

TO AMEND THE FEDERAL WATER POLLUTION CONTROL ACT TO CLARIFY THAT THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY DOES NOT HAVE THE AUTHORITY TO DISAPPROVE A PERMIT AFTER IT HAS BEEN ISSUED BY THE SECRETARY OF THE ARMY UNDER SECTION 404 OF SUCH ACT

JUNE 20, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SHUSTER, from the Committee on Transportation and Infrastructure, submitted the following

REPORT

[To accompany H.R. 524]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 524) to amend the Federal Water Pollution Control Act to clarify that the Administrator of the Environmental Protection Agency does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under section 404 of such Act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose of Legislation	2
Background and Need for Legislation	2
Hearings	4
Legislative History and Consideration	4
Committee Votes	5
Committee Oversight Findings	7
New Budget Authority and Tax Expenditures	7
Congressional Budget Office Cost Estimate	7
Performance Goals and Objectives	8
Advisory of Earmarks	8
Duplication of Federal Programs	8
Disclosure of Directed Rule Makings	8
Federal Mandate Statement	8
Preemption Clarification	9
Advisory Committee Statement	9
Applicability of Legislative Branch	9
Section-by-Section Analysis of Legislation	9
Changes in Existing Law Made by the Bill, as Reported	9

PURPOSE OF LEGISLATION

H.R. 524 amends the Federal Water Pollution Control Act to provide that the Administrator of the Environmental Protection Agency does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under section 404 of the Act.

BACKGROUND AND NEED FOR LEGISLATION

THE CLEAN WATER ACT

In 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the "Clean Water Act" or the "CWA"; 33 U.S.C. § 1251 *et seq.*). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The primary mechanisms for achieving this objective are the CWA's general prohibition against the discharge of pollutants into jurisdictional waterbodies, and the Act's permitting process for such discharges, either through a National Pollutant Discharge Elimination System (NPDES) permit (*see* CWA § 402), or through a separate permit program, for the discharge of dredged or fill material into jurisdictional waterbodies, including wetlands (*see* CWA § 404).

The U.S. Environmental Protection Agency (EPA) has the basic responsibility for administering and enforcing most of the CWA, including the NPDES permit program, and the U.S. Army Corps of Engineers (Corps) has lead responsibility for administering the dredge or fill (wetlands) permit program under section 404 of the CWA. However, the EPA does have a complementary role in administering section 404, both in the development of environmental guidelines (called the 404(b)(1) guidelines) to provide a means of evaluating whether any discharge of fill is environmentally acceptable, and through its review under section 404(c) (*discussed below*). Under the wetlands permitting program, the Corps has authority to issue dredge or fill permits (typically for a permit term of five years) for the discharge of materials into jurisdictional waterbodies at specified disposal sites. It is unlawful for a facility to discharge dredged or fill materials into a jurisdictional waterbody unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps.

EPA'S PERMIT VETO AUTHORITY UNDER CWA SECTION 404(C)

Even though the Corps has the lead responsibility to implement the CWA's section 404 permit program, the EPA retains residual authority under CWA section 404(c) to oversee, review, and object to the Corps' issuance of section 404 permits for the discharge of dredged or fill material into jurisdictional waters, to ensure that such permitting decisions meet the minimum requirements of the CWA. Section 404(c) of the CWA confers the EPA authority, under specified procedures, to prevent the Corps from authorizing a particular disposal site:

(c) The Administrator 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. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection (CWA § 404(c).)

To exercise this “veto” authority, the EPA must determine, after notice and opportunity for public hearings, that certain unacceptable adverse environmental effects on municipal water supplies, shellfish beds, and fishery areas, wildlife, or recreation areas would result. The EPA also must consult with the Corps and make public its written findings and reasons for any determinations it makes under Section 404(c).

Once the EPA has approved a Corps section 404 permit, generally speaking, the implementation and interpretation of the permit is left to the Corps. However, according to the U.S. Court of Appeals for the D.C. Circuit, the EPA retains the authority to “prohibit, restrict or withdraw the specification [of a disposal site under section 404(c)] “*whenever*” [the Administrator of the EPA] makes a determination that the statutory “unacceptable adverse effect” will result. (*See Mingo Logan Coal Co. v. U.S. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013).)

EPA REVOCATION OF A SECTION 404 PERMIT

In the *Mingo Logan Coal Co.* case before the D.C. Circuit Court of Appeals, the Mingo Logan Coal Company (Mingo Logan) applied to the Corps for a permit under CWA section 404 to discharge fill material in connection with the Spruce No. 1 surface mine project, located in Logan County, West Virginia. Prior to the issuance of the permit, the project applicant conducted a lengthy environmental review, in which the EPA participated.

In 2007, the Corps issued the section 404 permit to Mingo Logan. While the EPA did express concern with the terms of the permit prior to its issuance, the agency did not object to the permit at the time of its issuance. Subsequently, the mine operated pursuant to, and in compliance with, the Section 404 permit.

In September 2009, almost two years after the Corps issued the section 404 permit, the EPA requested that the Corps use its discretionary authority to suspend, revoke, or modify the permit that it had issued to Mingo Logan. The Corps rejected the EPA’s request, finding no grounds to suspend, revoke, or modify the permit. In March 2010, the EPA then published a Proposed Determination to prohibit, restrict, or deny the authorized discharges to certain of the waters associated with the Spruce project site, without alleging any violation of the section 404 permit.

In January 2011, the EPA issued a Final Determination to withdraw the discharge authorization, effectively revoking the permit and halting development of the mine. This action to revoke the permit was more than three years after the permit’s issuance. The EPA stated that it had the ability under the CWA to initiate a section 404(c) action to retroactively withdraw a discharge site speci-

fication in a permit even after permit issuance. (See 75 Fed. Reg. 16788, 16790 (Apr. 2, 2010) (EPA Notice of *Proposed Determination To Prohibit, Restrict, or Deny the Specification, or the Use for Specification (Including Withdrawal of Specification), of an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, WV*).)

The permit holder challenged the EPA's revocation of the Section 404 permit in federal district court. (See *Mingo Logan Coal Company Inc. v. U.S. EPA*, 850 F.Supp.2d 133 (D.D.C. 2012).) The district court issued an opinion in 2012 that overturned the EPA's retroactive withdrawal of the project's permit discharge site specification. (See *id.*) In April 2013, the U.S. Court of Appeals for the D.C. Circuit reversed the district court, ruling that the EPA had not exceeded its authority. (See *Mingo Logan Coal Co. v. U.S. EPA*, 714 F.3d 608 (D.C. Cir. 2013).) The permit holder then applied to the U.S. Supreme Court to review the case, but in March 2014, the Supreme Court announced it would not review the 2013 Appeals Court decision. (See *Mingo Logan Coal Co. v. U.S. EPA*, No. 13-599 (U.S. Mar. 24, 2014) (cert. denied).)

In response to the EPA's recent actions to withdraw the discharge authorization for the Spruce project after issuance of the project's permit, the bill's sponsor introduced H.R. 524 to provide that the EPA has the authority under section 404(c) to withdraw a project's discharge site specification only prior to the Corps' issuance of the 404 permit for the project. The bill aims to address the concern that the EPA's authority to undo a Corps section 404 permit action has the potential to disrupt the finality and certainty of the CWA section 404 permit process, a process that is critical to a wide range of industries and projects. There is concern that this lack of certainty could chill future investments in vital infrastructure and other development projects that require 404 permits.

HEARINGS

No hearings were held on H.R. 524.

In the 112th Congress, the Subcommittee on Water Resources and Environment held a hearing on the EPA's surface mining policies and related regulatory activities, including the EPA's retroactive withdrawal of the discharge authorization of the Spruce Mine's section 404 permit.

LEGISLATIVE HISTORY AND CONSIDERATION

On February 6, 2013, Representative David McKinley of West Virginia introduced H.R. 524, a bill to provide that the Administrator of the Environmental Protection Agency does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under section 404 of the CWA.

On April 9, 2014, the Committee on Transportation and Infrastructure met in open session to consider H.R. 524, and ordered the bill reported favorably to the House by record vote with a quorum present. The vote was 34 yeas to 19 nays. No amendments were offered.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. During consideration of H.R. 524, a total of one record vote was taken, which was on a final vote ordering the bill reported. The bill was reported to the House with a favorable recommendation after a record vote which was disposed of as follows:

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Shuster	X			<i>Mr. Rahall</i>	X		
Mr. Young	X			<i>Mr. DeFazio</i>			
Mr. Petri	X			<i>Ms. Norton</i>		X	
Mr. Coble	X			<i>Mr. Nadler</i>		X	
Mr. Duncan	X			<i>Ms. Brown</i>		X	
Mr. Mica	X			<i>Ms. Johnson</i>			
Mr. LoBiondo	X			<i>Mr. Cummings</i>		X	
Mr. Miller	X			<i>Mr. Larsen</i>		X	
Mr. Graves	X			<i>Mr. Capuano</i>		X	
Mrs. Capito	X			<i>Mr. Bishop</i>		X	
Mrs. Miller	X			<i>Mr. Michaud</i>		X	
Mr. Hunter	X			<i>Mrs. Napolitano</i>		X	
Mr. Crawford	X			<i>Mr. Lipinski</i>		X	
Mr. Barletta	X			<i>Mr. Walz</i>		X	
Mr. Farenthold				<i>Mr. Cohen</i>			
Dr. Bucshon	X			<i>Mr. Sires</i>		X	
Mr. Gibbs	X			<i>Ms. Edwards</i>		X	
Mr. Meehan	X			<i>Mr. Garamendi</i>		X	
Mr. Hanna	X			<i>Mr. Carson</i>	X		
Mr. Webster	X			<i>Ms. Hahn</i>		X	
Mr. Southerland	X			<i>Mr. Nolan</i>	X		
Mr. Denham	X			<i>Mrs. Kirkpatrick</i>		X	
Mr. Ribble	X			<i>Ms. Titus</i>		X	
Mr. Massie	X			<i>Mr. Maloney</i>		X	
Mr. Daines	X			<i>Ms. Esty</i>		X	
Mr. Rice	X			<i>Ms. Frankel</i>		X	
Mr. Mullin	X			<i>Mrs. Bustos</i>	X		
Mr. Williams							
Mr. Meadows	X						
Mr. Perry							
Mr. Davis	X						
Mr. Sanford	X						
Mr. Jolly	X						

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for H.R. 524 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 17, 2014.

Hon. BILL SHUSTER,
Chairman, Committee on Transportation and Infrastructure,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 524, a bill to amend the Federal Water Pollution Control Act to clarify that the Administrator of the Environmental Protection Agency does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under section 404 of such Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 524—A bill to amend the Federal Water Pollution Control Act to clarify that the Administrator of the Environmental Protection Agency does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under section 404 of such Act

Section 404 of the Federal Water Pollution Control Act (Clean Water Act) established a program to regulate the discharge of dredged or fill material (for example, rock, sand, soil, clay, plastics, construction debris, wood chips, or waste from mining or other excavation activities) into waters of the United States, including wetlands. Proposed activities that could result in such discharges are regulated through a permit and review process wherein the U.S. Army Corps of Engineers (Corps) is responsible for making permitting decisions. Under current law, the Environmental Protection Agency (EPA) has the authority to revoke or modify permits issued by the Corps. Enacting this legislation would prohibit EPA from re-

voking a permit issued by the Corps under section 404 of the Clean Water Act.

Based on information from EPA, CBO estimates that enacting this legislation would have no significant effect on the federal budget because EPA seldom revokes permits issued by the Corps. Since 1972, EPA has revoked permits from the Corps for only two projects.

Pay-as-you-go procedures do not apply to H.R. 524 because enacting the bill would not affect direct spending or revenues.

H.R. 524 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of this legislation is to provide that the Administrator of the Environmental Protection Agency does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under section 404 of the CWA.

ADVISORY OF EARMARKS

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee is required to include a list of congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives. No provision in the bill includes an earmark, limited tax benefit, or limited tariff benefit under clause 9(e), 9(f), or 9(g) of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(j) of H. Res. 5, 113th Cong. (2013), the Committee finds that no provision of H.R. 524 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to section 3(k) of H. Res. 5, 113th Cong. (2013), the Committee estimates that enacting H.R. 524 does not specifically direct the completion of any specific rule makings within the meaning of section 551 of title 5, United States Code.

FEDERAL MANDATE STATEMENT

The Committee adopts as its own the estimate of federal mandates prepared by the Director of the Congressional Budget Office

pursuant to section 423 of the Unfunded Mandates Reform Act (P.L. 104-4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 524 does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (P.L. 104-1).

SECTION-BY-SECTION ANALYSIS OF LEGISLATION

Section 1. Permits for Dredged or Fill Material

Section 1 amends section 404(c) of the CWA to provide that the Administrator of the Environmental Protection Agency has the authority to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, or deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, under section 404(c) of the CWA only until such time as the Secretary of the Army has issued a permit under section 404 covering such area. Once the Secretary of the Army has issued a section 404 permit for the use of an area as a disposal site, the Administrator no longer has the authority to prohibit, deny, restrict, or withdraw the use of such area as a disposal site.

The bill does not alter the authority of the Corps to issue a Section 404 permit, or to modify, suspend, or revoke a section 404 permit should it find a violation of the permit. The bill also does not change the requirements that the EPA must satisfy in order to exercise its “veto” authority under CWA section 404(c).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by H.R. 524, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL WATER POLLUTION CONTROL ACT

* * * * *

TITLE IV—PERMITS AND LICENSES

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PERMITS FOR DREDGED OR FILL MATERIAL

SEC. 404. (a) * * *

* * * * *

(c) **【The Administrator is authorized】** *Until such time as the Secretary has issued a permit under this section, the Administrator 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. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.*

* * * * *

