

U.S. EPA Authority to Veto U.S. Army Corps of Engineers Permits

Legal Research Summary

(Prepared for WaterLegacy October 2010 by Elliott Wyse, William Mitchell Law School Intern)

A. The Legal Basis for EPA Exercise of 404(c) Veto Authority

Section 404(c) of the Clean Water Act (CWA), 33 U.S.C. 1344(c), authorizes the EPA to withdraw, deny, or otherwise restrict a permit that specifies a dredged or fill material disposal site if it would lead to “an unacceptable adverse impact.”¹

“The Administrator [of the EPA] is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. 33 U.S.C. § 1344(c)(2010).”

Specifically, the following factors may be important to a 404(c) veto determination.²

- Substantial effects on water quality, including³
 - Violation of applicable state & federal water quality standards⁴
 - Risks to the wellbeing of threatened & endangered species⁵
- Significant degradation of United States Waters⁶
 - Economic, recreational, & aesthetic values⁷
 - Human health & welfare⁸
 - Biodiversity⁹
- Affected indigenous communities¹⁰

B. Past & Present EPA Use of 404(c) Veto Authority: Factual Considerations

1. Spruce No. 1 Surface Mine (EPA Region 3, West Virginia)

- 2,278 acres directly impacted, including seven miles of valuable headstreams¹¹
- Inadequate current regulations & practices that are unable to curtail the billions in damages caused by adverse mining impacts, notably acid mine drainage¹²
- Elite fishery, threatened by habitat loss & a variety of chemical/metallic toxins¹³
- Lost breeding/feeding grounds for threatened/endangered birds & mammals¹⁴
- Ineffective & incomplete plans to mitigate detrimental impacts¹⁵

- Tainted subsistence hunting & fishing prospects, as they impact local residents¹⁶
2. Big Branch Surface Mine (EPA Region 4, Kentucky)
 - EPA initiated 404(c) review in April of 2009¹⁷
 3. Yazoo Backwater Area Pumps (Yazoo Pumps) (EPA Region 4, Mississippi)
 - 67,000 acres of directly-impacted wetlands¹⁸
 - Benefits such as jobs & flood protection were achievable via alternative means¹⁹
 - Unaccounted for potential extent of physical & biological damage²⁰
 - Harmed wildlife: a diverse array of invertebrates, birds, mammals, & fish²¹
 - Unacceptable change in land use, particularly vague reforestation plans²²
 - Limited mitigation plans that failed to provide specific detail required to ensure long-term monitoring of the ecosystem recovery²³
 4. Bayou aux Carpes (EPA Region 6, Louisiana)
 - 600 acre impact initially vetoed, modified to allow for an impact to 9.6 acres²⁴
 5. Two Forks (EPA Region 8, Colorado)
 - A dam/reservoir on the South Platte River, to provide water for the Denver area²⁵
 - Status as an elite trout fishery, highly aesthetic and internationally renowned²⁶
 - Popularity & close proximity to the Denver metropolitan area²⁷
 - EPA can veto a project on the basis of unacceptable adverse impact, even if no viable alternatives exist²⁸
 6. Big River (EPA Region 1, Rhode Island)
 - Direct loss of at least 550 acres of wetlands & at least 500 impacted indirectly²⁹
 - Healthy cold-water fishery warranted protection³⁰
 - High regional biodiversity, including resident and transient species³¹
 - Weakened downstream water flow & its impact on the greater watershed³²
 - Lost recreational value, including toxic fish & wildlife unfit for consumption³³
 7. Ware Creek (EPA Region 3, Virginia)
 - Direct loss of 381 acres of vegetated wetlands, 44 acres of open water systems, & 792 acres of forest habitat in a geographically & biologically diverse region³⁴
 - Threatened status of commercially & recreationally important fish species³⁵
 - Reduced viability of spawning & nursing habitat crucial to multiple fish species³⁶
 - Inability of mitigation plans to prevent adverse impacts from reaching larger downstream waters³⁷
 8. Lake Alma (EPA Region 4, Georgia)
 - Direct loss or irretrievable degradation of 1,155 acres of wetlands³⁸
 - Threatened fish, bird, & mammal biodiversity³⁹
 - Mitigation efforts failed to fully account for the extent of the potential harm⁴⁰
 9. Henry Rem Estates (EPA Region 4, Florida)

- 432 acres of wetlands razed for their conversion to agricultural use⁴¹
 - Deprived a multitude of species of valuable territory, aggravating their decline⁴²
10. Russo Development Corporation (EPA Region 2, New Jersey)
 - Irreversible loss of 13.5 acres of quality wetlands mandated off-site mitigation⁴³
 - EPA required deed of a separate 16.3 acre wetland parcel for preservation purposes and the payment of \$700,000 in conservation expenses⁴⁴
 11. Sweedens Swamp Site (EPA Region 1, Massachusetts)
 - Impact to 49 acres of forested wetlands, adjacent to an important river system⁴⁵
 - On/off site mitigation not enough an alternative site was required⁴⁶
 - Alternative sites relevant to 404(c) consideration include all those feasibly obtainable at the time the developer initially entered the market for a site⁴⁷
 - Alternatives were available & unacceptable harm was avoidable, so accepting the permit would violate the 404(b)(1) guidelines governing 404(c) veto authority⁴⁸
 12. Jack Maybank Site (EPA Region 4, South Carolina)
 - 30 acres of wetlands filled & a further 900 acres impounded, essentially removing them from the local ecosystem⁴⁹
 - Disruption of the local fishery & shellfish beds⁵⁰
 - Pre-existing wetlands degradation caused by other projects in the area⁵¹
 13. Norden Company (EPA Region 4, Alabama)
 - Initial veto of a 25-acre wetland site later amended to allow for an impact to 1.5 acres of wetlands for use as an access road⁵²
 - Lost habitat, immediately-harmed fish & wildlife, & most importantly the harmful effect on downstream fisheries⁵³
 14. North Miami (EPA Region 4, Florida)
 - Unacceptable adverse impact on fisheries & shellfish beds, as well as recreational use of the site⁵⁴

D. Federal Court Affirmation of EPA 404(c) Veto Authority

- Two Forks (District Court for the District of Colorado)
 - The EPA can consider recreational impacts & fishing conditions⁵⁵
 - Water quantity is related to quality, & is relevant to the greater inquiry⁵⁶
- Ware Creek (4th Circuit Court of Appeals)
 - “[EPA’s] authority to veto to protect the environment is practically unadorned⁵⁷
 - Statutory language of 404(c) confirms that the EPA can veto solely on the basis of unacceptable harm, it needn’t consider benefits or alternatives⁵⁸
 - EPA can veto a project, even if the lack of viable alternatives means the project would be scrapped entirely⁵⁹

-Sweedens Swamp Site (2nd Circuit Court of Appeals)

- Market entry consideration of alternatives is not unnecessarily vague a varies depending on the case, therefore it is the “best method” for determining the availability of reasonable alternatives⁶⁰

-Lake Alma (District Court for the Southern District of Georgia)

- The EPA can exercise veto authority even if it previously supported a project⁶¹
- A veto is reasonable even if it is opposed by other government agencies⁶²

¹ Protection of Environment, 40 C.F.R. § 231.1 (2009), *available at*

http://water.epa.gov/lawsregs/rulesregs/cwa/upload/2004_10_21_wetlands_40cfrPart231.pdf.

² Spruce No. 1 Surface Mine, 75 Fed. Reg. 16788, 16797 (Envtl. Prot. Agency Apr. 2, 2010) (notice of proposed determination) (construing Protection of Environment 40 C.F.R. § 230 (2009)), *available at* <http://edocket.access.gpo.gov/2010/pdf/2010-7532.pdf>.

³ *Id.*

⁴ Protection of Environment, 40 C.F.R. § 230.10(b)(1) (2009) (noting a specific factor in considering substantial effects on water quality), *available at*

http://water.epa.gov/lawsregs/rulesregs/cwa/upload/2004_10_21_wetlands_pdf_40cfrPart230.pdf.

⁵ Protection of Environment, 40 C.F.R. § 230(b)(3) (2009) (noting a specific factor in considering substantial effects on water quality).

⁶ Spruce No. 1 Surface Mine, 75 Fed. Reg. at 16797.

⁷ Protection of Environment, 40 C.F.R. § 230(c)(4) (2009) (noting a specific factor in considering significant degradation of U.S. waters).

⁸ Protection of Environment, 40 C.F.R. § 230(c)(1) (2009) (noting a specific factor in considering significant degradation of U.S. waters).

⁹ Protection of Environment, 40 C.F.R. § 230(c)(3) (2009) (noting a specific factor in considering significant degradation of U.S. waters).

¹⁰ Spruce No. 1 Surface Mine, 75 Fed. Reg. at 16797.

¹¹ *Id.* at 16789.

¹² *Id.* at 16789.

¹³ *See id.* at 16794, 16799, 16801-03.

¹⁴ *Id.* at 16805-06.

¹⁵ *Id.* at 16903-04.

¹⁶ *Id.* at 16806.

¹⁷ Letter from A. Stanley Meiburg, Acting Regional Administrator, Env'tl. Prot. Agency Region Four, to Colonel Dana R. Hurst, Dist. Eng'r, U.S. Army Corps of Eng'rs (Apr. 28, 2009), *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/2009_06_11_wetlands_BigBranch_15Day_4-28-09.pdf.

¹⁸ Yazoo River Basin Issaquena County, 73 Fed. Reg. 14806, 14806 (Env'tl. Prot. Agency Mar. 29, 2008) (notice of proposed determination), *available at* http://www.epa.gov/wetlands/pdf/Yazoo_PD.pdf.

¹⁹ *Id.* at 14809.

²⁰ *Id.* at 14816-17.

²¹ *Id.* at 14809, 14813.

²² *Id.* at 14809.

²³ *Id.* at 14809, 14816-18.

²⁴ Bayou aux Carpes Jefferson Parish, 74 Fed. Reg. 37219, 37219 (Env'tl. Prot. Agency July 28, 2009) (notice of modified final determination), *available at* <http://www.thefederalregister.com/d/p/2009-07-28-E9-17928>.

²⁵ Two Forks Water Supply Impoundments, 56 Fed. Reg. 76, 76 (Env'tl. Prot. Agency Jan. 2, 1991) (notice of final determination), *available at* [http://www.epa.gov/owow/wetlands/pdf/TwoForks404\(c\)FinalFRN-1991.pdf](http://www.epa.gov/owow/wetlands/pdf/TwoForks404(c)FinalFRN-1991.pdf).

²⁶ Two Forks Water Supply Impoundments, 54 Fed. Reg. 36862, 36864-65 (Env'tl. Prot. Agency Sept. 5, 1989) (notice of proposed determination), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/Two-Forks_PD.pdf.

²⁷ *Id.* at 36870.

-
- ²⁸ Two Forks Water Supply Impoundments, 56 Fed. Reg at 77.
- ²⁹ Big River, 54 Fed. Reg. 5133, 5133 (Envtl. Prot. Agency Feb. 1, 1989) (notice of proposed determination), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/Big-River_PD.pdf.
- ³⁰ *Id.* at 5135.
- ³¹ *Id.* at 5136.
- ³² *Id.* at 5136.
- ³³ *Id.* at 5135.
- ³⁴ *James City County Va. V. EPA*, 12 F.3d 1330, 1336 (4th Cir. 1993), available at http://scholar.google.com/scholar_case?case=5010536345034780543&q=james+city+county+EPA&hl=en&as_sdt=100000002.
- ³⁵ Ware Creek Water Supply Impoundment at 34 (Envtl. Prot. Agency July 10, 1989) (final determination), available at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/WareCreekFD.pdf>.
- ³⁶ *Id.* at 18, 22, 33.
- ³⁷ *See id.* at 44-51.
- ³⁸ Lake Alma, 54 Fed. Reg. 6749, 6759 (Envtl. Prot. Agency Feb. 14, 1989) (notice of final determination), available at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/LakeAlma404-c-FinalFRN-1989.pdf>.
- ³⁹ *Id.* at 6750.
- ⁴⁰ Lake Alma 53 Fed. Reg. 26859, 26862 (Envtl. Prot. Agency July 15, 1988) (notice of proposed determination), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/Lake-Alma_PD.pdf.
- ⁴¹ Henry Rem Estates, 53 Fed. Reg. 30093, 30093 (Envtl. Prot. Agency Aug. 10 1989) (notice of final determination), available at [http://www.epa.gov/owow/wetlands/pdf/HenryRemEstates404\(c\)FinalFRN-1988.pdf](http://www.epa.gov/owow/wetlands/pdf/HenryRemEstates404(c)FinalFRN-1988.pdf).
- ⁴² *Id.* at 30094.
- ⁴³ Russo Development Corporation, 60 Fed. Reg. 47568, 47568 (Envtl. Prot. Agency Sept. 13, 1995) (notice of amended final determination), available at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/RussoCorp404-c-Final-amendedFRN-1995.pdf>.
- ⁴⁴ *Id.*
- ⁴⁵ Sweedens Swamp Site, 51 Fed. Reg. 22977, 22977 (Envtl. Prot. Agency June 24, 1986) (notice of final determination), available at [http://www.epa.gov/owow/wetlands/pdf/Attleboro404\(c\)FinalFRN-1986.pdf](http://www.epa.gov/owow/wetlands/pdf/Attleboro404(c)FinalFRN-1986.pdf).
- ⁴⁶ *Id.* at 22977-78.
- ⁴⁷ *Bersani v. Robichaud*, 850 F.2d 36, 46-7 (2nd Cir. 1988), available at http://scholar.google.com/scholar_case?case=16335888687124364896&q=bersani+robichaud&hl=en&as_sdt=100000002.
- ⁴⁸ Sweedens Swamp Site, 51 Fed. Reg. at 22978.
- ⁴⁹ Jack Maybank Site, 50 Fed. Reg. 20291, 20291 (Envtl. Prot. Agency May 15, 1985) (notice of final determination), available at [http://www.epa.gov/owow/wetlands/pdf/MaybankSite404\(c\)FinalFRN-1985.pdf](http://www.epa.gov/owow/wetlands/pdf/MaybankSite404(c)FinalFRN-1985.pdf).
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² M.A. Norden Company Site, 59 Fed. Reg. 46246, 46247 (Envtl. Prot. Agency Sept. 7, 1994) (notice of amended final determination), available at [http://www.epa.gov/owow/wetlands/pdf/NordenCo404\(c\)Final-amendedFRN-1994.pdf](http://www.epa.gov/owow/wetlands/pdf/NordenCo404(c)Final-amendedFRN-1994.pdf).
- ⁵³ *See id.*
- ⁵⁴ North Miami Landfill Site, 46 Fed. Reg. 10203, 10203 (Envtl. Prot. Agency Feb. 2, 1981) (notice of final determination), available at [http://www.epa.gov/owow/wetlands/pdf/NorthMiami404\(c\)FinalFRN-1981.pdf](http://www.epa.gov/owow/wetlands/pdf/NorthMiami404(c)FinalFRN-1981.pdf).
- ⁵⁵ *See Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486 (D. Colo. 1996).
- ⁵⁶ *Id.* at 491.
- ⁵⁷ *James City*, at 1336.
- ⁵⁸ *Id.* at 1335.
- ⁵⁹ *Id.*
- ⁶⁰ *Bersani*, at 46.
- ⁶¹ *Alma v. U.S.*, 744 F. Supp. 1546, 1555-57 (S.D. Ga. 1990). available at http://scholar.google.com/scholar_case?case=12066260047825704902&q=alma+v.+US+EPA&hl=en&as_sdt=100000002.
- ⁶² *Id.* at 1563-66.