IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC., Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 1:10-cv-00541-ABJ

BRIEF OF AMICI CURIAE FOR THE WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, OHIO VALLEY ENVIRONMENTAL COALITION, AND SIERRA CLUB
IN SUPPORT OF DEFENDANT EPA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and Sierra Club (collectively "Conservation Amici") submit this brief as Amici Curiae to address four points that demonstrate that the veto of the Spruce No. 1 Mine permit by the U.S. Environmental Protection Agency ("EPA") pursuant to section 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(c), is lawful, well-supported, and should be upheld by this Court.

First, as shown in the administrative record, EPA's veto is greatly needed because the Spruce Fork watershed and Coal River sub-basin have suffered substantial, lasting impacts from past surface mining and cannot afford the additional cumulative impacts of the proposed Spruce valley fills. It is partly because such impacts have been "routine" (Pl. Br. at 39, Dkt. 26) that allowing 6.6 more miles of these impacts to occur on such a dramatic scale would be unacceptable under CWA § 404(c). Second, EPA's authority to protect waters under the CWA § 404(c) takes precedence over a state's preference to allow the disposal of mining waste under the CWA or the Surface Mining Control and Reclamation Act ("SMCRA"). Although Plaintiff argues the contrary, a state may not tie EPA's hands from addressing unacceptable adverse impacts and force it to allow a valley fill to proceed. Third, EPA's CWA § 404(c) authority is a true right to veto, and as such is both paramount and unconstrained by the timing or substance of a choice made by the U.S. Army Corps of Engineers ("Corps"). The statute has authorized EPA to issue a veto "whenever" there are waters that need its protection, in part to ensure that EPA may consider new science and information relevant to the environmental impacts of a § 404 discharge. Finally, the Court should ignore attempts by other amici to inject into this case economic arguments that are not lawful factors for consideration.

STATEMENT OF INTEREST

Conservation Amici respectfully submit this brief on behalf of their members who live in West Virginia and who seek to continue to enjoy and appreciate the wildlife, aquatic resources, and aesthetic and recreational value of the waters protected by EPA's Final Determination.[1] Conservation Amici have worked for years, starting with an effort by the West Virginia Highlands Conservancy, to protect the affected waters and their litigation succeeded in preventing the waters from being filled prior to EPA's determination in 2009. *See Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999); AR010121-22 (describing *OVEC v. U.S. Army Corps of Eng'rs*, Civ. Nos. 3:05-0784 (S.D. W. Va.) (stayed pending D.D.C. review of EPA veto, Order of Mar. 21, 2011, Dkt. 504)). All Conservation Amici and many of their members submitted comments in support of the proposed veto describing the dire environmental impacts at stake, and the need for EPA to prevent further harm. *See, e.g.*, AR02401.[2]

I. ARGUMENT

A. The History of Local Mining Impacts Supports EPA's Determination that Additional Harm from the Spruce No. 1 Mine Would Be Unacceptable.

The Coal River sub-basin and Spruce Fork watershed are suffering a death by a thousand cuts at the hands of the coal mining industry. EPA's decision to prevent what could be a final, fatal blow to those aquatic ecosystems was reasonable and fully within its authority under Section 404(c), 33 U.S.C. § 1344(c). Mingo Logan argues that many of the impacts of the Spruce Mine's burial of 6.6 miles of vital headwater streams cannot be considered unacceptable because they are "fundamentally routine." Pl. Br. at 39. It is true that the Corps and West

[1] Conservation Amici submit this brief pursuant to the Court's Order of August 1, 2011.

[2] More information about each organization is available on its website at: www.wvhighlands.org, www.crmw.net, www.ohvec.org, www.sierraclub.org (last visited Aug. 15, 2011).

Virginia have repeatedly granted Clean Water Act permits for mining operations that have led to seriously adverse aquatic impacts, particularly in the Spruce Fork watershed and the larger Coal River sub-basin. Those permits and conditions they contained have utterly failed to prevent or mitigate the significant degradation of water quality and loss of aquatic habitat in local watersheds. Far from supporting Mingo Logan's claims, however, the fact that Spruce would add even more to these cumulative mining impacts only bolsters EPA's determination that the Spruce Mine's proposed valley fills are unacceptable.[3]

Section 404(c)'s implementing regulations direct EPA to consider the unacceptability of the proposed discharges in light of the present and future cumulative impacts in the watershed. The regulations define "unacceptable adverse effect[s]" in terms of the effects on the "aquatic or wetland *ecosystem*." 40 C.F.R. § 231.2(e) (emphasis added). Moreover, the veto regulations direct EPA to consider the 404(b)(1) Guidelines when making its determination. *Id.* A "fundamental" precept of the Guidelines is that a discharge should not be permitted if it will "have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." *Id.* § 230.1(c). The Guidelines require factual findings regarding cumulative impacts, which they define as "changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." *Id.* § 230.11(g); *see also id.* § 230.11(e). Consideration of cumulative impacts is critical because, as the Guidelines recognize, "[a]lthough the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous

[3] EPA's brief does not emphasize cumulative impacts, but the record makes clear that the agency's consideration of those impacts formed part of the basis for its determination. *See* Final Determination, AR010179–85; App. 5, AR010264–65.

such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems." *Id.* § 230.11(g).

EPA properly relied on the scientific evidence in the record to support its determination that direct stream loss and related environmental impacts caused by the Spruce valley fills would be unacceptable. Final Determ., AR010103. EPA's determination is particularly reasonable "when considered in the context of the significant cumulative losses and impairment of streams across the Central Appalachian ecoregion" and the lack of successful mitigation to compensate for those losses. *Id.*, AR010112. The Spruce Fork watershed and Coal River sub-basin cannot afford the additional pollution and further loss of vital headwater streams that would result from the Spruce Valley fills. *See id.*, AR010109 (describing "extirpation" and other harm including the transformation of headwater streams into new sources of downstream pollution). As EPA found, "just as loss of blood flow through capillaries can lead to organ failure, alteration of headwater streams has the potential to affect the ecological integrity of aquatic ecosystems at broad spatial scales." *See id.*, AR010128 (headwater streams are "the early stages of the river continuum" and "provide the most basic and fundamental building blocks to the remainder of the aquatic environment").

As the record demonstrates, widespread mining-related impacts in the Coal River sub-basin, including the Spruce Fork watershed, have already resulted in major impairment of the aquatic ecosystems' ability to support life. Numerous studies indicate that when surface disturbances reach a significant percentage of a watershed, as low as 3 to 5%, the ecosystem suffers "dramatic declines in aquatic biodiversity and water quality." Palmer & Bernhardt (2009), AR032675 at AR032680. *See also* Bernhardt, et al., AR026631 ("[S]tream water quality and benthic communities are significantly altered when as little as 3% of the upstream

watershed is converted to surface mining."). By comparison, in the Coal River sub-basin, 257 past and present surface mining permits occupy more than 13% of the land area, while in the Spruce Fork watershed, 34 permits occupy more than 33% of the land area. Final Determ., AR010180. As EPA recognized, these percentages will continue to grow as more mines are authorized. *Id.* Thus, the Coal River sub-basin already exceeds the threshold of disturbance that triggers "dramatic declines in aquatic biodiversity and water quality." The Spruce Fork watershed impacts are already at 11 times that threshold. And, indeed, the record shows that streams within the Coal River sub-basin and the Spruce Fork watershed are seriously degraded. As EPA noted in Appendix 1 to its Final Determination, approximately 33% and 34% of the streams are impaired within the Coal River sub-basin and the Spruce Fork watershed, respectively. AR010075. The primary cause of impairment in the sub-basin is coal mining waste. *Id.*

Compounding this problem is the fact that the adverse aquatic impacts of surface mining disturbance are significantly more severe than other forms of disturbance, such as construction or forestry. That is because surface mining impacts are "immense in scale and lead to irreversible alterations of impacted watersheds. . . . Once filled, streams are completely destroyed and those streams remaining below the fills are impacted significantly." Palmer & Bernhardt, AR032679; Palmer et al. (2010), AR032708 ("impacts are pervasive and irreversible"). As the U.S. District Court for the Southern District of West Virginia recognized in granting a preliminary injunction against the Spruce No. 1 mine in 1999, "[b]ecause the headwater stream community is a 'keystone community,' if it is disturbed, the rest of the stream is adversely affected in a serious manner," and "[d]estruction of the unique topography of southern West Virginia, and of Pigeonroost Hollow in particular, cannot be regarded as

anything but permanent and irreversible." *Bragg*, 54 F. Supp. 2d at 643, 646. The adverse effects of valley fills are so extreme that EPA found that "the naturally occurring aquatic communities in more than 90% of streams below valley fills were degraded." EPA, Initiation Letter, AR042900. The destruction wrought by valley fills is indeed irreversible. *Id.* ("Despite years of post-mining recovery time, many streams [below valley fills] were degraded or exhibited an excursion from narrative standards 15 to 20 years after construction of the upstream facility was completed.").

Those grave impacts to the watersheds have occurred despite West Virginia's 402 permits and the Corps' 404 permits and mitigation measures, similar to those included in the Spruce No. 1 permit, that were supposed to protect the integrity of the aquatic environment. Such a disconnect between the Corps' and the state's assurances and the observed, real-world impacts is consistent with EPA's recent review of CWA permits for Appalachian surface mines. That review found that state permitting agencies routinely failed to include appropriate effluent limitations on pollutants in the mining discharges and similarly failed to include permit conditions to assure compliance with narrative water quality standards. EPA's Interim Detailed Guidance (Apr. 2010), AR034384–90.*Id.* at AR034380) (finding that 9 out of 10 streams below valley fills were impaired).[4] As for the Corps' § 404 permits, EPA found that "[a]s many as 80% of these permits raised concerns with respect to compliance with state narrative water quality

[4] The report cited by EPA is available at http://www.epa.gov/owow/wetlands/guidance/pdf/Final_Appalachian_Mining_PQR_07-13-10.pdf (last visited Aug. 15, 2011). EPA's Final Guidance also citing this information is available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/Final_Appalachian_Mining_Guidance_072111.pdf (July 21, 2011) (last visited Aug. 15, 2011).

standards while more than half raised concern for the potential for significant degradation of aquatic ecosystems." AR034383.

The clear evidence of widespread degradation wrought by Section 404-permitted valley fills in the Coal River sub-basin and Spruce Fork watershed lends further support to EPA's contention, already backed by robust science in the record, that known compensatory mitigation techniques cannot replace the crucial ecosystem functions performed by headwater streams. *See* Final Determ., AR010185. The issue of mitigation is essential because the Corps has generally relied on the purported ability of newly-created "streams" to compensate for the unavoidable losses caused by valley fills as its primary basis for finding compliance with the Guidelines' requirement of no significant degradation. *See* 40 C.F.R. § 230.10(c); Pl. Br. at 53 (citing AR010186). However, as both EPA and the Fish and Wildlife Service have stated to the Corps, "[t]here is *no evidence* in the peer-reviewed literature that the type of stream creation included in the [Spruce mitigation plan] will successfully replace lost biological function and comparable stream chemistry to high quality stream resources such as Pigeonroost Branch and Oldhouse Branch." AR010187 (emphasis added); *see also* AR010234-47 (app. 3); AR002417-18 (WVHC et al. comments). Neither the Corps nor Mingo Logan has refuted the scientific consensus. Instead, the real-world impacts of past permitting that has relied on mitigation of this kind have shown that the Corps has engaged in a massive, failed environmental experiment on vital watersheds in one of the most ecologically valuable and diverse regions in the United States. In view of the robust record EPA has created, including on cumulative impacts, AR01079-84, AR010264-78 (app. 5), the need to protect high-quality headwater streams, like those at issue here, in a watershed that is already overwhelmed by surface mining impacts, provides just the type of instance where a veto is essential. Final 404(c) Regulations, 44 Fed. Reg. 58,076, 58,077

(Oct. 9, 1979) (discussing the need for a veto "where a site may be so sensitive and valuable that it is possible to say that any filling of more that [sic] X acres will have unacceptable adverse effects").[5]

The record in this case unambiguously demonstrates that neither the state of West Virginia nor the Corps has prevented or mitigated the extreme adverse aquatic impacts associated with the construction of valley fills. The result of those failures is that the Spruce Fork watershed and the Coal River sub-basin have faced extensive losses that would be exacerbated in an unacceptable manner by the extreme additional impact caused by the Spruce permit. EPA has long interpreted "unacceptable adverse effects" to mean impacts "that the aquatic and wetland ecosystem cannot afford." 44 Fed. Reg. at 58,078. EPA's decision to veto a permit that would have such significant additional adverse impacts on fragile watershed areas was thus reasonable and fully supported by the record. *Cf. James City County v. EPA*, 12 F.3d 1330, 1337 (4th Cir. 1993) (upholding Ware Creek veto in part due to need to prevent "profound cumulative loss").

B. EPA's Authority Under § 404(c) to Prevent Unacceptable Adverse Effects Trumps State Authority under the CWA and SMCRA

Although Plaintiff contends that EPA's veto has upset the federal-state balance of power, it fails to prove any violation of law. Pl. Br. at 29, 35 (claiming that EPA's veto "usurps West Virginia's regulatory authority under § 402 and SMCRA," and that "EPA cannot use § 404(c) to substitute its own judgment for West Virginia's water quality standards"). Amici, including

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[5] Plaintiff mischaracterizes *OVEC v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), which has no impact here. That decision involved four permits, not including Spruce No. 1, and the court did not address EPA's veto authority. Since then, significant scientific developments have occurred and regulatory action, including EPA-Corps guidance, has reaffirmed the importance of the requirements, such as 40 C.F.R. § 230.11(e), that the Corps had ignored in the permits at issue in that case. *See, e.g.*, http://www.epa.gov/owow/wetlands/guidance/pdf/Stream_Guidance_final_073010.pdf (July 30, 2010) (last visited Aug. 15, 2011).

West Virginia, make similar arguments, contending that the "numerous permits" the state has issued for the Spruce mine somehow limit EPA's veto authority. WV Amicus Br. at 1, 18 (Dkt. 53) (stating that whether the violation of a water quality standard may occur is a determination that "rests with the State"); *see also* NMA Amicus Br. at 4 (Dkt. 52). However, neither the CWA nor SMCRA gives a state the power to prevent an EPA veto. EPA must make its own independent § 404(c) determination because neither the statute's text nor its longstanding regulations allow the agency defer to a state's determinations under § 401, § 402, or any other provision of law. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1-231.8. The state's relentless efforts to ensure that the Spruce No. 1 Mine goes forward, in spite of the overwhelming evidence of direct and cumulative harm it would cause to the aquatic ecosystem, demonstrates the need for EPA's ultimate authority to prevent unacceptable adverse impacts regardless of state approval. Consistent with the plain text and regulatory framework of the CWA under each provision cited by Plaintiff, the Court should uphold EPA's veto and reject Plaintiff's and West Virginia's efforts to exaggerate the state's power.

1. CWA § 402 has no effect on EPA's § 404(c) veto action.

The Court should reject Plaintiff's argument that state approval of pollution discharges under § 402 bars EPA from issuing a veto based in part on significant harm to downstream water quality. The text of CWA §§ 404(c) and 402 shows there is no such limitation on EPA's authority to prevent any discharge of fill that would have "an unacceptable adverse effect" on protected resources. 33 U.S.C. §§ 1344(c), 1342. Instead, EPA has a "broad grant of power [under § 404(c)]" and this authority "focuses only on the agency's assigned function of assuring pure water and is consistent with the missions assigned to it throughout the [CWA]." *James City County v. EPA*, 12 F.3d at 1336. While a state may have conflicting interests affecting its regulatory objectives, EPA's mission under the CWA is to fulfill the Act's primary goal to

"restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and ultimately eliminate pollution in U.S. waters. 33 U.S.C. § 1251(a), (d).

Under section 404(c) and its own regulations, EPA may not ignore unacceptable downstream impacts that would be created by a valley fill simply because the state has approved those discharges at a prior point in time. EPA has reasonably defined "unacceptable adverse effect" to include consideration of the Section 404(b)(1) Guidelines and thus must consider the potential for significant degradation of the aquatic environment and water quality impacts under 40 C.F.R. § 230.10(b) and (c). *See* 40 C.F.R. § 231.2(e); 44 Fed. Reg. at 58,078. As EPA recognized, consideration of the Section 404(b)(1) Guidelines ensures that the cumulative and secondary effects of a valley fill will be taken into account and allows EPA to veto a proposed valley fill if those effects would be unacceptable. *See, e.g.*, 40 C.F.R. § 230.11(a)-(c), (e), (g), (h). Therefore, EPA appropriately considers not only the downstream pollutant discharges from a valley fill, but also the direct loss of the buried headwater streams and the loss to downstream waters, wildlife, and local communities of the vital functions provided by those streams. AR010152, AR010159-62, AR010493-94. Issuance of a § 402 permit plainly could not foreclose an EPA veto based on the combination of these impacts. *See* EPA Br. at 42-52.

2. EPA's veto is fully consistent with CWA § 401 and state standards.

A state's decision to certify a proposed valley fill under section 401, 33 U.S.C. § 1341, does not limit EPA's veto authority. Plaintiff and West Virginia disagree with EPA's veto determination, contending that it conflicts with the state's view of its water quality standards, and ask the Court to choose the state's view, just because it comes from the state. Pl. Br. at 35 (stating that "EPA cannot . . . second-guess" the WVDEP); WV Br. at 21 (asserting that "EPA usurped . . . West Virginia's rightful place"). That is not the law under the CWA, however. Once a state has spoken, EPA can still exercise its independent, ultimate authority delegated by

Congress under § 404(c). Although § 401 allows a state to prevent a federal agency from *issuing a § 404 permit*, or issuing it without the necessary protective conditions, § 401 gives the state no power to prevent an agency from *denying or vetoing a permit*. 33 U.S.C. § 1341(a), (d).

Although a § 401 certification provides a mechanism for the state to protect its waters if it believes a federal permit would be inadequate, a federal agency retains full authority to protect the waters of the United States. *See id.* § 1341(b) ("Nothing in this section shall be construed to limit the authority of *any* department or agency pursuant to *any* other provision of law to require compliance with any applicable water quality requirements.") (emphasis added). The use of the word "any" in a federal statute "must be construed to mean exactly what it says" and "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (citations and quotations omitted). As the Supreme Court explained, "[s]ection 401 recast pre-existing law and was meant to 'continu[e] the authority of the State . . . to act *to deny a permit* and thereby prevent a Federal license or permit from issuing to a discharge source within such State." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006) (quoting S. Rep. No. 92-414, p. 69 (1971)) (emphasis added). Section 401 is a shield for the state, not a sword, and the state cannot use it to try to force a permit to issue, or to prevent a veto.[6]

Furthermore, a state also may not rely on its interpretation of its water quality standards, pursuant to section 303 of the CWA, as justification for requiring EPA to defer to the state's § 401 certification. Plaintiff and amici contend that EPA "wrongly seeks to apply its own ad hoc water quality standards." Pl. Br. at 37. Instead, as the veto determination itself shows, EPA has

[6] A state's § 401 certification authority is distinct from any authority it might have if it were granted delegated authority under § 404(g) to issue § 404 permits. 33 U.S.C. § 1344(g).

reasonably considered and applied the best available science on conductivity and water quality which shows as a fact that harm to aquatic life occurs at certain levels of conductivity.[7] The EPA must not defer to a state's decision to ignore substantial scientific evidence regarding reliable indicators of biological impairment. Congress granted EPA authority under § 404(c) to prevent a discharge *whenever* it finds unacceptable adverse effects and, as such, it is not constrained by any state's interpretation or determination regarding its water quality standards. EPA has full authority to consider and apply the best available science on aquatic impairment in the exercise of its veto, and in fact, it would be arbitrary and capricious for EPA to ignore the science on conductivity. Showing deference to a state's conclusion that conflicts with the science, and that is less protective of streams, would conflict with EPA's duty under § 404(c) and the CWA's overarching purpose to prevent further degradation of U.S. waters by maintaining, restoring, and improving water quality. *See* 33 U.S.C. § 1251(a); *id.* § 1313(d)(4)(B); *see also PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994) (explaining that a state may apply only "more stringent" controls and that the Act's "antidegradation policy" requires that existing stream uses "shall be maintained and protected").

Even aside from the statutory framework, West Virginia's § 401 certification for Spruce from 2005 is not only outdated, but it is also devoid of scientific analysis or any reasoned explanation regarding important water quality considerations, particularly in comparison with EPA's carefully reasoned and supported veto determination based on extensive recent scientific

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[7] *See, e.g.*, AR010160-62 (describing pollutant increases leading to increased conductivity and explaining that "EPA expects that these additional conductivity increases will have significant adverse effects on native aquatic macroinvertebrates and other wildlife that are not tolerant to increased conductivity"); AR010168 (explaining the science demonstrating that "conductivity is an excellent predictor of native taxa loss from Appalachian streams"); *see generally* AR01063-70; Pond et al. (2008), AR033413.

research. *Compare* AR020921 (§ 401 certification) *with* AR010103 (EPA final veto). The state's rubber-stamping of serious adverse aquatic impacts demonstrates part of the reason why Congress gave EPA both oversight authority and veto power.

3. The CWA prevails over SMCRA and requires deference to EPA.

State authority to issue surface mining permits under SMCRA cannot limit EPA's authority under § 404(c). *See* Pl. Br. at 34-35. Specifically, SMCRA includes a broad savings clause that makes clear that, if there were any potential conflict (which is not true in this case) it is the CWA, not SMCRA, that governs. 30 U.S.C. § 1292(a)(3). SMCRA further recognizes EPA's ultimate environmental expertise and authority by prohibiting the Office of Surface Mining (Department of Interior) from approving a state permitting program, state regulations, and even its own federal regulations without the approval of EPA. *See* 30 U.S.C. § 1251(a)(B), 1253(b)(1)-(2) (conditioning DOI action on EPA's "concurrence"). Thus, state approval of a mining permit pursuant to SMCRA cannot limit EPA's CWA § 404(c) veto authority in any way.

4. West Virginia's history of allowing serious degradation of its waters demonstrates why its findings should receive no deference.

The state of West Virginia also deserves no deference from this Court on the water quality impacts of the Spruce No. 1 permit because it has not fulfilled its duty to protect water quality from surface coal mining impacts. As discussed in Part I.A., above, the state's ineffective permitting and lax enforcement have led to widespread impairment from mining pollution, particularly in the watersheds surrounding the Spruce mine. A federal court familiar with West Virginia's administration of the CWA found that the state's regulation of the mining industry suffered from a "climate of lawlessness," in which

> continued disregard for federal law and statutory requirements goes unpunished, or possibly unnoticed. Agency warnings have no more effect than a wink and a nod, a deadline is just an arbitrary date on the calendar and, once passed, not to be mentioned again. Financial benefits accrue to the owners and operators who were not required to incur the statutory burden and costs attendant to surface mining;

> political benefits accrue to the state executive and legislators who escape accountability while the mining industry gets a free pass.

W. Va. Highlands Conservancy v. Norton, 161 F. Supp. 2d 676, 684 (S.D. W. Va. 2001); *see also Ohio Valley Envtl. Coal., Inc. v. Hobet Min.*, LLC, 723 F. Supp. 2d 886, 907 (S.D. W. Va. 2010) (finding West Virginia failed to diligently prosecute CWA violations from a surface coal mine). The state's own Environmental Quality Board has noted that it is "amazing" "how little the WVDEP [WV Department of Environmental Protection] seems to expect from the coal industry." *W. Va. Highlands Conservancy v. McClung*, Appeal Nos. 07-10-EQB & 07-12-EQB, Final Order, slip op. at 28 (June 12, 2008) (attached as Ex. 1). The state board also recently ruled that a mountaintop removal mining permit issued by the state failed to satisfy § 402 because it contained no effluent limitations for conductivity, total dissolved solids, or sulfates, and also violated the state's water quality standards for numerous other reasons. *Sierra Club v. Clarke*, Appeal No. 10-34-EQB, Final Order, slip op. at 23-25 (Mar. 25, 2011) (attached as Ex. 2) (stayed pending appeal).

In its history of regulating surface coal mining under the CWA, the state has proven to be anything but the "bulwark in the effort to abate water pollution" that it portrays itself as. WV Br. at 18 (quoting *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)). The record suggests instead that the state's permitting agency has worked to ensure that mining can continue regardless of the mounting costs to the environment and the local communities whose interest it is supposed to be protecting. WV. Br. at 21 (stating that "EPA should not be allowed to interfere . . . with mining at Spruce after the fact"). In this climate, EPA's veto authority is the last safeguard for the aquatic life and ecosystems in the Spruce Fork watershed and Coal River sub-basin.

In short, the state's preference has no legal import under section 404(c). A court must uphold an EPA veto determination that satisfies the law and follows the science and must do so even if a state "has been the most steadfast and vigorous agency supporter" of the vetoed discharge. *City of Alma v. United States*, 744 F. Supp. 1546, 1563-64, 1566 (S.D. Ga. 1990) (affirming EPA veto partly based on water quality impacts over the state's objection and stating that it would not overturn this veto "simply because other agencies have disagreed with it"); *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 493 (D. Colorado, 1996) (explaining that, even in the face of local government officials' frustration with an EPA decision, the court's role is to "referee the record" and apply the standard of review).

C. Section 404(c) Gives EPA Ultimate Authority to Address New Scientific or Environmental Information and Decide to Veto "Whenever" It Finds Unacceptable Adverse Impacts.

The Court must reject Plaintiff's challenge to EPA's use of its veto authority after the Corps had issued a § 404 permit. The plenary authority and responsibility granted to EPA by § 404(c) allows EPA to issue a veto "whenever" it determines there will be an "unacceptable adverse effect." 33 U.S.C. § 1344(c). Section 404(b) explicitly makes the Corps' exercise of its authority fully "[s]ubject to" EPA's veto authority and requires that "each such disposal site shall be specified for each such permit . . . through the application of guidelines developed by [EPA], in conjunction with [the Corps]." *Id.* § 1344(b). The only time restrictions on EPA's authority are the requirements to consult with the Corps some time "[b]efore" it exercises its veto power, and to wait to issue a veto until "after notice and opportunity for public hearings." *Id* § 1344(c). Thus, "Congress gave the EPA wide discretion to determine *when* to initiate proceedings under section 404(c)." *Newport Galleria Gr. v. Deland*, 618 F. Supp. 1179, 1182 (D.D.C. 1985) (denying permittee's challenge to EPA's proposed veto before proceedings were complete) (emphasis added); *see also City of Alma*, 744 F. Supp. at 1562 ("the CWA grants the EPA wide

discretion to employ section 404(c) as it deems appropriate"). The statutory language could not be clearer, but if there were any ambiguity, EPA's interpretation controls under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 862 (1984). *See* EPA Br. 11-15, 28-30. Under its longstanding and reasonable interpretation of section 404(c), EPA "may [issue a veto] in advance of a planned discharge [before a permit application] or while a permit application is being evaluated or even, in unusual circumstances, *after issuance of a permit*." 45 Fed. Reg. 85,336, 85,337 (Dec. 24, 1980) (emphasis added).

The divergent industry positions in this case and the case involving the EPA and Army Corps memoranda on Appalachian surface mining (in which the agencies agreed to coordinate an enhanced interagency review of a set of permit applications that raise serious environmental concerns) further illustrate how illogical Plaintiff's argument is about the timing of an EPA veto.[8] *See* NMA v. Jackson, No. 10-cv-1220-RBW (D.D.C.). While in this case, Plaintiff and industry amici seek a ruling that would prevent EPA from issuing a veto *after* the Corps has issued a permit, in the other case the National Mining Association, the state of West Virginia, and numerous industry plaintiffs seek to prevent EPA from investigating a veto (such as through reviewing the proposed permit and related information and consulting with the Corps to decide whether to initiate a veto), *before* the Corps acts, which would make it difficult for EPA to issue a veto before the Corps has issued the final permit. NMA, No. 10-cv-1220-RBW (D.D.C.) (Dkt. 59-1) (Pls.' mem. in support of motion for summary judgment). In contrast with these conflicting arguments, the plain text of section 404(c) neither bars EPA's action *before* or *after*

[8] *See* Enhanced Coordination Procedures for Pending Clean Water Act Permit Applications, http://water.epa.gov/lawsregs/guidance/wetlands/mining.cfm#ecp (issued in 2009).

the Corps has acted. The Court should therefore reject the apparent goal of Plaintiff and other amici to eviscerate the vital safeguard of EPA's veto authority from all angles.

Similarly to the Spruce veto, other past EPA veto determinations have not come quickly, in part because EPA has used it as "a tool of last resort" to prevent unacceptable environmental impacts. 44 Fed. Reg. at 58,080. A veto is no small matter and it can and should take time for EPA to evaluate relevant information and decide whether to take the significant step of initiating a veto to prohibit or withdraw the action of another federal agency. *See* 40 C.F.R. § 231.3(a) (allowing Regional Administrator to initiate certain actions only if s/he "has reason to believe . . . that 'an unacceptable adverse effect' could result" from a discharge). Although the Corps has initial permitting authority, the ultimate veto power rests with EPA as a "safeguard for the waters of the United States," in an intentional decision to make EPA the "'environmental conscience' of the Clean Water Act." 44 Fed. Reg. at 58,081; *see Newport Galleria*, 618 F. Supp. at 1185 (explaining that "Congress has entrusted the resolution of [environmental] issues to the expertise of the EPA" and discussing the need to develop a significant administrative record). EPA does not exercise this power lightly, but instead undertakes a major effort to work with the Corps and the permittee before even initiating this process as shown in the Spruce veto record. As a result of the tremendous fact-finding that a veto entails, EPA has only issued 13 final veto determinations since 1972.[9] EPA has created comprehensive records to initiate and support its veto determinations, leading to consistent judicial affirmances.[10] In this instance, the Corps'

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[9] http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm (last visit August 10, 2011).

[10] *See, e.g.*, *James City County*, 12 F.3d at 1338 (affirming veto); *Bersani v. EPA*, 850 F.2d 36, 47 (2d Cir. 1988) (upholding EPA's veto); *City of Alma*, 744 F. Supp. at 1556 (upholding veto and declining to estop EPA "from enforcing the law"); *Creppel v. Army Corps of Eng'rs*, No. CIV. A. No. 77-25, 1988 WL 70103, at *4 (E.D. La. June 29, 1988) (explaining that Congress "added another safeguard" with EPA's veto); *see also Alameda*, 930 F. Supp. at 493 (dismissing

Spruce § 404 permit was in litigation for over two years, which began soon after issuance and continued until the time when EPA initiated its § 404(c) veto process in 2009. *See* AR010108 & n.1, AR010121. Other veto determinations have taken years. *See, e.g.*, *Alameda*, 930 F. Supp. at 489-90 (permit application submitted in March 1986, and EPA vetoed in November 1990, and noting the "massive administrative record," *id.* at 493).

Congress made clear that EPA is to bring an environmental and scientific perspective to Section 404 by designating EPA as the lead agency defining the guidelines that the Corps must follow in issuing permits, 33 U.S.C. § 1344(b), and giving it the final say in whether a discharge may occur, *id.* § 1344(c); *see also James City County*, 12 F.3d at 1335-36. While the Corps was allowed to continue exercising permitting authority due to its past experience issuing permits for navigation and anchorage, "the Conferees agreed that the Administrator of the [EPA] should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site." 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (Comm. Print 1973) (Sen. Muskie report entitled exhibit 1) (explaining that Corps retained permitting authority "in light of the fact that [its] system to issue permits already existed" under the Rivers and Harbors Act, 33 U.S.C. § 403).[11] Congress' designation of EPA as the environmental voice of the § 404 program and final arbiter of environmental impacts necessarily implies that EPA must have a full authority to consider and analyze new scientific or other relevant environmental information. Congress' unqualified

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due to lack of standing but also finding plaintiffs had not proven case against EPA veto).

[11] *See* 33 U.S.C. § 1344(b)(2) (providing for consideration of the impact "on navigation and anchorage"); *see also* CWA LEG. HIST., *supra*, at 236 (House consideration of conf. rep.) (emphasizing "importance of navigation and waterborne commerce" and "anchorage"); *cf. Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1166 (9th Cir. 1998) (explaining that Corps retained its "historical role" to regulate navigation dredging).

authorization for EPA to issue a veto "whenever" it reviews such information and finds unacceptable impacts demonstrates this. Under section 404(c) of the Clean Water Act, it is never too late to protect aquatic resources, wildlife, and local communities from unacceptable impacts. For these reasons, it would violate Congress' intent expressed through the text of the Act to bar EPA's use of a veto merely because the Corps has issued a permit. EPA has no ability to control the timing of a Corps decision. Whether or not EPA is able to prevent unacceptable adverse impacts does not depend on when the Corps chooses to issue the permit.

D. The Court Should Reject Industry Amici's Economic Arguments Because They Are Irrelevant to the Legality of EPA's Veto

Amici representing industries far afield from Mingo Logan's mountaintop removal mining business have submitted briefs offering assertions about economic impacts of EPA's exercise of its 404(c) authority. The industry briefs are not supported by the record and, even if they were, they are irrelevant in view of the plain statutory text and the record in this case. The question before the Court is whether EPA's robust and well-supported veto of the 404 permit for one vast mountaintop removal mine in southern West Virginia is a permissible exercise of its authority to prevent unacceptable adverse impacts under the CWA, and the record demonstrates this. Final Determ., AR010201. Nothing in Section 404(c) or its implementing regulations requires, or even allows, EPA or this Court to consider the economic impacts of this veto offered by amici. Rather, EPA must act under § 404(c) "solely on the basis that [a discharge] would cause unacceptable adverse effects on the environment." *James City County*, 12 F.3d at 1335; *see also* 44 Fed. Reg. at 58,078 ("[S]ection 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project. This view is based on the language of 404(c) which refers only to environmental factors.").

Even if otherwise, the quite different § 404 activities that amici discuss do not generally approach the level of adverse effects caused by valley fills associated with Appalachian surface coal mining. *See* Section I.A above. As the U.S. Fish and Wildlife Service has recognized, the impacts of valley fills "reach a magnitude unparalleled by any other kind of section-404 regulated activity." AR020808. Industry amici also ignore the economic and social harm associated with this practice. For example, scientific research has found that both higher levels of poverty and higher levels of health problems are correlated with residence near mountaintop removal mining sites. *See, e.g.*, Final Determ., AR010196–99; Recomm. Determ., AR009960-64 (describing environmental justice and health concerns).

CONCLUSION

For these reasons and those provided by Defendant EPA, EPA's final veto determination should be upheld and the Court should grant EPA's motion for summary judgment.

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Respectfully submitted,

/s/ Jennifer C. Chavez

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CERTIFICATE OF SERVICE

I, Jennifer C. Chavez, hereby certify that on this 15th day of August, 2011, I filed the foregoing Brief Of Amici Curiae For The West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, And Sierra Club In Support Of Defendant EPA's Motion For Summary Judgment using the Court's CM/ECF system, which caused a copy to be served on counsel of record.

/s/ *Jennifer C. Chavez*