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EPA Threat To Permits Drives Pivotal High Court Appeal

By **Sean McLernon**

Law360, New York (November 18, 2013, 8:12 PM ET) -- The U.S. Supreme Court serves as the last hope for private industry and municipal agencies wary of a newly emboldened U.S. Environmental Protection Agency that's willing to withdraw Clean Water Act permits years after they are issued, leaving hundreds of billions of dollars' worth of projects at risk of shutting down.

Arch Coal. Inc. unit Mingo Logan Coal Co. lodged a petition with the high court last week, challenging a D.C. Circuit decision from April that upheld the EPA's power to withdraw permits for two of the company's disposal sites. Mingo argues that the decision misconstrues the agency's authority and unfairly leaves permit holders in limbo.

If the EPA can pull a permit anytime it finds a problem, even years after approved operations begin, experts say the regulatory uncertainty will stifle investment for projects that receive more than $220 billion per year, according to the petition.

The U.S. Department of Justice has argued that federal regulators would only exercise this authority in extenuating circumstances. The Mingo Logan permit was, after all, the only one the EPA had ever revoked when a project was already underway.

But the mere possibility that a permit could eventually be pulled is enough to disturb the process significantly, according to Mayer Brown LLP partner Timothy S. Bishop.

“It's such an extraordinary power grab by the EPA,” said Bishop, who has argued five cases and briefed more than 60 before the Supreme Court. “I don't think anyone had thought that the EPA has this authority.”

The U.S. Army Corps of Engineers is the primary agency for the permit at issue, known as a Section 404 permit, but the EPA is also involved in the process. The D.C. Circuit ruled that the CWA grants the EPA “broad veto power extending beyond the permit issuance.”

The practical implications of the decision could be devastating to permit holders. If the EPA retains unchecked authority to step in, following the terms of a permit may not be enough to ensure that a project can continue, according to Hollingsworth LLP partner Richard O. Faulk.

“If the EPA is correct, then literally decades of compliance with the permit issued by the primary regulatory authority comes to naught when EPA moves to revoke it,” said Faulk, who also serves as senior director of energy and the environment at the Law and Economic Center of George Mason University School of Law. “That just makes absolutely no sense whatsoever.”

A newly elected president bringing in new regulatory officials could undo approvals from his predecessor with relative ease. That was a major factor leading to the Mingo Logan revocation, according to Bishop, and it could easily happen again.

“The trouble is, what happened here was a change in administration,” Bishop said. “The new people didn't like the project. If they have this power, you can't trust the agency, and you can't trust the permits.”

Coal mining companies aren't the only ones affected by the decision. Major water systems throughout the country need Section 404 permits to operate, and they will be faced with the same troubling uncertainty, according to Bishop.

“We're talking about a massive expenditure of public money,” Bishop said.

Mingo Logan's Supreme Court petition stresses the economic importance of the decision, calling it an issue of “paramount importance” that it says the court should take up even in the absence of a circuit split, or even of a dissenting voter on a D.C. Circuit panel made up of judges appointed by Republican presidents.

The approximately $220 billion of investment tied up in Section 404 permits is “an extraordinarily large sum to subject to EPA's caprice,” the petition said.

The coal mining company is hoping this major risk to investment will help convince the court that the case involves a question of exceptional importance, according to Jones Day partner Kevin P. Holewinski, who coordinates the firm's environmental health and safety practice.

“Let's assume the $220 billion number is 50 percent off,” said Holewinski, who helped write an amicus brief in favor of Mingo Logan when the case was before the D.C. Circuit. “That's still huge.”

Other permit holders will be urging the court to take up the case as well. Faulk says the justices can expect a ton of amicus briefs, which will provide more pressure to grant the petition.

“The CWA permit is designed to be relied on indefinitely unless the Corps of Engineers decides to modify it,” Faulk said. “There will be a huge outcry from literally the entire regulated community.”

It's surprising the case has even reached this point, according to Bishop. A federal judge initially ruled in favor of Mingo Logan, finding that the EPA had overstepped its authority. While Section 404 was “awkwardly written and extremely unclear,” it did not give the EPA the authority to unilaterally modify or revoke a permit that has been issued by the Corps, the decision found.

But the D.C. Circuit saw it differently, finding “unambiguous statutory language” granting the EPA power to pull a permit.

“To come up with this reading of the statute, it really requires reading the word 'specification' as 'permit,'” Bishop said. “You have to stretch some to get there, and you shouldn't make that stretch.”

The petition claims that the D.C. Circuit panel's reading of the CWA is too narrow, with an isolated focus on Section 404(c). Viewed more broadly, the Clean Air Act clearly establishes that the EPA has a secondary role in the process and has no "retroactive trump card" for overruling the Corps, according to the petition.

Although a number of attorneys say the case has a reasonable shot at being taken up by the high court, West Virginia University law professor Patrick C. McGinley believes its chances are slim. The petition claims the issue is of enormous importance to the industry, but according to McGinley, a single enforcement action over four decades can't do much to unsettle the markets.

"Once in 40 years isn't at the level of important federal question that the court generally reviews," he said.

Nevertheless, Bishop remains confident that at least four justices will find enough importance in the case to take up the petition, particularly given the interest the court has shown in examining major environmental statutes.

"All of the projects that could be upended by this withdrawal of a permit, and the uncertainty that creates, should be important enough of an issue to attract their attention," Bishop said.

Mingo Logan is represented by Paul D. Clement, Nathan A. Sales and Jeffrey M. Harris of Bancroft PLLC and Robert M. Rolfe, George P. Sibley III, Deidre G. Duncan and Virginia S. Albrecht of Hunton & Williams LLP.

The case is Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, case number 13A286, in the U.S. Supreme Court.

--Editing by Kat Laskowski and Edrienne Su.