vetoes previously issued retroactively, such as the Spruce No. 1 Mine.[243] The fourth bill, H.R. 4854, would require the EPA to wait for the Corps to render a permit before exercising its veto authority.[244]

In short, section 404(c) is politically vulnerable. If the above-mentioned bills succeed, the EPA is completely removed from the section 404 permitting process, rendering *Mingo Logan II* wholly insignificant. While Justice Ginsburg deemed the EPA veto as "hardly reassuring," the lack of an EPA check on the Corps' permitting authority could produce the precise results raised in her dissent: polluters turning discharges subject to effluent limitations and standards of performance into fill material.[245]

CONCLUSION

The EPA sent a powerful message to the coal industry with the veto of the Spruce No. 1 Mine. Despite promising economic returns, the EPA focused on the harmful effects of mountaintop removal mining and took a giant leap toward achieving the CWA's forty-two year old goals.

Mingo Logan II additionally has the potential to thwart polluters attempting to manipulate the CWA permitting process. In *Coeur Alaska*, Justice Ginsburg exposed a potential "loophole" in the CWA permitting regime and raised concerns that "[w]hole categories of regulated industries" may "gain immunity" from pollution control standards by turning pollutants into fill material.[246] In response, Justice

240 *See id.*

241 *See id.* at 16–17.

242 H.R. 524, 113th Cong. (2014); S. 830, 113th Cong. (2014).

243 S. 2156, 113th Cong. (2014).

244 H.R. 4854, 113th Cong. (2014).

245 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 303 n.5 (2009) (Ginsburg, J., dissenting).

246 *Id*. at 302.

Breyer cited the EPA's veto authority as an effective safeguard against such a result.[247] *Mingo Logan II* supports Justice Breyer's position and improves the landscape *Coeur Alaska* left behind.

At the same time, Justice Ginsburg rightly expressed her skepticism in response to Justice Breyer's reliance on the EPA's veto.[248] Competing considerations limit the significance of *Mingo Logan II*. These include: the rarity in which the EPA invokes it veto, the uncertainty surrounding the CWA's citizen suit provision, the coal industry's economic influence at every stage of government, changes in Administrations, and current legislative challenges to the veto.[249] In short, Justice Ginsburg is correct in saying that the EPA's veto is "hardly reassuring" as an effective safeguard against evasive polluters.[250]

Mingo Logan II is a powerful step in regulating mountaintop removal mining, but the decision may not be powerful enough. As Henry Caudill writes, coal "is an extractive industry, which takes all and restores nothing."[251] Despite the potential of *Mingo Logan II* to reduce this "extractive industry," the foregoing competing considerations enable coal to continue to "take[] all" and "restore[] nothing."[252]

247 *Id*. at 293 (Breyer, J., concurring).

248 *Id.* at 303 n.5 (Ginsburg, J., dissenting).

249 *See supra* Part IV.B.

250 *Coeur Alaska*, 557 U.S. at 303 n.5 (Ginsburg, J., dissenting).

251 CAUDILL, *supra* note 1.

252 *Id.*