ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5150

MINGO LOGAN COAL COMPANY, INC.,
Plaintiff-Appellee,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Columbia
Case No. 10-cv-00541 (Hon. Amy Berman Jackson)

AMICUS CURIAE FINAL BRIEF OF WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, NATURAL RESOURCES DEFENSE COUNCIL, OHIO VALLEY ENVIRONMENTAL COALITION, AND SIERRA CLUB IN SUPPORT OF APPELLANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND IN SUPPORT OF REVERSAL

Benjamin A. Luckett
Joseph M. Lovett
APPALACHIAN MOUNTAIN ADVOCATES
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 645-0125
Fax: (304) 645-9008
bluckett@appalmad.org
jlovett@appalmad.org

Emma C. Cheuse
Jennifer C. Chavez
EARTHJUSTICE
1625 Massachusetts Ave., N.W., Suite 702
Washington, D.C. 20036-2243
Telephone: (202) 667-4500
Fax: (202) 667-2356
echeuse@earthjustice.org
jchavez@earthjustice.org

Counsel for Environmental Amici

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

Defendant-Appellant is the United States Environmental Protection Agency. Plaintiff-Appellee is Mingo Logan Coal Company, Inc., a subsidiary of Arch Coal Inc.

Environmental Amici in this case include the following, and all except the one italicized participated as amici before the district court:

West Virginia Highlands Conservancy, Coal River Mountain Watch, *Natural Resources Defense Council*, Ohio Valley Environmental Coalition, and Sierra Club.

See EPA's Certificate for the full list of Amici expected to participate or seek to participate in this case.

(ii) Circuit Rule 26.1 Disclosures

Environmental Amici have filed the required Rule 26.1 disclosure statement below.

(B) Rulings Under Review

Order and Memorandum Opinion issued by the Honorable Amy Berman Jackson in *Mingo Logan Coal Company Inc. v. U.S. Environmental Protection Agency*, No. 1:10-cv-00541-ABJ, --- F. Supp. 2d ---, 2012 WL 975880

(D.D.C. March 23, 2012), JA175-76, JA177-210.

(C) Related Cases

See EPA's Certificate. Some of Environmental Amici are the plaintiffs in the case challenging the U.S. Army Corps of Engineers' permit for the Spruce No. 1 mine.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and D.C. Circuit Rule 26.1, Environmental Amici West Virginia Highlands Conservancy *et al.* make the following disclosures:

1. **West Virginia Highlands Conservancy** ("WVHC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in WVHC. WVHC, a corporation organized and existing under the laws of the State of West Virginia, is a nonprofit organization which aims to protect West Virginia's land and water resources, including from the harm caused by mountaintop removal mining.

2. **Coal River Mountain Watch** ("CRMW") has no parent companies, and no publicly held company has a 10% or greater ownership interest in CRMW. CRMW, a corporation organized and existing under the laws of the State of West

Virginia, is a nonprofit organization whose mission is to stop the destruction of local communities and the environment by mountaintop removal mining, to improve the quality of life, and to help rebuild sustainable communities.

3. **Natural Resources Defense Council** ("NRDC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in NRDC. NRDC, a corporation organized and existing under the laws of the State of New York, is a nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

4. **Ohio Valley Environmental Coalition** ("OVEC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in OVEC. OVEC, a corporation organized and existing under the laws of the State of Ohio, is a nonprofit organization dedicated to the improvement and preservation of the environment.

5. **Sierra Club** has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club. Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES C-1
RULE 26.1 DISCLOSURE STATEMENT.....C-2
TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES iii
GLOSSARY..... vii
STATUTES AND REGULATIONS..... viii
STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE viii
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS ix
SUMMARY OF ARGUMENT 1
ARGUMENT 2
I. THE CLEAN WATER ACT AUTHORIZES EPA TO WITHDRAW THE SPECIFICATION OF ANY DISPOSAL SITE WHENEVER NECESSARY TO PROTECT WATERS. 2
II. RELEVANT INDICIA OF CONGRESSIONAL INTENT REINFORCE THE PLAIN MEANING OF THE STATUTE AND PROVE THE REASONABLENESS OF EPA'S READING. 4
A. EPA's Post-Permit Authority Serves the Act's Explicit Purpose to Protect Waters. 4
B. The Prohibition on Polluting U.S. Waterways Is the Touchstone of the Clean Water Act, Not the Finality of a Permit. 6

C. Recognizing that Section 404(c) Authorizes EPA to Issue a Post-Permit Veto Honors Congressional Intent, as Shown in Legislative History. 11

D. The District Court Erred by Considering Economic Factors Which Have No Relevance to EPA's Veto Authority. 17

III. EPA'S DETERMINATION THAT THE SPRUCE MINE WOULD CAUSE UNACCEPTABLE HARM TO WILDLIFE HAS A FIRM SCIENTIFIC FOUNDATION IN THE ADMINISTRATIVE RECORD. 20

A. EPA Well Supported Its Determination that the Burial and Loss of Headwater Streams Would Harm Wildlife 24

B. Substantial Record Evidence Validates EPA's Determination that the Spruce Mine Would Harm Wildlife Downstream. 26

CONCLUSION 30

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alameda Water & Sanitation Dist. v. Reilly,
930 F. Supp. 488 (D. Colo. 1996).....21

Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.,
299 F.3d 1007 (9th Cir. 2002) 7

Bersani v. U.S. EPA,
674 F. Supp. 405 (N.D. N.Y. 1987) 11

Bersani v. U.S. EPA,
850 F.2d 36 (2d Cir. 1988) 11, 16, 20

Bragg v. Robertson,
54 F. Supp. 2d 635 (S.D. W. Va. 1999).....ix

Bragg v. Robertson,
72 F. Supp. 2d 642 (S.D. W.Va. 1999), *rev'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001) 23

* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,
467 U.S. 837 (1984).....1, 3, 17, 18

City of Alma v. United States,
744 F. Supp. 1546 (S.D. Ga. 1990) 5, 20

Clinton v. New York,
524 U.S. 417 (1998).....15

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,
557 U.S. 261 (2009).....15, 17

Creppel v. Army Corps of Eng'rs,
CIV. A. No. 77-25, 1988 WL 70103 (E.D. La. June 29, 1988) 20

Golden Gate Audubon Soc'y v. U.S. Army Corps of Eng'rs,
700 F. Supp. 1549 (N.D. Cal. 1988), *order am.* 717 F. Supp. 1417 (N.D. Cal. 1988).....14

James City County v. EPA,
12 F.3d 1330 (4th Cir. 1993) 5, 13, 16, 18, 20

Kentuckians for the Commonwealth, Inc. v. Rivenburgh,
317 F.3d 425 (4th Cir. 2003) 16

Metro. Wash. Airports Auth., v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).....15

Nat. Res. Def. Council v. U.S. EPA,
822 F.2d 104 (D.C. Cir. 1987).....7, 10

Newport Galleria Gr. v. Deland,
618 F. Supp. 1179 (D.D.C. 1985).....5, 12, 16

OVEC v. U.S. Army Corps of Eng'rs,
Civ. No. 3:05-0784 (S.D. W. Va.) ix

Res. Invs., Inc. v. U.S. Army Corps of Eng'rs,
151 F.3d 1162 (9th Cir. 1998) 12

Serono Labs., Inc. v. Shalala,
158 F.3d 1313 (D.C. Cir. 1998).....18

STATUTES

Clean Water Act, Section 101, 33 U.S.C. § 1251.....6

* 33 U.S.C. § 1251(a) 4, 6

33 U.S.C. § 1251(b).....4

Section 301, 33 U.S.C. § 1311.....7, 8

* 33 U.S.C. § 1311(a) 6, 7

Section 307, 33 U.S.C. § 1317(d).....9

Section 402, 33 U.S.C. § 1342.....9

Section 404, 33 U.S.C. § 1344..... 1, 8, 11-17

* 33 U.S.C. § 1344(b) 2, 3, 14

33 U.S.C. § 1344(b)(1) 13

33 U.S.C. § 1344(b)(2) 14

* 33 U.S.C. § 1344(c) 1-6, 9-18, 20-22

33 U.S.C. § 1344(h)-(j) 13

33 U.S.C. § 1344(p) 9, 10

Section 504, 33 U.S.C. § 1364(a) 9

Rivers and Harbors Act, 33 U.S.C. § 403 12

Administrative Procedure Act, 5 U.S.C. § 706 .....20, 30

RULES AND REGULATIONS

FED. R. APP. P. 29 and D.C. CIR. R. 29(b). viii

33 C.F.R. § 325.7(a) 8, 9

40 C.F.R. § 122.64 9

40 C.F.R. § 230.3(c) 21

* 40 C.F.R. § 231.1(a) 16

* 40 C.F.R. § 231.2(e) 21

40 C.F.R. § 231.3(a) 5

404(b)(1) Guidelines, 40 C.F.R. Part 230 .....14, 21, 30

FEDERAL REGISTER NOTICES

* 44 Fed. Reg. 58,076 (Oct. 9, 1979) 3, 4, 5, 10, 18-19, 21, 30

45 Fed. Reg. 85,336 (Dec. 24, 1980) 6, 16

76 Fed. Reg. 3126 (Jan. 19, 2011) 22

76 Fed. Reg. 30,938 (May 27, 2011) 26

LEGISLATIVE HISTORY

House Consideration of the Report of the Conference Committee (Oct. 4, 1972), 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973) 12

Senate Consideration of the Report of the Conference Committee on Amendment of the Federal Water Pollution Control Act (Oct. 4, 1972), 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973) 12, 15, 18

S. REP. NO. 92-414 (1972), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973) 7, 8

S. REP. NO. 95-370 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326 13

OTHER AUTHORITIES

Civiletti Memorandum, Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197 (Sept. 5, 1979) 17

U.S. CONSTITUTION, art. I, § 7 15

GLOSSARY

404(b)(1) Guidelines	40 C.F.R. Part 230 (§§ 230.1-230.98)
APA	Administrative Procedure Act
Corps	U.S. Army Corps of Engineers
CWA or the Act	Clean Water Act
CWA 1972 LEG. HIST.	A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973)
Environmental Amici	West Virginia Highlands Conservancy, Coal River Mountain Watch, Natural Resources Defense Council, Ohio Valley Environmental Coalition, Sierra Club
EPA	U.S. Environmental Protection Agency
Final Determination or FD	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 (Jan. 13, 2011)
JA/SJA	Joint Appendix/Supplemental Joint Appendix
Section 404	Clean Water Act, 33 U.S.C. § 1344
Spruce mine	Spruce No. 1 Mine
Spruce permit	United States Department of the Army Permit No. 199800436-3 (Section 10: Coal River)
USFWS	U.S. Fish and Wildlife Service
Veto or Spruce veto	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 (Jan. 13, 2011)

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Brief for Appellant Environmental Protection Agency.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

As local and national nonprofit conservation organizations, West Virginia Highlands Conservancy, Coal River Mountain Watch, Natural Resources Defense Council, Ohio Valley Environmental Coalition, and Sierra Club ("Environmental Amici"), respectfully submit this brief in support of the Final Determination of the U.S. Environmental Protection Agency ("EPA"). Environmental Amici seek to protect their members' interests in preventing the irreversible loss of the wildlife and aquatic ecosystems protected by the Final Determination ("FD"), and other environmental and health impacts associated with the type of extreme mountaintop removal mining that would occur under the Spruce permit.[1] Litigation brought by several Environmental Amici prevented this mine from destroying the waterways at issue, Pigeonroost and Oldhouse Branches and their tributaries, during the time

[1] The parties consent to Environmental Amici's submission of this brief, which is thus authorized by FED. R. APP. P. 29 and D.C. CIR. R. 29(b). [DN1378382].

EPA took to issue the Final Determination now under review. *See Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999); FD at 19-20, JA788-89 (describing *OVEC v. U.S. Army Corps of Eng'rs*, Civ. No. 3:05-0784 (S.D. W. Va.)); EPA Br. 13-14. In recent years Environmental Amici have worked to bring EPA's attention to new science that puts the dire environmental harm of the Spruce mine into stark relief. *See, e.g.*, Comments of Envtl. Amici, JA317-27, JA333-42; Keating Letter, JA584.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The district court's decision contravened first principles of administrative law by imposing a restriction on the Environmental Protection Agency's authority in conflict with both the governing statute and EPA's reasonable reading of it. The plain text of Section 404(c) of the Clean Water Act alone requires reversal. But if there is any ambiguity, this Court should defer to EPA's well-founded interpretation that the Act grants it the authority to withdraw (and thus reverse) a Corps of Engineers specification – whether memorialized in a permit or not – whenever necessary to prevent unacceptable environmental harm. EPA's reading honors the text of the statute, the Act's core purpose of protecting the integrity of the nation's waters, the fundamental prohibition on discharges into waters without a permit designed to protect them, and the Congressional intent to give EPA final say over environmental decisions under Section 404. The district court erred in ruling otherwise, placing the finality of a permit for one of the most destructive mountaintop removal mines ever proposed above the Act's central goal of environmental protection, and importing improper economic policy considerations into the *Chevron* step two analysis. This Court must reverse.

The Court should then reach the merits, review the robust administrative record, and conclude that EPA's expert determination was not arbitrary and

capricious. Appellee Mingo Logan seeks to bury over six miles of pristine streams, including all wildlife living in those streams, with millions of cubic yards of mining waste, disturbing over 2,000 acres (about 3.5 square miles), releasing toxic pollutants into downstream waters, and devastating wildlife and watersheds. FD at 13, 17, 49-50, 73, 78-79, JA782, JA786, JA818-19, JA842, JA847-48. Congress aimed to stop such widespread destruction of wildlife and vital aquatic ecosystems when it enacted the Clean Water Act. In keeping with the important role Congress directed the agency to perform under Section 404(c), EPA made a well-reasoned, scientific determination that it would be unacceptable to allow the Spruce mine to cause irreversible environmental harm to wildlife and West Virginia streams in vulnerable watersheds already under extreme ecological stress. This Court should uphold EPA's veto of the specifications for the Spruce mine.

ARGUMENT

I. THE CLEAN WATER ACT AUTHORIZES EPA TO WITHDRAW THE SPECIFICATION OF ANY DISPOSAL SITE WHENEVER NECESSARY TO PROTECT WATERS.

The text of Section 404(b)-(c) of the Clean Water Act ("CWA") alone requires this Court to uphold EPA's action and reverse the district court for the reasons explained by EPA's Brief (at 24-32). [DN1384478]. The plain terms "withdrawal," "any," and "whenever" leave no room for confusion as to their meaning. 33 U.S.C. § 1344(c). Congress granted EPA the authority to withdraw a

specification (whether or not it has been memorialized in a permit) as the ultimate safeguard to protect U.S. waterways whenever EPA makes the requisite scientific determination that this is necessary to prevent unacceptable harm to environmental resources Congress deemed valuable and worth protecting, including wildlife. *Id.*; EPA, Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,077 (Oct. 9, 1979); FD at 45, JA814.

Contrary to the district court's view, Section 404(c) contains no limit on EPA's authority based on whether or not the Corps has issued a permit. Rather, the statute does the opposite: Section 404(b) mandates that the Corps' permitting authority is at all times "subject to" EPA's veto authority. 33 U.S.C. § 1344(b) (citing *id.* § 1344(c)). Because there is no reasonable reading of the statute in which the Corps' issuance of a permit limits EPA's authority,[2] this Court should end its analysis with the plain text, and uphold EPA's action. *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

---

[2] The district court did not even purport to adopt such an interpretation aside from a footnote. JA189 n.6.

II. RELEVANT INDICIA OF CONGRESSIONAL INTENT REINFORCE THE PLAIN MEANING OF THE STATUTE AND PROVE THE REASONABLENESS OF EPA'S READING.

A. EPA's Post-Permit Authority Serves the Act's Explicit Purpose to Protect Waters.

Cutting off EPA's authority as soon as the Corps acts, as the district court did, contradicts not only the plain text of Section 404(c), but also the basic statutory purpose that provision implements. The primary objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see* FD at 11, JA780. Yet under the district court's reading of the statute, no matter how much unacceptable harm would occur to waters, aquatic life, and affected communities, EPA would be powerless to act after the Corps issues a permit. It would be inconsistent with the Act's primary objective of protecting waters to decide that the mere issuance of any permit by the Corps – no matter how much harm it authorizes – prevents EPA from issuing a veto determination. *Cf.* 33 U.S.C. § 1251(b) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated . . . ").

Congress, through Section 404(c), gave EPA authority to provide 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. EPA's "authority to veto to protect the environment is practically

unadorned." *James City County v. EPA*, 12 F.3d 1330, 1336 (4th Cir. 1993). Without regard to the timing of Corps action, Congress "gave the EPA wide discretion to determine *when* to initiate proceedings under section 404(c)," to prevent environmental harm. *Newport Galleria Gr. v. Deland*, 618 F. Supp. 1179, 1182 (D.D.C. 1985) (emphasis added); *see also City of Alma v. United States*, 744 F. Supp. 1546, 1562 (S.D. Ga. 1990) ("[T]he CWA grants the EPA wide discretion to employ section 404(c) as it deems appropriate."). Although EPA may often have sufficient information to initiate the Section 404(c) veto process before a permit is issued, there are also instances, such as with the Spruce mine, where for practical or scientific reasons EPA may not yet have reached the threshold it deems necessary to make the required finding before the Corps chooses to act. *See* 40 C.F.R. § 231.3(a) (to initiate veto process, requiring EPA regional administrator to have "reason to believe" unacceptable adverse effects may occur).

Thus the timing of any Corps action has no bearing on whether EPA may act to protect waters. To serve the Act's primary objective of environmental protection, Congress authorized EPA to issue a veto "whenever" EPA deems necessary to prevent unacceptable harm to aquatic resources. 33 U.S.C. § 1344(c); *see* 44 Fed. Reg. at 58,076 ("section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been

issued"); EPA, 404(b)(1) Guidelines, 45 Fed. Reg. 85,336, 85,337 (Dec. 24, 1980) (same) (promulgated in consultation with the Corps), JA266. For the same reasons that EPA received Section 404(c) authority in the first place, this authority does not hinge on when the Corps chooses to act, and continues after permit issuance. Accordingly, reading the statute in the most straightforward manner, as EPA has done, best advances the core environmental purpose of the Act. Section 404(c) ensures that the "integrity of the Nation's waters," 33 U.S.C. § 1251(a), will *never* depend on the Corps alone for protection.

B. The Prohibition on Polluting U.S. Waterways Is the Touchstone of the Clean Water Act, Not the Finality of a Permit.

To carry out the environmental goals of the Clean Water Act, Congress outlawed the addition of any pollutant to the nation's waters without a permit designed to ensure protection of those waters. 33 U.S.C. § 1311(a). The district court erred by assigning too much significance to industry amici's desire for finality, at the expense of environmental protection. The court called the permit the "touchstone" of the Act, and found that it would be "unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality." JA207. However, industry's interest in the finality of permits is not mentioned in the Act's statement of Congressional intent. *See* 33 U.S.C. § 1251. Rather, it is the prohibition on the discharge of pollutants without a permit designed to protect

the integrity of those waters, *id.* § 1311(a), that is the "cornerstone" of the Act. *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002); *Nat. Res. Def. Council v. U.S. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) ("The foremost national goal enunciated by Congress is the complete elimination of the discharge of pollutants."). Congress's prohibition on discharging into U.S. waters without a permit that will protect those waters supports EPA's post-permit veto authority.

Contrary to the district court's statements, JA192, a CWA permit provides only a limited, conditional authorization to discharge pollutants which at all times depends on the permit's protection of waters. As Section 301 states: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).[3] The legislative history of Section 301 explains its protective purpose: "This section clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program . . . , this legislation would clearly establish that no one has the right to pollute." S. REP. NO. 92-414 at 42 (1972), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL

[3] The cited sections detail requirements that permits must meet to protect waters.

AMENDMENTS of 1972, at 1460 (Comm. Print 1973) ("CWA 1972 LEG. HIST."). Because there is no "inherent right to use the nation's waterways for the purpose of disposing of wastes," *id.*, any interest in "finality" cannot trump the environmental purpose of an EPA veto.

The district court's emphasis on finality at all costs finds no support in the Clean Water Act's permitting framework that implements Section 301. A CWA permit is never truly final in the way the district court suggested, because it always remains subject to potential agency action necessary to protect the environment. The permit at issue in this case stated that it was a temporary authorization that did not convey a legal right, and that could be changed, suspended, or revoked. Permit at 2-3, JA985-86. The Corps' regulations expressly provide for the reevaluation, modification, suspension, or revocation of a Section 404 permit at any time. 33 C.F.R. § 325.7(a) (authorizing the Corps to take such action based on consideration of factors such as the public interest and "the continuing adequacy of . . . the

permit conditions").[4] Similarly, other types of CWA permits lack the finality the district court imputed to the Act. *See, e.g.*, 33 U.S.C. § 1317(d) (requiring nationwide compliance with newly promulgated effluent standards for certain toxic pollutants regardless of existing permit limits); 40 C.F.R. § 122.64 (authorizing the termination of a Section 402 permit if "permitted activity endangers human health or the environment"). Further, "[n]otwithstanding any other provision of this chapter," all permits are subject to EPA's emergency power "to stop the discharge of pollutants." 33 U.S.C. § 1364(a).

Section 404(p) does not upend Congress's emphasis on ensuring that permits protect the environment. The district court ascribed undue significance to Section 404(p), finding it states an "unambiguous Congressional directive" that EPA's authority to protect waters under Section 404(c) forever ceases the moment the Corps issues a permit, regardless of the environmental harm it would cause.

---

[4] The Court should give no weight to the district court's concern about confusion over a permit's status after EPA vetoes specifications contained in that permit. There was no such confusion here because EPA notified the permittee, and both EPA and the Corps agree that the Final Determination was self-executing, such that upon issuance it had the legal effect of prohibiting discharges into Pigeonroost and Oldhouse Branches. *See* EPA Br. at 15, 44; FD at 21-25 (discussing notice provided to permittee), JA790-94; EPA Br. at 12; JA85-86 & Exhs. A-C, E, JA260-85. But in the event that there were any such confusion, 33 C.F.R. § 325.7(a) provides a regulatory mechanism for the Corps to resolve this by modifying the permit to reflect EPA's action.

JA192. It says no such thing. Section 404(p) shields a permittee from enforcement actions only. 33 U.S.C. § 1344(p); *see also* 44 Fed. Reg. at 58,077 (explaining that withdrawal of specification under 404(c) does not render past discharges illegal). Congress's decision to limit civil and criminal liability for past discharges in compliance with a permit does not make the permit itself immutable. Rather, if EPA decides, as it did here, FD at 98, JA867, that the permit fails to protect waters from unacceptable harm, then environmental concerns must prevail. "The first principle of the statute is . . . that it is unlawful to pollute at all." *Nat. Res. Def. Council*, 822 F.2d at 123.

Thus the district court erred by placing such significance on the finality of a permit for finality's sake instead of applying the text and environmental purpose of the Act. The permit is not an end in itself, and it has worth only if it protects waters from harm, which EPA has determined the Spruce permit would not do. FD at 49-50, 73, 83-91 (explaining how mitigation conditions in the permit would fail to prevent unacceptable adverse effects), JA818-19, JA842, JA852-60. Whenever wildlife and waters face unacceptable impacts, EPA has Section 404(c) authority to protect them.

C. Recognizing that Section 404(c) Authorizes EPA to Issue a Post-Permit Veto Honors Congressional Intent, as Shown in Legislative History.

The Court need not make recourse to legislative history in interpreting Section 404(c), for reasons EPA has explained. EPA Br. at 37-39. But assuming it is relevant, the legislative history shows that Congress gave EPA the authority to withdraw any specification, including one contained in a permit. The district court was incorrect that "nothing in the legislative history of the amendments" supports the conclusion that Congress authorized EPA to withdraw a specification embodied in a permit. JA199. To the contrary, "nothing in the legislative history indicates Congress' desire to *limit* the EPA's role in assessing the environmental acceptability of a site." *Bersani v. U.S. EPA*, 674 F. Supp. 405, 417 (N.D. N.Y. 1987) (emphasis added), *aff'd*, 850 F.2d 36 (2d Cir. 1988). Moreover, the legislative history reveals that Congress granted EPA the ultimate power to disagree with and reject a Corps decision due to environmental concerns, which reinforces that EPA's authority to withdraw continues even after the Corps issues a permit.

The district court put undeserved weight on the decision to make the Corps the permitting authority, and insufficient weight on Congress's decision to make EPA the ultimate environmental arbiter under Section 404. Rather than strip the

Corps of all of its prior authority, Congress decided to allow the Corps to maintain a role in permitting "in light of the fact that [its] system to issue permits already existed" under the Rivers and Harbors Act, 33 U.S.C. § 403. Senate Consideration of the Report of the Conference Committee on Amendment of the Federal Water Pollution Control Act, 1 CWA 1972 LEG. HIST. at 177 (Sen. Muskie statement entitled exhibit 1); House Consideration of the Report of the Conference Committee (Oct. 4, 1972), 1 CWA 1972 LEG. HIST. at 236 (emphasizing "importance of navigation and waterborne commerce" and "anchorage"); *see also Res. 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).

But Congress gave EPA the final say in protecting waters from any unacceptable Section 404 discharge. As Senator Muskie explained, "the [Conference] Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either the site to be selected or the specific soil to be disposed of in a site." 1 CWA 1972 LEG. HIST. at 177 (Muskie ex. 1); *see also Newport Galleria*, 618 F. Supp. at 1185 ("Congress has entrusted the resolution of [environmental] issues to the expertise of the EPA."). Congress therefore

authorized EPA to develop the environmental guidelines that the Corps must apply when making permitting decisions and to exercise its Section 404(c) authority as a final check on the Corps. 33 U.S.C. § 1344(b)(1), (c); *see also James City County*, 12 F.3d at 1336 (recognizing that CWA § 404(c) is a "broad grant of power" that "focuses only on [EPA's] assigned function of assuring pure water and is consistent with the missions assigned to it throughout the [CWA]").

Moreover, even though the Corps initially received Section 404 permitting authority, Congress granted EPA the power to revoke that authority and delegate it to the states, with all such state permits subject to EPA's review and objection. 33 U.S.C. § 1344(h)-(j). Regardless of whether the Corps or states are administering the permit program, in each instance Congress granted EPA the ultimate authority over Section 404 permits. As explained by the Senate Report's explanation of Section 1344(h)-(j), added as part of the 1977 CWA Amendments: "[a]lthough discretion is granted to establish separate administration for a State permit program, the authority of the Administrator [of EPA] to assure compliance with guidelines in the issuance and enforcement of permits and in the specification of disposal sites which is provided in sections 402(c) through (k) and 404(c) is in no way diminished." S. REP. NO. 95-370, at 78 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4403.

By endowing EPA with both Section 404(c) veto authority and Section 404(j) objection authority, Congress intended that environmental protection would trump any economic interest. Congress chose to partly maintain the Corps' (or the states') day-to-day administration of permitting, but gave EPA "substantial responsibility over administration and enforcement" of the Section 404 permit program because EPA "could be better trusted to make environmentally-sensitive determinations." *Golden Gate Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 700 F. Supp. 1549, 1552, 1553 (N.D. Cal. 1988), *order am.* 717 F. Supp. 1417 (N.D. Cal. 1988). Indeed, even though the statute allows for an exception to the 404(b)(1) Guidelines based on the "economic impact . . . on navigation and anchorage," 33 U.S.C. § 1344(b)(2), this exception is still "subject to" the safeguard of EPA's 404(c) veto authority. *Id.* § 1344(b). Thus the legislative history of Section 404 sheds light on the plain meaning of Section 404(c) and shows that it is the same as EPA's reading of the statute – that the issuance of a permit does not extinguish EPA's authority to fulfill its environmental responsibility.

It is also instructive that Congress used a particular term – "veto" – to describe EPA's Section 404(c) authority. As Senator Muskie explained, "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 CWA 1972 LEG. HIST. at 177 (Muskie ex. 1) (emphasis added). The concept of a "veto," whether under the Constitution (Art. I, § 7) or in statutory use, generally means to "cancel in whole" a decision already made by a different government actor. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417, 436 (1998) (in case finding Line Item Veto Act unconstitutional, explaining that the Act "gives the President the power to 'cancel in whole' three types of provisions that have been signed into law"); *see also Metro. Wash. Airports Auth., v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (finding challenge to be ripe before veto was exercised because this veto power is like "the sword over Damocles, creating a 'here-and-now subservience'") (citation omitted). The word "veto" shows the intent to allow EPA to withdraw or reverse a Corps specification retrospectively, and thus prohibit an unacceptable discharge.

Following the legislative history, the courts and EPA have used the word "veto" as the shorthand concept describing EPA's authority to prohibit or withdraw a Section 404 specification. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009), the Supreme Court stated that "EPA had the statutory authority to veto the Corps permit" and found that "[a]fter considering the Corps findings, the EPA did not veto the Corps permit." *Id.* at 270,

274. EPA's regulations and other court decisions use the same word – "veto" to describe action EPA could take in regard to any specification. *See* 40 C.F.R. § 231.1(a) ("Under section 404(c), the Administrator may exercise a veto over the specification by the U.S. Army Corps of Engineers."); 45 Fed. Reg. at 85,336, JA265 ("if the Guidelines are properly applied, EPA will rarely have to use its 404(c) veto"); *see, e.g.*, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003) (explaining that "when a permit is issued by the Corps under § 404 . . . , EPA can veto the Corps' permit"); *James City County*, 12 F.3d at 1332 ("The Environmental Protection Agency ("EPA") 'vetoed' the permit under the authority granted it by section 404(c) of the Clean Water Act . . . . "); *Bersani*, 850 F.2d at 40 ("EPA has the authority under § 404(c) to veto any permit granted by the Corps."). The district court in this case also repeatedly described EPA's Section 404(c) authority as a "veto." JA177, *e.g.*, JA178, JA184, JA186, JA188, JA192, JA208, JA209.

The effect of a veto is to nullify or cancel a prior decision. As a result, "it would be extraordinary if Congress granted the EPA a veto power over the Corps' permit decision, but precluded it from reconsidering those issues the Corps considered in granting the permit in the first place." *Newport Galleria*, 618 F. Supp. at 1182 n.2. "[I]f the section 404(c) veto is to have any meaning at all, the

EPA must be able to disagree with the Corps' conclusions." *Id.* at 1184 (finding EPA regional administrator had not abused its discretion by initiating Section 404(c) proceeding "after the Corps . . . reached its decision," and dismissing challenge brought before veto was finalized). The description of EPA's Section 404(c) authority as "veto" power affirms EPA's statutory reading that it may withdraw a Corps' specification after issuance of a permit. This Court should therefore defer to EPA's permissible interpretation of the Act as the Supreme Court did in *Coeur Alaska*, 557 U.S. at 284, and for similar reasons as discussed in Attorney General Civiletti's Memorandum on EPA's authority to interpret Section 404. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197, 202 (Sept. 5, 1979).

D. The District Court Erred by Considering Economic Factors Which Have No Relevance to EPA's Veto Authority.

The principle of "finality" on which the district court relied to find EPA's interpretation impermissible came not from the plain text of the statute, but from its view of the economic consequences of a post-permit EPA veto. The district court erroneously imported economic policy preferences of industry amici into its consideration of a statutory question in which economic considerations are irrelevant. JA207. This policy choice, cloaked in statutory interpretation,

contravened the text and purpose of the Act and breached a cardinal rule of *Chevron*.

First, a court may not interpret Section 404(c) to serve a particular economic policy view. Doing so violates the fundamental principle that courts must put aside their policy preferences when interpreting a statute, and not question the "wisdom of the agency's policy." *Chevron*, 467 U.S. at 866; *see id.* at 843 n.11. "[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable – regardless whether there may be other reasonable, or even more reasonable, views." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998).

Second, the purpose behind Section 404(c) shows that environmental concerns trump economic ones, such that economic policy considerations should carry no weight in this Court's interpretation of whether EPA may issue a Section 404(c) determination after the Corps has issued a permit. As Senator Muskie explained, "[t]he Conferees believe that the economic argument alone is not sufficient to override the environmental requirements of fresh water lakes and streams." 1 CWA 1972 LEG. HIST. at 178 (Muskie ex. 1). Just as Section 404(c) authorizes EPA action merely to "assur[e] pure water," and "solely on the basis that [a discharge] would cause unacceptable adverse effects on the environment,"

James City County, 12 F.3d at 1335-36, judicial interpretation of the Act should not devolve into "a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project," 44 Fed. Reg. at 58,078. Congress was well aware that there could be some economic costs from authorizing EPA to veto specifications based purely on environmental concerns, and it chose to establish a regulatory framework that would best protect waters. The district court erred by ignoring this policy choice made by Congress and implemented by EPA.

Further, the economic concerns cited by the industry amici briefs relied on by the district court are unfounded. JA192, JA207. The record does not show that it would advance local communities' long-term economic well-being (as opposed to mining companies' short-term profit) to prohibit EPA from exercising its veto authority after the Corps issues a permit. The contrary is true. *See, e.g.*, FD at 94, JA863 ("Studies have highlighted that, despite the economic benefits produced by coal extraction, coal-producing counties in Central Appalachia continue to have some of the highest poverty and unemployment rates in the region."); Comments, JA327-33; Keating Letter, JA584-85. In addition, scientific research shows that living near a mountaintop removal mining site like Spruce is associated with harm to human health, and thus raises additional obvious economic concerns. FD at 96-

97, JA865-66; Recomm. Determ., JA672-73 (citing research, *e.g.*, JA527, JA534, JA548, JA558, JA564, JA1036). Thus even considering economic policy would not counsel in favor of the district court's view of protecting "finality" for a permit at all costs.

III. EPA'S DETERMINATION THAT THE SPRUCE MINE WOULD CAUSE UNACCEPTABLE HARM TO WILDLIFE HAS A FIRM SCIENTIFIC FOUNDATION IN THE ADMINISTRATIVE RECORD.

This Court should reach the merits and uphold EPA's well-grounded veto determination as reasonable and supported by a robust scientific record. *See* EPA Br. at 56. Remanding to the district court would cause unnecessary delay and inefficiency, and eventually this Court would review the result of any such remand based on *de novo* review of the administrative record. Thus, Environmental Amici urge this Court to reach and reject Appellee Mingo Logan's Administrative Procedure Act ("APA") claims.

Applying the deferential standard of review required, EPA Br. at 56-57, courts have repeatedly affirmed EPA's Section 404(c) determinations. *See*, *e.g.*, *James City County*, 12 F.3d at 1338 (stressing the "deference due [to] EPA's determination"); *Bersani*, 850 F.2d at 47; *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*, CIV. A. No. 77-25, 1988 WL 70103, at *4, 12 (E.D. La.

June 29, 1988) (explaining that Congress "added another safeguard" with EPA's veto); *see also Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 488, 493 (D. Colo. 1996) (dismissing due to lack of standing, but also finding EPA veto was not arbitrary and capricious). This Court should do the same here.

EPA met the statutory test for a veto under Section 404(c) by providing a reasoned explanation based on the record for its determination that the destruction of Pigeonroost Branch and Oldhouse Branch by mining waste would lead to an "unacceptable adverse effect" on wildlife. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.2(e) (defining unacceptable as an "impact on an aquatic or wetland ecosystem which is likely to result in . . . significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas" and also defining this in part based on consistency with the Section 404(b)(1) Guidelines); *see also* 40 C.F.R. § 230.3(c) (defining "aquatic ecosystem" as the waters "that serve as habitat for interrelated and interacting communities and populations of plants and animals"). The term unacceptable "refers to the significance of the adverse effect — e.g. is it a large impact and is it one the aquatic and wetland ecosystem cannot afford." 44 Fed. Reg. at 58,078. Here EPA found unacceptable harm to wildlife within the streams that would be destroyed and unacceptable harm to wildlife downstream due to the fact that: "The Spruce No. 1 Mine will eliminate the entire suite of

important physical, chemical and biological functions provided by the streams of Pigeonroost Branch and Oldhouse Branch including maintenance of biologically diverse wildlife habitat and will critically degrade the chemical and biological integrity of downstream waters," on a scale associated with "significant degradation." FD at 77, JA846; *see also* FD at 49-50, 73, JA818-19, JA842; Notice, 76 Fed. Reg. 3126, 3128 (Jan. 19, 2011), JA768-69. Each of EPA's conclusions establishes the requisite foundation for its Spruce 404(c) determination and has significant support in the administrative record.

The record contains overwhelming scientific evidence showing that the direct burial of high quality streams and the resulting downstream impairment would lead to unacceptable harm to wildlife that depend on healthy aquatic ecosystems. FD at 8-9, 20-21, 30-44, 47-73, JA777-78, JA789-90, JA799-813, JA816-42. Part of this evidence includes a new wave of science, including 100 scientific articles and data sources released after the Corps issued the permit. FD at 20, JA789; FD App. 7, JA910-36; FD App. 6, JA887-88. For example, in 2008 an EPA scientist published a ground-breaking study finding that 93% of streams below valley fills are biologically impaired, compared with 0% of streams

surveyed in unmined watersheds. Pond *et al.* (2008), JA1058, JA1072.[5] EPA based its veto determination on "a growing consensus" on the ecological value of the aquatic resources that the Spruce mine would destroy and the permanence of the resulting harm to wildlife, as well as recent science showing "that stream restoration projects based upon channel design [like that described in the Spruce permit conditions] . . . are not effective in restoring ecological function and biodiversity." FD at 20, JA789; FD App. 6, JA886-87, JA905-07. EPA also consulted information on a nearby (Dal-Tex) mine from 2007-2010 and new site-specific information from 2008-2010 showing that the Spruce mine's existing valley fill in the Right Fork of Seng Camp Creek was indeed discharging harmful levels of toxic selenium—discharges that were likely to be repeated at the proposed valley fills in Pigeonroost Branch and Oldhouse Branch. FD at 52-58, JA821-27. EPA's "determination was initiated based on the substantial number of project-specific considerations focusing on important headwater stream miles impacted in a stressed watershed where a vast majority of the impacts authorized

---

[5] "Valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream." *Bragg v. Robertson*, 72 F. Supp. 2d 642, 661-62 (S.D. W.Va. 1999) ("No effect on . . . environmental values is more adverse than obliteration. . . ."), *rev'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

by the permit had not occurred because of third-party litigation." FD at 99, JA868. Based on careful review of the science and consideration of 50,000 public comments, including supportive comments from the U.S. Fish and Wildlife Service ("USFWS"), EPA's scientific determination should stand. *Id.* at 21, JA790; USFWS Comments, JA586-89.

A. EPA Well Supported Its Determination that the Burial and Loss of Headwater Streams Would Harm Wildlife.

First, EPA found that the impacts to wildlife and habitat that would occur as a result of the direct loss of vital headwater streams are unacceptable. FD at 46-50, JA815-19. Because headwater streams act like capillaries for the ecosystem, "just as a 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." *Id.* at 26, JA795. Healthy headwater streams sustain aquatic life and "as the early stages of the river continuum, provide the most basic and fundamental building blocks to the remainder of the aquatic environment." *Id.* The streams perform essential functions including provision of wildlife habitat, movement of water and sediments, and transformation of organic matter, such as leaves, into nutrients and energy needed by wildlife throughout the aquatic ecosystem. *Id.* at 26-27, 33 fig. 7, JA795-96, JA802 (illustration "highlighting the importance of aquatic macroinvertebrates to other stream and

riparian wildlife"). Headwater streams not only provide habitat for full-time resident wildlife, but also serve as refugia and spawning grounds for aquatic life that inhabit and make up the starting point for the food-web in the larger watersheds and allow recolonization of nearby waters following drought or disturbance. *Id.* at 7, 27, 38, 68, JA776, JA796, JA807, JA837.

The headwater streams that would be destroyed—Pigeonroost Branch, Oldhouse Branch, and their tributaries—"support least-disturbed conditions and represent some of the last remaining high quality stream and riparian resources within the Headwaters Spruce Fork sub-watershed and the Coal River sub-basin." *Id.* at 44, JA813. Construction of the Spruce mine as authorized by the Corps' permit would completely bury over 6.6 miles of these streams, including virtually all of Oldhouse Branch and its tributaries and much of Pigeonroost Branch and its tributaries. *Id*. at 13, JA782. The effects on wildlife and the aquatic ecosystem would be "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 (2009), JA495, JA499; *see* Palmer *et al.* (2010), JA527-28 ("impacts are pervasive and irreversible"); *see also* EPA (2009) (draft report summarizing available science on harm mountaintop removal mines and valley fills cause to wildlife and

ecosystems), JA1080 (publication announced at 76 Fed. Reg. 30,938 (May 27, 2011)).

EPA made a rational decision compelled by science in the record showing that the Spruce No. 1 valley fills, if allowed, will bury "all wildlife living in these streams, their tributaries, and associated riparian areas," "will eliminate habitat for wildlife that depend upon those streams," and "will also adversely impact wildlife within this watershed that depend on headwater streams for all or part of their life cycles." FD at 47, JA816. Filling these streams with waste from the Spruce mine would cause devastating harm because the streams perform critical hydrologic and biological functions (*i.e.*, ecosystem services) and serve as important habitat for "over 84 taxa of macroinvertebrates, . . . as well as up to 46 species of reptiles and amphibians, 4 species of crayfish, 5 species of fish and at least one water-dependent bird species." *Id.* at 49, JA818. EPA reached a rational, scientific conclusion to protect wildlife that depend on these headwater streams and the vital services they provide in the greater aquatic ecosystem.

B. Substantial Record Evidence Validates EPA's Determination that the Spruce Mine Would Harm Wildlife Downstream.

As a second, independent ground for its determination, EPA found that the watershed impacts of the Spruce mine would cause unacceptable harm to wildlife downstream from Pigeonroost and Oldhouse Branches. These streams are located

in the Spruce Fork sub-watershed, which is part of the larger Coal River sub-basin, both of which have already experienced significant degradation from past mining permits for waste disposal that failed to prevent or mitigate environmental harm. FD at 27-30, 78-82, JA796-99, JA847-51. EPA's decision prevents the Spruce mine from polluting downstream waterways and causing a final, fatal blow to wildlife within these fragile ecosystems.

As EPA found, based on impacts observed at adjacent mines and from existing discharges at the Spruce mine, the fills of mining waste would transform headwater streams that now act as sources of clean water into additional sources of pollution for contaminants such as total dissolved solids and selenium. FD at 50-60, JA819-29. Selenium is a toxic pollutant that accumulates up the food chain and causes severe reproductive impairment and birth defects in wildlife at low concentrations. *Id.* at 51, App. 4, JA820, JA717-41. Increases in total dissolved solids "can have a toxic effect because the ions, regardless of type, can overwhelm the respiratory system and other physiological processes leading to impaired breathing, dehydration, and decreased survival or reproduction." FD at 60, JA829. This pollution would increase conductivity in downstream waters to levels that would wipe out entire genera (or groups of species) of aquatic life. *Id.* at 7, 13, 60-62, 65, App. 1 & 2, JA776, JA782, JA829-31, JA834, JA639-71, JA674-716; *id.* at

58-59, JA827-28 (defining conductivity); *see also* Pond *et al.* (2008), JA1058, JA1072; Pond (2010), JA1053-54. Additionally, the burial of the headwater streams would remove them as sources of dilution to help offset or reduce pollution throughout the watershed. FD at 57, 59, JA826, JA828. These impacts combined would harm native macroinvertebrates that are the starting point for the food-chain and cycle of life in this aquatic ecosystem, and harm wildlife dependent on these species and clean water, including fish, salamanders, and water-dependent birds. *Id.* at 68-73, JA837-42. The adverse effects of valley fills are so extreme that "the naturally occurring aquatic communities in more than 90% of streams below valley fills were degraded," and remain so 15 to 20 years later. EPA, 404(c) Initiation Letter, SJA4; Pond (2008), JA1072; *see also* USFWS Comments, JA586-89.

Importantly, the mitigation measures required by the Spruce permit would not alleviate those impacts. "There 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." FD at 85, JA854 (emphasis added); *see also id.* at 20, JA789 (citing new science

on the inefficacy of mitigation); *id.* FD App. 3, JA869-82; *see, e.g.*, Palmer *et al.* (2010), JA528.

Moreover, EPA found that wildlife in these downstream areas is particularly vulnerable due to biological impairment caused by mining waste disposal. In the Coal River sub-basin, 257 past and present surface mining permits occupy more than 13% of the land area, and in the Spruce Fork sub-watershed, 34 permits occupy more than 33% of the land area. FD at 78, JA847. Scientific research indicates that when surface disturbances reach a significant percentage of a watershed, as low as 3 to 5%, "stream biodiversity and water quality suffer." Palmer *et al.* (2010), JA527; *see* Palmer & Bernhardt (2009), JA495, JA500; Bernhardt *et al.* (2010 pre-publication draft), JA1000 (published at ENVTL. SCI. & TECH. (2012), http://www.ncbi.nlm.nih.gov/pubmed/22788537). The Spruce Fork watershed impacts exceed that threshold by an order of magnitude.

The Spruce discharges would make the already degraded water quality downstream even worse. The record shows that about 33% and 34% of the streams are biologically impaired within the Coal River sub-basin and the Spruce Fork watershed, respectively, due to contamination by coal mining waste. FD App. 1, JA742. Given this, EPA reasonably found that the Spruce valley fills would cause impacts that "the aquatic ecosystem cannot afford," and that this damage

would not "be adequately mitigated to reduce the impacts to an acceptable level." FD at 50, 90, JA819, JA859; *see* 44 Fed. Reg. at 58,078; *see also* FD at 77-83, JA846-52 (concluding that the Spruce valley fills would lead to "significant degradation . . . particularly in light of the extensive cumulative stream losses in the Spruce Fork and Coal River watersheds"); FD App. 5, JA883-84 (describing cumulative harm); USFWS Comments, JA587-89. In view of the science, EPA concluded that the discharge of mining waste into Pigeonroost and Oldhouse Branches, as authorized by the Spruce permit, would cause unacceptable adverse effects on wildlife and "does not comply with the requirements of the § 404(b)(1) Guidelines." FD at 91, JA860. EPA has satisfied the APA and the Clean Water Act.

CONCLUSION

For these reasons, Environmental Amici urge this Court to reverse the district court's ruling and affirm EPA's Final Determination to prevent unacceptable harm to vital West Virginia waterways.

DATED: October 17, 2012

Respectfully Submitted,

/s/ *Emma C. Cheuse*

Emma C. Cheuse
Jennifer C. Chavez
EARTHJUSTICE
1625 Massachusetts Ave., N.W., Suite 702
Washington, D.C. 20036-2243
Telephone: (202) 667-4500
Fax: (202) 667-2356
echeuse@earthjustice.org
jchavez@earthjustice.org

Benjamin A. Luckett
Joseph M. Lovett
APPALACHIAN MOUNTAIN ADVOCATES
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 645-0125
Fax: (304) 645-9008
bluckett@appalmad.org
jlovett@appalmad.org

Counsel for Environmental Amici – West Virginia Highlands Conservancy, Coal River Mountain Watch, Natural Resources Defense Council, Ohio Valley Environmental Coalition, and Sierra Club

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rules of Appellate Procedure 32(a)(7)(C), and 29(d) (and except for the portions of the brief described in FED. R. APP. P. 32(a)(7)(B)(iii)), the foregoing *Amicus Curiae* Final Brief contains 6,994 words, as counted by counsel's word processing system.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point.

DATED: October 17, 2012

/s/ *Emma C. Cheuse*
Emma C. Cheuse

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing *Amicus Curiae* Final Brief Of West Virginia Highlands Conservancy, Coal River Mountain Watch, Natural Resources Defense Council, Ohio Valley Environmental Coalition, And Sierra Club In Support Of Appellant United States Environmental Protection Agency And In Support Of Reversal on all parties through the Court's electronic case filing (ECF) system.

DATED: October 17, 2012

/s/ *Emma C. Cheuse*
Emma C. Cheuse