Cross-posted at CPRBlog.

Regular readers of this blog know that on January 13, 2011, EPA vetoed a Clean Water Act section 404 permit issued by the Corp of Engineers for valley fill at the Spruce No. 1 mountaintop removal mine project in West Virginia. This was only the 13th time EPA had used its veto power, and the first time it had vetoed a permit after it was formally issued. I wrote at the time: "Expect litigation, and expect it to focus on the timing of the veto."

It's nice, sort of, to have my instincts confirmed. Sure enough, the mining company, Mingo Logan, challenged the veto precisely on the grounds that EPA lacked authority to revoke a permit once issued. Today the D.C. District Court agreed with that argument. Here's how the court summarized its ruling:

> The Court concludes that EPA exceeded its authority under section 404(c) of the Clean Water Act when it attempted to invalidate an existing permit by withdrawing the specification of certain areas as disposal sites after a permit had been issued by the Corps under section 404(a). Based upon a consideration of the provision in question, the language and structure of the entire statutory scheme, and the legislative history, the Court concludes that the statute does not give EPA the power to render a permit invalid once it has been issued by the Corps. EPA's view of its authority is inconsistent with clear provisions in the statute, which deem compliance with a permit to be compliance with the Act, and with the legislative history of section 404. Indeed, it is the Court's view that it could deem EPA's action to be unlawful without venturing beyond the first step of the analysis called for by Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). But it is undeniable that the provision in question is awkwardly written and extremely unclear. So, the Court will go on to rule as well that even if the absence of a clear grant of authority to EPA to invalidate a permit is seen as a gap or ambiguity in the statute, and even if the Court accords the agency some deference, EPA's interpretation of the statute to confer this power on itself is not reasonable. Neither the statute nor the Memorandum of Agreement between EPA and the Corps makes any provision for a post-permit veto, and the agency was completely unable to articulate what the practical consequence of its action would be.

I disagree with the decision, but as with the Supreme Court decision in Sackett (which Rick blogged about earlier) I understand the intuition behind it. EPA had articulated concerns throughout the Spruce No. 1 permitting process, but (as recounted in the opinion) told the Corps before the permit was issued that it wasn’t going to take its objections to the veto stage. It’s easy to see unfairness in a veto that was finalized four years after that assurance, even if (as was true in this case) the veto does not affect any ongoing operations.

Nonetheless, the text of the statute supports EPA’s interpretation rather than the court’s. I think the idea that this case could be decided on *Chevron* step 1 grounds, that is that the statute unambiguously precludes what EPA did, is clearly wrong. The statute authorizes a veto whenever the EPA administrator “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.” Nothing in that language either says or suggests that EPA must exercise its veto before the permit is issued.

The court conceded that 404(c), the veto provision, was “garbled,” which sure sounds like “ambiguous” to me. But, as the Supreme Court has sometimes done in *Chevron* cases, the court drew support for its interpretation from other provisions of the CWA. In particular, the court noted that section 404(p) says that compliance with a permit amounts to compliance with the CWA.

True, but a non-sequitur. EPA didn’t propose to punish, or require the undoing of, any activity already taken under the permit. In fact, a citizen suit had resulted in an injunction that blocked most operations under the permit. EPA’s veto expressly allowed those operations which had gone ahead under an agreement between the citizen plaintiffs and the company to continue.

The court noted but did not further consider the fact that in the permit the Corps of Engineers had expressly reserved the authority to “reevaluate its decision on this permit at any time the circumstances warrant.” That provision, which the court does not question the Corps’ right to impose, is directly inconsistent with the court’s insistence that the permittee was entitled to rely on the permit.

That highlights the real issue here, which is whether the EPA’s authority to override Corps permitting decisions is limited to a once-through veto option prior to permit issuance (Mingo Logan’s position, and the court’s), or whether instead (EPA’s

position) EPA’s has the authority to override the Corps’ decision not only to issue the permit but later to refuse to withdraw it. I agree with EPA’s interpretation because I see EPA as an essential check on the Corps’ persistent urge to issue (and by the same token not to modify or withdraw) permits. The history of mountaintop removal mining, which for a long time was routinely permitted by the Corps without any individual review under a nationwide permit, seems to support my view of the interagency dynamics. But those who see EPA as the quintessential over-zealous regulatory agency are understandably inclined to read EPA’s 404 authority narrowly

Two aspects of this decision are especially troubling for those who, like me, think the Corps of Engineers can’t be relied upon to look after the environmental interests section 404 is supposed to protect. First, the judge flirted with the idea that EPA should get no deference for its interpretation of section 404 because it co-implements that provision with the Corps. Ultimately, the judge rejected that position, but did seem to conclude that EPA should get something less than *Chevron* deference. If this decision stands up, that aspect of it is going to embolden opponents of wetlands regulation, and not just in the context of mountaintop removal mining.

Second, this decision was issued by an Obama appointee, Judge Amy B. Jackson. That can’t bode well for EPA’s section 404 program.