

EPA MINING POLICIES: ASSAULT ON APPALACHIAN JOBS—PART II

(112-30)

HEARING
BEFORE THE
SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

MAY 11, 2011

Printed for the use of the
Committee on Transportation and Infrastructure



Available online at: <http://www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=transportation>

U.S. GOVERNMENT PRINTING OFFICE

66-308 PDF

WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

JOHN L. MICA, Florida, *Chairman*

DON YOUNG, Alaska
THOMAS E. PETRI, Wisconsin
HOWARD COBLE, North Carolina
JOHN J. DUNCAN, Jr., Tennessee
FRANK A. LoBIONDO, New Jersey
GARY G. MILLER, California
TIMOTHY V. JOHNSON, Illinois
SAM GRAVES, Missouri
BILL SHUSTER, Pennsylvania
SHELLEY MOORE CAPITO, West Virginia
JEAN SCHMIDT, Ohio
CANDICE S. MILLER, Michigan
DUNCAN HUNTER, California
ANDY HARRIS, Maryland
ERIC A. "RICK" CRAWFORD, Arkansas
JAIME HERRERA BEUTLER, Washington
FRANK C. GUINTA, New Hampshire
RANDY HULTGREN, Illinois
LOU BARLETTA, Pennsylvania
CHIP CRAVAACK, Minnesota
BLAKE FARENTHOLD, Texas
LARRY BUCSHON, Indiana
BILLY LONG, Missouri
BOB GIBBS, Ohio
PATRICK MEEHAN, Pennsylvania
RICHARD L. HANNA, New York
JEFFREY M. LANDRY, Louisiana
STEVE SOUTHERLAND II, Florida
JEFF DENHAM, California
JAMES LANKFORD, Oklahoma
REID J. RIBBLE, Wisconsin
VACANCY

NICK J. RAHALL II, West Virginia
PETER A. DeFAZIO, Oregon
JERRY F. COSTELLO, Illinois
ELEANOR HOLMES NORTON, District of
Columbia
JERROLD NADLER, New York
CORRINE BROWN, Florida
BOB FILNER, California
EDDIE BERNICE JOHNSON, Texas
ELIJAH E. CUMMINGS, Maryland
LEONARD L. BOSWELL, Iowa
TIM HOLDEN, Pennsylvania
RICK LARSEN, Washington
MICHAEL E. CAPUANO, Massachusetts
TIMOTHY H. BISHOP, New York
MICHAEL H. MICHAUD, Maine
RUSS CARNAHAN, Missouri
GRACE F. NAPOLITANO, California
DANIEL LIPINSKI, Illinois
MAZIE K. HIRONO, Hawaii
JASON ALTMIRE, Pennsylvania
TIMOTHY J. WALZ, Minnesota
HEATH SHULER, North Carolina
STEVE COHEN, Tennessee
LAURA RICHARDSON, California
ALBIO SIRES, New Jersey
DONNA F. EDWARDS, Maryland

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

BOB GIBBS, Ohio, *Chairman*

DON YOUNG, Alaska	TIMOTHY H. BISHOP, New York
JOHN J. DUNCAN, Jr., Tennessee	JERRY F. COSTELLO, Illinois
GARY G. MILLER, California	ELEANOR HOLMES NORTON, District of Columbia
TIMOTHY V. JOHNSON, Illinois	RUSS CARNAHAN, Missouri
BILL SHUSTER, Pennsylvania	DONNA F. EDWARDS, Maryland
SHELLEY MOORE CAPITO, West Virginia	CORRINE BROWN, Florida
CANDICE S. MILLER, Michigan	BOB FILNER, California
DUNCAN HUNTER, California	EDDIE BERNICE JOHNSON, Texas
ANDY HARRIS, Maryland	MICHAEL E. CAPUANO, Massachusetts
ERIC A. "RICK" CRAWFORD, Arkansas	GRACE F. NAPOLITANO, California
JAIME HERRERA BEUTLER, Washington,	JASON ALTMIRE, Pennsylvania
<i>Vice Chair</i>	STEVE COHEN, Tennessee
CHIP CRAVAACK, Minnesota	LAURA RICHARDSON, California
LARRY BUCSHON, Indiana	MAZIE K. HIRONO, Hawaii
JEFFREY M. LANDRY, Louisiana	NICK J. RAHALL II, West Virginia
JEFF DENHAM, California	<i>(Ex Officio)</i>
JAMES LANKFORD, Oklahoma	
JOHN L. MICA, Florida <i>(Ex Officio)</i>	
VACANCY	

CONTENTS

	Page
Summary of Subject Matter	vi
TESTIMONY	
PANEL ONE	
Carey, Michael, President, Ohio Coal Association	7
Hopper, M. Reed, Principal Attorney, Pacific Legal Foundation	7
Roberts, Steve, President, West Virginia Chamber of Commerce	7
Sunding, David L., University of California, Berkeley	7
PANEL TWO	
Stoner, Nancy K., Acting Assistant Administrator, Environmental Protection Agency, Office of Water	28
PREPARED STATEMENTS SUBMITTED BY WITNESSES	
Carey, Michael	54
Hopper, M. Reed	59
Roberts, Steve	67
Stoner, Nancy K.	71
Sunding, David L.	81
SUBMISSIONS FOR THE RECORD	
Stoner, Nancy K., Acting Assistant Administrator, Environmental Protection Agency, Office of Water, submittal of peer-reviewed literature published since 2007 that supports the Spruce Mine 404(c) final determination	38
ADDITIONS TO THE RECORD	
Peters, Leonard K., Secretary, State of Kentucky Energy and Environment Cabinet:	
Cover letter to Hon. Bob Gibbs, Chairman, Subcommittee on Water Resources and Environment, May 17, 2011	85
Letter regarding permit delays to Nancy Stoner, Acting Assistant Administrator, Office of Water, Environmental Protection Agency, May 17, 2011 ..	86
“EPA Specific Permit Objection—CY2000 to Present”—Spreadsheet showing EPA objections to Kentucky permits	90
ECOS, “Objection to U.S. Environmental Protection Agency’s Imposition of Interim Guidance, Interim Rules, Draft Policy and Reinterpretation Policy”	94
National Mining Association Memorandum Opinion	96



**U.S. House of Representatives
Committee on Transportation and Infrastructure**

John L. Mica
Chairman

Washington, DC 20515

Rick J. Rahall, III
Ranking Member

April 29, 2011

James W. Coon II, Chief of Staff

James H. Zola, Democrat Chief of Staff

MEMORANDUM

TO: Members of the Subcommittee on Water Resources and Environment
FR: Bob Gibbs
Subcommittee Chairman
RE: Hearing on "EPA Mining Policies: Assault on Appalachian Jobs Parts I and II"

PURPOSE OF HEARING

The Water Resources and Environment Subcommittee is scheduled to meet on Thursday, May 5, 2011, at 10:00 a.m. and on May 11, 2011 at 10:30 a.m. in 2167 Rayburn House Office Building, to receive testimony from State regulators, the mining industry, impacted businesses, economists, and the Environmental Protection Agency on the Environmental Protection Agency's surface mining guidance and other related extra-regulatory activities.

BACKGROUND

Surface Mining

Mining in the United States takes place in all 50 States and is critical in providing the nation with the raw materials to maintain our quality of life. Like any industry, advances in technologies have increased efficiencies and safety at today's mining operations.

Coal is the nation's most abundant fossil fuel and the United States has more coal reserves than any other country. Commercial coal mining began in Virginia in the 1740's and by 1800 coal fueled the steam engines that propelled the Industrial Revolution and manufacturing into the 20th century.

Coal mining is an important aspect of the nation's mining industry and is woven into the fabric of Appalachian life. Today coal is mined in 26 States. While Wyoming is the leading coal producing State, it is closely followed by West Virginia and Kentucky. The United States

consumes 1.1 billion tons of coal every year. 33% of this coal (approximately 390 million tons annually) comes from the Appalachian region of the United States. 50% of the power generated in the nation comes from coal as its fuel source.

Surface mining in Appalachia has created some environmental impacts on landscapes, streams, and communities. Many of these coal seams lie deep below the surface of the mountains in Appalachia. During initiation of a surface mining operation, the land is cleared of trees and other vegetation. Explosives or other techniques are then employed to break up the overlying solid rock, creating dislodged materials referred to as "spoil." Most of this spoil is placed back in the mined-out area. However, spoil that cannot be placed back in the mined-out area is sometimes placed as "fill" in adjacent valleys and in some rare cases, this fill buries nearby streams.

Selected Federal Laws Pertaining to Surface Mining

Under Section 404 of the Clean Water Act, the United States Army Corps of Engineers has authority to issue "dredge and fill" permits for the discharge of materials into navigable waterways at specified disposal sites. The Corps of Engineers develops these disposal site permits in conjunction with the Environmental Protection Agency. Congress intended for expeditious decisions on Section 404 permits. Specifically, it instructed that, to the maximum extent practicable, decisions on Section 404 permits will be made within ninety days.

The Corps' own procedures require the Corps to review permit applications for completeness and, within 15 days of receiving applications, issue a public notice for applications deemed complete. By regulation, the comment period shall last for a reasonable period of time within which interested parties may express their views, but generally should not be more than 30 days. The Corps generally must decide on all applications no later than 60 days after receipt of a complete application.

Section 404 assigns the EPA two tasks in regard to fill material. First, EPA must develop the guidelines in conjunction with the Corps for the Corps to follow in determining whether to permit a discharge of fill material. Second, the Act confers EPA authority, under specified procedures, to prevent the Corps from authorizing certain disposal sites. EPA guides the Corps' review of the environmental effects of the proposed disposal sites. For example, no permit shall be issued if it causes or contributes to any water quality standard violations.

EPA may comment on the Corps' application of the Section 404 guidelines to particular permit applications during the interagency review period required for each permit. In addition, EPA has limited authority under Section 404(c) to prevent the Corps from authorizing a particular disposal site. To exercise that authority, EPA must determine, after notice and an opportunity for public hearing that certain unacceptable environmental effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas would result. EPA does not have authority to exercise unfettered enforcement of compliance with the Section 404 guidelines. EPA must also consult with the Corps and publicize written findings and reasons for any determinations it makes under Section 404(c).

Section 303 of the Clean Water Act reflects Congress' policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. Section 303 allocates primary authority for development of water quality standards to the States. A water quality standard defines the water quality goals of a water body by designating uses for a particular body of water and setting criteria necessary to protect those uses. Such standards can be expressed as specific numeric limitations or as general narrative statements. Permit limitations are developed to meet these water quality standards. Courts have consistently held that States have the primary role in establishing water quality standards, and that EPA's sole function is to review those standards for approval.

Congress gave EPA limited authority to promulgate water quality standards only if it determines that a state's proposed new or revised standard does not measure up to the requirements of the Clean Water Act and the State refuses to accept EPA-proposed revisions to the standard.

Section 402 of the Clean Water Act focuses on wastewater discharges to receiving waters and governs such discharges through the establishment of technology-based limits placed on the constituent make-up of a wastewater discharge. Section 402 permits are known as National Pollutant Discharge Elimination System ("NPDES") permits. When application of a technology-based limit to a particular discharge will not assure compliance with applicable water quality standards established for the particular receiving stream, the permitting authority must develop permit limitations that would work to maintain such water quality.

Conforming to the statute's goal of allocating the primary responsibilities for water pollution control to the States, the Act establishes a system of cooperative federalism, whereby States assume primary administration and enforcement of the NPDES permitting program. Once EPA approves a proposed State permitting program, States have exclusive authority to implement the NPDES program within their boundaries, and EPA has only limited authority to review State action. EPA retains authority in certain instances to object to a particular NPDES permit. If the State does not respond adequately to EPA's objection within specified timeframes, EPA may assume the authority to issue the permit. If EPA does not object to a permit within the specified procedures and timeframes, the State may proceed in accordance with its delegated authority and issue the permit.

In addition, the Surface Mining Control and Reclamation Act carried out by the Department of the Interior imposes requirements to minimize impacts on the land and natural channels, such as requiring that water discharged from mines will not degrade water quality on nearby streams.

Arch Coal Permit Revocation

In 2007, the Corps of Engineers issued a Sec. 404 permit in connection with the Arch Coal, Mingo Logan, Inc., Spruce No. 1 Surface Mine, located in Logan County, West Virginia.

Prior to the issuance of the permit, Arch Coal conducted an extensive 10-year environmental review, including a 1,600 page Environmental Impact Statement (EIS) in which EPA fully participated and agreed to all the terms and conditions included in the authorized permit. Subsequently, the mine operated pursuant to and in full compliance with the Section 404 authorization. This type of environmental review is unprecedented for activities on private lands.

Without alleging any violation of the permit, on April 2, 2010, EPA Region III published a Proposed Determination to prohibit, restrict or deny the authorized discharges to certain of the waters associated with the Spruce project site. The notice was followed by public comment and hearings. In addition, the notice prompted a legal challenge in the federal district court where Mingo Logan Coal Company, Inc. challenged the agency's unlawful attempt to revoke a CWA Section 404 permit more than three years after the permit's issuance.

On September 24, 2010, EPA Region III Regional Administrator signed a Recommended Determination recommending EPA withdraw the discharge authorization. In response, Mingo Logan Coal provided EPA with substantial technical comments to support its opposition to the Recommended Determination.

Guidance vs. Regulation

Much of the Clean Water Act is a delegated program. States that have received delegation have demonstrated to the Environmental Protection Agency that they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies and these States have developed and demonstrated the capability to maintain existing and assume new delegations.

Congress in environmental statutes and the Administrative Procedure Act (APA) established a formal rulemaking process to provide a mechanism for public comment, offering amendments, or allowing States to object, and provided standards for judicial review of agency actions.

The APA prescribes procedures for agency actions such as rulemaking as well as judicial review of such actions. Rulemaking is the agency process for formulating, amending, or repealing a rule, where a rule is defined as an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.

Guidance documents, which are not specifically defined by the APA, generally are considered to be a particular type of agency rule, known as a "general statement of policy." Under APA notice-and-comment rulemaking procedures, agencies must publish notice of a proposed rulemaking in the Federal Register, provide opportunity for the submission of comments by the public, and publish a final rule and a general statement of basis and purpose in the Federal Register at least thirty days before it becomes effective as a substantive rule.

Rules that have been promulgated through the notice-and-comment process have the force and effect of law and are known as substantive, or legislative, rules. A substantive rule has been described by courts as a rule through which an agency intends to create a new law, rights or duties, or rule that is issued by an agency pursuant to statutory authority and which implements the statute. A rule has also been defined as substantive if in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties.

In contrast, agency documents that are merely general statements of policy, such as guidance documents, do not have to undergo APA notice-and-comment procedures. APA notice-and-comment requirements do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. These types of agency action, while technically defined as rules, are generally referred to as nonlegislative rules, as they do not have the force and effect of law. General statements of policy have been described by courts as statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

General statements of policy do not impose any rights and obligations, nor do they establish a binding norm because they do not represent the final determination regarding the issues they address. Thus, while a guidance document indicates the agency's thoughts on a topic, the document is not legally binding on courts or persons outside the agency.

A guidance document can become binding on an agency in practice. If a general statement of policy is implemented in a manner that is binding on the agency and/or outside parties, a reviewing court would likely regard it as a legislative rule that should be deemed invalid for failing to comply with APA notice-and-comment procedures. The question of whether a general statement of policy or a nonlegislative rule is in fact a legislative rule required to be issued under APA notice-and-comment procedures is a fact-specific one that courts will examine on a case-by-case basis. A reviewing court may examine whether the document has a binding effect, whether the agency retains its ability to exercise discretion, whether the document uses voluntary or mandatory language, whether the agency characterizes the document as guidance, and whether the agency published the document in the Federal Register or the Code of Federal Regulations to determine if the guidance document is in fact a legislative rule.

Some States are required by their own laws to conduct their own rulemaking prior to implementing federal regulations and some States are prohibited by State law from implementing any requirement more stringent than the federal requirement. The States have limited options to challenge interim guidance or interim rules, draft policy or reinterpretation policy, and the Courts have been inconsistent in their findings for judicial review in these cases.

The processes used by EPA, rather than the environmental substance of the underlying rules, to impose interim guidance, interim rules, draft policy or reinterpretation policy, may result in a State agency being forced to choose whether it will comply with either EPA's policy or its own State laws. While interim guidance, interim rules, or policy may not be legally binding, States may have to use these as the basis for issuing permits or other actions and this may result in delays and potential job losses. EPA's continued imposition of interim guidance,

interim rules, draft policy or reinterpretation policy has led to uncertainty regarding actions taken by State and federal regulatory bodies.

Enhanced Coordination

On June 11, 2009, EPA, the Corps, and the Department of Interior released a Memorandum of Understanding on Implementing the Interagency Action Plan on Appalachian Surface Coal Mining ("MOU"). Among other things, the MOU formalized an extraregulatory review process of CWA Section 404 permits that EPA had previously commenced in January 2009 and signaled a further change in the Section 404 permitting process, the launch of the Enhanced Coordination Process. Concurrent with the release of the MOU, EPA issued formal details on the Enhanced Coordination Process (EC), which were immediately effective and imposed substantive changes to the Section 404 permitting process by creating a new level of review by EPA and an alternate permitting pathway not contemplated by the current regulatory structure.

In the Enhanced Coordination Process, EPA first utilizes a Multi-Criteria Integrated Resource Assessment (the "MCIR Assessment") to screen all pending Section 404 permit applications for Appalachian coal mining operations. In the MCIR Assessment, EPA determines which permit applications will proceed to review by the Corps under the longstanding existing permit processing procedures and which permit applications will be subject to the EC Process. It effectively sets a threshold of acceptable effects from coal mining to create a "fork in the road" in the Section 404 permitting process, and it expands EPA's role from mere commenter to gate-keeper. The Corps was not involved in developing the components of the MCIR Assessment, and the MCIR Assessment was not subjected to public notice and comment.

Once a permit application is earmarked for the EC Process as a result of the MCIR Assessment, the applicant faces a burdensome review process that is wholly separate from the public hearing and comment process envisioned in Section 404. Specifically, the EC Process involves discussions among EPA, the Corps, the permit applicant, and other potentially relevant agencies during a 60-day coordination period that the Corps must initiate. There is no requirement for the Corps to do so in a timely fashion, which contrasts sharply with the permitting processing timelines set forth in Section 404 and its implementing regulations.

Thus, the EC Process adds a minimum of 60 days and potentially many months of review to the existing review process entirely outside of, and in addition to, the existing Section 404 procedures and timelines. At the end of the EC Process, only if issues identified by EPA are resolved in individual permit applications may those permits move forward to the Corps for processing and incorporation of new permit terms or conditions dictated by EPA during the EC Process. If EPA's concerns remain unresolved at the close of the EC Process period, EPA may then initiate Section 404(c) procedures. Neither EPA nor the Corps proposed to revise the existing codified review procedures and EPA did not propose to amend its existing Section 404 Guidelines when formalizing the EC Process.

In practice, EPA has utilized the MCIR Assessment to identify almost 250 coal-related Section 404 permits currently pending with the Corps that would be subject to the EC Process rather than the Section 404 process. Numerous permit applications remain indefinitely stalled. The timelines for those permit applications stray far from the deadlines that Congress envisioned in Section 404 and from the Corps' own regulatory deadlines.

EPA released the Guidance on April 1, 2010 to provide EPA Regions 3, 4, and 5 for the review of all coal mining operations under the CWA, National Environmental Policy Act ("NEPA"), and the Environmental Justice Executive Order. While EPA solicited public comment on the Guidance, it nevertheless made the Guidance effective immediately.

In the Guidance, EPA made sweeping pronouncements regarding the need for water quality-based limits in CWA Section 402 and 404 permits, as well as the adequacy of mitigation measures associated with Section 404 permits.

First, the Guidance effectively established a region-wide water quality standard by directing that Section 402 and 404 permits should contain conditions that ensure that conductivity levels do not exceed 500 Siemens ($\mu\text{S}/\text{cm}$). (For reference, Evian water contains conductivity levels of 552 $\mu\text{S}/\text{cm}$ while Perrier contains conductivity levels of 712 $\mu\text{S}/\text{cm}$.) EPA's direction was based on a draft, not-yet-peer-reviewed EPA report entitled, "A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams," which purports to recognize stream-life impacts associated with conductivity. From that report, EPA established a presumption that it expects that in-stream conductivity levels above 500 $\mu\text{S}/\text{cm}$ are likely to be associated with adverse impacts to water quality. Further, the Guidance seeks to provide EPA with a continuing review and approval role by sequencing the installation of valley fills such that fills must proceed one at a time and only after various permit conditions are met.

EPA is using the Guidance to cause indefinite delays and impose new and unattainable conditions in the Section 402 and 404 permit processes for coal mining operations. In addition, various permitting authorities, at EPA's insistence, have begun inserting the conductivity limit from the Guidance into pending Section 402 and 404 permits.

Yet, EPA has provided no basis to conclude that these conductivity levels will harm the uses protected by the various narrative water quality standards promulgated by the States, and, in some instances, natural background is higher than these levels. Furthermore, as contemplated in the Guidance's sequencing policy, EPA recently began invoking the Guidance to reopen *previously issued permits* in order to impose the conductivity limit, which works to effectively halt projects in their tracks. In short, the Guidance is threatening to cause significant financial losses and even drive some companies out of business.

Some estimates provided to Congress show that the EC Process and Guidance will place roughly 1 in every 4 coal mining jobs in the Appalachian region at risk of elimination and that 81 small businesses will lose significant income and will be at risk of bankruptcy.

The EPA has placed a time consuming, costly, and perhaps unlawful obstacle in the path of the exercise of property rights in the form of the EC Process and Guidance. The EPA is

delaying and effectively preventing mining companies from developing their private property interests. Moreover, the strict conductivity limit that the Corps is imposing as a result of EPA's Guidance will render certain contemplated mining projects unfeasible. Last, EPA is even using the Guidance to revisit permitting decisions that pre-date the Guidance in order to impose the conductivity limit therein, completely disrupting the established regulatory certainty a permit provides in the exercise of property rights.

The Environmental Protection Agency assert that none of these actions—the MCIR Assessment, the EC Process, or the Guidance Memorandum—qualify as final agency action within the meaning of the Administrative Procedures Act. They maintain that the EPA used the MCIR Assessment to screen permit applications as only the first of several steps in the permitting process, and that the MCIR Assessment therefore did not cause a denial or issuance of any permits.

Use of Conductivity as a Measure of Water Quality

The U.S. Environmental Protection Agency has issued guidance on water quality requirements for coal mines in Appalachia. The guidance, which was issued on April 1, 2010 and became immediately effective, relies solely on electric conductivity (also known as specific conductance) as an indicator of water quality impairment.

Conductivity is a measure of a given quantity of water to conduct electricity at a specified temperature. It is predicated upon the presence of dissolved solids, which conduct an electrical charge.

Conductivity has generally been used in the field as a first screen for water quality. Elevated conductivity levels indicate that further analysis should be done to determine the specific water chemistry, i.e., the makeup of the specific dissolved particles in the water, and whether those particles occur in amounts that are demonstrated to impair aquatic life specific to that stream.

Conductivity is not a meaningful measure of contamination or the ability of a given body of water to meet its designated use. The EPA guidance eliminates this vital step, an approach that is scientifically and legally deficient. Further, the levels are unachievable. EPA has noted they expect few, if any fill permit applications in Appalachia to meet the levels of conductivity set in the guidance. This limit will apply immediately to all coal mining, including underground operations, in the six Appalachian states. EPA has not ruled out applying the standard similarly to other industries throughout the water program.

This conductivity guidance establishes a de facto water quality standard that interferes with the States' statutory authority to set water quality standards and issue permits. Implementation of the conductivity limit also will make EPA the final decision-maker on permits issued by the U.S. Army Corps of Engineers and the Office of Surface Mining (OSM).

Witnesses

(In no particular order)

Thursday, May 5, 2011, 10:00 a.m.

Michael Gardner, General Counsel, Oxford Resources
Harold Quinn, President, National Mining Association
Dr. Leonard Peters, Secretary, State of Kentucky Energy and Environment Cabinet
Teresa Marks, Director, State of Arkansas Department of Environmental Quality

Wednesday, May 11, 2011, 10:30 a.m.

Ms. Lisa Jackson, Administrator, Environmental Protection Agency
Dr. David Sunding, University of California-Berkeley
Reed Hopper, Pacific Legal Foundation
Michael Carey, President, Ohio Coal Association
Steve Roberts, President, West Virginia Chamber of Commerce

EPA MINING POLICIES: ASSAULT ON APPALACHIAN JOBS—PART II

THURSDAY, MAY 11, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER RESOURCES
AND ENVIRONMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:37 a.m., in Room 2167, Rayburn House Office Building, Hon. Bob Gibbs (chairman of the subcommittee) presiding.

Mr. GIBBS. Good morning. The committee of—the Subcommittee of Water Resources and Environment, subcommittee of Transportation and Infrastructure, will come to order. Today we are having our—we are calling it a part two hearing of EPA mining policies and the effect on jobs in Appalachia.

I will start with an opening statement. Welcome, again. The Appalachian region is being subjected to an unequal treatment under the law by the Environmental Protection Agency for the arbitrary reason that it produces a domestic source of energy.

The United States consumes 1.1 billion tons of coal every year—33 percent of this coal, or approximately 390 million tons—annually comes from the Appalachian region of the United States. And 50 percent of the power generated in this Nation comes from coal as its fuel source.

Coal is an abundant and domestic source of energy. Its use is not subject to the whims of foreign cartel, nor does it tend to thrust us into international conflicts. In addition, using domestic coal creates American jobs. It is clear that coal will and must remain a major source of energy well into the future. And, therefore, it is important that we keep coal as a safe and inexpensive alternative to other energy options.

But to quote one of our witnesses from last week's panel, Michael Gardner, general counsel of Oxford Resources, one of the job providers harmed by the actions of the EPA—as he quotes, “These permit applications literally fell into a black hole, where no information was forthcoming. Literally, the opposite of transparency. You couldn't find out why a permit was on the list. You couldn't find out how to get them issued off the list. This was a de facto moratorium on section 404 permits. So much for transparency and the EPA enhanced coordination.”

I am extremely concerned how the administration is attempting to short-circuit the process for changing substantive Agency policy under the Clean Water Act without following the proper trans-

parent rulemaking process that is dictated by the Administrative Procedures Act. This Act lays out a process for public comment, making amendments to policy for States to object and for judicial review. By ignoring the Administrative Procedures Act, EPA is changing the Clean Water Act, it is implementing regulations through means of interim guidance, interim rules, draft policy, or reinterpretation of policy.

EPA is taking these actions with little regard to economic consequences, with little regard to national security, and, most importantly, with little regard to the law. Much of the Clean Water Act is a delegated program. Through its practices, EPA is usurping the role of the States.

At last week's hearing on this issue, the committee heard from two State regulators on the issue of EPA's legally dubious interpretation of the law. As Teresa Marks, representing the Environmental Council of the States, the 50 State departments of environmental quality agencies, said last week, "Requiring States to implement interim guidance puts each State in the position of deciding whether it will break the Federal law or State law. At the very least, this should be a good enough reason why a Federal agency should never ask a State to implement something that is not final."

Even though EPA is very much involved in the permit application process with the States, the Corps of Engineers, and other Federal agencies, EPA is now revoking permits that have already been issued. This is not legal. In addition, revoking a permit after it has been issued is an arbitrary and irresponsible way for a Government to act. I consider this regulatory overreach, and to be a fundamental property rights issue. This is an example of Government that thinks it has no limitations on its power.

What does it really mean to get a permit? What does it mean to get a final decision from the Federal Government? If an agency is given the right to unilaterally revoke an already-issued permit, then nothing can ever be considered final. The issuance of a Federal permit should come with some certainty that the activity can go forward unencumbered, but within the bounds of the permit, particularly those activities on private lands. This no longer seems to be the case, and it is going to have a stifling effect on not just mining operations in Appalachia, but on the economic development, nationwide.

I would like to close my statement with a quote. As our committee ranking member, Mr. Rahall, eloquently said last week, "EPA has a legitimate role to play in the Clean Water Act permitting process. Early on in this administration many had high hopes that the EPA would provide the clarity and the certainty that coal mining constituencies throughout Appalachia have been asking for, pleading for, and for many years. Unfortunately, we have been disappointed, as a result of the guidance that the EPA issues in April of last year, guidance with far-reaching consequences that was made effective immediately, without the opportunity for the public comment. Instead of offering that clarity and certainty, the regime set forth by the EPA has thrown the entire permitting process throughout the region into utter turmoil." End quote from Ranking Member Rahall.

I welcome our witnesses today. Before we move to our witnesses, I recognize Ranking Member Representative Bishop for an opening statement.

Mr. BISHOP. Thank you, Mr. Chairman. Today marks the second of two planned hearings on issues surrounding the oversight and regulation of surface coal mining. As I mentioned at last week's hearing, while I do not live with the day-to-day impacts of surface coal mining, I have quickly learned that few issues engender a more passionate response from industry, from mine workers, and from everyday citizens as this one.

Last week we heard the concerns from representatives of the States and mining industry on recent actions by the Obama administration related to surface coal mining operations. Today we will have the opportunity to hear from other affected interests, as well as a witness from the United States Environmental Protection Agency.

Mr. Chairman, when we last met I noted that the issue of surface coal mining highlights the complex balance in providing well-paying jobs for American families, in ensuring the continued growth and economic health and safety of our communities, and in protecting our natural environment for current and future generations. Finding this balance can—finding this balance point can be particularly tricky, especially when we consider that the production of energy itself comes with a significant cost.

Several Members have already alluded to a pendulum of oversight and regulation of surface coal mining practices that may have been too lax in the last administration—is now swinging back in the other direction.

I am hopeful today the administration will have the opportunity to explain its actions with respect to surface coal mining, and its reasons for undertaking its actions to date. I welcome all of the witnesses. I look forward to your testimony. I yield back the balance of my time.

Mr. GIBBS. Thank you. Ranking Member Rahall, do you have a statement?

Mr. RAHALL. No, Mr. Chairman. I don't have any statement. I appreciate, again, you having these hearings. I think I said it all last week—I must have, since you quoted me this morning—I appreciate it.

But I do want to welcome our president of the West Virginia Chamber of Commerce, Steve Roberts, a constituent of mine—I believe you still live in Huntington—and looking forward to his testimony, as well as the entire panel.

Thank you, Mr. Chairman.

Mr. GIBBS. At this time I recognize Representative Capito.

Mrs. CAPITO. Thank you, Mr. Chairman. Thank you, Chairman Gibbs, and thank you, Ranking Member Bishop, for holding this second hearing regarding jobs and job loss in Appalachia.

I, too, would like to join my colleague from West Virginia in welcoming Mr. Steve Roberts, who is the president of our West Virginia Chamber of Commerce. Thank you, Steve, for coming today, and thank you for your hard work in creating and preserving our jobs in West Virginia.

As we all know, I come from West Virginia. West Virginia is a major producer of coal and natural gas. These industries produce thousands of jobs and millions of dollars in tax revenue for my home State, our home State, of West Virginia. The administration's coordinated effort to end coal mining threatens the very future, I believe, of our Appalachia, and I am here today to continue to fight for every mining job that the EPA policies threaten.

In fact, as I have stated numerous times before, when I met with Administrator Jackson she told me point blank that she does not take into consideration the economic or the job impact of the policies or decisions that they make. Well, I am here to tell the members of the committee that these policies are threatening communities, and potentially hurting our families. And if you look out into the audience, you will see the faces of coal who are here today to protect an industry that is so important to the way of life of Appalachia.

The revocation of the 404 permit given to Spruce Mine No. 1 in West Virginia sent shock waves throughout the entire energy industry. Last week, during his testimony, Dr. Leonard Peters stated that the science the EPA is using to revoke the permit from Spruce Mine No. 1, as well as review 235 other permits, is "incomplete."

Furthermore, the EPA revocation is without precedent. While the EPA does have the authority to veto an existing permit, it is questionable whether EPA has the authority to revoke a permit that has already been approved by the Army Corps of Engineers and the EPA. The EPA has not given any indication how revoked permits could be regained.

This massive overreach by the EPA has created so much uncertainty within Appalachia that companies are beginning to withdraw their own permit requests, and that means job loss. Companies are not willing to invest hundreds of millions of dollars in a mining operation that could be shut down at a moment's notice.

We are now seeing inflation on the rise, and food costs are soaring through the roof, and employment has been at or above 9 percent for the last 2 years. It seems incomprehensible to me that our Government would take such drastic measures that could result in job loss, increase our energy costs for every American, and increase our demand for overseas energy sources.

Mr. Chairman and members of the committee, if the administration is willing to take drastic measures to destroy coal, what would they be willing to do to the industries in your district?

I look forward to hearing today's testimony, and I yield back my time.

Mr. GIBBS. I would just like to give notice to the people in the audience that outbursts will not be tolerated, and you will be removed. Just decorum and respect to the Members and the witnesses.

At this time I recognize Representative Cravaack for an opening statement.

Mr. CRAVAACK. Thank you, Chairman Gibbs and Ranking Member Bishop, for holding the second part of this important hearing to the effect the EPA has on mining jobs in Appalachia. I would like to welcome today's witnesses for our panel, and I look forward to hearing your testimony, the EPA's permitting process, and how

it affects jobs not only in the Appalachian coal mining communities, but also in the taconite and precious metal mining communities in Minnesota's Iron Range.

As you know, 50 percent of our Nation's power comes from coal; 33 percent of the coal mines for—come right from the Appalachian regions. Coal mining provides thousands of jobs and supports numerous businesses and communities throughout the United States.

In times of rising energy costs and high unemployment, jobs must be protected and costs must be kept as low as possible, while at the same time protecting our environment. I am concerned at some of the steps recently taken by the EPA to expand its oversight, and to impose increased burdensome regulation on industry. The new process is creating a permitting process that is more burdensome, and with proven inefficiencies.

I find the EPA's new regulations and overreach very troubling, and I worry about the effect it will have on the mining jobs in and outside of Appalachia. I wonder why the changing permitting process is necessary, and also what thought was put into making these changes the EPA is attempting to push through.

I look forward to hearing from our witnesses today, and their thoughts on what steps can be taken to protect thousands of jobs within the United States. Thank you again, and I look forward to hearing from your testimony.

And I yield back, sir.

Mr. GIBBS. Mr. Landry, do you have an opening comment? Proceed.

Mr. LANDRY. Thank you, Mr. Chairman, for calling today's hearing. Thank you all for participating.

Today's hearing addresses part of an enormous problem in this country: the EPA and the 404 permit process is stifling economic progress and job creation in this county. According to Chairman Mica's landmark study entitled, "Sitting on our Assets," a 404 permit application costs over \$271,000 to prepare, not counting the cost of mitigation, design changes, carrying capital, and other costs. And it takes more than 2 years to secure.

Each and every year, businesses and local governments spend more than \$1.7 billion trying to secure 404 permits. But as today's hearing will show, even after a 404 permit applicant completes this onerous process, the EPA can simply come in and arbitrarily revoke a permit. This is exactly what they did to Mingo Logan, a subsidiary of Arch Coal. This company created a 1,600-page permit document for a mine which impacted 8.1 acres of applicable water. And after all of the work, the EPA unilaterally and retroactively revoked this permit last year. In doing so, the EPA acted far outside the authority Congress has provided to it.

The EPA has also acted outside of congressional authority by issuing guidance which virtually halts Appalachian coal mining, short-circuits the official rulemaking process, and completely undermines the expedient 404 permit process envisioned by Congress.

The sum of EPA's action in Appalachian coal mines have been the loss of at least 17,000 coal mining jobs, and more expensive power for much of the eastern seaboard. However, this is not the only region to be hurt by EPA's abuse of the Clean Water Act. In 2008, EPA revoked the 404 permit for the Yazoo Backwater Area

Project. This project was designed to protect more than 400,000 acres of land and 1,300 homes from flooding by installing a pumping system to drain the area during flooding. That project was authorized and appropriated by Congress, and provided a permit by the U.S. Army Corps of Engineers. Yet, even after all of this study and approval, EPA pulled the permit at the last minute. In their official documents they said they were pulling the permit because the project would endanger 67,000 acres of wetlands.

This makes absolutely no sense. How can EPA endanger countless lives, 400,000 acres of land, 1,300 homes, in order to save 6,000 acres of wetlands? Where is our priorities and where is our balance? When will EPA see that residents of those 1,300 homes, residents who are currently homeless, due to the historic flooding experienced in the Mississippi River Valley are more important than the 6,000 acres of wetlands they claim that it would protect?

I hope today's hearing sheds some light on these issues, and helps us get back to the path where we prevent EPA from utilizing the Clean Water Act to put supposed wetlands protection ahead of people's lives and their livelihood.

Thank you, Mr. Chairman.

Mr. GIBBS. Representative Altmire, do you have an opening statement?

Mr. ALTMIRE. Thank you, Mr. Chairman. I would say thank you to the witnesses for being here for this second hearing on this topic. I found the first to be very productive.

And I wanted to just shed some light in a bipartisan way on our support, as a group, this entire committee, of cultivating our own domestic resources. There is a national security implication, there is an economic implication, a jobs implication, and certainly an energy implication to using all of our resources. And anything that we can do to help lessen the burden that is in front of you in doing that, we want to assist with that, and we very much appreciate your being here today to discuss this issue, because we take it in the national interest. And certainly being from western Pennsylvania, it is critical to my region of the country, also. So, thank you, Mr. Chairman, for holding the hearing. I look forward to hearing the witnesses.

Mr. GIBBS. Representative Herrera-Beutler, do you have a comment? OK. No? Lankford, Representative Lankford?

Mr. LANKFORD. Thank you. And thank you for being here. You will find a common passion among many of the representatives for clean water and clean air and an interest in living in a society that we are very grateful for our own children to grow up in, and that we want to be good stewards of our environment, as well. But we also are a Nation that has to have power, and that continues to fuel our economy and jobs. And we need to be able to strike a balance.

As you are very aware, EPA's mission began in the Nixon administration, with the beginning point of those five major focus areas. But during the Carter administration, there was a dramatic shift to be able to push more and more of the Federal Government towards coal. And that became a major focus during that administration and the days after that. Many of these power plants responded by continuing to use coal as the piece of energy that was encour-

aged by our Federal Government. They have done a good job, they have been good stewards with those things. They have made corrections, and they have made changes along the path.

As a Nation that needs more power, though, we are bumping up against, I sense, an EPA that is continuing to focus on its central core mission of land, air, and water, but that is changing the rules on a lot of people that felt like they were abiding by the rules. When a permit can change in the middle of a 10-year process, that makes a big shift for a group of people that were trying to play by the rules.

When 316(b) rules change, or they are not clear for a coal-fired power plant, and they are not sure what happens around the intake valve, there is no clarity and there is no ability to be able to plan. When the air quality rules change on them, good players are not able to determine what are the fair rules, and how do we do this. And when it takes 10 years to do an environmental study, at some point we have to ask the question: Is EPA intentionally standing in the way of developing more power for the United States, and slowing down our economy?

Now, I would hope the answer to that would be no. And I would anticipate from you it would be. But we are going to have to look at the facts and the details and say, "Are these continual changing rules changing our power capacity and our jobs in the United States?" And, if so, we need to be able to hold those to account, and to be able to hear clearly, "Where are we going from here?"

With that, I yield back.

Mr. GIBBS. Thank you. And again, I welcome our witnesses today. We are going to have two panels. The first panel, we have: Mr. Michael Carey, president of the Ohio Coal Association; also, Mr. Steve Roberts, president of the West Virginia Chamber of Commerce; Dr. David Sunding, University of California at Berkeley; and Mr. Reed Hopper, principal of the Pacific Legal Foundation.

And in our second panel will be acting assistant administrator of the Environmental Protection Agency, Office of Water, Ms. Nancy Stoner.

Welcome, Mr. Carey. The floor is yours.

TESTIMONY OF MICHAEL CAREY, PRESIDENT, OHIO COAL ASSOCIATION; STEVE ROBERTS, PRESIDENT, WEST VIRGINIA CHAMBER OF COMMERCE; DAVID L. SUNDING, UNIVERSITY OF CALIFORNIA, BERKELEY; AND M. REED HOPPER, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION

Mr. CAREY. Chairman Gibbs, Ranking Member Bishop, Congressman Rahall, members of the committee, good morning. I want to thank you for inviting me to testify at this important hearing regarding the litany of new regulations being put forth by the U.S. EPA, and their effects on Appalachian jobs. My name is Mike Carey; I am president of the Ohio Coal Association. The Association provides a voice for many thousands of citizens working in Ohio's coal sector. I also serve on the National Coal Council, an advisory committee to the Secretary of Energy on energy resource issues.

Cheap, abundant coal is what powers the manufacturing base and provides affordable energy for families across the Midwest and other regions in America. The companies we represent, both large

and small, directly employ over 3,000 individuals in Ohio alone, and over 30,000 secondary jobs that are dependent upon our industry.

The Obama administration and its allies have declared war on coal across Appalachia. We are at ground zero for the fundamental overreach by this administration's regulatory agenda. The rural regions of Ohio, Kentucky, West Virginia, Tennessee, Illinois, Pennsylvania, and Indiana would all be devastated from losing major employers such as coal companies.

In a rare statement of honesty, which actually bordered on hubris, last year the Office of Surface Mining stated, in justification for the Stream Protection Rule, that 7,000 jobs—7,000 jobs—would be lost in Appalachia. That was OK, because some jobs would be created out West. Mr. Chairman, that is simply unacceptable.

In fact, just last week, the Army Corps of Engineers filed a lawsuit against Buckingham Coal Company related to an operation in Morgan County, Ohio, which is right in your congressional district. They are attempting to prevent access for mining coal reserves already permitted under our State regulatory authority. Doing so ignores the intent of this committee and Congress when it wrote the Clean Water Act and SMCRA, where permitting jurisdiction was to be vested to the States.

As you can clearly see, this administration is picking winners and losers by regulatory proclamation. The policies of the current administration will force fuel-switching and shifts in regional coal from eastern to western reserves, which would lead to an increase in utility costs.

Some people may think that I am exaggerating, but one need only look at the host of new regulatory proposals that are aimed at the Appalachian coal industry that are not only just coming from the EPA, but they are coming from the Department of Interior, MSHA, and, as I mentioned before, the Army Corps of Engineers, a partial list of which has been provided in my written testimony.

Mr. Chairman, we need to do four things to stop this abuse on Appalachian coal jobs. First, we need to declare a regulatory timeout. We are still recovering from a recession. And this administration seems to forget that, compared to 30 years ago, our air is cleaner, our mines are safer, and of course, our water resources are better protected.

Number two, we need to reassert the primary role of the States in permitting decisions. We need legislation clarifying that our States continue to have primacy in interpreting the relevant portions of the Clean Water Act.

Three, end the abusive use of regulatory guidance documents. If it is important enough to be issued as a guidance document, then it is important enough to go through the normal public notice and comment period.

Number four, provide certainty in permitting decisions. Unfortunately, we need Congress to tell the administration to live up to its permitting promise. We also need the permits to be processed in a timely manner.

The thousands of workers that are affected in Appalachia deserve the right to earn a livelihood without being subjected to the whims of bureaucracy. And, unfortunately, the administration is

pushing bureaucracy to advance the most extreme anti-coal agenda that our Nation has ever seen.

And how do we know this? They simply are following through on their campaign plan. Also, as Commissioner of the New Jersey Department of Environmental Protection, current EPA administrator, Lisa Jackson, issued the New Jersey global warming plan, which called for a moratorium on all coal-fired power plants. Now, she may not be calling for a moratorium today at the EPA, but her regulatory policies are certainly creating them.

Again, Mr. Chairman, this committee could declare a regulatory time-out, reassert State primacy in permitting decisions, end the abuse of the regulatory guidance documents, and provide certainty in permitting decisions.

Mr. Chairman, I appreciate the opportunity to testify, and I look forward to your questions.

Mr. GIBBS. Thank you.

And our next panelist is Mr. Steve Roberts, president of the West Virginia Chamber of Commerce.

Welcome.

Mr. ROBERTS. Thank you. Thank you very much for having me. Ladies and gentlemen, honorable chairman, and members of the committee, thank you very much for your interest and concern about the impact of actions of the U.S. EPA on mining production, energy needs, employment, and quality of life in mining communities throughout West Virginia and the Nation. I particularly want to acknowledge and express appreciation to Chairman Gibbs, to the Honorable Nick Rahall, and Shelley Moore Capito, who I am proud to know, and by whom I and my family members living in both Huntington and Charleston, West Virginia, are so proud to be represented. I am Steve Roberts, I am the president of the West Virginia Chamber.

West Virginia is a beautiful State, populated by decent, hard-working, caring people. We are proud of our over-20 colleges and universities, our well-developed transportation network, our breathtaking peaks and valleys, and our industrial base that supplies the much-needed coal, gas, timber, and electricity that have helped build our great Nation.

West Virginia proudly boasts the Nation's lowest crime rate, the highest level of home ownership, and the first public schools found in the post-Civil War South. The West Virginia mountains have given our Nation many famous Americans. Coal and energy production have long been key components of our State's being. And because of that, we are especially afraid of the assault referred to in this hearing's title.

Outside of Wyoming, we produce the most coal in the United States. Because of the sensitive nature of our economy, these jobs are more than important. Without them, tens of thousands of families, and a historic American mountaineer culture, would cease to exist here.

The best jobs in our State's neediest areas are nearly always mining jobs. Per capita income in southern West Virginia is about half the national figure. Yet the average coal job pays more than four times that amount. A mining income can stabilize an extended family, providing support for the elderly, a future for children, and

a livelihood for many relatives of the wage earner. Killing off such work will do the opposite. Tens of thousands of families will be thrown into crisis.

If surface mining ended in West Virginia, coal production would be cut by 40 percent. There are 537 mines in West Virginia, and 232 of those are surface mines. If permitted, more could exist.

As the country's second-largest coal mining State, limiting 40 percent of our production would be destructive to our country, broadly, at a time when our country needs energy. Locally, 6,255 surface miners would be jobless. Many workers at coal handling facilities would be let go, and secondary industries would experience cuts, as well. For these reasons, the environmental impact of surface mining can never be considered in isolation from the real experience of real people who live in this environment.

Before I delve further into statistics, let me quote one of these people. Ellen Taylor is the president of the Beckley-Raleigh County Chamber of Commerce. Her area is particularly rich in coal and coal mining history. She knows mining communities. She says, in reference to 404 mining permits, that "Canceling permits will have a disastrous affect on the people here. Not only mining families, but local businesses will be widely affected."

To use one of many examples, buying groceries could become a real problem if they were to lose their jobs. Stores would close. Refusing to issue permits would have a terribly harsh trickle-down effect on the economy. Many, many families depend on that paycheck from mining companies, Ms. Taylor says.

This is because those companies treat their employees well. In the mining industry, wages have increased 3.9 percent yearly, on average, through 2008. Mining companies freely maximize their employment. They do not risk pressuring employees by under-hiring. As of 2008, the coal industry in West Virginia employs over 20,000 people, more than any other State. These workers were paid \$1.5 billion with total compensation of \$2.8 billion. And these statistics and those to follow come from recent studies by West Virginia's two largest universities.

I have just listed some of the direct benefits of coal. The indirect benefits are also vast. In 2008, coal companies paid over almost \$700 million in taxes, amounting to a substantial portion of all State revenue. It is the Chamber's assessment that this contribution will shrink to the point of State crisis if 404 mining permits are denied. The loss of property taxes alone would be fatal to local governments, the above-referenced study found.

Thank you for the opportunity to testify, Mr. Chairman. We believe the denial and revocation of 404 permits has already threatened our economy and workforce. There could be much more damage still. For this reason, I appreciate your attention to our struggle, as we try to retain jobs in this most traditional of Appalachian industries. Thank you very much.

Mr. GIBBS. Thank you.

Our next panelist is Dr. David Sunding, University of California at Berkeley.

Welcome.

Mr. SUNDING. Thank you. Chairman Gibbs, members of the subcommittee, it is an honor to speak here today.

This committee is considering an issue of regulatory policy that has significant implications for the vast range of public and private projects that must receive permits under section 404 of the Clean Water Act. The willingness of the EPA to revoke a valid discharge permit approved after a decade-long review process including in-depth environmental impact assessment and public comment, as well as the direct involvement by the EPA and the permitting process, can have far-reaching economic incentive effects.

The EPA's action may bring into question any future investment, hiring, or development decisions in projects that rely on an approved section 404 permit. These activities are vital to the American economy, and include pipelines and electric transmission, housing and commercial development, renewable energy projects like wind, solar, and biomass, transportation infrastructure, including roads and rail, agriculture, and many others.

The Army Corps of Engineers estimates that over \$220 billion of investment each year is conditioned on the issuance of 404 permits. EPA's precedential decision to override the judgement of the Corps of Engineers in this case alters the incentive to invest in projects requiring a permit under section 404.

Project development often requires significant capital expenditure over a sustained period of time, after which the project generates some return. Actions that undermine the certainty of the 404 permit raise the threshold for any private or public entity to undertake the required early-stage investment. In this way, the EPA's action may chill investment in activities requiring 404 authorization.

Increasing the level of uncertainty can also reduce investment by making it more difficult to obtain project financing. Land development activities, infrastructure projects, and the like, often require a significant level of capital formation. Reducing the reliability of the section 404 permit will make it harder for project proponents to find financing at attractive rates, as lenders and bond holders will require higher interest rates to compensate for increased risk. And some credit rationing may also result.

It is worth remembering that public and private activities requiring section 404 authorization generate significant and direct benefits to affiliated industries, thus reduced levels of project investment translate directly into lost jobs and lost economic activity. You have just heard testimony about the indirect impacts of mining on the economies of the Appalachian States.

Similar indirect benefits are evident for housing and commercial development, road-building, and other activities. In the case of housing construction, for example, which, over the long run, accounts for as much as 15 percent of all economic activity in the United States, every \$1 spent on housing construction produces roughly \$2 in total economic activity. And every \$1 billion in residential construction generates nearly 12,000 new jobs. Regulation that creates a disincentive for investment in projects requiring 404 authorization places these indirect economic benefits at risk.

A reduced level of investment in projects requiring a section 404 permit would have effects that go far beyond the industry participants themselves. Private projects authorized under section 404 increase the supply of housing, commercial development, and the

like. When development projects are not undertaken, these consumer benefits are reduced or lost all together.

Public sector activities, like road building and repair and utility infrastructure also contribute in fundamental ways to the quality of life throughout the Nation, as evidenced by the frequently large benefit cost ratios associated with transportation infrastructure projects. Similarly, other types of public land development, such as libraries, schools, and emergency response infrastructure generate significant levels of economic welfare, some part of which would be at risk, as a result of the EPA's actions.

Finally, it should be remembered that land owners could suffer losses and wealth as a result of the EPA's action. In a competitive land market, prices reflect the discounted value of the returns earned from dedicating land to its highest and best use. For undeveloped land, this sum is typically equal to the value of rents when the land is in an undeveloped condition, plus the amount that developers are willing to pay for land when they ultimately initiate their project. Regulation that lowers the profits from development will be capitalized into current land values, meaning that the equilibrium market price of land will be lower, as a result.

I am currently working on a study of these various disincentive effects and economic impacts of the EPA's actions with respect to the Spruce Mine matter, and hope to have results on their importance within the next few weeks. I will make the results of the study available to the committee, and look forward to discussing them with you and your staff. Thank you.

Mr. GIBBS. Thank you.

Our final panelist on this panel is Mr. Reed Hopper, from the Pacific Legal Foundation.

Welcome.

Mr. HOPPER. Thank you. Mr. Chairman, members of the committee, as an attorney with the Pacific Legal Foundation, a non-profit public interest organization dedicated to the protection of individual rights and private property rights, I wish to thank you for this opportunity to testify.

The handling of the Mingo Logan permit is instructive in a number of ways, in that it raises a number of red flags that indicate when an agency is pursuing a political agenda, as opposed to pursuing its statutory mandate.

The first red flag is when the agency response is disproportionate to the payoff. The final notice of the permit revocation indicates, for example, that the Mingo Logan Mine is one of the largest mining projects of its type, and therefore, is unprecedented. However, it fails to mention that the evaluation of this particular project was also unprecedented.

This was the first time that a full EIS has been completed for such a project. As has already been indicated, 10 years in review, 1,600 pages in length, 58 pages responding to comments of the EPA. More importantly, the two agencies that issued permits for the project, the State department of environmental protection and the Corps of Engineers, opposed this revocation, and indicated that the mine has been in full compliance with the permit, that these agencies continue to monitor compliance regularly, and that they have the wherewithal to address any unforeseen impacts. The no-

tion that the EPA suddenly needed to intervene to protect us against some sort of a significant disastrous ecological impact simply is not credible.

The second red flag is when the agency abruptly changes its policy or practice. This typically results when an agency is pushing the envelop on its statutory or regulatory authority. In this case, the Agency has, for the first time in its history, used the 404(c) veto power retroactively to suspend a permit that has been ongoing and has been held in compliance for over 3 years.

In most cases, the courts would require the agency to justify this type of change in policy or practice, which brings me to the third red flag, and that is when the agency policy or practice is changed by means of "guidance," as opposed to the formal APA rulemaking procedure. Using internal guidance as a means to substantively change the law is a recurring practice with the EPA. We saw this with the SWANCC guidance after the 2001 Supreme Court decision, after the Rapanos decision in 2006, and now, with this mining policy. The sole purpose appears to be to insulate the Agency from having its broad interpretation of the law subject to any sort of direct legal challenge. The guidance forces a case-by-case challenge, which means that, overall, there can never be any real change in Agency practice, even if a court finds that the application of its policy is illegal in a particular circumstance.

Another red flag is when the agency changes its policy or practice, and creates greater uncertainty, instead of more uniformity. The proper purpose, I think, of agency rules or guidance should be to ensure objective and uniform administration of the law. But the new mining policy does just the opposite: it demonstrates that the Agency can change procedures and standards at will; and, with respect to 404(c), that it can revoke a permit whenever it deems appropriate. This is the very definition of arbitrary Government.

Finally, I think that another red flag is when the agency shows little or no regard for the impact its change in policy or practice will have on affected parties. The new mining policy truly is an assault on jobs, individual rights, property rights, and the economy.

Until now, 404 permits could be modified or revoked only with a consideration of the effect on the investment and the reliance that the permit-holder had in properly complying with the permit. But EPA has thrown that out the window.

Instead of viewing land owners and permit-holders as allies to be helped, the EPA views land owners and permit holders as enemies to be thwarted. I believe this needs to change.

Mr. GIBBS. Thank you. We will begin our first round of questions. Mr. Carey, you are a member of the National Coal Council advisory board of the Department of Energy. How many meetings does the Council have with the Secretary of Energy, the administrator of the EPA, and how would you describe those meetings?

Mr. CAREY. Mr. Chairman, I would be unprepared to give you that, but I would be happy to find out exactly how many meetings took place, and provide that to the committee.

I would not be able to answer that question, because I don't know exactly—

Mr. GIBBS. Yes. The second part of the question is how would you describe the tone of the meetings?

Mr. CAREY. Well, again, I wasn't in the meetings, so it would be hard for me to actually answer that question, Mr. Chairman.

Mr. GIBBS. OK. Let's go on to Mr. Hopper. Since a section 404 permit has never been revoked prior to the Arch Coal permit. What types of compensation would you suggest would be, you know, warranted?

Mr. HOPPER. Well, that has to be determined on a case-by-case basis by the court. But it is clear that the coal company has spent millions of dollars in reliance on this permit. The courts typically look at the reasonableness of that reliance, the extent of the reliance, and issue a mandate as to how much that compensation should be.

As you know, the mine has sued the Agency, arguing that the retroactive application of this 404(c) veto power is illegal, and they have itemized in those pleadings the extent of their reliance.

Mr. GIBBS. OK, thank you. Mr. Roberts, in your testimony, you talked about how important the jobs are to West Virginia, and of course, the whole Appalachian region. With these new policies coming from this administration in regards to the mining policies, what—have you seen anything the administration has done to help bring new jobs to your State?

Mr. ROBERTS. We are very concerned about the actions that have an impact on mining jobs, because those are the jobs that really pay the kinds of benefits that can support families. We have not seen any sort of commensurate effort, in terms of bringing new jobs into the area where mining occurs, and particularly into southern West Virginia, where this method of mining is most prevalent.

Mr. GIBBS. OK. Dr. Sunding, I am really concerned about the EPA's policy on the conductivity tests for water quality. It is my understanding that the science advisory board really convened after that decision was made by the EPA. Do you think that is—that they kind of went backwards, that they should have developed the science first before they put out the guidance—guidelines?

Mr. SUNDING. Well, I am an economist, so that is somewhat outside my area of expertise. Maybe there are others here on the panel that can—

Mr. GIBBS. OK, we can open it up to the rest of the panelists.

Mr. SUNDING [continuing]. That could address that. Sure.

Mr. GIBBS. Anybody else want to comment on that? Mr. Carey?

Mr. CAREY. Mr. Chairman, I will comment. I think it would be nice to actually—to have the development of the policies before you actually make the outcome. So I would agree with that, Mr. Chairman.

Mr. GIBBS. Also for the panelists, the expanded coordination. Want to comment a little bit about that?

When I read through your testimony, it kind of looks like that's a procedure they kind of put in place to, at least at the very minimum, delay permitting action by 60 days, and really go on forever. Because, the way I read the law, there is no provision to do that in expanded coordination that is in law. How do you see the impact of what's happened on that, and what is your feelings about—with regard to the law?

Mr. CAREY. Mr. Chairman, I would be happy to answer that question. I think, if you looked at just Ohio, you had a company

from Ohio that talked about having permits that were caught in that tidal wave, where they were in no-man's land, nobody knew where they were.

But I think if you look to our neighbor just to the south of us, in West Virginia, they clearly had over 154 permits that were tied up in that. And that truly devastated them, because how do you make investments in moving forward with mining operations and meeting market demands? So, clearly, it hasn't worked.

Mr. GIBBS. OK. At this time I will yield to Mr. Rahall. Do you have questions for the panelists?

Mr. RAHALL. Did you want to go first? Go ahead.

Mr. GIBBS. Whoever wants to go first.

Mr. RAHALL. Yes, let—

Mr. GIBBS. OK. Mr. Bishop?

Mr. RAHALL. Thank you, Mr. Chairman, I appreciate it.

Mr. BISHOP. Thank you, Mr. Chairman. And, Mr. Rahall, thank you.

I always find it helpful—and we all have the same set of facts—both Mr. Carey and Mr. Roberts, I think it's fair to characterize or summarize your testimony that—and I believe, Mr. Carey, you may have even used this phrase, that the current administration is—has declared a war on coal. Is that pretty much what you said? I don't want to put words in your mouth.

Mr. CAREY. That is true.

Mr. BISHOP. OK. Here is my understanding of the permitting numbers since the Obama administration took office, that they inherited 140 pending permits. Of that number—for surface mining—52 have been approved. Of the 88 that have not been approved, none have been denied. Some are still pending. And some were withdrawn. Do you feel that those, that set of numbers, you still keep to your characterization?

Mr. CAREY. Mr. Chairman, Ranking Member Bishop, I would say not just only in the numbers of permits, but I think, if you look at my written testimony, I describe a series of attacks on the coal industry, not just from the EPA perspective, but also if you look at MSHA, if you look at the Office of Surface Mining. If you look at the myriad of issues that are now facing the coal industry, there is no doubt in my mind, Mr. Chairman, Ranking Member Bishop, that the coal industry is under assault.

And as far as the numbers of permits, where the permitting numbers are concerned, I think you have to look back at certainly there were 140 permits, but then, when you throw all those permits back into some coordinated policy that delays the time period, I think that is an issue.

Mr. BISHOP. But to be clear, the current administration inherited 140 pending permits. So, if they were thrown back, as you just said, into some other process, that was a process that perhaps took place prior to the advent of this administration?

Mr. CAREY. Mr. Chairman, again, I would have to look at the exact permits to which you were referring in order to be able to answer that question. But I would be happy to provide those answers to you.

Mr. BISHOP. Mr. Roberts?

Mr. ROBERTS. Sir, I—the information that I had provided to me indicates that there is a backlog of 239 permit applications, and that 190 of those had already been considered complete by the U.S. Corps of Engineers. So, one of the challenges for us is to deal with the sort of going back and re-looking at permits that have also received the blessing of the appropriate regulatory authorities in the States and within the U.S. Corps of Engineers.

Mr. BISHOP. But the fact that remains is that, of the applications that have been acted on by the current administration, with the exception of the Spruce Mine, 100 percent of the decisions rendered have been favorable decisions allowing that mining to go forward.

Mr. ROBERTS. I wouldn't have—that is just not information I have. The information I have is related to the 235—

Mr. BISHOP. It is information that we have. So—

Mr. ROBERTS. Thank you.

Mr. BISHOP [continuing]. Thank you. Let me just go to the issue of jobs. And, again, something all of us need to be—have a heightened concern about, no matter where we live, what we represent.

My understanding is that—and this is data that comes from MSHA—is that over the recent past, mining employment has dropped from about 60,000 jobs to about 30,000 jobs. Does that comport pretty much with—Mr. Carey, Mr. Roberts, or Mr. Sunding, does that comport—Dr. Sunding, I'm sorry, does that comport pretty much with your information?

Mr. CAREY. Mr. Chairman, Mr. Bishop, I would say that I can tell you about the 3,000 direct employees that are employed in Ohio's coal mining industry—and I believe that there are 17,000 that are in our sister State of West Virginia, and somewhere in the middle in Pennsylvania. So it would be hard for me to quantify that exact—

Mr. BISHOP. My understanding, again, from MSHA, is that we have gone from about 60,000 employees in the mining industry to about 30,000, and that all of that job loss took place prior to the Obama administration, and that the vast majority of that job loss is related to a move away from underground mining and more so towards surface mining, because it is considered to be less expensive and safer. Does that comport with your information?

Mr. CAREY. Mr. Chairman, Mr. Bishop, I would say that is absolutely not true.

Mr. BISHOP. So what is the loss? If the loss took place prior to the advent of the Obama administration, and it is not related to the move to surface mining, then what is it related to?

Mr. CAREY. Mr. Chairman and Mr. Bishop, I would say that if you're—what time period are you referring to, that there is a loss of 30,000 coal jobs? I would argue very clearly that there is probably a difference in the amount of wagon wheel makers from 1890 to 1940.

Mr. BISHOP. Trust me, I am not trying to be that specious, OK? We are—this is recent data from MSHA. And I do think wagon wheel production has gone down. I'm not sure of that, but I think it has.

[Laughter.]

Mr. CAREY. Mr. Chairman and Mr. Bishop, as has the pick axe.

But I will tell you that I would again have to see the numbers for which you are referring. Because, certainly, as mining practices have improved, just the amount of tonnage that you can get out of an underground coal mine now by man-hour is completely different than it was 20, 30, 40 years ago. But as far as the move to western coal, again, I would—it would be hard to quantify that.

Mr. BISHOP. But—I'm sorry, my time has expired. Thank you, Mr. Chairman.

Mr. GIBBS. We will have another round.

Mr. BISHOP. Thank you for indulging.

Mr. GIBBS. I would just like to interject, just to clarify a question. Mr. Bishop talked about the number of permits. When I have looked at this, it looks like to me that just close to 250 permits that are under the enhanced coordination process. And in my understanding, that's kind of fallen into a black hole, where nobody knows what is happening. And then some of those permits, I think, have been withdrawn, because they have given up. Is this accurate, this statement? Anybody want to answer that?

Mr. CAREY. Mr. Chairman, I would agree with that, completely.

Mr. GIBBS. So enhanced coordination is really the issue here on the permitting part?

Mr. CAREY. Mr. Chairman, members of the committee, I think it's a myriad of things. But I think certainly that is one issue.

Mr. GIBBS. OK. At this time we will move on to Representative Cravaack. Do you have questions?

Mr. CRAVAACK. Thank you, Mr. Chairman. Thank you, panelists, as well.

Dr. SUNDING, what are the added costs, in your opinion, related to the permitting and any uncertainty of the whole EPA process here? Could you comment on that?

Mr. SUNDING. Sure. I mentioned a few types of direct and indirect effects in my testimony. Two that I would point out, just as a matter of economic theory, almost.

The issue of delay, which is related to uncertainty, we were discussing it a few minutes ago. In the context of most land development activities, delay is tremendously significant. And it is often sort of a hidden cost of regulation. The fact that the permitting process under 404 has no certain end to it can be very significant when developers, lenders, other entities are considering whether or not to enter into an activity in the first place. So I would point out, first, delay.

Second, I did speak directly to the issue of uncertainty. The way most development, private and public, works is a significant amount of money is put up first, in terms of, you know, investment in the permitting process, and required capital expenditures. And then the returns come later. What this process does, what the EPA's action does, is put more uncertainty onto that stream of returns, which makes it much less likely that the investment will pass the required threshold in the first place. So that is probably the most important incentive effect that I would point out.

Mr. CRAVAACK. Related to that, can you tell me—I don't know if you have these kind of figures—what kind of job loss are we talking about during a time period like that, or lack of job creation? Would you have numbers on that?

Mr. SUNDING. Right. I think we have better information on—sort of at the project level, you know. For a typical land development project, a housing project, typical mining project, we know.

To figure out the expected economic cost of what the EPA has done in this case, it's important to have a lot of other information about the whole range of economic activities that get permitted under 404. I think we're not quite there yet, I'm just not able to give you, you know, a number for, "Here is the cost on the economy."

But what I can do is point out—pretty effectively, I think—some of the fundamental economic incentive effects of eliminating the certainty of the 404 permit, and then talking on a project-by-project or activity-by-activity basis, what the impacts might be. And they are potentially very significant.

Mr. CRAVAACK. OK. Thank you very much, sir. Appreciate it.

Mr. Carey, I'm assuming you're a Buckeye?

Mr. CAREY. Mr. Chairman—Congressman, that is for sure, yes.

Mr. CRAVAACK. I'm a fellow Buckeye too, so I was kind of—I was born in Charleston, grew up in Ohio, so there you go.

I just have one quick question for you. We have open pit mining in Minnesota, in the Iron Range. We mine taconite. And this concerns me greatly, what you guys have happening in the Appalachian mines, as well.

How important in your industry—and one of the problems that we're having is we're trying to actually get an open pit precious metal mine. We're talking 7 years, I think over \$27 million in—just in studies and EPA studies. And one of the things I keep on hearing more and more is that the EPA keeps on moving the bar, which moves the timeline, almost to see who is the last man standing at the end of this game. That is the impression that I am getting. We are trying to open up a taconite mine that—it's an old mine. It's going to do the same thing it did before, but more efficiently, and more environmentally friendly, and we are still having those—these type of problems.

How important is—in the industry—would you say is a pretty solid timeline to the coal industry?

Mr. CAREY. Mr. Chairman, Congressman, I—clearly, any time that you are investing millions and millions of dollars into a project, you want to have a rate of return. And if you simply can't get the permit, you can't get your product to market, you are not going to make that investment. And that investment, those investment dollars, will go offshore. We need the material.

Mr. CRAVAACK. I couldn't agree with you more. And I just hope to keep our mines open in Minnesota, as well, because it is essential to not only the Iron Range, but it is also essential to Minnesota. And I thank you for all the efforts that you are going through right now.

So, Mr. Chairman, with that I have got about 18 seconds, so I will just go ahead and yield back my time. Thank you.

Mr. GIBBS. Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman. I appreciate all the panel's testimony this morning. And in particular, thank you, Mr. Roberts, for giving the committee some insight into the history and the heritage of West Virginia, and our relationship to coal mining, and

what it means for job creation, what it means for, literally, keeping the lights on and employing a lot of law enforcement officials in our southern counties who otherwise would not have the budget from coal severance taxes to do such. And it is a story that is not well known in many parts of this Nation, yet it is a story that has contributed so much to the energy security of this Nation.

Now, we all want to see our economy diversified, and we want to see other job creation, which the Chamber of Commerce is certainly in the lead in developing. And I am sure you recognize, as much as the next person, how we have struggled over decades in West Virginia to strike this proper balance between job creation, diversifying our economy, and environmental preservation. And it can be done.

You know the importance of tourism to our State of West Virginia, for example, and how those figures keep on the upswing. So we can do it. We can preserve our beauty, we can create jobs in tourism at the same time that we provide jobs in coal mining.

I wanted to comment—that's just a comment, not a question. I wanted to comment on what my dear friend, Mr. Bishop, brought up in regard to the pending permits, 140 pending—I believe he was quoting, obviously, EPA statistics—and 52 approved. And of the 88 not approved, none were denied, I believe, is an accurate description.

I would say of those 52 that were approved, it was one heck of a process to get those 52 approvals. I mean it was—to say put the industry through the ringer would be an understatement. And a lot of concessions were made along the way by industry—by all groups, both sides. As we know, it is part of the approval process.

And some of those that were approved were characterized by many as a dare-to-mine permit, if you will. In other words, conditions were placed upon that approval such that one misstep, however slight, could cause a revocation of that permit approval. And now we have seen, since the Spruce revocation, that there is even the further danger that these approvals don't really mean much if the Agency can come back later and revoke a permit that has been granted.

In addition, there is court cases. Court cases have contributed a great deal to this backlog, more so than what any administration has done. So, it is one hell of a process. And I am not saying that is bad, because there are obviously—there is obviously a negotiating process that has to occur here.

But I guess I would ask you, you know, it does have an effect upon business' ability to make a decision for job creation, because they need a certainty. And is it your understanding that many of these permit applications have been withdrawn because the industry simply has gotten so frustrated, has been unable to make those decisions to keep people working, and are not sure of the rules of the game because they keep shifting, and in other cases cannot even find out what they have to do? So it is a whole maze of uncertainty here. Did you wish to comment on that?

Mr. ROBERTS. I would comment briefly, sir, that employers very much need stability and predictability, and that without stability and predictability the level of risk goes up enormously.

And then the cost benefit ratio begins to turn into, "Well maybe it is safer to not then," too, and that is where, really, the risk of—managing the risk comes into play. It is predictability and stability that the companies are saying they need as much—it is not their inability to play within the rules, it is the ability to know what the rules are, and for those rules to be stable and predictable.

Mr. RAHALL. Thank you. Thank you, Mr. Chairman.

Mr. GIBBS. Before I go to the next—our next question, I just want to interject a question here to the panel. My understanding of enhanced coordination and dealing with the criteria integrated resource assessment, MCIR, it is unique to the Appalachian region. And it is also my understanding that there is close to about 250 of those permits under enhanced coordination. And I think only two have been approved.

Now, when you talk about permits being approved, is that a national figure, what is happening in Appalachia is because of enhanced coordination that we are not getting those approved? Is—would you have any insight on that, Mr. Carey, or anybody?

Mr. CAREY. Mr. Chairman, I would go back to what Mr. Rahall said, with describing a lot of those permits that were in the process of—they had already been in the process, and some things—the things that were given by those permits to move forward was almost a dare-to-mine type of scenario. So I would clearly—and your numbers may be more correct.

But I would also say the concern that we have, as producers of a commodity, is for our customers. Our customers have to have reliability that we will be able to get our product to market. And if we in Ohio and West Virginia, Kentucky, Pennsylvania cannot meet that market demand for coal, that coal will come from someplace else. We need to have consistency and permitting. We need to have a reasonable time schedule so we can get our product to market.

Mr. GIBBS. But it is clear to understand that there is, from this administration, the Appalachian region has been targeted, compared to the rest of the country. Is that true?

Mr. CAREY. Mr. Chairman, I would clearly say that, and I believe I did say that in my testimony.

Mr. GIBBS. OK, thank you. Mr. Landry, do you have questions?

Mr. LANDRY. Thank you, Mr. Chairman. Mr. Carey, you don't believe that the Federal agencies in this country create uncertainty in industries, do you?

Actually, my questions are for Mr. Hopper. You served as counsel for the board of the Mississippi Levee Commission, is that not correct?

Mr. HOPPER. Yes, our foundation does.

Mr. LANDRY. Are you—were you involved, or do you know the particulars of the vetoing of the Yazoo Backwater Area Project permit?

Mr. HOPPER. I know some of them, yes.

Mr. LANDRY. And I am sure you understand the impact that the current flood waters are having on the Yazoo River basin.

If those levies fail, is—I guess could—if EPA would not have vetoed that permit, and that project would have been allowed to pro-

ceed, would it—would the levee system be in a better position to handle the flood waters currently than they are now?

Mr. HOPPER. Certainly for that area, there is no question about it.

Mr. LANDRY. So, just to make sure I understand, so EPA's vetoing of that permit could be endangering over 1,000 homes and hundreds of thousands of acres right now.

Mr. HOPPER. That is correct.

Mr. LANDRY. All right. So, it would be logic to say that if EPA would have been around in 1927, and would have been vetoing 404 permits, could we have built the Mississippi River and tributaries levees that are protecting, you know, not only Mississippi, but Louisiana, Arkansas, as well?

Mr. HOPPER. Well, I don't know how to answer that. But I think, clearly, it is contrary to the public interest to stand in the way of these flood protection programs. The EPA needs to facilitate these things, and not hinder them.

As you say, this backwater area is flooded regularly. We now have serious flooding because of the rising Mississippi currently that has resulted in harm to individuals, private property, and to the ecosystem itself.

The EIS, the new EIS that the Corps did, indicated that there would be a net improvement of wetland resources. The veto is based on a technicality that shouldn't come into play.

Mr. LANDRY. I just wonder whether or not, you know, the—this 404 permit, had it been around, you know, between 1927 and, I guess, you know, into the 1960s, if the Corps would have been able to even build the system that is currently protecting hundreds of thousands of Americans right now in that Mississippi River basin, in addition to the property that it is currently protecting.

We certainly noted there are weaknesses in the system right now. I pray that the Corps is able to, you know, rectify those weaknesses in the levee system. But I think it is important for people to understand that if EPA would have been around back then, we might not have those levees.

One last question. In reading your statement I found it interesting that you believe that—do you believe—see if I can make this brief—do you believe that EPA's retroactive vetoing of a 404 permit to be a Government taking?

Mr. HOPPER. Yes. I think that the argument could be made that it is a Government taking. The courts have recognized that when one relies to one's detriment reasonably on a valid permit, that one establishes a vested right, which is a property interest, and it cannot be taken away without regard for an opportunity to recoup the investment. I think that is black letter law.

But, that is just one means by which these new mining policies can result in a taking of private property. There are other means, as well.

Mr. LANDRY. Thank you, Mr. Chairman. I yield back.

Mr. GIBBS. Representative Lankford, do you have questions?

Mr. LANKFORD. Thank you, Mr. Chairman. Mr. Carey, you mentioned four things that we can do to try to find some balance here: regulatory time-out; the State, making them the primary permitting authority; ending the guidance document without any kind of

public comment; and then also certainty in permits. Let me just specify one of those.

Let's talk a little bit more about the State being primary in the permitting process. Do you know of a State out there that you would look at, Mr. Carey, and say, "This State is really not competent to handle the energy sources," whether they be coal, oil, natural gas—whatever the energy—wind, that that State, in particular, does not have competent leadership?

Mr. CAREY. Mr. Chairman, Congressmen, there are actually a couple of States that are currently—the Federal Government currently does the permitting and the inspecting. I believe Tennessee is one of those States, and I could be mistaken, but I believe the Missouri. But I could provide those numbers to you.

So I think there are certain models that, clearly, the Federal Government has taken over the State programs when they have proved to be inefficient or unable to actually meet the challenge under the Federal law of SMCRA.

Mr. LANKFORD. OK. A Federal structured program for, let's say, coal mining. Mining of coal, is it the same in West Virginia and Ohio and Wyoming, Oklahoma? They're all pretty much the same, each one is the same, acts the same, has the same kind of regulations and permits, or are they uniquely different, State to State?

Mr. CAREY. Mr. Chairman, Congressman, no. Each State is different. Each State has different topography. Each State has different coal seams that are mined in different manners. So each State is different.

Mr. LANKFORD. So, have you seen EPA regulations show that kind of flexibility, that they are different in Ohio than they are in West Virginia or Kentucky or Wyoming, or are they pretty much trying to regulate with the same instrument in every single State?

Mr. CAREY. Mr. Chairman, Congressman, they are trying to regulate the same in all States, and break it up by regions. And that simply does not work.

Mr. LANKFORD. OK. Dr. Sunding, let's talk about some economic models here. Investment slows down when you don't have certainty in the permitting process. If you are trying to get investment into any type of energy, then obviously that slows down when no one has any idea what is going to be permitted.

What we have—seem to have at this point is an administration that, at their whims, is going to try to pick and choose winners and losers. When a plant started the permitting process 10 years ago, now with a change of administration, you lose favor and now you have millions of dollars on the line.

Based on that, what type—and knowing the topography—who knows what is going to happen in the Presidential election next time. Based on—if this model continues, where it is not based on science, it is based on the politics of what is the preferences of an executive when an energy company has to plan 10 years in advance, what type of energy would you recommend for any power company out there and say, "This would be a good investment model, I would look at this?"

Mr. SUNDING. Right. Well, I think you are right to focus on the incentive effects, and I will say a few remarks about energy, but then I want to return to a broader focus, not to minimize the im-

portance of energy at all, but the 404 program touches virtually every part of the economy.

Mr. LANKFORD. Right.

Mr. SUNDING. And I do want to return to that a little bit.

You are quite correct to point out that the EPA's decision in this case is precedential, and can have impacts that last far into the future, way beyond the case with just Arch Coal. I think it is fair to say that it would have a chilling effect on any potential investment that requires a 404 permit, whether it is energy or otherwise. So I think your point there is very well taken.

With respect to other kinds of activities, let me come back again to something I talked about in my testimony, residential construction and transportation. By many measures, economists would say those are the most important sectors of the economy, in the sense that the average household in this country spends over half of their disposable income on housing and transportation, transportation being linked to energy, of course.

But this is a tremendously important economic decision. And housing permits, or housing projects, most of the large projects that I know or have studied, require 404 authorization. So this could not be more important for the housing sector. And—

Mr. LANKFORD. So, basically, you are saying this removes certainty from all of the most critical parts of our economy.

Mr. SUNDING. Yes.

Mr. LANKFORD. That if we don't have certainty in permitting in this, we are in trouble economically, because no one can plan, no one knows how to invest, and it is at the whims of whatever the policies are at the moment, rather than based on long-term science and planning and certainty.

Mr. SUNDING. Right. The ability to revoke a permit like 404 can have very important incentive effects on investment across the entire economy.

Mr. LANKFORD. OK. Let me just ask an opinion question of Mr. Hopper, as well. How long should a 404 permit take? What is a reasonable period of time?

Mr. HOPPER. A reasonable period of time would be 90 days to 6 months.

Mr. LANKFORD. And they typically take how long now?

Mr. HOPPER. According to—

Mr. LANKFORD. If they hold?

Mr. HOPPER [continuing]. The research by Dr. Sunding, they typically take 2 years or more.

Mr. LANKFORD. OK. Thank you. I yield back.

Mr. GIBBS. Thank you. Representative Capito?

Mrs. CAPITO. Yes, thank you. Mr. Roberts, you mentioned in your testimony that if surface mining were to be discontinued in West Virginia it would cost directly 6,255 jobs. But there is a job multiplier, I am sure, that you use. What is that job multiplier? For every one of those jobs, how many ancillary jobs?

Mr. ROBERTS. Mr. Chairman and Congresswoman, we think that a reasonable multiplier could be perhaps—a reasonable and conservative multiplier could be anything from one-and-a-half to two, related to those jobs. And I think that is probably on the very—if that is an error, it is on the very low side.

Our estimates are that, while we have approximately 21,000 mining jobs in West Virginia, and nationwide approximately 81,000 mining jobs, according to the U.S. Bureau of Labor Statistics, that we have another close to 80,000 jobs in West Virginia that exist because of the mining industry. So, if we were to extrapolate from that that 40 percent of those jobs are related to surface mining, that is 32,000 ancillary jobs related to surface mining in West Virginia.

Mrs. CAPITO. OK, thank you. And then, just recently—I believe maybe Monday—in Congressman Rahall's district was announced the beginning of a construction of a coal-to-liquid plant which will obviously create jobs, another usage of coal, and will also help with our dependence issue on the foreign sources of oil.

We have had stops and starts with coal-to-liquid before, because of the high expense of converting. How do you see this, in terms of the future and the longevity of coal, other uses of coal, and what kind of things are we doing in West Virginia to promote this?

Mr. ROBERTS. I am actually pretty optimistic about the long-term prospects for using coal and converting it to other types of energy, and doing it cleanly and in an environmentally sound way.

One of the mantras that people who are close to coal tend to have is that in our country and in the world we are going to need all of the energy we can get, on a going forward basis, and we are going to need it from virtually every source that we can think to create it. And to that extent, what we are hopeful about is that more research dollars will go into how we convert coal to other energy uses, and then how we do that cleanly and in an environmentally sound way, and how we transport that energy, once we convert it.

But from a looking-forward basis, there is lots of reason for optimism that the massive coal reserves we have can be converted to other energy uses.

Mrs. CAPITO. Right, and our universities are doing that right now, particularly WVU and Marshall—there again, another job creator, in terms of the development of technology and research around coal.

Dr. SUNDING, let me ask you a question. Does the EPA have to consider energy and economic impacts when they are making a decision? My understanding is that that should be part of their decision. And our next witness says in there that they do consider that, although, as I said in my opening statement, the administrator said that's not a consideration that she takes. What is your take on that?

Mr. SUNDING. Right. My take would be that, as a matter of public policy, they should be considering economic impacts. Earlier this morning I forget who was talking about balancing. And I think that is what we are ultimately trying to find here, is some kind of balance. Economic impacts and jobs are part of the balancing test.

Mrs. CAPITO. But is it statutory that they consider this? Is it in the statute?

Mr. SUNDING. Well, again, I am not an attorney. There are probably better people here to—

Mrs. CAPITO. There is Mr. Hopper. You are an attorney. Is it in the statute?

Mr. HOPPER. I am not aware of a requirement in the statute.

Mrs. CAPITO. To consider that as an impact?

Mr. HOPPER. But the administrator has very broad discretion in how she administers the law, including rulemaking and enforcement.

Mrs. CAPITO. OK. And one last question for Mr. Roberts. West Virginia generates, what is it, 98 percent of our energy from coal.

Mr. ROBERTS. From coal.

Mrs. CAPITO. For obvious reasons. We are right there, we have a lot of it.

When you are recruiting businesses to West Virginia and asking them to relocate to West Virginia, one of our primary recruiting goals is our affordable energy resources, because of the proximity of the resource, the abundance of the resource, and the fact that we are very reliant on the resource.

If that goes away, what kind of disadvantage would that put our State—but other States, like Indiana, I think, is one of the States that has a large reliance on coal as a resource.

Mr. ROBERTS. Yes.

Mrs. CAPITO. What would you—

Mr. ROBERTS. The result of the high level of electricity generation that comes from coal in our State and in many similar States is that we have the—among the lowest electricity cost for commercial and industrial users in the Nation. For many years, West Virginia has had the second-lowest electricity costs in the Nation for industrial and commercial users. And that is very important, as our country tries to see its manufacturing economy recover. The recovery is likely to occur in the States that can provide the energy and provide it in a dependable, reliable, and low-cost way. And, for West Virginia, that has been a key factor in keeping some of the industrial facilities that we have in our State.

Mrs. CAPITO. Thank you, and I think my time has expired. But the other question I wanted to ask—so I am just going to put it out there—is in West Virginia we have had a lot of issues around DEP, who has primacy on water rights, you know, the Corps, and it looks like a circle that keeps going around.

And I think this is something that we need to have decided, because our State government officials are in a quandary, not knowing how to react, not only—well, around the permitting issues. Not only the private sector doesn't know how to react, but the State government is in a big quandary as to the correct way to move forward on what they think is an authority that the State DEP has.

And with that, I thank you.

Mr. GIBBS. Thank you. Representative Richardson, do you have a question?

Ms. RICHARDSON. Thank you, Mr. Chairman. I just have two questions.

Dr. Sunding, first of all, welcome. I am from California, so welcome here. In your testimony you argued that EPA's decision to override the judgement of the Corps of Engineers in the Arch Coal case alters the incentives to invest in projects requiring a permit under section 404, and that the EPA's actions will chill investment in activities requiring a 404 authorization. Could you elaborate a little further on that point?

Mr. SUNDING. Sure, I would be happy to.

Ms. RICHARDSON. And if you could, provide some specific examples.

Mr. SUNDING. Yes, sure, I would be happy to. I could give you some examples.

Let me just say, as a threshold comment, that people often forget—I am not saying any members of the committee have forgotten—but the 404 program touches, as we were talking about a minute ago, many parts of the economy, not just the mining sector, not just housing. Virtually all public infrastructure projects can potentially have to get 404 authorization: school building, road building, emergency response infrastructure, utility pipelines. These are all projects that routinely get 404 authorization.

And if you think about the economic incentive effects of being able to revoke a valid permit ex-post, that is very different than the economic incentive effects of not just approving it in the first place. Because the investment has already been made. So that money is sunk. And it can't be recovered. Once part of a road is built, or part of a project is completed, it is irreversible, can't be recouped if the EPA changes its mind.

So, that is a much more consideration, ex ante, than just the ability to have a permit denied in the first place, before the investment is made. So when I talk about the direct incentive effects of the action on all kinds of activities that happen in the economy, that is really what I am referring to.

Ms. RICHARDSON. OK. Thank you, sir. And, Mr. Carey, in your statement today you argued that one of the four things that could help to stimulate job creation in the Appalachian coal mining industry is to declare a regulatory time-out.

Sir, with all due respect, if you look at various things that have happened in this country, whether it is financial regulation, whether it is the Deepwater Horizon, I don't think, realistically, you are going to get support of a regulation time-out. So what might you suggest that would be something more in the middle that we could possibly address and help you with?

Mr. CAREY. Mr. Chairman, Congresswoman, I think I laid out pretty specifically what I think this committee could outline to promote jobs in Appalachia. To take a middle ground approach, I am not sure what that means. If we are saying—if we are looking at what the surface mining or the 7,000 jobs that—the direct jobs that would be lost in Appalachia because of the surface mining rules, and other jobs grown into the west, I am not sure that is—how do you cut that in half and say, “Well, I will take half of those job losses?”

The Penn State University did a study a number of years ago that says for one coal job, up to 11 spin-off jobs are associated with that one job. So, if we are talking 7,000 people—

Ms. RICHARDSON. Excuse me.

Mr. CAREY [continuing]. Congressman, we are looking at a factor of 77,000.

Ms. RICHARDSON. Excuse me. Excuse me. Excuse me. This is my time. You already gave your testimony, OK? So excuse me.

And I do want to say for the record, Mr. Chairman, I was a little offended by this gentleman's testimony in reference to the Presi-

dent and to the EPA administrator. I have been on this committee 4 years, and we don't attack our administrators, and I don't think we allow people giving testimony to do so, either.

Sir, the question I was asking you—and I am trying to help you, I am not against you—my question to you was you are not going to see no regulation. You know, you can sit here, if you want people to lie to you, you know, look at someone else. But I am just telling you I seriously doubt you are going to see anything that is going to be no regulation.

So, if it is going to be no regulation—and we are talking about regulations, I am not talking about a specific job—what specific things could we do—because, you know, EPA is coming up next—what specific items could we help you within that regulation to ease—to get to the point of where you are trying to go? I am trying to help you.

Mr. CAREY. Mr. Chairman, Congresswoman, I would be happy to outline several different things that you could help with.

Ms. RICHARDSON. OK.

Mr. CAREY. I would be more than happy. But I do want to say something. I don't think that I ever inflammatorily went after the director of the EPA. I just stated what she did as an EPA administrator in New Jersey.

Ms. RICHARDSON. We normally don't reference specific to our administrators or to the President, and I don't know if you have testified here before, but I thought it was a little over the top, in my opinion.

I welcome your comments of specific examples, and I would be happy to work with the chairman and the ranking member to assist you to achieve your goal. We want to help you, and we want you to be successful. Thank you.

Mr. GIBBS. Mr. Bishop?

Mr. BISHOP. Thank you. Just one point, and I thank the chairman for indulging me.

Dr. Sunding, and I think Mr. Roberts and Mr. Carey all made reference to the fact that the section 404 veto authority remains with the EPA, leads to a level of uncertainty that is debilitating.

Under the heading of us all having the same set of facts, in the last 39 years—which I think we will agree is the post-wagon wheel era—in the last 39 years, the Army Corps of Engineers has authorized over 2 million activities in the waters of the United States that are subject to section 402 regulatory authority. There have been 13 vetoes. And, to be specific, the Obama administration, one veto. The Bush II administration, one veto. Bush I, four vetoes. Reagan, seven vetoes.

So, I think 2 million permits set against 13 vetoes, it is a little difficult to argue that there is a level of uncertainty that is debilitating.

I thank you, I yield back.

Mr. GIBBS. Thank you. I want to thank this panel for your coming and testifying. It is very enlightening. And just a quick comment.

You know, we are—I am really personally concerned about the revocation of a permit after 3 years it was issued. That is different from a veto, in my opinion. I think in the process, the application

process, the EPA has the right to veto it. But the question here is after the fact, for not being in violation of that permit. And I haven't seen any evidence yet that they were in violation of the permit.

So, again, thank you, and we are going to conclude this first panel and move on to our second panel, with the administrator, Ms. Stoner.

Welcome, Ms. Stoner. At this time I welcome Ms. Stoner, the acting assistant administrator of the Environmental Protection Agency Office of Water. The floor is yours.

TESTIMONY OF NANCY K. STONER, ACTING ASSISTANT ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER

Ms. STONER. Good morning, Chairman Gibbs, Ranking Member Bishop, and members of the committee. Mr. Rahall, as well. I am Nancy Stoner, acting assistant administrator of the office of water at the U.S. EPA. I appreciate the opportunity to testify before you on EPA's work to protect all of America's waters, including those in Appalachia.

Mr. Chairman, before I describe EPA's obligations to protect water quality and the environment, allow me to repeat something EPA Administrator Lisa Jackson has said many times: "Americans do not need to choose between having clean water and a health economy; they deserve both."

Let me also repeat another point the administrator has made. None of EPA's actions are about ending coal mining. They are about reducing coal pollution and protecting the health and the environment of coal field communities. We have a responsibility under the Clean Water Act passed by Congress to ensure that surface coal mining projects do not impair water quality or endanger human health or environmental health. We are committed to fulfilling that responsibility, because we believe that every community deserves our full protection under that law.

In the last 29 months we have worked with our Federal and State colleagues and with mining companies to design projects so they do not adversely impact water quality, so that they can move ahead. In fact, since 2009, more than 50 of the permits have now been issued that had been stalled, due to litigation or other factors.

We all want our communities to be successful. The health of humans and ecosystems is an essential part of this equation. And clean water is essential to the health and well-being of every American. When the water is polluted, the community struggles, as we have seen in parts of the world where people have inadequate access to clean water, and are forced to rely on contaminated sources.

In 2010 an independent peer-reviewed study by 2 university professors found that communities near degraded streams have higher rates of respiratory, digestive, urinary, and breast cancer. The study was not conducted in a far-off country. It was conducted here, in the U.S., in Appalachian communities.

A peer-reviewed West Virginia University study released yesterday concludes that Appalachian citizens in areas affected by mountaintop mining experience significantly more unhealthy days each year than the average American.

Healthier watersheds mean healthier people. It has been a high priority of this administration to reduce the substantial human health and environmental consequences of surface coal mining in Appalachia, to minimize further impairment of already compromised watersheds. We have demonstrated a constructive approach in our work with mining companies. When people of good will work together, we are able to find approaches that allow mining projects to move forward without degrading water quality.

Let me make two specific points about this. First, initial monitoring data shows that mines that use modern practices to protect the environment can achieve downstream water quality well below levels of concern. These companies should be commended for working with EPA to protect water quality and human health while also mining coal.

Second, given the discussion today about Arch Coal's Spruce Mine permit, I would like to point out that EPA offered a pathway for that project to move forward in a manner that did not impair water quality, just as we did with the projects we approved. Unfortunately, the company rejected this approach, and refused to modify the mine to protect waterways and stream life, as required by law.

EPA reserves its authority to veto permits for only truly unacceptable circumstances. EPA has used its authority to revoke an issued permit only twice since 1972. We have stood our ground in this case, based on peer-reviewed science that has increasingly documented the effects of surface coal mining operations on downstream water quality and aquatic life. I have brought some of those peer-reviewed studies with me here today.

Peer-reviewed studies have found elevated levels of highly toxic and bioaccumulative selenium, sulfates, and total dissolved solids in streams downstream of valley fills. Studies by the West Virginia Department of Environmental Protection have emphasized the role of high selenium levels in causing developmental effects in fish.

EPA itself recently completed a review of the scientific literature related to the environmental impacts of surface coal mining, and found effects that included resource loss, water quality impairment, and degradation of aquatic ecosystems. We also completed an extensive assessment of the relationship between stream quality and high levels of conductivity. Both EPA reports were subject to extensive peer—public comment, and have been independently peer-reviewed by our science advisory board.

In conclusion, Mr. Chairman, science has told us that when we don't protect our waters from coal pollution, our communities and future generations will suffer. As leaders, we should be taking every possible step to keep them healthy, and working together to provide a clear path for the future of coal, a path that ensures the health and prosperity of Americans living in Appalachia, and the energy future for our Nation.

Just months before his passing, after serving 57 years in the U.S. Congress, Senator Robert Byrd stated eloquently that, "The greatest threats to the future of coal do not come from possible constraints on mountaintop removal mining, or other environmental regulations. But rather, from rigid mindsets, depleting coal re-

serves, and the declining demand for coal. The future of coal—and, indeed, of our total energy picture—lies in change and innovation.”

I sincerely respect Senator Byrd’s challenge to all of us to embrace the future. EPA will continue to work with our Federal partners, State agencies, the mining industry, and the public to fulfill our common goals of reducing adverse impacts to water quality, aquatic ecosystems, and human health. Thank you.

Mr. GIBBS. Thank you for your testimony, Ms. Stoner. I will get right to the questions.

My first question with the Spruce permit. Did the State of West Virginia support EPA’s veto, or the—what you call a veto, I call it revocation of the permit.

Ms. STONER. No, sir. I don’t believe they did so. The U.S. Fish and Wildlife Service supported it, and U.S. EPA made the determination.

Mr. GIBBS. Did the Army Corps of Engineers support it?

Ms. STONER. They did not indicate that they thought a veto was necessary.

Mr. GIBBS. Did they find any information that—in your testimony you talk about—because information had changed that warranted the revocation of the permit. Did the Corps give any new information to the EPA that there was any new information from the Corps?

Ms. STONER. They have specific statutory factors that they need to follow. They didn’t find that those were met. But the new information, the science that I just referred to, I have brought with us today. These are scientific—

Mr. GIBBS. Well, let me just stay with the Corps a second. Is that true, that the Corps submitted a report that was at least 50 pages long with no new information?

Ms. STONER. The correspondence that I saw referred to the statutory factors for the Corps’ decision about whether to take further action.

Mr. GIBBS. OK, but for the record, they did not support EPA’s action.

Ms. STONER. They did not ask EPA to take that action, that is correct.

Mr. GIBBS. OK. Can the EPA revoke a permit, even though the applicant is in full compliance with the law, and the regulations and water quality standards are in effect?

Ms. STONER. The statute specifies withdrawing a specification. It indicates the criteria for a 404 that include significant adverse impacts on wildlife, drinking water sources, other specific factors. That is what the statute refers to.

Mr. GIBBS. In your testimony you talk about there was significant new scientific information that emerged, because I keep in mind that they went through an environmental impact study of about 10 years, got—and, of course, they got their permit there in 2007. And in your testimony you talk about how there was significant new scientific information. Can you be specific of what that information is?

Ms. STONER. Yes. Again, I brought more than 100 studies. I would actually like to have them be made a part of the record, if I could. And what that scientific information is, is documentation

of the adverse impacts of valley fills and mountaintop mining, discharges in waterways on both the stream communities buried by that fill and downstream—

Mr. GIBBS. Would that be using the conductivity as a test, as the main component of the studies?

Ms. STONER. Conductivity is a measure of stream degradation. So there are studies on conductivity, including one that EPA did and was peer-reviewed by the SAB. But there is lots of different studies that show the adverse impacts on public health and the environment. And those studies have been coming in in large numbers since 2007.

Mr. GIBBS. Just so you are aware, last week we had a Dr. Leonard Peters, who is the secretary of the State of Kentucky energy and environment, he is a chemical engineer, and he testified on the conductivity that your standard that you have—that the EPA is imposing now, the water cannot exceed 500 siemens. And I am told that most bottled water is allowed up to 750. Is that true?

Ms. STONER. It is a standard that is based on fresh water. So it is what creatures that live in the water all the time need in order to survive. It is different than what we drink, and the salt that we are used to.

Mr. GIBBS. In regards to enhanced coordination, there has been concern, we have had testimony that this procedure only applies to the Appalachian region, it doesn't apply anywhere else in the country.

Do you think that—where do you—where can you tell me where it is in the law, that the EPA has the authority to do the enhanced coordination? Because, to me, it looks like it is kind of circumventing the permitting process. Can you—

Ms. STONER. It is designed to have agencies work together better to make decisions, provide clarity to industry, to do so in a timely way. That is the purpose of the process—

Mr. GIBBS. I think the facts of what has happened, the results, have been that there is many—numerous delays. And since you are using that procedure that is not in law, there is nothing in the law that says you have to move forward in a timely fashion under enhanced coordination, because enhanced coordination does not exist in the law, is my understanding.

Ms. STONER. The enhanced coordination procedures actually has time limits in it. And those are designed to help move the permitting process along. As I said, more than 50 permits have moved through that process. A lot of those permits were stalled prior to the development of the enhanced coordination process.

Mr. GIBBS. My understanding, there has only been two permits issued under enhanced coordination. Is that correct, out of the 250 that you had when you started your administration?

Ms. STONER. No, sir, I don't believe that is correct.

Mr. GIBBS. OK. OK, Representative Rahall?

Mr. RAHALL. Thank you, Mr. Chairman. And thank you, Administrator Stoner, for once again being before our committee on water resources.

As you certainly know, I have a number of concerns regarding EPA's review of Corps-issued section 404 permits and its interven-

tion in coal-related State-issued section 402 permits in West Virginia, throughout the Appalachian region.

Now, with respect to the April 2010 guidance document affecting mining permits in Appalachia—and only, by the way, only by the way, coal mining in Appalachia, no other industry, no other region has been targeted by this guidance document, April 2010. You have testified previously that this kind of guidance is just a first step, and that such guidance, the documents are never binding and mandatory.

Yet the EPA is using that guidance document in discussions with State agencies to comment on, dictate the terms of, and object to coal mining permits in Appalachia. This guidance document, along with other guidance documents on this matter, sets new timelines and criteria for permits that differ from the law and current regulation.

So, my question is, how do you reconcile the way the guidance is being issued by EPA with the Agency's assertion that the guidance is not binding?

And then, a second question I have is how many permits have been approved—because that seems to be a topic of discussion today—how many permits have been approved since that April 2010 guidance document was issued?

Ms. STONER. First, on the guidance document, it applies to Appalachia because of the science on which it is based, which is science that was done in the field in Appalachia. So that is why the guidance document applies to Appalachia. It is not binding. And there have been no decisions that have been made that are based on guidance, as opposed to on the statutes and the regulations that govern our decisionmaking. They are informed by that science that has been done.

So, that is the way that we are using it. It has timeframes in it to try to get the agencies to work promptly with mining companies to find solutions that allow mining to continue and protect water quality.

Mr. RAHALL. So you are working with coal companies to try to develop these models, or whatever, to—so we can move forward?

Ms. STONER. Yes, sir. We are working with coal companies. We have been very proud of the progress that we have made in a number of situations, including with Coal-Mac, with Hobet 45 in having permits that are issued that protect public health and allow coal mining to continue.

And even in Spruce, the mining that had already started was allowed to continue. So we are looking for solutions. We are looking for ways of protecting public health and protecting the economy in Appalachia.

Mr. RAHALL. Why is it that the April 2010 guidance document issued “for surface coal mining in Appalachia” is being applied to all types of mining, including deep mining and mining that not even occurs in jurisdictional waters?

Ms. STONER. It applies to surface coal mining in Appalachia. And the information—

Mr. RAHALL. Not deep mining?

Ms. STONER. The information in it may be relevant, but the guidance is limited to—those areas in which the information was gathered was surface coal mining in Appalachia.

Mr. RAHALL. All right. Let me ask you. On April—I'm sorry, May 2nd of this year, the EPA and the U.S. Corps of Engineers jointly published in the Federal Register their proposal to issue clarifying guidance for determining which waters and wetlands throughout the Nation are protected in the CWA programs. That draft guidance was made public, and the Agency solicited comments from all interested parties.

In April 2010 the EPA issued its detailed guidance for permitting and surface coal mining in Appalachia. It was made effective immediately. And the public comment was only solicited afterward.

Can you tell me why the EPA, on the one hand, felt it was important to allow the public to weigh in on new guidance before it took effect, but on the other hand, in the instance involving only the Appalachian States, it did not allow that public input?

Ms. STONER. We are, as you may know, getting input on the mining guidance. We got it through the past year, we are analyzing that input, and are planning to move forward with a revised guidance, based on that input and based on our experience.

We did feel it was important to get the science out to people to address the clarity issues that have come up several times in the hearing.

Mr. RAHALL. But all that was done after you implemented.

Ms. STONER. No, the science was put out at the same time, April of last year, the science reports from our office of research and development. We felt it was important to get that science out at that time so people could look at the science, which went through a peer review process thereafter, as well as the guidance, and have the best information possible on the clarity that people are seeking on how the permit process would work, so that we could reach our solutions of having mining permits issued that protect public health and the environment.

Mr. RAHALL. Why did you seek OMB review of your national guidance on jurisdictional waters but not on the guidance targeting Appalachian coal mining?

Ms. STONER. OMB is currently reviewing the revision to the Appalachian coal mining guidance. So we are seeking OMB review, other agencies' review—

Mr. RAHALL. At my request, by the way.

Ms. STONER [continuing]. Through that process. We were glad to see to that request.

Mr. RAHALL. What is the timeline for the EPA issuing its final guidance?

Ms. STONER. I expect it to come out later this month.

Mr. RAHALL. Thank you. Thank you, Mr. Chairman.

Mr. GIBBS. Representative Cravaack, have you got a question? Yes.

Mr. CRAVAACK. Thank you, Mr. Chairman. Ms. Stoner, last time we spoke—I appreciate you being here today—I asked you what the definition of navigable waters is. Can you please tell me what the definition of navigable water is in the new guidance?

Ms. STONER. The new guidance has a number of elements that are involved in the definition of navigable waters that relate to tributaries, that relate to wetlands, that relate to those connections to traditionally navigable waters and interstate waters.

Mr. CRAVAACK. Would it include a seasonal slough or a wet meadow?

Ms. STONER. It would depend on the specific facts and circumstances associated with those.

Mr. CRAVAACK. So you are saying that it would include a seasonal slough or a wet meadow at times?

Ms. STONER. It could, if they had a significant nexus to a traditional navigable water or an interstate water. The point of the draft guidance is to close loopholes and, again, as with the mountaintop mining guidance, provide greater clarity to the public to speed the permitting process and allow projects to move forward.

Mr. CRAVAACK. Well, this isn't just affecting mountaintop mining. It is also affecting open pit mining in Minnesota. For example, the Keetac Mine has gone through 3 years and \$300 million of EPA studies in regards to trying to get a mine open that was already a previous mine that has just been shut down for a number of years. So the issue is there.

So what wasn't able to go through the Clean Water—America's Commitment to Clean Water Act, it seems like you are legislating by regulating.

Well, let me ask you, then. If the EPA has guidance, would you agree that it should not be binding in any way?

Ms. STONER. EPA guidance is not binding. That is correct, Congressman.

Mr. CRAVAACK. OK. If this is correct, if this is true, why would you propose such guidance?

Ms. STONER. It is to provide information and clarity to the regulated public.

Mr. CRAVAACK. Why not a white paper?

Ms. STONER. A white paper could be considered a guidance.

Mr. CRAVAACK. OK. But you are classifying it a guidance. And the reason why I bring this up, I have seen what guidance has done to our timber industry in the northern part of Minnesota; it has become a mandate. And that is what we are very concerned with, as well.

Could you tell me just yes or no, do you believe the implementation of the ERP presents a substantive change to prior regulations?

Ms. STONER. I am not sure what the ERP is. Are you talking about the enhanced coordination process?

Mr. CRAVAACK. Yes, yes.

Ms. STONER. Yes, that is not a substantive change. That is a process.

Mr. CRAVAACK. OK. You think it is a process. All right.

What authority, then, is the EPA acting under this enhanced review procedure, instead of the Corps regulations to process a certain coal permits selected by the EPA?

Ms. STONER. It is just a coordination process among Federal agencies. So we are operating with our Federal agencies to enhance our coordination to improve the permitting process.

Mr. CRAVAACK. OK. I just understood—didn't I understand that the Army Corps did not agree with your assessment?

Ms. STONER. That was a question about the Spruce Mine veto. They very much agreed to and signed an MOU with us on the enhanced coordination process. We are working closely with the Army Corps on that process to get permits issued that protect public health and the environment.

Mr. CRAVAACK. OK. So then how does the EPA reconcile the fact that in this process that you are saying—called the enhanced review of permits, suspends the Corps timeline for issuing the 404 permits required by the Clean Water Act and the Corps regulations?

Ms. STONER. It is my understanding that it includes dates for speeding up the process, not for slowing down the process.

Mr. CRAVAACK. OK. Again, I will go back to the Keetac Mine with 3 years and, you know, through this process moving—the experience that we have seen in Minnesota is that the EPA keeps on changing the bar, where they will come up to a certain point—PolyMet Project, as well—where they will come up to a certain point, and then they will reach that point, and then the EPA changes the point, the data point, once again.

So, my question is, you know, how can—and we talked just recently in the previous panel—how can business go about and do any type of certainty if EPA keeps on moving the bar on us?

Ms. STONER. We are very anxious to provide the certainty which you are seeking, and that is actually what these efforts are about.

One thing about the scope of Clean Water Act jurisdiction is that we had heard from a lot of different entities from different perspectives that there was a lack of clarity. That is one of the reasons to provide the guidance and close those loopholes, provide that clarity the regulated entities need.

Mr. CRAVAACK. Well, ma'am, to tell you the truth, and speaking in regards to the mines in Minnesota—and I will—the people of the mines in Appalachia—I can tell you there is not one person or one entity that has said the EPA gives them any type of certainty. As a matter of fact, it does the exact opposite.

So, that is my comment to you. And I am out of time, and I will yield back, sir.

Mr. GIBBS. Thank you. Representative Richardson?

Ms. RICHARDSON. Thank you, Mr. Chairman. Ms. Stoner, you mentioned about EPA working together. Do you have a stakeholders group or an advisory group regarding mining, coal mining, specifically?

Ms. STONER. We have advisory groups on a lot of different topics. I am not sure whether we have one on coal mining, in particular.

Ms. RICHARDSON. OK. Might I suggest that if something raises to the level of the U.S. House of Representatives, you might want to consider having a stakeholders group. I don't really think, legitimately, you can say that you are working together if you don't even have a group where you are seeking their feedback to be able to work with them.

So, my request would be—if you would take it back to the administrator—if she would consider having a stakeholders advisory—whatever you want to call it—and I think certainly, with all due

respect to Mr. Carey, he should be one of the people that is first on the list to be considered as a part of that group. Would you consider that?

Ms. STONER. I would be happy to take that suggestion back.

Ms. RICHARDSON. Thank you, Ms. Stoner. My second question would be any time something like this rises to the level, it says to us there is probably a problem, and I listen to my colleagues here. Have you had any hearings in the Appalachian area to talk about some of the concerns that have been brought forward to us today?

Ms. STONER. Yes, we have. We have had hearings, including hearings on the Spruce Mine itself, in which we had lots of public interest, lots of testimony from people from various perspectives within Appalachia: people who were concerned about public health, people who were concerned about the environment, people who were concerned about jobs, people who were concerned about all kinds of issues. And we did listen to and considered all of the input we received at those hearings.

Ms. RICHARDSON. And specifically regarding the ability to do jobs, what have you implemented, based upon those hearings that you had?

Ms. STONER. Our strategy is to work with companies to meet the requirements of the Clean Water Act to protect public health and the environment and get permits issued that allow mining to continue and provide those jobs, while protecting public health.

Ms. RICHARDSON. And what, specifically, are you doing to help them to do that?

Ms. STONER. We are doing that in individual cases, working with those companies under the ECP process that we have been talking about, mostly through our regions. Most of the implementation of the Clean Water Act is through our regions. And we have been proud of the success that we have had. We have data showing that—recent data from Coal-Mac permits showing that the requirements of the Clean Water Act can be met in those cases, and jobs can be preserved, as well. That is our strategy.

Ms. RICHARDSON. OK. Ms. Stoner, I thank you for your time, and I would just really urge you to—if we say we are working together, we need to be able to prove that we are working together. And I would just strongly encourage some sort of group where the impacted people have an opportunity to work with you and make some changes.

Mr. Carey, I asked him—I apologize, Mr. Chairman—I asked Mr. Carey if he would give us some specific examples of regulatory things that could be done to help. Are you willing to consider those and answer what he provides to this committee?

Ms. STONER. Of course.

Ms. RICHARDSON. Thank you, ma'am. I yield back.

Mr. GIBBS. Representative Capito, do you have a question?

Mrs. CAPITO. Thank you. I am sorry I had to be out of the room, but I read your testimony, and I appreciate you coming before the committee.

I want to ask a question about the interplay between the EPA and the DEP. My understanding is that the DEP—the State DEP—I am from West Virginia—is tasked with setting the water quality

standards, correct? But EPA has come in and keeps changing the standards and overturning what the State is doing.

How are you working with the State to try to work out those issues?

Ms. STONER. We are not overturning State standards. So you are correct, that West Virginia sets State standards.

Mrs. CAPITO. Right.

Ms. STONER. Some of the standards are narrative standards, and they need interpretation. And the science that we are working on is to help interpret those standards so that they can achieve their goals, which is ensuring that waters are usable for the people of West Virginia.

And so, we are in regular contact with the State in discussing those State standards, and discussing particular permits, and trying to move forward together to get the permits issued to protect public health for citizens in West Virginia.

Mrs. CAPITO. When you are considering the standards—and you heard, probably, my testimony, and you heard my conversation with Administrator Jackson telling me that the implications of jobs and the economy is something that she considers when making a decision, because her job is to oversee the Clean Water Act, exclusively.

And in your statement, you talk about—and we have talked about this—the balance between healthy watersheds and a healthy economy. What considerations do you have when you are looking at a permit, in terms of the economic impact? Do you have a job impact statement? Do you have a—do you go to the community and talk to people that are actually living and working there, what kind of impact this is going to have on their livelihoods?

Is that part of your written statement? Is there a metric that you have to follow? Or is that, in fact, as the administrator said, that is not considered, in terms of whether to move forward?

Ms. STONER. It—first of all, with respect to the Spruce Mine, as I mentioned, we had a hearing in West Virginia where we had lots of people, and could consider all of the different input that they provided at that hearing.

But our strategy on jobs is to work with the company to meet the requirements of the Clean Water Act, which are about meeting those water quality standards that you referenced before. And those standards are set to ensure that waters are usable for the things that people use them for: drinking, swimming, fishing, and so forth. Those are all economic activities. The Clean Water Act supports strong economies.

And so, having clean water, having a strong economy, having public health protection in West Virginia, that is our goal.

Mrs. CAPITO. Well, I mean, I agree clean water—I mean I live in West Virginia, it is important to all of us across the Nation. I mean I don't think there is a disagreement there.

But I think you would agree and I would agree that weaving the balance between the economy and the environment is difficult, not just in mining, but in—we are seeing this in our natural gas exploration in the northern part of our State. The ag community has seen it, the hard rock mining folks are seeing it.

And so, I guess basically what you are telling me is that, no, you don't, as the EPA, consider the job and economic impact. That is the company's job, to put forth the job and economic impacts, and to—and so, in plain talk I guess, what I want to see is you basically following up with what you are actually saying, and having behavior follow what the rhetoric is. And that is my concern. And that is our concern in West Virginia.

Ms. STONER. So what I am saying is that Appalachian communities don't need to choose between jobs and a healthy environment. They deserve and can have both. And we are totally committed to following up to ensure that we are working toward that common goal.

Mrs. CAPITO. Well, I wish I could feel that that were absolutely the case. But, as I said, actions speak louder than words. And, unfortunately, a lot of the actions that we are seeing don't follow with what you are telling me today.

I would yield back.

Mr. GIBBS. Ms. Richardson, you had a follow-up?

Ms. RICHARDSON. Yes, Mr. Chairman. I just wanted to clarify. I didn't hear for the record. Did you accept Ms. Stoner's materials into the printed record? She had asked, but I did not hear us confirm it.

Mr. GIBBS. Oh, yes, we will.

[The information follows:]

The studies may be accessed online at the Government Printing Office's Federal Digital System (FDsys) at: <http://www.gpo.gov/fdsys/search/pagedetails.action?st=jacketid%3A72-211&granuleId=CPRT-112HPRT72211&packageId=CPRT-112HPRT72211>. In the "Download Files" section of the Web page, select the PDF format.

Ms. RICHARDSON. Perfect. Thank you, sir. Appreciate that.

Mr. GIBBS. Representative Landry?

Mr. LANDRY. Ms. Stoner, I was glad to see the chairman point out the fact that, you know, in your guidance on conductivity standards you said that they could not exceed 500 siemens, and Perrier doesn't—would exceed that. So should I not put Perrier in my fish tank, or should I not swim in it, or should I not drink? I mean I am trying to understand. You know, what exactly is—you know, are we setting as a threshold?

Ms. STONER. Well, first of all, in the guidance 500 is not a standard, as you suggested. It is—again, based on the science, it is a benchmark. But what it is designed to do is to protect fresh water communities. So there is fish and various different kinds of creatures that live in fresh water and some that live in salt water. This is fresh water communities. And what we are doing is, based on the science, what is necessary to protect those.

And what we have seen is that high conductivity levels are linked with high levels of dissolved solids that are detrimental to that stream life. So the conductivity limit is about protecting 95 percent of the species that one would find in a mountain stream.

Mr. LANDRY. Well, but what I am concerned about is whether or not you put out these guidance documents, and then you strong-arm those permittees by threatening your use of your veto power. So it is kind of like we want you to—this is a guidance, but if you don't meet it, remember we can veto you over here.

You know, that is what concerns, I believe, not only me but my colleagues here, is what goes on not in this committee room and your answers, but when you all close the door and put those companies in your office. Believe you me, as a business owner, I wouldn't deny that you all do that, because I have experienced it.

The other thing that kind of strikes me is that section 101(f) of the Clean Water Act states, "It is the national policy that, to the maximum extent possible, the procedures utilized for implementing this act shall encourage the drastic minimization of paperwork."

Now, considering that a 404 permit required an EIS on a permit that I studied that I had mentioned earlier that spanned over 1,600 pages, including 58 pages just to respond to your EPA comments, would you say that you all are failing to actively implement that section?

Ms. STONER. Most 404 permits are issued through a general permit process, and that is about 80,000 per year, as I understand it. And they take less than 90 days. So that is how most 404 authorizations occur.

Mr. LANDRY. Well now, I want you to know something. Down—you know, look, I have got levee districts back in Louisiana that basically can't repair their levees because the cost of your permit is more expensive than the cost to repair the levee. Do you understand what kind of effect you all are having?

Ms. STONER. I agree with you on the importance of limiting paperwork, and in speed and efficiency in Government operations. That is in everybody's interest. I completely agree.

Mr. LANDRY. Well, I don't understand, because back when the Chapala Basin levee was first—or when it was strengthened back in the 1980s, the 404 permit came like that. But yet—so at a time when the 404 permits started, the issuance of them happened at a quicker pace. But yet, as time has dragged on, the amount of time that it's taken to get that permit has continued to exceed what it was prior to it.

So, what you are saying, your actions don't match the rhetoric.

Ms. STONER. Well, we are working closely with the Army Corps to make permit decisions expeditiously, and to make decisions that meet the requirements of the law and protect public health.

Mr. LANDRY. Well, I am about to run out of time, but are you familiar with the fact that you all vetoed a permit in the Yazoo River Basin that now could come back to cost hundreds of millions of dollars if those levees fail? Do you understand that impact of what that decision may create for those people? And I do not represent Mississippi.

Ms. STONER. I was not personally involved in the decision having to do with the Yazoo pumps veto, but my understanding is that it actually was not about flooding in the Mississippi River. So it was actually about pumping backwater behind the levees. That is my understanding, and that 67,000 acres of wetlands were involved in that decision.

Mr. LANDRY. Have you ever lived in an area that is prone to flooding?

Ms. STONER. You know, interesting that you ask that. I grew up in a flood plain, sir. I grew up in the flood plain on the south fork of the Shenandoah River in Waynesboro, Virginia. And my house

was frequently flooded. And I am very interested in protection against flooding.

Mr. LANDRY. Well, I hope that EPA never vetoes any of the permits that would protect that area you used to live in. I yield back.

Mr. GIBBS. Representative Young?

Mr. YOUNG. Thank you, Mr. Chairman. Ms. Stoner, the newly created enhancement review procedures is—it is the EPA, not the Corps, that determines permit review criteria and—coal mining section and 404 permits. So who is making the ultimate determination of those permits, the Corps, the EPA regional offices, EPA headquarters, or the administrator?

Ms. STONER. Normally, decisions about Corps 404 permits are made by the Corps.

Mr. YOUNG. By the Corps?

Ms. STONER. Yes, sir.

Mr. YOUNG. OK, that is enough. What authority was EPA acting under when it created new enhanced review procedures instead of the Corps regulations to process certain coal permits as selected by EPA? What authority?

Ms. STONER. It didn't take away the authority of the Corps—

Mr. YOUNG. What authority did it act under?

Ms. STONER. This is intergovernmental relations within the executive—

Mr. YOUNG. What authority did the EPA act under?

Ms. STONER. We are acting under the Clean Water Act, our authority, the Corps' authority—

Mr. YOUNG. So, you usurped the Corps?

Ms. STONER. No, sir.

Mr. YOUNG. That is what—my interpretation.

Ms. STONER. It is about—

Mr. YOUNG. That is enough. Yes or no, do you believe that implementation enhanced review procedures represents a change in our prior regulations?

If yes, why didn't the Agency go through the formal rulemaking process to make these changes to the regulatory program, particularly since the CWA requires any changes to the 404(b)(1) guidelines must be done through rulemaking?

Ms. STONER. They are not regulatory changes.

Mr. YOUNG. They are not? So you don't consider this a substantive change?

Ms. STONER. No, sir. They are not a regulatory—

Mr. YOUNG. It is not a substantive change, yet you are overcoming the Corps.

Ms. STONER. And it doesn't overcome the Corps. We are working with the Corps. That is what the enhanced—

Mr. YOUNG. The Corps doesn't agree with you.

Ms. STONER. Well, that is—

Mr. YOUNG. And I have talked to the Corps. You are not working together. You are running roughshod, as an agency. And I think you can tell that Congress understands that.

Ms. STONER. I meet with the Corps on a regular basis.

Mr. YOUNG. You meet with the Corps, but you are not working. You are dictating to the Corps.

Ms. STONER. We work closely with—

Mr. YOUNG. Now—that is enough.

Ms. STONER [continuing]. Congressman.

Mr. YOUNG. Under the MOA issued by the administration almost 2 years ago, the administration stated new procedures were then necessary to streamline and coordinate the permitting process. And how do you explain that the new process has only resulted in an issuance of eight permits in nearly 2 years?

Ms. STONER. We—you are not counting the 42 that we issued immediately.

Mr. YOUNG. No, what—

Ms. STONER. More than 50 had been—

Mr. YOUNG. In 2 years you issued eight permits. After this was organized, 2 years, eight permits. How is that a streamline?

Ms. STONER. Since January—

Mr. YOUNG. It is not a streamline, and you and I know it.

Ms. STONER. Since January of 2009, it has been more than 50.

Mr. YOUNG. Ms. Stoner, I have to tell you I am not a happy person with EPA. I think you have gone far beyond your authority. You have been dancing very well at this hearing. And what you are doing is using abusive power against the legislative intent.

I watched this in Alaska. You came in and set different standards on arsenic, which is natural, after we put a plan in 20 years ago. You changed it, and cost the community \$37 million to meet your standards without any science. The science you have is flawed.

Now, what I am suggesting to any State or any area to have a good set of scientists and contradict what you do. You are doing—you have an agenda. Your agenda does not make this country productive. It takes away jobs from this country. We are not producing in this country. And you look at every time we try to produce something, you are involved. And your administrator is directly involved. This administration has a new agenda. The agenda is non-production. No working for the working man. People sitting in their little office, making regulations.

Mr. Chairman, this has to stop, and the only way it can stop is de-fund them. Go through each area and de-fund when it doesn't make sense and when the science is not there. When they don't listen to the other science, they use the science of a university to get the money from this Congress. And that is where we have to stop it. I yield back.

Mr. GIBBS. I thank you. Representative Lankford?

Mr. LANKFORD. Thank you, Mr. Chairman. Thanks for being here, as well.

Obviously, we have a lot of questions and a lot of concerns. The last time you were here I asked you point blank if there was a State that you could identify their department of environmental quality, or whatever term they may use, that was incompetent for the task on that. At the time, you said back to me, "We don't know of a State, they are all working, they are all doing a great job." I affirm that, that is great.

The issue comes up in a situation like this, where a State is saying, "We are walking through this process, we are trying to establish it," EPA steps over the top of them and says, "No, we have got this, we are now going to take this on."

And though the science comes up—and you referenced earlier we have a high propensity for, or higher propensity for certain diseases and things in this area—there is not a causal relationship that I am hearing from that science, unless you—unless there is something I missed on that. To say that this particular area has certain health issues, and then to say, “And it is because this water issue” is a different gap.

Is your science saying that it is causal, or is your science saying that it exists here? Because there are lots of issues that could be causing that. Is there something that you are saying that is causing it?

Ms. STONER. There are two studies, one about cancer rates and another about other health indices that show a correlation between degraded streams, between mountaintop mining, and between people’s health issues in Appalachia. So I am referring to the correlation that was found to be statistically significant by scientists at Virginia Tech, University of West Virginia, and the medical school at University—

Mr. LANKFORD. Part of what you gave to us today.

Ms. STONER. Yes, sir.

Mr. LANKFORD. Because I would be interested—I didn’t get a chance to see that. Because, obviously, there are a lot of assumptions that are made to say, “This occurs, and so naturally it is because of this, because we don’t like this at this point, and so we will try to shut this down,” whatever the “this” is at the moment of that.

Let me shift a little bit. Obviously, the Federal Government, for years, has promoted coal. You go back to the Carter administration, as I mentioned earlier, the Carter administration was a leading advocate for coal, and pushing a lot of companies to start using more and more and more of that. Now they are, now America is very focused in on using coal, which has been very affordable and has been very efficient for us, and now there is—this administration is pulling away from it as fast as they possibly can, and there is a shift on that.

We are seeing that not only in the mining of that, but also in coal production. Let me give you an example from my State, the 316(b). Cooling ponds next to a coal-fired power plant have some fish that are getting caught into it, and so EPA has recently contacted them and said, “You are going to have to change the way that you do your intakes.”

Is there a certain number—because they are trying to find—is there a certain number of minnows—and that is what it is in one of these ponds, literally, it is bait fish that are getting caught against this—is there certain minnows, a number out there, that they can go by and say if there are 300 minnows killed in a year that is OK, if there is 1,000 it is not OK? How is that guideline working? Because it is moving for them, and it is about to cost Oklahoma consumers of energy millions of dollars to make an adjustment.

Ms. STONER. First of all, let me just say EPA actually is not working to end coal mining. What we are doing is addressing coal mining pollution and protecting public health and the environment under the statutes that we are authorized to implement.

Mr. LANKFORD. All right.

Ms. STONER. With respect to 316(b), we are currently working on standards for existing facilities—I don't know if this is an existing—

Mr. LANKFORD. It is an existing facility.

Ms. STONER. And those standards are not yet complete.

Mr. LANKFORD. Correct. And they have been years in the process.

Ms. STONER. That is right.

Mr. LANKFORD. And now—waiting, and now it is all coming down.

My concern on it is there is no standard. There are millions of dollars in now having to retrofit something where there is something—and I am going to ask the same question. If there is going to be some standard implemented for how many minnows can be killed in an area, I am going to ask the same question. How many birds can be killed at a wind farm? Will EPA also be submitting—you know, we can't have more than 10 birds a year killed at a wind farm, or else there is going to have to be some new guidance, some new something that happens in that.

This is the moving process that is occurring in every form of energy production currently, that as soon as mining starts or shifts or begins to plan, they can't plan because they don't know what the EPA guidelines are going to be. These plants can't change on a dime. They are 10 years in process to get up to speed.

And currently, no one knows what type of energy is the new form of energy. Because if they put up wind offshore, Sierra is going to hit them because there are birds being killed there. So maybe that is going to last long, maybe that is not going to last long. We cannot do nuclear now, and we cannot do, really, coal now, because the permitting takes so long, and we don't know if that is going to be acceptable.

And for the energy companies, they have no idea about rules and now water streams and—they have no idea. "We would like to shift to natural gas." Oh, no, wait. EPA is doing a whole big study now on hydraulic fracking. My State in Oklahoma, since 1949, has been doing hydraulic fracking. Come drink our water and breath our air. It is a beautiful State.

No one knows what energy they can use. You are shutting down the production of energy, based on these arbitrary rulings and guidelines that go out that may have some scientists on it, but there is no correlation between reality of how things really get paid for and what really occurs. We have got to have some stability.

If there is anything the EPA can give to us, it is a break in the regulatory environment and provide our consumers some stability so that we can catch up. That would be a great gift to our economy. And with that, I yield back.

Mr. GIBBS. Thank you. Representative Bucshon?

Dr. BUCSHON. Thank you for coming. I am a cardio-vascular surgeon, so I know something about peer-reviewed studies. And the question I have is you mentioned the environmental impact studies that were published and peer reviewed. And who were the scientists that peer-reviewed them and their organizations?

Any—I mean do any of the studies that you are saying that are applying to this, did they come from outside of Government organi-

zations or organizations that were contracted by the Government to provide that data?

Ms. STONER. Well, there are a number of studies. As I said, more than 100. So there are EPA studies that are peer-reviewed by our science advisory board. There are also studies from—

Dr. BUCSHON. Can I ask a question? Who appoints the science advisory board? Is that someone—does the administration pick the members of that?

Ms. STONER. I don't know the answer to that question. I would be happy to submit it for the record.

Dr. BUCSHON. You know, because I think that is critically important.

The point I am trying to make here is that if you are quoting peer-reviewed studies, like in health care—for example, would you believe a peer-reviewed study of a product if the companies that make the product did the peer review?

Ms. STONER. That would be a factor to look at in evaluating the study.

Dr. BUCSHON. That is just a yes or no. I mean would you believe—do you think the American people would believe a study on a product that is being made, if the people that make—or companies making the product did the peer reviewing, and then said it was peer-reviewed?

Ms. STONER. There are such studies all the time.

The other studies that I was referencing were ones from universities—

Dr. BUCSHON. My point is this. If your peer review that you are talking about are all Government agencies, or people who the Government has contracted on behalf of the Government to give peer review, that is not peer review. What peer review is, is independent people that have no financial or political motivation about what the results show.

And so, I will—we will—it will be interesting to see those studies and see that—whether or not there is any of those type of folks that are telling you the same thing, or else—or whether or not this is all stuff that the Federal Government is doing. And I will be honest with you. As a citizen I don't have a great deal of confidence that, because of politics and because of other reasons, there won't be some outside thing motivating the results as a means to an end.

The other question I have is do we have baseline conductivity, water—conductivity studies from water all around the country in different areas? You guys just—do you have just, you know, streams, rivers, everywhere, do you have, like, a whole list of what the—just baseline is of conductivity?

Ms. STONER. Congressman, I have some information on the science advisory board. So we solicit nominations for reviewers from outside entities, including from mining representatives.

Dr. BUCSHON. Great.

Ms. STONER. And the other studies are from universities. And I think that the universities know how to do peer review work.

Dr. BUCSHON. They may, unless you have contracted with them for the information.

Ms. STONER. No, no. I am talking about studies they have done—

Dr. BUCSHON. That is a big, big difference.

Ms. STONER. That they have done, not that we—

Dr. BUCSHON. Well, they have done the studies. But if the EPA contacted them and they—and asked them to do the study and they are getting funded through some Government organization to do the study, that is not an independent peer review. That is a—and the—because I have trained at universities, I have went to multiple universities. I understand the whole university, you know, publish or perish environment. I understand all that.

And if—say, for example, if a drug company came to a university and said, “Could you guys test our drug,” and the drug company was going to pay them a bunch of money to do it, would you believe that? I wouldn’t.

Ms. STONER. No, I understand about the conflicts of interest point that you are making. It is an excellent point.

Dr. BUCSHON. Yes.

Ms. STONER. I would be happy to provide more information about the peer-review process.

Dr. BUCSHON. That would be great. On the baseline conductivity, I am interested in how you establish—first of all, how you establish what is safe. And do we have baseline conductivity—and, for that matter, you know, particle studies like the selenium you are quoting—from multiple streams throughout the country to give us—you know, to see how—if there is a scientific baseline?

Do we have that? Because if I was—as a scientist, want to say, “OK, I am going to set a level,” I would want information from all my streams and waterways from all over the country, and I would look at all that, and I would say, “Well, here is what is reasonable.”

Because I know you are making the distinction between the water and what is survivable by fish or other things, and that is a good distinction. But on the other hand, then where are you getting that survivability data from? Who studied it, and where is the baseline—how is the baseline established?

Ms. STONER. We have an existing water quality criteria for selenium, so we have done—

Dr. BUCSHON. From—where did that come from, though? That is the—see, I understand that you have criteria, but the question is, who did it? Did you—if you did it, do you have scientific data that has shown it? Have they done—you know, that is the question.

Ms. STONER. Right. We go through a rigorous scientific process to do a water quality criteria. And we would have data from different areas of the country for selenium—

Dr. BUCSHON. Could you please provide all of the water quality data based on conductivity and all other foreign products that are in water from every—from all 50 States, for example, so you can help the Congress establish what is actually out there as a baseline?

Because if you set—and I can tell by your expression you are not quite understanding what I am saying—

Ms. STONER. That is true.

Dr. BUCSHON [continuing]. Or whether it is useful or not. But in medicine, for example, if you are going to establish a baseline on anything, right, you have to have a broad, diverse data. You can’t just pull—you just can’t go to one area, one State, and say, “This

is how this works here.” If you are establishing this for the United States, I would think that you would want to see what your baseline levels are everywhere, and establish a reasonable baseline.

Ms. STONER. Yes, we have a strong scientific peer review process for all those water quality criteria. We get input from outside entities for all of those. In the water quality criteria for conductivity we did have review by the science advisory board, which strongly endorsed our science and said it was a model for future water quality studies.

Dr. BUCSHON. OK. I am over time, but what I would like to see is I would like to see the water quality data from around the country that the EPA uses to establish its baselines. Thank you.

Mr. GIBBS. Thank you. I think there is a lot of things that just aren’t reconciling with some of your statements and what some of our information is. So we are going to have another round of questioning, and I am going to start that off.

It is my understanding, when you talk about the conductivity that peer reviewed, it is my understanding that the EPA actually put out that guideline before it was peer-reviewed, is that correct?

Ms. STONER. We put it out in draft before the peer review, and then took public comment in, went through the peer review with the SAB. That is correct.

Mr. GIBBS. OK. Because you know what is happening is some of these—it is kind of de facto taking effect.

I am a little concerned. It is my understanding it took—the EPA spent more than 15 years to revise the aquatic life criteria for selenium, and that effort is still not completed. And it is—apparently it has just taken you, literally, months to develop a benchmark for conductivity—a matter of months.

Can you tell me the difference in developing a water quality criteria versus developing a benchmark, and then explain how these two limits differ in their use?

Ms. STONER. A water quality criteria is the science that EPA provides to States to use in setting water quality standards. It is done under a statutory provision, and has processes associated with it, including the science that I was just discussing with the other congressman.

The benchmark is not as formal. It is based on science that we have been acquiring over the past several years. As I indicated, we did get that science peer-reviewed. But it is a benchmark. It is not a water quality standard, and it is not a water quality criteria. So it is used to provide guidance to States, for example, in interpreting the narrative criteria that they have.

Mr. GIBBS. You referenced the science advisory board, SAB, panel. Apparently raised a number of issues that warranted further study, which certainly suggested that science is anything but conclusive, with respect to conductivity. How do you explain the response to the SAB’s concerns?

Ms. STONER. We are revising the guidance, the guidance that was issued April of last year, we are revising it. It will reflect the recommendations from the SAB in full when we finish that guidance document.

Mr. GIBBS. Did they ever respond to the National Mining Association’s report?

Ms. STONER. They examined the National Mining Association's report, which—my understanding—was not peer-reviewed. But they did evaluate that in their final report. The office of research and development did, looked at the National Mining Association input.

Mr. GIBBS. I mean I don't think they responded to them, though. I don't believe they did.

Ms. STONER. If there was correspondence with them, I am not aware of it. But I do know that they received the report, I actually saw that they had received it and were considering it.

Mr. GIBBS. What is the cost of replacing coal provided by these mines with other energy resources? Are these other energy resources currently available domestically through currently permitted operations? If not, what countries would we have to trade with to obtain these energy resources? And what are the national security implications of relying on energy resources from these countries, since we are not permitting coal operations?

Ms. STONER. Well, it is my understanding that we have excess stockpiles of coal in this country at this point. I am not an expert in the mix of energy sources. My work relates to protecting water quality and human health and the environment.

And so, the mix of energy sources, that is actually something that others, including the Department of Energy, would work on with the U.S. Congress.

Mr. GIBBS. So it is not in consideration, then. OK.

What EPA contracted with Morgan Worldwide to assess the alternative configurations for the Spruce No. 1 mine in August 2010. A year after that, they asked the Corps to modify, suspend, or revoke the permit, 4 months after they issued a proposed determination. Why did EPA contract with, you know, Morgan Worldwide and offer alternatives? But I don't believe Arch-Coal was notified of those alternatives.

Ms. STONER. You are correct that we contracted to get information. That report was delivered last fall, I believe, in the hope of having successful discussions with Arch.

Mr. GIBBS. But you revoked the permit first, didn't you?

Ms. STONER. No, sir. We already had that information. We had been successful in working with Arch in other cases, including Coal-Mac, and we were preparing for a negotiation with them, in the hope of finding a way to have the permit be issued to protect water quality—

Mr. GIBBS. I believe you didn't disclose that to Arch until afterwards, so—after the revocation was issued.

Ms. STONER. They were informed of a number of different approaches that could be used to meet the requirements of the Clean Water Act. They did not express an interest in having further negotiations.

Mr. GIBBS. But is it true to say that they weren't formally informed before the revocation was issued?

Ms. STONER. I am talking about discussion of alternatives in general. We had discussions, including region three had extensive discussions with Arch about sequencing as a means of meeting the requirements of the Clean Water Act. Arch did not express an inter-

est in further modifications to the permit at the time that U.S. EPA headquarters met with them.

Mr. GIBBS. Back in January, I believe this year, the President issued some executive order for regulatory streamlining. Enhanced coordination, how does that mesh with that?

Ms. STONER. It totally meshes with it. What we are trying to do is get agencies to work together expeditiously to make determinations and provide the clarity that industry wants on what is necessary—

Mr. GIBBS. I think there has also been additional delays.

Ms. STONER. It is not intended to result in additional delays. And we have actually issued more than 50 permits. We have not completed that work. You are absolutely correct about that. But we are working hard at it. It does require some time, sometimes, to find a solution, an innovative solution that will work for everyone. But we are trying to do that. Sometimes it takes time, but it does produce results that we are proud of when we are able to protect water quality and public health and have coal mining continue.

Mr. GIBBS. This is my last question. Would you agree that revoking a permit after they went through a 10-year environmental impact study, revoking it 3 years after the fact, just because you claim there is new science, what precedent or what signal does that send out to all sectors in our economy?

I am really concerned about this issue. Who is going to put capital together? Who is going to risk capital if they have to get permits, knowing that they are not in violation of their permit but they can still lose their permit, because of a policy decision in Washington, I mean, doesn't that concern the EPA, what that is going to do to stifle economic growth and jobs?

Ms. STONER. EPA is very concerned about growth and jobs, as well as protection of human health and the environment. We have expressed concerns about that particular permit for a very long time. Most of the delay to which you refer has to do with litigation, delay associated with litigation.

But we worked very hard to try to find a solution that would have allowed that permit to be issued. We would like to still see a solution that would allow permitting to go forward for any mine in West Virginia that can meet the requirements of the Clean Water Act.

Mr. GIBBS. Well, we need to move that on. We agree with you, and I would like to see that be handled, you know, as fast as possible.

Representative Cravaack, do you have any more questions?

Mr. CRAVAACK. Thank you, Mr. Chairman. Ms. Stoner, I am trying to get to the basis of understanding why you produced a guidance. Why produce a guidance? Why not go through a formal rule-making?

Ms. STONER. Is this a question about the waters of the U.S., or about the mountaintop mining guidance?

Mr. CRAVAACK. Any. Any guidance coming out of the EPA.

Ms. STONER. OK.

Mr. CRAVAACK. Why would you produce guidance, versus a rule-making process?

And in the guidance you just produced in 2010, you said there was public input to the guidance?

Ms. STONER. If you are talking about the mountaintop—I am sorry, you are asking me about two different kinds of guidances, so—

Mr. CRAVAACK. All right. No, I am talking about any guidance coming out of—

Ms. STONER. Any guidance. Well, there is some guidance—again, guidance is not a term that means something specific. So it can be correspondence, it could be white papers, it could be all kinds of things. And part of what we do is provide information out to our regions, out to States, out to the regulated entities that indicate how we are interpreting the law.

The law is binding, the guidance is not binding, but we put that out, and we figure out what is it that is the best means of putting out that information. Sometimes it is on the Internet, you know, on our home page. It could be on all kinds of different—and then we use all these other methods to gather information.

So we have been talking about advisory committees, stakeholder meetings. We have regular dialogue with members of the public from various different sectors to get input. So it is not a static process, it is a process of accommodation and working—

Mr. CRAVAACK. OK.

Ms. STONER [continuing]. To try to get information out to do our job.

Mr. CRAVAACK. I understand. OK, so let's specifically go with the mountaintop. OK. Was there public input prior to that, to your guidance there?

Ms. STONER. It was put out, and public input was solicited at the time that it was put out. That is correct.

Mr. CRAVAACK. So after it was put out.

Ms. STONER. Yes, sir.

Mr. CRAVAACK. The guidance was already put out, and then there was public input after that. And how long was the public input allotted? How long?

Ms. STONER. I believe it was 6 months. I think it was—

Mr. CRAVAACK. OK.

Ms. STONER. No, actually, it was through the end of the calendar year, I think. So that is from April 1 to the end of the—

Mr. CRAVAACK. All right. For the record, then, can this Congress be—can Congress be unequivocally assured that no agency, entity, or individual will be prosecuted, denied, or withdraw permitting, or made or enticed to comply with any guidance coming out of the EPA?

Ms. STONER. Only the statutes and regulations are the basis for those actions.

Mr. CRAVAACK. OK—I just want a yes or no.

Ms. STONER. Not based on the guidance, that is right. Statutes and regulations guide those—

Mr. CRAVAACK. So, just to be clear, for the record, the EPA will not prosecute, deny, or withdraw any permitting, or made to entice any agency, entity, or individual to comply with any guidance out of—coming out of the EPA.

Ms. STONER. Only the statutes and the regulations. That is correct.

Mr. CRAVAACK. OK. Thank you very much, sir, and I yield back.

Mr. GIBBS. Representative Lankford?

Mr. LANKFORD. Let me finish up on that comment for clarification.

So, someone can ignore a guidance, and they will be fine? If a guidance comes out and they get a record, they are in the process of doing surface mining, whatever it may be, they get a guidance document, here is a letter from EPA, "Here is our guidance," they can ignore that, that is fine?

Ms. STONER. The guidance is our interpretation of the statutes and the regulations. The statutes and regulations are binding, the guidance is not.

Mr. LANKFORD. OK.

Ms. STONER. So it reflects our interpretation of those. And guidances always indicate that in site-specific circumstances, something different may apply, but, "Here is our general interpretation of the statutes and regulations, those are the legal requirements."

Mr. LANKFORD. OK. So they can ignore—they can say, "That's nice, I can ignore that," and just continue to move on because that is not binding, that is an opinion? Is there—is guidance typically the first step towards rulemaking in saying, "Here it comes, here is the guidance, this may become rule?"

Ms. STONER. Sometimes. Again, guidance can be used for many different purposes. But the statute—the regulations are what people need to follow, so they need to make sure—

Mr. LANKFORD. Right.

Ms. STONER [continuing]. That they are doing that.

Mr. LANKFORD. I am processing through just our conversation today and the multiple times that I appreciate that you have come back and said, "We are not going after coal. We are not trying to shut down coal." The difficulty for me is processing through that from what I see on the ground.

Currently, there is a push to make coal fly ash a hazardous waste, which will make disposal of that very expensive. It goes into a lot of products: in cement, it goes into roofing materials. A lot of things that are out there, that will dramatically increase the cost of how to handle coal on that side of it.

Mining permits are slow, or we now have one pulled. Retrofit, costs are going up dramatically, because this requirement for best technology, so anyone can invent a new technology, no matter how expensive it is, and say, "Now this is the new best technology," and there is a push to now try to retrofit a plant dealing with that.

Regional haze, all of the changes that are happening with that currently, and everyone is pointing directly at coal and saying, "This is the culprit on it." 316(b) intake, it is shifting—the cooling towers are having to shift around, another dramatic increase in cost.

This administration is pushing to remove loans from rural electric companies that want to be able to do coal plants, and saying they can do it if they want to do wind, but they can't do it if they want to do coal.

We are talking about carbon capture.

Which one of these things would tell any investor coal is a good idea, if you want to invest and do something, do it in coal? There are eight things I just listed that are very specific that are—all seem to be going after coal. While I am hearing us say, “We are not going after coal,” everything that seems to be coming out of EPA and this administration is, “Oh, but yes, we are. We are just saying we are not.”

And again, no one can evaluate motives. I am just telling you what I am seeing on this side of it. So that is the struggle that we are—let me ask you a specific question. I know that is not something you can really respond to on that.

How long should a permit take? What is the target length of time, if they are going to request a permit from EPA? I know there is a given time. How long should it take?

Ms. STONER. It really depends on what the permit is for. So the bigger the impacts, the more likely a significant degradation, as with the more than 6 miles of streams that were proposed to be filled with Spruce Mine. It does take longer with a bigger, more complicated, more significant matter.

As I indicated, most actions, most 404 actions, go through the general permitting process—

Mr. LANKFORD. Which takes how long?

Ms. STONER. Less than 90 days.

Mr. LANKFORD. OK.

Ms. STONER. That is—so it is designed to streamline those things that can go more quickly, and to spend more time on the more significant actions with more likely impacts on public health and the environment.

Mr. LANKFORD. OK. I know you know this, we have talked about it before. I am tracking very carefully, because I am watching what is happening to coal, and now seeing companies that are trying to shift to natural gas, but also seeing on the horizon all of the studies that are now out there on fracking, knowing that the price of natural gas is dropping dramatically because of the supply we are able to pull out because of the fracking that is going on.

It is the great unknown out there. Again, we are back to power plants. Can't really plan, don't really know what to predict, because they don't know what EPA—if they are going to do to natural gas what they are doing to coal, then who knows what to predict on that one?

Who is better for regulating fracking, a State or the EPA?

Ms. STONER. I don't know that I can answer that right now. You know, we have studies going on on fracking. There are—

Mr. LANKFORD. Do we have a date on that yet, when that is going to be complete?

Ms. STONER. I believe it is still more than a year out, when we expect to have that study done from the office of research and development on fracking.

You know, in general, the programs are run by the States, and it is our preference, in general, to have State-run programs for the underground injection control, for the Clean Water Act permitting, and so forth. And so that is generally our preference.

We are trying to figure out how well things are being done now on fracking. It is, you know, as you indicated, new, and a lot is still to be learned about it, outside of Oklahoma—

Mr. LANKFORD. Well, yes. Fracking is not new.

Ms. STONER. Right.

Mr. LANKFORD. I mean since 1949 it has been going on in our State.

Ms. STONER. But—

Mr. LANKFORD. This is new to some areas.

Ms. STONER. Right.

Mr. LANKFORD. It is not new to other areas.

Ms. STONER. No, I understand your point. And the technologies that are being used now are new.

Mr. LANKFORD. Correct.

Ms. STONER. And we are trying to ensure that we are protecting public health. There is a lot of concern about that. And one of the things that we are doing is looking at where fracking has occurred already, to figure out what is the best way to do that.

But our general answer would be we like to have States run the programs, not EPA. But I can't say that there isn't anything that EPA would need to do to ensure that public health is protected, with respect to fracking. There may be things that we need to do, as well.

Mr. LANKFORD. Well, thank you. I appreciate that. I yield back.

Mr. GIBBS. We are going to close this down, but just kind of a little bit of follow-up.

Last week we had Ms. Teresa Marks, who is the director of the State of Arkansas Department of Environmental Quality, and she talked about this issue with the guidance. This is a little bit disturbing, because you put out guidance and you say it is not binding. But then in some instances it could be in conflict with State law. And she testified that they are in a Catch-22: they are going to violate State law or they are going to violate the guidance, which sometimes becomes law by de facto standards.

And you talk about we need to put out—you know, you are working to increase the certainty versus uncertainty. And it seems to me there is a huge issue there where you are creating massive uncertainty. Can you respond to that?

Ms. STONER. The guidance is not binding. So it actually, I don't think, could put States in a bind in the way that you are talking about, where they can't comply with the guidance and with something else, because the guidance is not binding.

Mr. GIBBS. I think what is happening in the practice, you know, they don't know what to do. And then, of course, in the private sector a person that is in business, then they really get confused, because they don't know what is going to come after them, litigation. And so it is creating a huge problem.

And I think that we had two State directors of State EPAs testify to that fact. So I think you need to be—recognize that fact, that you are creating more uncertainty, and it is just bad public policy, I think, and you know, we sent a letter I had 172 co-sponsors on that, instead of putting out all these guidances and interim guidances, you need to move forward under the law with the regulatory process and have the public hearings and set the rules under that

framework that is established by law. Because you are kind of circumventing all that, and it is becoming de facto rules and creating problems and problems to economic growth and jobs.

Just in closing, I need to say that we are really concerned. Administrator Jackson was before the Ag committee a few weeks ago, and both sides of the aisle had massive concerns about what this Agency is doing. And when I see State agencies, the EPAs, having the same concerns, there is a problem here. And it needs to be addressed, because we are not putting out the certainty and the confidence for the private sector to grow their businesses and create jobs. And the EPA is a massive hurdle blocking that; those investments. And I think you need to be aware of that.

So, this will conclude the second hearing. The meeting is adjourned.

[Whereupon, at 1:17 p.m., the subcommittee was adjourned.]

Testimony of Mr. Mike Carey, Ohio Coal Association, 5.11.11

Testimony of Mr. Mike Carey
President, Ohio Coal Association
Before the
House Committee on Transportation and Infrastructure,
Subcommittee on Water Resources and Environment
Hearing Entitled: "EPA Mining Policies: Assault on Appalachian Jobs Part II"
May 11, 2011

Chairman Gibbs, Ranking Member Bishop, Members of the Committee, good morning.

Thank you for inviting me to testify at this important hearing regarding the litany of new regulations being put forth by the U.S. Environmental Protection Agency (EPA) and their effects on Appalachian jobs. My name is Mike Carey, and I am President of the Ohio Coal Association. The Association provides a voice for the many thousands of citizens working in Ohio's coal sector. I also serve on the National Coal Council, an advisory committee to the Secretary of Energy on energy resource issues.

Cheap, abundant coal is what powers the manufacturing base and provides affordable energy for families across the Midwest and in other regions of America. The companies we represent, both large and small, directly employ over 3,000 individuals in Ohio alone, with over 30,000 secondary jobs that are dependent upon our industry. In fact, an independent analysis shows that for every primary job, our industry supports up to 11 secondary jobs.

The Obama Administration and its allies have declared war on coal across all of Appalachia. We are ground zero for the fundamental overreach of the Obama regulatory agenda. They appear to be hell-bent on hurting those who work in the coal mining industry. The rural regions of Ohio, Kentucky, West Virginia, Tennessee, Illinois, Indiana, and Pennsylvania would be devastated from losing major employers such as coal companies. That's because in so many cases, all that these families have are their homes, and they can't simply pick up and move elsewhere. In a rare statement of honesty bordering on hubris, last year the Office of Surface Mining stated in the justification for the Stream Protection Rule that 7,000 thousand jobs would be lost in Appalachia, but that was okay because some jobs would be created out West.

Mr. Chairman, that's not acceptable. The Obama Administration is picking winners and losers by regulatory proclamation. That's not okay with the people I represent in Appalachia, and I

Testimony of Mr. Mike Carey, Ohio Coal Association, 5.11.11

hope it's not okay with this Committee. The Eastern coal-fired power plants are not necessarily designed to burn Western coal. What this tells me is that the Obama Administration wants to shut down Eastern coal, forcing our power plants to either be redesigned or shut down. What this would lead to is a massive increase in utility prices across the Midwest. Nevermind all of the coal miners put out of work – we are talking about thousands of more workers across the manufacturing sector losing their jobs, too. This will cause a massive relocation of our citizens to other states with those left behind becoming totally dependent on the federal government through unemployment insurance, Medicaid, and vast new expenditures in LIHEAP.

Some may think that I am exaggerating, but one need only look at the host of new regulatory programs aimed at the Appalachian coal industry:

- The EPA Greenhouse Gas Regulations
- The EPA Utility MACT Regulations
- The EPA Transport Rule
- The EPA Coal Fly Ash Regulations
- The MSHA Mine Dust Standards
- The OSM Streamwater Regulations
- The EPA PM and Ozone Standards

Just to name a few, and I haven't even tried to list all of the permitting problems, guidance documents, interim and draft policies, and the most aggressive enforcement actions anyone has seen in years. I'm not complaining about enforcement actions that protect miners' safety or the environment, but the increase in minor infractions across the board by multiple agencies.

Mr. Chairman, we need to do four things to stop the abusive assault by the Obama Administration across Appalachia:

- 1) Declare a regulatory time-out. We are still recovering from a recession, and the Obama Administration seems to forget that compared to 30 years ago, our air is cleaner, our miners are safer, and our water resources are better protected.
- 2) Re-assert the primary role of the States in the permitting decisions. We need legislation clarifying that our States continue to have primacy in interpreting the relevant portions of the Clean Water Act.
- 3) End the abusive use of regulatory guidance documents. If it's important enough to issue a guidance document, then it's important enough to go through the normal public notice and comment period.
- 4) Provide certainty in permitting decisions. Unfortunately, we need Congress to tell the Administration to live up to its permitting promises. We also need the

Testimony of Mr. Mike Carey, Ohio Coal Association, 5.11.11

permits to be processed in a timely fashion. The months of permitting delays amount to a federal takings of private property. Months and sometimes years of permitting delays deny property owners the use of their land.

Just two weeks ago, the Energy Information Administration released its 2011 Energy Outlook. Unfortunately, it paints a frustrating picture for those living in Appalachia. If Congress or the EPA puts a cap-and-trade inspired price on carbon, EIA estimates that by 2035, electricity generation from coal will be approximately 54 percent below the 2009 level. These are numbers that we cannot ignore.

I briefly mentioned earlier just a few of the burdensome regulations targeting coal operators and coal-fired power plants. Nobody across the multitude of agencies has evaluated the cumulative impacts of these draconian measures. We need, at a minimum, a regulatory time-out so that our country and those businesses and residents who rely on affordable energy resources like coal have the time to recover.

Members of this Committee will certainly appreciate that State primacy in permitting decisions was the clear intent of Congress in passing the original Clean Water Act. The Obama Administration is ignoring the law and is instead using interim guidance, interim rules, and draft policies to attack coal mining operations through coercion. Holding up permit applications and overriding state decisions is an inconsistent and dangerous approach.

By ignoring the law and shutting out the public from the process, we are seeing yet another attempt by the EPA to regulate what they have been unable to legislate on Capitol Hill. With the "train wreck" policies they are attempting to use the Clean Air Act, and here the Obama Administration's allies are using the Clean Water Act to go after American employers.

As I stated before, the delay in permits is almost a federal takings of private property. Coal miners have waited months for even the simplest of permits. For example, EPA is holding up Section 404 permits. The Senate Environment and Public Works Committee has identified 190 permits, with 154 submitted by small businesses. These permits represent operations that could support over 17,000 jobs. Meanwhile, EPA has also retroactively revoked a permit in West Virginia that had already been issued. This unprecedented action by the Federal government is like tearing up a contract after both parties agreed to the rules of the game.

For years the bureaucracy in Washington, DC has been pushing guidance documents instead of issuing regulations. The Obama Administration has elevated this to an art form. The EPA is working with the Army Corps of Engineers on the "Clean Water Protection Guidance" that the Office of Management and Budget is reviewing. Holding states to a new set of policies like these that are not legally binding violates the spirit of the law authored by this Committee.

Has the EPA done any formal examination of the job impacts of these guidance documents? Do these interim rules get a thorough review by the Office of Management and Budget or the Small

Testimony of Mr. Mike Carey, Ohio Coal Association, 5.11.11

Business Administration and their Office of Advocacy? They do not, which may be precisely the reason why the EPA is using this sinister means with which to halt coal mining in our country.

An average-sized mine requires about \$350 million just to get to the point of resource production. Certainly, the smaller mining companies across Appalachia are taking on an enormous risk in a situation where new rules are being placed on them. You can imagine that this type of governmental overreach into our private businesses could very well lead to major companies simply choosing to move their operations overseas. The thousands of workers affected in Appalachia deserve the right to earn a livelihood without being subject to the whims of a bureaucracy. Unfortunately, today we have an Administration that is pushing the bureaucracy to advance the most extreme anti-coal agenda in our nation's history.

How do we know this? They are simply following through on their campaign promises:

- In January 2008, President Barack Obama stated in reference to coal, "If somebody wants to build a coal-powered plant, they can. It's just that it will bankrupt them, because they're going to be charged a huge sum for all that greenhouse gas that's being emitted."
- Vice President Joe Biden also declared in 2008, "No coal plants here in America."
- As Commissioner of the New Jersey Department of Environmental Protection, current EPA Administrator Lisa Jackson issued New Jersey's Global Warming Plan calling for a moratorium on all new coal-fired power plants. She may not be calling for a moratorium today at EPA, but her regulatory policies are certainly creating one.

Every day goes by with hard-working coal miners across our country wondering what their futures will be as the EPA takes hold of unilaterally attempting to regulate our air and water policies in an attempt to put coal miners out of work. Americans working in related industries that depend on low-cost electricity made from coal are asking what America is doing to ensure their livelihood. These same individuals, living in many states throughout the nation, rely on coal as an affordable, reliable source of energy. They are vociferously rejecting this attempted overreach by Mr. Obama's EPA.

However, the Committee has the authority to address these problems. We need the following four actions in order to save Appalachian coal jobs:

- 1) Declare a regulatory time-out.
- 2) Re-assert the primary role of the States in the permitting decisions.
- 3) End the abusive use of regulatory guidance documents.
- 4) Provide certainty in permitting decisions.

Testimony of Mr. Mike Carey, Ohio Coal Association, 5.11.11

I thank you for this opportunity to testify, Mr. Chairman, and stand ready to answer any questions the Committee may have about the job impacts of what is a directed attack on coal by the current Administration. I must also say, Chairman Gibbs, the people of Ohio are proud to see you serving as the Chairman of this distinguished Subcommittee.

May 11, 2011

Hearing
on
EPA Mining Policies: Assault on Appalachian Jobs Part II

United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

Statement
by
M. Reed Hopper
Principal Attorney
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Telephone: 916-419-7111
Facsimile: 916-419-7747

Mr. Chairman, members of the committee, as an attorney with Pacific Legal Foundation, a nonprofit, public interest organization dedicated to the protection of individual liberties and private property rights, I wish to thank you for this opportunity to express my views on Environmental Protection Agency (EPA) § 404 enforcement policies under the Clean Water Act and how it affects the regulated community.

The EPA's exercise of its putative "veto" power to unilaterally revoke the § 404 "dredge and fill" permit issued to Mingo Logan Coal Company, for surface mining in Appalachia, three years after the fact, and after more than ten years of exhaustive environmental review, and without any change in circumstance or law, is emblematic of a growing trend among federal agencies to change the law for political ends. This is a remarkable breach of the public trust that breeds a justifiable skepticism of governmental motivations. I believe public officials should stand as fair and objective enforcers of the law and stop bending in the winds of political expediency. Public officials must be held accountable for blatant abuses of power. If they are not, we can expect to see a continuing erosion of our rights under the law. Therefore, I commend this committee for convening this hearing today.

The injustice of EPA's revocation of Mingo Logan's § 404 permit, is evident from the facts, which bear repetition here (as gleaned from the pleadings in *Mingo Logan Coal Co., Inc., v. United States Environmental Protection Agency*, Case No. 1:10-cv-00541-CKK, U.S. District Court for the District of Columbia).

Mingo Logan (a subsidiary of Arch Coal Company) owns a surface coal mine in West Virginia known as Spruce No. 1. In January, 2007, the Army Corps of Engineers (Corps) issued Mingo Logan a Clean Water Act § 404 permit authorizing the discharge of fill material into 8.11 acres of "waters of the United States," including 0.12 acres of wetland (an abandoned farm pond); 1.83 acres of storm runoff streams; 6.13 acres of seasonal streams, and 0.034 acres of permanently flowing streams. This permit was

issued after more than ten years of study and evaluation by the Corps, EPA, and other federal and state agencies. A full environmental impact statement (EIS) was prepared involving thousands of man-hours and multiple agencies, including the EPA. This was the only full EIS ever prepared for a mining project of this type. The Draft EIS covered 1,600 pages and the Final EIS included 58 pages specifically addressing EPA comments. The permit cost Mingo Logan millions of dollars and imposed substantial mitigation requiring the creation of new wetlands, enhancement of thousands of feet of existing streams, planting of thousands of trees and shrubs, and long-term monitoring to ensure compliance with all permit conditions. The permit was issued without EPA objection.

However, two and a half years after the Corps issued a § 404 permit to Mingo Logan, the EPA pressed the Corps to suspend, revoke, or modify the permit. By letter dated September 30, 2009, from Colonel Robert Peterson, District Engineer of the Corps, to William Early, Acting Regional Administrator of the EPA, the Corps refused to do so explaining such action was only authorized under 33 C.F.R. § 325.7 upon a consideration of five factors: the extent of the permittee's compliance with the terms of its permit; whether circumstances relating to the authorized activity have changed since the permit was issued; significant permit objections which were not earlier considered; revisions to law; and the extent to which permit suspension, revocation, or modification would adversely affect plans, investments, and actions the permittee has reasonably taken in reliance on the permit.

After a consideration of these factors and EPA concerns, the District Engineer determined that Mingo Logan was in full compliance with the permit, there were no changes in circumstances or the law requiring a change to the permit, and all objections had been addressed in the previous multi-year review.

The State Department of Environmental Review also issued a letter, dated November 25, 2009, affirming that Mingo Logan was in complete compliance with all water quality standards and castigating EPA for its mistaken factual assertions and for suggesting further National Environmental Policy Act (NEPA) review is required:

At some point, a project must be deemed to have been studied enough to meet NEPA's requirements. This is the most heavily studied and scrutinized surface mining coal operation in the history of a state which has a long history with the coal mining industry. It has previously been through an EIS, litigation before at least two federal trial courts and twelve years of continuing scrutiny by the WVDEP, USEPA, the Corps and other federal agencies. In addition, it has been examined by the State permitting quality control panel comprised of representatives of the environmental community, the coal industry, the WVDEP and the federal Office of Surface Mining Reclamation and Enforcement.

Having gained no support from either the Corps or the State, EPA initiated its own unilateral proceedings to suspend, revoke, or modify the Mingo Logan permit, three years after its issuance. *See Proposed Determination To Prohibit, Restrict, or Deny the Specification, or the Use of Specification (Including Withdrawal of Specification), or an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, WV*, 75 Fed. Reg. 16788 (Apr. 2, 2010).

Those proceedings were based on the EPA's claim of authority under a novel interpretation of § 404(c) of the Clean Water Act that authorizes EPA to prohibit, deny, restrict, or withdraw any specified disposal site. Although the EPA has used this "veto" power prior to the issuance of a § 404 permit, this

is the first time the EPA has sought to exercise that “veto” after a permit has been granted. Mingo Logan challenged the retroactive application of § 404(c) to existing permits in court with a compelling argument that EPA’s interpretation is inconsistent with prior practice, the language and structure of the Act, and is contrary to the will of Congress as recorded in the legislative history. For example, in the Report on the Committee of Conference, Senator Muskie stated:

[P]rior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

He added:

Thus, the Conferees agreed that the Administrator of the Environmental Protection Agency should have a veto power over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.

The decision is not duplicative or cumbersome because the **permit application** transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific material can be disposed of at such site.

I Legislative History at 161-339 (Oct. 4, 1972) (emphasis added).

Nevertheless, on January 19, 2011, EPA revoked the Mingo Logan permit. *See Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV* (76 Fed. Reg. 3126). Aside from the questionable legality of EPA’s use of the § 404(c) “veto” power in this way, the agency’s revocation of a valid § 404 permit shows a disdain for property owners and a disregard for economic realities that is difficult to comprehend. If EPA can “veto” an existing § 404 permit, years after its issuance and even when the permit holder is in full compliance with all permit conditions, why would a permit holder risk expending thousands, or in the case of Mingo Logan, millions, of dollars in reliance on such a permit? The mere acquisition of a § 404 permit is already prohibitively expensive for many: “The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *Natural Resources J.* 59, 74-76 (2002). “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.’ *Id.*, at 81,” *Rapanos v. United States*, 547 U.S. 715 (2006) (J. Scalia).

The EPA’s action against the Mingo Logan permit sets a dangerous precedent. One can predict with almost mathematical certainty that it will have a chilling effect on future projects and do incalculable harm to the local and national economy. The Corps processes tens of thousands of § 404 permits each year. Now, each of these permits is subject to recall by the EPA, at any time in the future. Under EPA’s

interpretation of its “veto” power, no permit holder receives a final permit on which he may rely. No matter how much effort, time, and cost, the permit holder may expend in permit preparation, acquisition, and compliance, he can never be sure he has a vested right in the permit issued. The EPA can snatch the permit away at any time. This is the very essence of arbitrary government.

The five-factor test for permit modification codified in 33 C.F.R. § 325.7, on which the Corps relied in its reconsideration of the Mingo Logan permit, at least recognized some fundamental limitations on federal power, which the retroactive EPA “veto” process does not. As noted above, before the District Engineer can revise or revoke an existing permit because of a change in circumstances, he must take into account the extent to which permit suspension, revocation, or modification would adversely affect plans, investments, and actions the permittee has reasonably taken in reliance on the permit. This factor is a necessary acknowledgment that when permit holders rely on a validly issued permit they obtain a property interest or vested right in the permit itself and it cannot be revised or revoked without regard to the economic impact on the permit holder. This is an essential safeguard against the “taking” of private property without just compensation prohibited by the Constitution. It is also a safeguard against the deprivation of a vested right without a fair process. As the State observed in its defense of the Mingo Logan permit: “At some point, a project must be deemed to have been studied enough.” But the EPA “veto” process provides no such safeguards. To the contrary, it eviscerates the concept of finality in the § 404 permit process thereby undermining individual rights, public confidence in government institutions, and the economy.

Regrettably, Mingo Logan is not the only example of EPA’s heavy-handed use of its § 404(c) “veto” power. In the Flood Control Act of 1941, Congress authorized the construction of the Yazoo Backwater Area Project located in west central Mississippi. An essential component of the project is the construction of a pumping station that will reduce the effects of catastrophic flooding in the lower Mississippi Delta. When that river floods, the natural gravitational flow of other, smaller rivers in the area is impeded, causing water to back up into the Backwater Area. That process has led to the regular flooding of 1,300 homes, and the damaging of 316,000 acres of agricultural land, with an average annual cost of \$7.7 million. The pumping station would force waters that otherwise would remain in the Backwater Area back over existing flood control structures to flow down the Mississippi.

In 1984, Congress received an EIS from the Corps setting forth the ecological effects of the proposed pumping station. Congress authorized funding for the pumping station and, in 1986, construction began. Shortly thereafter, construction was stopped due to the passage of the Water Resources Development Act that required localities to help defray the costs of federal flood control projects. When Congress repealed the cost-sharing provision in 1996 (allowing full federal funding of the project), the Corps began work on a supplemental EIS. In this document, the Corps presented a revamped pump project that would substantially increase environmental benefits including the planting of new vegetation across 55,000 acres that would enhance terrestrial and aquatic habitats.

In August, 2008, EPA “vetoed” the Yazoo Project, under § 404(c), claiming that it would harm wetlands. Pacific Legal Foundation attorneys are now representing the Board of Mississippi Levee Commissioners in challenging EPA’s veto decision on the grounds that the pumping station component of the Yazoo Project is immune from veto, under § 404(r) of the Clean Water Act, because Congress received adequate information on the pumping station more than a year prior to Congress’ fiscal

appropriation for the project; and the current version of the Yazoo Project addresses environmental concerns.

Congress promised area residents flood protection over 70 years ago, but the EPA is standing in the way of the final component, putting lives, property, and the ecosystem at risk. Unfortunately, residents in the south delta are facing more flooding this year as the Mississippi continues to rise.

Yet another case underscores EPA abuse of power. James Boyd and his family have owned the Smith Farm in Virginia for more than two decades. To remove excess water from their land, the Boyds proposed digging some drainage ditches on their property. To ensure they would not run afoul of any federal concerns, they hired a consultant who had worked for the Army Corps of Engineers for eight years. The consultant produced a letter from the Corps that outlined the procedures to dig such ditches without the need of a § 404 “dredge and fill” permit.

Before the Boyds started any land clearing on their farm, the Boyds met with the Corps and showed the Corps the designs for what they proposed to do. **They were advised that they did not need any permits for their project.** Nevertheless, the Boyds went a step further and asked Corps officials to inspect the site, specifically to ensure that all of their work was in compliance with the law. Pursuant to the Boyds’ request, the Corps inspected the site on five separate occasions throughout the ditch excavation project. Despite the Boyds’ specific request that the Corps advise them if the inspector observed any problems with the project—and the Boyds’ commitment to cease work if any problems arose—the Corps raised no objections to the work being done at any time during the project.

However, in a *Kafkaesque* turn of events, after the project was completed, EPA officials chose to inspect the site two days after Hurricane Dennis had inundated the area. Nine months later, without prior notice, EPA issued a notice to the Boyds asserting federal jurisdiction over large areas of the site and alleging multiple violations of the Clean Water Act.

During the administrative hearings that followed, the Boyds learned, for the first time, that the EPA and the Corps had been discussing their ditching project the entire time it was under way. Yet despite the Boyds’ express reliance on agency oversight to ensure their full compliance with the law, neither the Corps nor the EPA advised the Boyds they may be in violation of the Clean Water Act.

The Boyds have repeatedly tried to settle the case, at one point even offering to fund the building of an entire oyster reef in the nearby Elizabeth River, an offer that would have substantially benefitted local water quality. But EPA has steadfastly refused to settle the case. The legal wrangling now has spanned several years. It has involved numerous hearings, more than 240 motions and briefs, and cost the Boyds hundreds of thousands of dollars in legal costs and nearly the loss of their farm. Although the Boyds made every effort to comply with the law, an administrative law judge held the Boyds liable for discharging a pollutant into “navigable waters” without a federal permit (*i.e.*, distributing wood chips in wetland areas and allowing silt to collect in the bottom of rain ditches). Pacific Legal Foundation attorneys are representing the Boyds on appeal challenging federal jurisdiction over the site.

The EPA’s use of its § 404 authority is breathtaking in its disregard for the rights of landowners. Rather than viewing landowners as allies to be helped, EPA officials appear to view landowners as enemies to be thwarted. The Boyds had no intent to circumvent the law. In fact, they made every effort to comply

with the law. But this was of no consequence to EPA officials who appear to have targeted the Boyds for no reason other than they could. This is the very type of officious conduct that results from “agency officials zealously but unintelligently pursuing their environmental objectives.” See *Bennet v. Spear*, 520 U.S. 154, 176-77 (1997).

But perhaps the most nefarious use of EPA power under the Clean Water Act involves the agency’s increasing use of unilateral compliance orders to browbeat small landowners into submission without a hearing or proof of violation.

Imagine you own a small lot in a built-out subdivision. You prepare your lot to build the home you always wanted when you get a letter from the federal government directing you to cease and desist. The government claims you filled regulated wetlands without a federal permit under the Clean Water Act and you must restore the property to its original condition or risk civil and criminal penalties.

The government provides you with no evidence of your alleged violation and offers you no opportunity to challenge its jurisdiction. Instead, you are given three options: (1) you can restore your property to its original condition at great expense and pay a civil fine and never build your home; (2) you can restore your property, pay a fine, and spend an average of \$250,000 just to apply for a federal permit to use your property, which you may never receive; or (3), you can ignore the government, in which case federal prosecutors will bring an enforcement action against you (at the time of their choosing) for civil penalties that could amount to thousands of dollars a day and/or criminal fines or even imprisonment.

Now imagine you insist on your right as an American citizen to have “your day in court” to prove the agency has misread the law and has no jurisdiction over your small lot, before subjecting you to severe penalties for the reasonable and ordinary use of your property, and the court says, “No! You must first have your permit application denied or subject yourself to prosecution.”

Incredibly, this is not a hypothetical case but a real situation.

Chantell and Michael Sackett own about a half-acre parcel of land near Priest Lake, Idaho, which they bought to build a home. The lot resides in a built-out subdivision near the lake. The lot itself has an existing sewer hookup and is zoned for residential construction. Prior to their purchase, the Sacketts undertook a due diligence investigation. None of their research indicated any Clean Water Act permitting history or requirements for the property. Therefore, the Sacketts had no reason to believe their home lot was subject to federal regulation.

The Sacketts began some earthmoving work with all local building permits in hand. Shortly thereafter, EPA sent the Sacketts a compliance order under the CWA asserting that their property is subject to federal regulation and that they had illegally placed fill material into jurisdictional wetlands on their land. The compliance order prohibited the Sacketts from constructing their home, as previously authorized by local authorities. And, it required the Sacketts immediately to begin substantial and costly restoration work, including removal of all fill material, replanting, and a three-year monitoring program during which the property must be left untouched. Further, the compliance order warned the Sacketts of significant civil penalties (and possible criminal sanctions) for failure to abide by its dictates, without providing the Sacketts any proof of violation or any opportunity to contest EPA’s claims.

Ignoring the compliance order is not an option because the CWA imposes significant civil penalties for violating compliance orders or the Act. *See* 33 U.S.C. § 1319(d) (imposing maximum civil penalty of \$25,000 per day per violation). Just one month of noncompliance puts the landowner at risk of civil liability of **\$750,000**. After a year of noncompliance the potential liability is at **\$9,000,000**. Moreover, a landowner who continues with his construction project in the face of a compliance order greatly increases the risk that the agency will seek criminal penalties against him. *See id.* § 1319(c)(1)-(2) (imposing criminal penalties for negligent and knowing violations of the Act).

Applying for a permit after the fact is also not a realistic option. In many instances the EPA will not entertain a permit application until the compliance order has been satisfied. *See, e.g.*, 33 C.F.R. § 326.3(e)(ii) (“No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate . . . until such legal action has been completed.”). For the Sacketts, that would mean: (a) removing all the fill; and, (b), restoring the preexisting “wetlands,” which would necessitate leaving the property untouched for a prolonged period of time. Few landowners could afford the time or cost. Also, as noted above, the time and cost involved in just applying for a permit is significant (*i.e.*, 788 days and \$271,596 for an individual permit and 313 days and \$28,915 for a nationwide permit—not counting costs of mitigation or design changes). There is no guarantee that the permit will be granted, with or without substantial conditions, and the cost of permitting often exceeds the value of the property. If a landowner succeeds in a subsequent lawsuit challenging the agency’s permitting jurisdiction, none of the permitting costs would be refundable. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment) (“[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.”).

Regrettably, the Sacketts are not alone in living this nightmare. EPA regularly relies on this means to force landowners to comply with agency demands: between 1980 and 2001, the agency issued from 1,500 to 3,000 compliance orders every year across the country. *See* Wynn, Christopher M., Note, *Facing a Hobson’s Choice? The Constitutionality of the EPA’s Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1895 (2005). During the previous administration, EPA’s issuance of compliance orders was below historical trends. *See* U.S. EPA, Office of Enforcement and Compliance Assurance, *OECA FY 2008 Accomplishments Report* App. B (Dec. 2008). But the EPA has recently announced its commitment to increase its enforcement efforts.¹ There is every expectation, therefore, that EPA’s reliance on the compliance order will continue and increase. That reliance is troubling when one considers that, as of the late 1990s, EPA referred only about 400 cases annually for judicial enforcement to the Department of Justice. Wynn, *supra*, at 1895. These statistics show an EPA preference to circumvent judicial review, where a landowner can challenge EPA allegations and jurisdiction, in favor of unreviewable compliance orders to compel landowners to comply with the agency’s dictates.

The issuance of a unilateral compliance order puts small landowners, like the Sacketts, in an untenable situation. They can either comply at great cost, sometimes amounting to more than the value

¹ *See generally* U.S. EPA, Office of Enforcement and Compliance Assurance, *Clean Water Act Action Plan* (Oct. 15, 2009, rev. Feb. 22, 2010), available at <http://www.epa.gov/oeceaerth/resources/policies/civil/cwa/actionplan101409.pdf> (last visited Feb. 17, 2011).

of the property, even though they believe the EPA has overstepped its authority, or they can ignore the order and risk monumental fines and/or imprisonment. PLF attorneys are representing the Sacketts in petitioning the U.S. Supreme Court to challenge this practice as a violation of due process.

When government agencies, like the EPA, exercise their regulatory power without regard to the very real impacts on the citizenry and in excess of statutory or constitutional authority, they undermine the constitutional foundation and become a law unto themselves. Citizens are left to conclude that the "rule of law" has no meaning and that rules and regulations are based on personal whim.

The great misconception in government thinking today is the bureaucratic notion that individual rights (including property rights) are a gift from government. And what the government gives it may take with impunity. This idea stands in stark contrast to the understanding the Framers had that individual rights are a constraint on governmental conduct. Therefore, EPA officials should be as dedicated to protecting individual rights as they are to protecting the environment.

Thank you,



M. REED HOPPER
Principal Attorney
Pacific Legal Foundation



WEST VIRGINIA CHAMBER

Testimony of

Steve Roberts
President
West Virginia Chamber of Commerce

Before the

Committee on Transportation and Infrastructure
U.S. House of Representatives

On

EPA Mining Policies: Assault on Appalachian Jobs Part II

May 11, 2011

Ladies and gentleman, Honorable Chairman and members of the committee:

Thank you very much for your interest and concern about the impact of actions of the US EPA on mining production, energy needs, employment and quality of life in mining communities throughout West Virginia and the nation.

I particularly want to acknowledge and express appreciation to Chairman Mica, Sub Committee Chairman Gibbs and to the Honorable Nick Rahall, who I am proud to know and by whom I and my family members living in beautiful Huntington, West Virginia have been so ably represented since 1978.

West Virginia is a beautiful state, populated by decent, hardworking, caring people. We are justifiably proud of our twenty colleges and universities, our well developed transportation network, our breathtaking peaks and valleys and our industrial base that supplies the much needed coal, gas, timber and electricity that have helped build our great nation.

West Virginia proudly boasts the nation's lowest crime rate, the highest level of home ownership, and the first publicly funded system of primary and secondary schools found in the post Civil War South. The West Virginia mountains have given our nation Pearl Buck, Homer Hickham, Chuck Yeager, George Patton, Booker T. Washington, and athletes Mary Lou Retton and Jerry West, to name a few.

Coal and energy production have been key components of our State's being since the discovery of coal in Boone County, West Virginia in 1742. Because of the importance of coal to our state, we are especially afraid of the assault referred to in this hearing's title. Outside of Wyoming, we produce the most coal in the United States. Because of the sensitive nature of our economy, the jobs coal provides are more than important: without them, tens of thousands of families, and a historic American mountaineer culture, would cease to exist here.

The best jobs in our state's neediest areas are nearly always mining jobs. Per capita income in southern West Virginia, \$15,800 in 2006, is about half of the national figure. Yet the average coal job pays more than four times that amount. These last two statistics come from the Appalachian Regional Commission and the West Virginia Coal Association, respectively. A mining income can stabilize a whole extended family in this region, providing support for the elderly, a future for children, and a livelihood for many relatives of the wage-earner. Killing off such

work will do the opposite: tens of thousands of families and many communities would be thrown into crisis.

If surface mining ended in West Virginia, coal production would be cut by more than 40%. The West Virginia Office of Miners' Health and Safety reports that of the 537 mines operating in West Virginia, 232 are surface mines. If permitted, more could exist. As the country's second largest coal mining state, limiting more than 40% of our total production would be destructive to our country broadly. Locally, 6,255 surface miners would be immediately jobless, a large portion of the 2,340 people employed by coal handling facilities would be let go, and secondary industries would experience cuts as well. For these reasons, the environmental effect of surface mining can never be considered in isolation from the real experience of the people who live in this environment.

Before I delve into statistics, let me quote one of those people. Ellen Taylor is the president of the Beckley Chamber of Commerce. The area served by her chamber is particularly rich in coal and coal mining history. She knows mines and mining communities, and works with them to make sure the local economy is able to sustain them. She says, in reference to 404 mining permits, that "cancelling permits will have a disastrous effect on the people here. Not only mining families, but local businesses will be widely affected. To use one of many examples: buying groceries could become a problem if they were to lose their jobs. Stores would close. Refusing to issue permits would have a terribly harsh trickle-down effect on the economy. Many, many families depend on that paycheck from mining companies."

This is because those companies treat their employees well. In the mining industry, wages per employee have increased 3.9 percent yearly on average through 2008. Mining companies freely maximize their employment. They do not risk pressuring employees by under-hiring. As of 2008, the coal industry employs 20,454 people: more than the coal mining industry in any other state. These workers were paid \$1.5 billion in wages, with a total employee compensation of \$2.8 billion. These statistics and those to follow come from a study by West Virginia's two largest universities, entitled *The West Virginia Coal Economy: 2008*.

I have just listed some of the direct benefits of coal. The indirect benefits are also vast. In 2008, coal companies paid \$676.2 million in taxes, amounting to a substantial portion of all state tax revenue. It is the West Virginia Chamber's assessment that this contribution would shrink to the point of state crisis if 404 mining permits are denied. The loss of property taxes alone "would be fatal to local governments," the study found.

The secondary benefits continue further. Many people are employed in the transportation of coal and the use of coal in the production of electricity. This employment would be hampered by a shrinking industry. Mining companies also take great concern to cultivate the local communities in which they work. This includes providing educational opportunities, supporting local athletics, contributing to local service departments, charities, festivals, fairs, and other community events and associations. All of this would be irrevocably damaged by limits to our industry of the sort the EPA is contemplating.

Thank you for this opportunity to testify, Mr. Chairman. We believe that the denial and revocation of 404 permits has already threatened our economy and workforce. There could be much more damage still. For that reason, I thank you for our attention to our struggle, as we try to retain jobs in this most traditional of Appalachian industries.

TESTIMONY OF
NANCY K. STONER
ACTING ASSISTANT ADMINISTRATOR
OFFICE OF WATER
U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

May 11, 2011

Good morning Chairman Gibbs, Ranking Member Bishop, and Members of the Committee. I am Nancy Stoner, Acting Assistant Administrator for the Office of Water at the U.S. Environmental Protection Agency. I am pleased to have the opportunity to discuss EPA's use of its authority under Section 404(c) of the Clean Water Act to protect water quality. I appreciate your interest in EPA's Clean Water Act role in assuring effective protection of human health and the environment.

EPA's Clean Water Act Role

EPA and our state agency partners work every day toward the goal of protecting human health and the environment. EPA's role in reviewing surface coal mining projects is conducted pursuant to the Clean Water Act, which Congress passed in order to ensure that our nation's waters are protected. Appalachian communities and all Americans depend upon these waters for drinking, swimming, fishing, farming, manufacturing, tourism, and other activities essential to the American economy and quality of life. Our work to review permit applications for Appalachian surface coal mining operations that affect streams is one way in which EPA carries out the mission Congress provided to us. We work hard to achieve our clean water goals in a way that

protects public health, sustains our economy, and ensures that we provide clean water to future generations.

Background on Clean Water Act Section 404(c)

Passage of the Federal Water Pollution Control Act Amendments of 1972 (also known as the Clean Water Act) established a comprehensive program to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Clean Water Act provided overall responsibility to EPA, in partnership with the states, to reduce pollution entering waters of the United States in order to protect their uses as sources of drinking water; habitat for aquatic wildlife; places for swimming, fishing, and recreation; and for other purposes. As part of the 1972 amendments, Section 404 gave specific roles to both the U.S. Army Corps of Engineers ("the Corps") and EPA in implementing a federal permitting program for activities proposing to discharge dredged or fill material in waters of the U.S. Section 404 of the Act provides the Secretary of the Army acting through the Chief of Engineers the authority for implementing the administration of the Section 404 regulatory program, including deciding whether to issue or deny permits. The Act authorizes EPA, in conjunction with the Corps, to develop the substantive environmental criteria applied in Section 404 permit reviews. The Section 404(b)(1) Guidelines, are regulations promulgated by EPA, in consultation with the Corps, and are set forth at 40 C.F.R. Part 230.

Under Section 404(c), the Act authorizes EPA to review activities in waters of the U.S. to determine whether such activities would result in significant and unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas, and to prohibit, restrict or deny, including withdrawal, of the use of any defined area as a disposal site. EPA does not view this authority as an opportunity to second guess the Corps's decisionmaking, but rather as an important responsibility to conduct an independent review of projects that have the potential to significantly impact public health,

water quality, or the environment, and which EPA has rarely used to prohibit or withdraw the use of an area. Specifically, the Act states:

“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 restrict or deny 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).

The procedures for implementation of Section 404(c) are set forth in EPA regulations at 40 C.F.R. Part 231. These procedures provide for a science based and transparent review of projects, with opportunity for meaningful dialogue among EPA, the Corps, the permit applicant or project proponent), the state, and the public. Key aspects of the 404(c) review process include an opportunity for discussion between EPA and the project proponent and opportunities for public involvement.

Use of Clean Water Act Section 404(c)

EPA works constructively with the Corps, the states, and other partners to assist applicants in developing environmentally sound projects in cases where a discharge of dredged or fill material into waters of the U.S. is proposed. EPA takes very seriously our responsibilities under the Clean Water Act, and believes that prudent and careful use of this authority is an effective provision for encouraging innovation to protect public health and preserving valuable environmental resources and our Nation’s economic security.

EPA has used its veto authority sparingly, completing only 13 final decisions, known as Final Determinations, since 1972. To put this in perspective, over the past 39 years, the Corps is estimated to have authorized more than two million activities in waters of the U.S. under the Clean Water Act Section 404 regulatory program. To emphasize the significance of the few projects reviewed by EPA under Section 404(c), these 13 completed Final Determinations have protected tens of thousands of acres of wetlands and other aquatic resources, as well as more than 35 miles of rivers and streams.

Examples where EPA used its Section 404(c) authority demonstrate the significance of potential project impacts and the important role that Section 404(c) plays in protecting human health and the environment. Prior veto actions by EPA include:

- The Yazoo Pumps Project¹ in 2008 to avoid significantly degrading the critical ecological functions provided by up to 67,000 acres of wetlands, including bottomland hardwood forests, in the Yazoo Backwater Area, Mississippi. These wetlands provide important habitat for an extensive variety of wetland dependent animal and plant species, including the federally protected Louisiana black bear, and serve as an integral part of the economic and social life of local residents and sportsmen from around the Nation;
- An action in 1990 on the Two Forks Dam, Colorado, to protect approximately 30 miles of the South Platte River corridor that have extraordinary aquatic resource values, including supporting an outstanding recreational fishery that the State of Colorado has designated a "gold medal" trout stream;
- An action in 1985 on the proposed Bayou aux Carpes flood control project¹ in Louisiana to protect a diverse, 3,000-acre coastal wetland complex consisting of forested wetland, shrub wetland, cypress-tupelo swamp, marsh, and open water; and
- An action in 1985 on Jehossee Island, South Carolina, to protect 900 acres of productive coastal marsh habitat.

¹ Discharges associated with these two projects were evaluated under the Corps' Civil Works program and not under the Corps' Section 404 permitting program.

As the numbers above demonstrate, EPA is able to work with the Corps and permit applicants to resolve issues without exercising its Section 404(c) authority in all but a miniscule fraction of cases. EPA's Section 404(c) procedures provide an effective, meaningful opportunity for EPA, the Corps, and the project proponent to discuss opportunities for reducing environmental impacts and preventing unacceptable adverse effects. These procedures also allow for significant public involvement in EPA's Clean Water Act review process to ensure that the agency's decisions are scientifically sound and transparent.

Spruce No. 1 Surface Mine

EPA's recent decision under Clean Water Act Section 404(c) involved the Spruce No. 1 Surface Mine in Logan County, West Virginia, one of the largest surface coal mining projects ever proposed in the Appalachian coalfields. First proposed in 1997, the project's unprecedented environmental impacts raised significant concerns for federal agencies, local communities, and the public from the beginning. The project was originally authorized under a Clean Water Act Section 404 general permit (also known as a "nationwide" permit). Litigation commenced immediately upon issuance of this permit authorization by environmental and community groups and the project was halted by a Federal District Court. The Corps subsequently agreed to withdraw the permit authorization as part of a settlement agreement. Under this agreement, the Corps agreed to review the proposed Spruce No. 1 Mine under an individual permit application and to prepare an Environmental Impact Statement. EPA was a cooperating agency on the Corps lead EIS.

EPA expressed its concerns about the environmental and water quality impacts of the Spruce No. 1 Mine consistently as scientific studies began to suggest that the associated impacts would be far more significant than initially understood. For example, in 1998 and 2002, EPA expressed significant concerns about the project's potential water quality effects in connection with EPA's review of draft state Clean Water Act NPDES permits for the Spruce No. 1 Mine. EPA noted

that preliminary scientific studies were beginning to demonstrate the potential for significant negative impacts to water quality and wildlife from mining operations similar to the Spruce No. 1 Mine. In 2006, EPA expressed concern and provided technical comments and recommendations for revision of the project in connection with our review under the National Environmental Policy Act.

A second permit for a modified Spruce No. 1 project was issued in January 2007 and was quickly challenged through litigation. Under an agreement with plaintiffs in the litigation, the company agreed to proceed with mining on only a portion of the project site. The permit would have authorized filling approximately 7.5 miles of pristine mountain streams. The project would have impacted three streams: Seng Camp Creek; Pigeonroost Branch; and Oldhouse Branch in addition to their tributaries. The latter two streams and their tributaries (6.6 miles total) represent some of the last remaining, least disturbed, high quality stream and riparian resources within the Coal River watershed and contain important wildlife resources and habitat. These streams are located within the Coal River watershed, one of the most impacted in all of Appalachia. More than 257 past and present surface mining permits have been issued in the Coal River subbasin, and the corresponding mines collectively occupy more than 13 percent of the land area. Within the smaller Spruce Fork subwatershed in which the Spruce No. 1 project is located, more than 34 past and present surface mining permits have been issued, and the corresponding mines collectively occupy more than 33 percent of the land area. The Spruce No. 1 Mine would have occupied a surface area of 2,200 acres, or more than three square miles.

As limited mining operations proceeded on the Spruce No. 1 site, EPA's concerns regarding the Spruce No. 1 Mine increased as a growing volume of scientific studies detailed the adverse water quality impacts associated with surface coal mining projects in central Appalachia and confirmed EPA's earlier articulated concerns.

EPA's Section 404(c) Review of the Spruce No. 1 Mine

EPA began its Section 404(c) review of the Spruce No. 1 Mine in response to significant new scientific information that emerged regarding the impacts of surface coal mining operations on Appalachian watersheds and on the coalfield communities that depend on clean water for their way of life, in addition to the jobs that coal mining provides. This scientific information has been published in peer reviewed scientific literature and supplemented by research by scientists at EPA, FWS and USGS. Peer reviewed science reflects a growing consensus regarding the importance of Appalachian headwater streams and the significant impacts to these streams from surface coal mining – impacts that cannot be readily mitigated by methods such as stream creation or restoration. These advances in scientific knowledge heightened EPA's long standing concerns that the Spruce No. 1 Mine would result in unacceptable adverse effects on wildlife, adverse water quality impacts, and significant cumulative effects.

EPA's Section 404(c) review began in September 2009 with an attempt to work with the Corps and the company to modify the Spruce No. 1 Mine permit in a way that would reduce environmental impacts, prevent the significant environmental effects that science shows would occur, and allow mining to proceed. EPA was eager to discuss alternative project designs that would reduce environmental impacts, assure a cost-effective mining operation, and preserve coal mining jobs on the project site. Unfortunately, while EPA offered various alternatives, EPA and the company were unable to reach agreement on changes to the project that EPA viewed as necessary to reflect best available science and prevent significant adverse effects to the aquatic environment. As a result, EPA Region 3 published a Proposed Determination under Section 404(c) in March 2010. EPA took public comment on its Proposed Determination, gathering more than 50,000 comments, and held a public hearing in Charleston, West Virginia. The majority of these comments supported EPA's Section 404(c) action to prohibit the burial of high-quality streams on the project site. After evaluating these comments, EPA Region 3 issued a Recommended Determination in September 2010 that recommended to EPA Headquarters that the filling of two high quality streams be prohibited.

Following the EPA Region 3 Recommended Determination, EPA Headquarters invited Arch Coal Company, state representatives, land and mineral rights owners, and the Corps to meet regarding the Recommended Determination and to discuss mining alternatives at the Spruce No.1 Mine that could reduce environmental and water quality impacts. Following an in-person meeting on November 16, 2010, EPA again reached out to Arch Coal on November 22 to reiterate its interest in finding alternative mine designs that might reduce anticipated environmental and water quality impacts. Again, while EPA offered various alternatives, EPA and the company could not reach agreement on options for redesigning the mine in ways that would meaningfully reduce anticipated unacceptable adverse environmental and water quality effects. After reviewing EPA Region 3's recommendations and comments provided by the public, the West Virginia Department of Environmental Protection, and Arch Coal Company, EPA Headquarters issued a Final Determination on the Spruce No. 1 Mine in January 2011, prohibiting new impacts to streams at the site but allowing significant ongoing mining activities to proceed.

Conclusions of EPA's Section 404(c) Review

EPA's Final Determination concluded that by filling 6.6 miles of streams on the project site – Pigeonroost Branch, Oldhouse Branch, and their tributaries – the Spruce No. 1 Mine would have resulted in unacceptable adverse environmental effects on wildlife. EPA's scientific review revealed that the wildlife communities in these streams are of high quality in comparison to other streams throughout the central Appalachian region and the State of West Virginia. Pigeonroost Branch, Oldhouse Branch, and their tributaries perform critical hydrologic and biological functions, support diverse and productive biological communities, contribute to prevention of further degradation of downstream waters, and play an important role within the broader watershed.

In their final determination, EPA concluded impacts from the Spruce No. 1 Mine would be unacceptable in several ways. The project would have eliminated more than 35,000 feet – or 6.6 miles – of high quality streams, which would have buried and killed fish, small invertebrates, salamanders, and other wildlife that live in them. The project would have also resulted in indirect impacts to stream life below the valley fills. In addition, in EPA's judgment, the proposed mitigation, which included in part reliance on sediment ditches at the mine, would not have offset the mine's significant environmental impacts to miles of high quality streams that would be buried and polluted by mining at the Spruce No. 1 Mine.

Uniqueness of the Spruce No. 1 Mine

Significant attention has been focused on the fact that EPA took action under Section 404(c) after issuance of the Spruce No. 1 Mine's Clean Water Act permit by the Corps. EPA's action on the Spruce No. 1 Mine represents only the second time that EPA has used its authority under Section 404(c) to withdraw authorization to discharge under a previously issued permit in the 39 years since the Clean Water Act was passed. EPA recognizes that such action should only be taken in exceptional circumstances. The Spruce No. 1 Mine represents such an exceptional set of circumstances.

Adverse environmental and water quality impacts associated with the Spruce No. 1 Mine are among the most extensive and significant of any surface coal mining project ever proposed in the Appalachian coalfields. In the case of the Spruce No. 1 Mine, as the result of a voluntary agreement between environmental and community groups and the mining company, discharges had only occurred on a portion of the project site at the time EPA initiated and completed its Section 404(c) action. EPA's action prohibits only the discharges that had not yet occurred – into Pigeonroost Branch, Oldhouse Branch, and their tributaries – and did not affect ongoing mining activities elsewhere on the project site.

EPA's Section 404(c) decision explicitly states the Agency's willingness to work with the Corps and the company to evaluate a future mining configuration at the Spruce site that avoids the unacceptable adverse effects on wildlife that would have been caused by the Spruce No. 1 Mine. EPA is also committed to working with others, including the mining industry and the states, under the Clean Water Act to encourage mining practices that protect Appalachian communities and the mining jobs on which these communities depend. EPA's repeated attempts to reach out to the company were guided by our recent experience with other mining projects, where it has been demonstrated that we can work together to develop innovative, cost effective, and balanced approaches to mining practices that not only protect water quality, but also create jobs. As EPA has repeatedly stated, its action on the Spruce No. 1 Mine represents an exceptional circumstance, and the Agency is not contemplating the use of Section 404(c) on any other previously permitted surface coal mining projects in Appalachia.

Conclusion

We are committed to work together with our federal and state partners, coal companies, and the public to assure that decisions under the Clean Water Act are consistent with the law and best available science. We also recognize the significant contribution of coal mining to the Nation's economic and energy security. I want to assure you that we will use our Clean Water Act Section 404(c) authority in a responsible and environmentally effective manner, and in careful consideration of potential environmental justice and economic implications. I am confident we can work with our federal and state partners, the public, and the Congress to promote the Nation's energy and economic security and provide the environmental and public health protections required under the law. Appalachian families should not have to choose between healthy watersheds and a healthy economy -- they deserve both. We look forward to working with you to achieve these important goals.

I appreciate the opportunity to be here today. I am pleased to answer any questions you might have.

Oral Testimony of David L. Sunding, University of California at Berkeley
U.S. House of Representatives, Committee on Transportation and Infrastructure
Subcommittee on Water, Resources and Environment
May 11, 2011

Chairman Gibbs, members of the subcommittee, it is an honor to speak here today.

This Committee is considering an issue of regulatory policy that has significant implications for the vast range of public and private projects that must receive permits under Section 404 of the Clean Water Act. As you are aware, in 2007 the Army Corps of Engineers issued a Section 404 permit to Arch Coal in connection with the Spruce No. 1 Mine located in Logan County, West Virginia. Arch Coal subsequently operated the mine in compliance with its permit. Nonetheless, three years after the Corps issued the 404 permit, EPA moved to withdraw the authorization granted to Arch Coal. Both the Corps and the State of West Virginia disagreed with the EPA decision, finding that there was no reason to take away the permit. This precedential decision by EPA -- to exercise its limited authority to revoke the permit over the objections of the Corps and State has the potential to affect a wide range of economic activities that require authorization under Section 404 of the Clean Water Act, affecting not just project proponents, but many others as well.

There are a wide range of public and private sector activities permitted under Section 404 of the Clean Water Act. These activities are vital to the American economy, and include: utility infrastructure; housing and commercial development; renewable

energy projects like wind, solar, and biomass; pipeline and electric transmission; transportation infrastructures including roads and rail; agriculture; and many others. The Corps estimates that over \$220 billion of investment annually is conditioned on the issuance of Section 404 permits. Given the breadth of the statute, a large share of public and private infrastructure or development projects must receive and depend on the certain operation of the 404 permit.

EPA's precedential decision to override the judgment of the Corps of Engineers in this case, alters the incentives to invest in projects requiring a permit under Section 404. Project development usually requires significant capital expenditure over a sustained period of time, after which the project generates some return. Actions like the EPA's that increase uncertainty, raise the threshold for any private or public entity to undertake the required early-stage investment. In this way, the EPA's action will chill investment in activities requiring a 404 authorization.

Increasing the level of uncertainty can also reduce investment by making it more difficult to obtain project financing. Land development activities, infrastructure projects and the like often require a significant level of capital formation. Reducing the reliability of the Section 404 permit will make it harder for project proponents to find financing at attractive rates as lenders and bondholders will require higher interest rates to compensate for increased risk, and some credit rationing may also result.

It is worth remembering that public and private activities requiring Section 404 authorization generate significant indirect benefits to affiliated industries. Thus, reduced levels of investment translate directly into lost jobs and lost economic activity. You have heard testimony about the indirect impacts of mining on the economies of the Appalachian states. Similar indirect benefits are evident for housing and commercial development, road building, and other activities. In the case of housing construction (which, over the long run accounts for as much as 15 percent of economic activity in the U.S.), every \$1 spent on new housing construction, for example, produces roughly \$2 in total economic activity, and every \$1 billion in residential construction generates nearly 12,000 new jobs. Regulation that creates a disincentive for investment in development has implications for these indirect economic benefits as well.

A reduced level of investment in projects requiring a Section 404 permit would have effects to go far beyond the industry participants themselves. Private projects authorized under Section 404 increase the supply of housing, commercial development and the like. When development projects are not undertaken, these consumer benefits are reduced or lost altogether. Public sector activities like road building and repair, and utility infrastructure also contribute to the quality of life throughout the nation, as evidenced by the frequently large benefit-cost ratios associated with transportation infrastructure projects, for example. Similarly, other types of public land development projects such as libraries, schools, and emergency response infrastructure generate

significant levels of economic welfare, some part of which would be at risk as a result of the EPA's actions with respect to the Spruce Mine.

Finally, it should also be remembered that landowners could suffer losses in wealth as a result of the EPA's action. In a competitive land market, land prices reflect the discounted value of the returns earned from dedicating land to its highest and best use. For undeveloped land, this sum is typically equal to the value of rents when the land is in an undeveloped condition, plus the amount developers are willing to pay for land when they initiate their project. Regulation that lowers the profits from and development will be capitalized into current land values, meaning that the equilibrium market price of land will be lower as a result. Thus, the EPA's action will, to a degree determined by local market conditions, be borne by landowners in areas containing wetlands and other waters of the United States.

I am currently conducting a study of these various disincentive effects and economic impacts, and hope to have results on their importance within the next few weeks. I will make the results of the study available to the committee, and look forward to discussing them with you and your staff.

STEVEN L. BESHEAR
GOVERNOR



LEONARD K. PETERS
SECRETARY

ENERGY AND ENVIRONMENT CABINET
OFFICE OF THE SECRETARY
500 MERO STREET
12TH FLOOR, CAPITAL PLAZA TOWER
FRANKFORT, KY 40601
TELEPHONE: (502) 564-3350
FACSIMILE: (502) 564-3354
www.eec.ky.gov

May 17, 2011

Representative Bob Gibbs
Chairman
Water Resources and Environment Subcommittee
B-370A Rayburn House Office Building
Washington, DC 20515-6261

Dear Chairman Gibbs:

I want to thank you again for the opportunity to present testimony to the subcommittee earlier this month regarding EPA's actions relative to Appalachian coal mine permitting. The second hearing on the subject on May 11 was particularly interesting, especially the testimony of Nancy Stoner, Acting Assistant Administrator for the Office of Water.

During Ms. Stoner's testimony, there were several areas where I believe further clarification is needed, and I have written to her to clarify several important issues related to EPA's permitting actions on Appalachian coal mine permitting. I would like to respectfully request that the attached letter to Ms. Stoner be submitted as part of the record related to the hearings on May 5, 2011, and May 11, 2011. I make this request because it is important to clarify several points regarding permit delays as a result of EPA's April 1, 2010, "interim final guidance." In addition, I respectfully request the accompanying documents (the spreadsheet showing EPA objections to Kentucky permits; the ECOS Interim Guidance Resolution; and the National Mining Association Memorandum Opinion) be submitted to the record, as well. These documents all serve to demonstrate the over-reaching authority of the U.S. Environmental Protection Agency in its actions related to Appalachian coal mining.

Thank you for your consideration of these requests.

Sincerely yours,

Leonard K. Peters
Secretary

Enclosure

STEVEN L. BESHEAR
GOVERNOR



LEONARD K. PETERS
SECRETARY

ENERGY AND ENVIRONMENT CABINET

OFFICE OF THE SECRETARY
500 MERO STREET
12TH FLOOR, CAPITAL PLAZA TOWER
FRANKFORT, KY 40601
TELEPHONE: (502) 564-3350
FACSIMILE: (502) 564-3354
www.eec.ky.gov

May 17, 2011

Ms. Nancy Stoner
Acting Assistant Administrator
Office of Water
US Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 4101M
Washington, DC 20460

Dear Acting Assistant Administrator Stoner:

This letter serves as a follow-up to your appearance and testimony at the May 11, 2011, Water Resources and Environment Subcommittee hearing regarding USEPA mining policies. A number of serious issues were discussed at the hearing that merit further clarification and follow-up for both USEPA and the subcommittee members. My comments in this letter have been prepared in consultation with Mr. R. Bruce Scott, Commissioner of Kentucky's Department for Environmental Protection in our Energy and Environment Cabinet.

Your testimony primarily focused on issues and processes related to the Clean Water Act (CWA) Section 404 permitting program. As you are aware, in all but less than a handful of states, the CWA 404 permitting program is administered by the United States Army Corps of Engineers (USACE). As such, the issuance of CWA 404 permits is predominantly a federal action as opposed to a delegated state action.

There was substantial discussion during the hearing regarding the Enhanced Coordination Process (ECP) that was initiated as a part of the June 11, 2009, Memorandum of Understanding (MOU) between USEPA, U.S. Department of the Army, which includes the USACE, and the U.S. Department of the Interior, which includes the Office of Surface Mining (OSM). In particular, there appeared to be conflicting information regarding how many CWA 404 permits have been issued since the June 11, 2009, ECP was initiated. As a reminder to USEPA and the subcommittee members, there were 108 pending CWA 404 applications identified to be subjected to the new ECP process. As that relates to Kentucky-specific mining operations, there were 49 operations among that list of 108 pending CWA 404 permit applications. Of those 49, one permit has been issued; 34 have been withdrawn; and 14 are pending. The ECP, which established enhanced oversight by USEPA, clearly has not increased the speed of the CWA 404 permitting process, as was testified to in the subcommittee; rather the ECP has effectively stopped the processing of those applications pending in Kentucky that have been subject to the ECP.

Ms. Nancy Stoner
May 17, 2011
Page No. 2

With this in mind, we would notify both USEPA and the subcommittee members of one observation in this regard. Please note the bottom of page 20, top of page 21, of the attached United States District Court for the District of Columbia Memorandum Opinion filed January 14, 2011, in the matter of the National Mining Association (plaintiff) v. Lisa Jackson Administrator, USEPA, Civil Action No. 10-1220 (RBW).

The Court states:

"Again, for reasons that mirror its finality analysis, the Court finds the plaintiff's arguments more persuasive and agrees that the plaintiff is likely to prevail on its claim that the EPA has exceeded its statutory authority. As to the MCIR Assessment, the EPA, and only the EPA, evaluates pending permits to determine if they will be subject to the EC Process. Pl.'s PI Mem. at 8. It seems clear, however, that Congress intended the EPA to have a limited role in the issuance of Section 404 permits, and that nothing in Section 404 of the Clean Water Act gives the EPA the authorization to develop a new evaluation or permitting process which expands its role. Likewise, it seems clear that with the implementation of the Guidance Memorandum the EPA has encroached upon the role carved out for the states under the Clean Water Act by setting region-wide conductivity standards. In short, the EPA has modified the Section 404 permitting scheme, authority not granted to it under the Clean Water Act, and has similarly taken an expansive role beyond what was afforded to it in determining Section 303 Water Quality Standards. Accordingly, the plaintiff has established that it will likely succeed in showing that the EPA has exceeded its statutory authority under the Clean Water Act by adopting and implementing the MCIR Assessment, the EC Process, and the Guidance Memorandum."

As such, while this legal action is clearly still pending, the Court has suggested that USEPA has exceeded its statutory authority with respect to the matters discussed at the May 11, 2011, hearing.

A topic that unfortunately was not discussed during the May 11, 2011, hearing relates to the processing of CWA 402 permits, or NPDES permits as they are commonly referred. In the matter of CWA 402 permits, we believe that USEPA's actions have arguably been even more beyond its authority than in its oversight of the CWA 404 permitting process. As you are aware, in addition to often needing a CWA 404 permit, a coal mining operation always needs a CWA 402 permit. In that regard, the process to obtain a CWA 402 permit is even more important to a coal mining operation given that such a permit is always needed to operate, whereas a CWA 404 permit is not always required. With respect to the April 1, 2010, interim final guidance, this issue is of particular importance to state environmental protection agencies given that most states are delegated to administer the CWA 402 program, whereas less than a handful of states are delegated to administer the CWA 404 program.

Had USEPA or the subcommittee discussed the processing of CWA 402 permits post-April 1, 2010, the results would have been very informative. For example, attached is a spreadsheet listing of all CWA 402 permits that USEPA has objected to over the period January 1, 2000, to October 15, 2010. This information was provided to Kentucky by USEPA on November 5, 2010, in response to a September 30, 2010, request by Kentucky Department for Environmental Protection Commissioner R. Bruce Scott. As

Ms. Nancy Stoner
May 17, 2011
Page No. 3

indicated by the spreadsheet listing, USEPA has objected to 148 proposed draft CWA 402 permits over the course of that nearly ten-year period. Of the 148, 50 (or 33.8%) of those CWA 402 permit objections have occurred since early 2009. Had this spreadsheet been further completed up to present, Kentucky alone would have added an additional 10 USEPA permit objections to the list, or 60 of the 158. Thus, nearly 40 percent of all of the CWA 402 permit objections during the past 10 years have occurred since early 2009, and this doesn't include objections that may have occurred in other states since October 15, 2010. To illuminate further what the facts actually show, at least 38 of the 60 objections that have occurred since January 20, 2009, have been for coal mining operations, and of those 38, all but 2 have occurred since April 1, 2010.

Clearly, all of the facts show that USEPA has established new requirements and oversight procedures of coal mining operations since April 1, 2010, the date consistent with the issuance of USEPA's interim final guidance for coal mining operations in Appalachia. Testimony provided at the May 11, 2011, hearing repeatedly indicated that the April 1, 2010, guidance is not binding. Of particular note, both Congressman Cravaack and Congressman Lankford (see the 2:30:16 to 2:32:20 mark of the hearing tape) specifically asked about whether a permit could be denied (objected to) as a result of the guidance, and the answer provided was no, the guidance cannot be used as the basis for such an action (paraphrased). Yet, the evidence both in terms of the data provided above and the large amount of correspondence sent by USEPA in response to proposed draft CWA 402 permits for USEPA review, indicate that the April 1, 2010, EPA interim final guidance has in fact been the basis for formal USEPA objections to CWA 402 proposed draft permits by delegated states in at least 36 instances, and has held up the permitting actions in dozens of other instances.

With this in mind, we would notify both USEPA and the subcommittee members of the attached resolution from the Environmental Council of States (ECOS), which was unanimously adopted March 30, 2011, by all of the state environmental agency ECOS members. ECOS clearly states that USEPA should not use its objection authority to object to proposed state draft permits when based entirely or in part on guidance. Testimony provided by Ms. Teresa Marks at the May 5, 2011, hearing on the behalf of ECOS outlines the ECOS position in this matter. Please keep in mind that ECOS is made up of states that have a variety of views and perspectives regarding how best to address environmental protection issues. The fact that ECOS is unanimous in its position relative to how EPA functions with respect to its use of guidance and its objection authority shows the bipartisan nature of this issue. Specific action should be considered with how USEPA uses guidance and its objection authority. We would remind everyone that while the specific issue at hand relates to coal mining and a handful of states, the next instance could be on another issue or in another state, which in fact has already occurred. In that regard, any action should consider how USEPA functions as a whole (air, waste, water, etc.) in its use of guidance and its objection powers. For example, currently, USEPA is insulated from judicial challenge in making a permit objection and is under no time obligation to make a final agency determination, effectively shutting down the state-delegated permitting process with no recourse available to the state or the permit applicant. This must change. If requested, we would be willing to work with Congress to provide recommended changes to provide appropriate balance to the state-federal relationship and to ensure that future overstepping by USEPA does not occur.

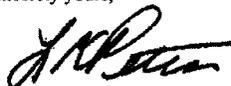
Finally, we would remind USEPA that Kentucky has been proactively working with USEPA Region IV for approximately two years on revising our CWA 402 permits for coal mining operations, and in particular in the last 8 months in an effort to resolve the 21 currently pending proposed permit objections. In so doing, several dozen pending permit applications have been temporarily placed on hold while these most recent discussions have cooperatively been occurring between Kentucky and the

Ms. Nancy Stoner
May 17, 2011
Page No. 4

USEPA staff in Atlanta. To that end, Kentucky has proposed numerous changes to its individual CWA 402 permits to the full satisfaction of all of Region IV's concerns. In particular, Kentucky has developed a biological approach that will measure and limit the actual site-specific effect (rather than EPA's guidance conductivity benchmark, which has no force of law and is intended for region-wide consideration rather than site-specific use) of a coal mining operation consistent with applicable statutory and regulatory requirements to implement Kentucky's state narrative water quality standard for conductivity to protect and maintain water quality. In light of USEPA's clear testimony before the committee on May 11, 2011, that the USEPA guidance cannot be the basis for permit objection, we therefore look forward to Region IV's timely acceptance of our revised draft permits. We have worked extensively with regional staff to resolve all of the issues expressed by USEPA Region IV so that the current impasse can be resolved to the satisfaction of all parties.

I want to inform you that I am sending this letter to Chairman Bob Gibbs and others noted below.

Sincerely yours,



Leonard K. Peters

cc: Rep. Bob Gibbs, Chairman, Water Resources and Environment Subcommittee
Ms. Lisa Jackson, Administrator, USEPA
Ms. Gwen Keyes-Fleming, Regional Administrator, USEPA Region IV
Mr. Steve Brown, Executive Director, Environmental Council of the States
Rep. Nick Rahall, Ranking Member, House Transportation and Infrastructure Committee

R e g i o n	Facility Name	MPEIS permit number	Date of Specific Permit Objection	EPA Specific Permit Objection - C72000 to present		If EPA issued, when did permit & enforcement oversight revert back to SARG?	Comments
				Name of Facility in respect of specific EPA objection	Date of Permit Issuance following specific permit objection		
R1	Hartford Quectee MWTF, VT	VT0100978	3/15/2010		Not yet issued	N/A	N/A
R1	Beacon Falls, CT	CT0010181	6/18/2010		Not yet issued	N/A	N/A
R3	Rehoboth Beach WWP	DE0020028	10/10/2003		9/11/2005	State	N/A
R3	Brockway Area SA	PA0028428	9/23/2005		Not yet issued	State	Draft permit
R3	Berwick Area ISA	PA0032448	11/14/2000		8/29/2001	State	N/A
R3	Maharoy City MA	PA0070041	12/21/2000		8/21/2001	State	N/A
R3	Chalfont-New Britain Twp	PA0055917	4/17/2001		1/19/2002	State	N/A
R3	AK Steel Corp	PA0086443	11/21/2000		5/1/2002	State	N/A
R3	City of Pittsburgh	PA0317611	11/11/2000		4/23/2004	State	N/A
R3	Shenango inc - Neville	PA0024537	2/14/2002		9/19/2003	State	N/A
R3	Southwest Delaware County Mun	PA0027383	3/20/2002		3/11/2003	State	N/A
R3	Woodland Tube Co - Sharon	PA0006578	1/23/2001		7/29/2003	State	N/A
R3	North East Boro	PA0033943	4/6/2001		7/10/2003	State	N/A
R3	New Freedom Boro Auth	PA0043357	12/17/2003		3/30/2004	State	N/A
R3	Upper Moreland-Hatboro ISA	PA0025576	6/11/2001		9/26/2006	State	N/A
R3	Orion Power Midwest - Chesw	PA0016427	2/14/2002		8/6/2007	State	N/A
R3	Lemoyne Boro STP	PA0026441	4/25/2009		8/21/2009	State	N/A
R3	A&G Coal Co - Iron Rock Ridge	VA1003484	12/09/2009		Not yet issued	State	Draft permit
R3	Tennessee Virginia Generating Station	VA0090905	2/25/2002		5/29/2002	State	N/A
R3	Grief Brothers	VA0096408	9/25/2001		6/28/2002	State	N/A
R3	Argus Energy - Godfrey Trace No. 2	WV1020013	5/27/2010		Not yet issued	N/A	Pending
R3	Alex Energy - Layford No. 5	WV1022113	3/23/2008		see Comments	N/A	Withdrawn
R3	Catenary Coal - Samspar Mine	WV1014684	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Coal-Mac DBA Phoenix Coal	WV0088764	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Mingo Logan Coal - Wolfpen/7, C	WV0056590	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Southern WV Resources - Lug	WV0044172	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Consolidation Coal Co.	WV0050558	2/9/2010		Not yet issued	N/A	Pending
R3	Mingo Logan Coal - Ancillary	WV0065737	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Jack's Branch Coal Co.	WV0093939	10/8/2010		Not yet issued	N/A	Pending
R3	Mingo Logan Coal - Ardrossan	WV0096369	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Catawba Coal - Left Fork	WV0099520	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Appagee Coal - Ruffner Mine	WV1048466	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Mingo Logan Coal - Left Fork 2	WV1028511	8/10/2010		Not yet issued	N/A	Pending
R3	Maple coal - Sycamore, N & S	WV0094889	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	CG Eastern - Evergreen Mining	WV0065889	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Mingo Logan Coal - Mondb	WV1011120	5/27/2010		see Comments	N/A	Application for Modification Denied
R3	Mingo Logan Coal - Hobot Gut	WV1017021	7/29/2002		8/7/2007	State	* Objection withdrawn, 12/3/2002, renewed in 2007
R3	Werton Steel Corp	WV0003336	12/2/2002		3/4/2003	State	N/A
R4	Timber Energy (Telega Power)	FL0039951	4/15/2003		1/28/2010	State	N/A

EPA Specific Permit Objections - C17200 to present							
R e g i o n	Name of Facility in receipt of specific EPA objection	NPDES permit number	Date of Specific Permit Objection	Date of Permit Issuance following specific permit objection	Permit was issued by State or EPA?	If EPA issued, when did permit & enforcement oversight revert back to state?	Comments
R4	Rayonier Inc.	FLO00701	9/30/2003	12/1/2004	State	N/A	
R4	Premier Chemical	FLO02607	7/28/2003	6/10/2008	State	N/A	
R4	Laurel Mountain Resources	KY0108715	9/16/2010	Not yet issued	N/A	N/A	
R4	Labco LLC	KY0105593	9/28/2010	Not yet issued	N/A	N/A	
R4	Near/Co Inc	KY0107412	9/29/2010	Not yet issued	N/A	N/A	
R4	Clintwood Elkiron Coal Co.	KY0107310	9/29/2010	Not yet issued	N/A	N/A	
R4	Enterprise Mining Co LLC	KY0107608	9/29/2010	Not yet issued	N/A	N/A	
R4	PJA Co Inc	KY0107603	9/29/2010	Not yet issued	N/A	N/A	
R4	Bahly & Hamilton Enterprises	KY042156	9/29/2010	Not yet issued	N/A	N/A	
R4	Sandlick Coal Company	KY0108951	9/29/2010	Not yet issued	N/A	N/A	
R4	Sidney Coal Company	KY0107085	9/29/2010	Not yet issued	N/A	N/A	
R4	Mart/Co Inc	KY0107778	9/29/2010	Not yet issued	N/A	N/A	
R4	Mart/Co Inc	KY0107760	9/29/2010	Not yet issued	N/A	N/A	
R4	CNA Holdings	NC0004952	11/24/2008	4/24/2009	State	N/A	
R4	Blue Ridge Paper	NC0000272	3/22/2010	5/26/2010	State	N/A	
R4	AL Phase II MSA General Permit	ALR040000	9/9/2010	Not yet issued	N/A	N/A	
R4	LCWSC/Clinton-Joanna WWTP	SC0037574	8/18/2004	12/1/2005	EPA	6/1/2010	
R4	City of Lancaster/Catawba River WWTP	SC0046892	8/18/2004	9/30/2005	EPA	Pending	Administratively continued. State in process of renewing.
R4	Town of Moncks Corner WWTP	SC0021598	8/18/2004	5/31/2006	EPA	N/A	
R4	Town of Batesburg-Leesville WWTP	SC0034465	8/18/2004	12/1/2005	EPA	4/0/2010	
R4	Midcon North American Sandy Springs	SC0039701	8/18/2004	12/1/2005	EPA	11/1/2008	
R4	ECW&A/Johnson H Plant	SC025691	8/18/2004	9/1/2006	EPA	3/1/2010	
R4	City of Columbia Meters WWTP	SC0026940	8/25/2004	9/1/2009	EPA	1/1/2010	
R4	Greenwood Metro District/Wilson Creek WWTP	SC0031709	8/25/2004	2/1/2006	EPA	6/1/2009	
R4	Laurens CW/Co/City of Laurens	SC0020702	7/20/2004	2/1/2006	EPA	1/1/2010	
R4	Trimmonsville WWTP	SC0025356	8/26/2004	8/31/2006	EPA	N/A	
R4	Lexington/Coventry Woods WWTP	SC0026735	9/1/2004	5/1/2006	EPA	2/1/2010	
R4	Alpine Utilities WWTP	SC0029483	9/3/2004	12/1/2005	EPA	7/1/2010	
R4	WCHSA/Grove Creek WWTP	SC0024317	9/13/2004	5/31/2006	EPA	N/A	
R4	Town of Ninety Six WWTP	SC0036048	9/22/2004	6/23/2006	EPA	N/A	
R4	Ware Shoals/Dairy Street WWTP	SC0020314	9/22/2004	2/1/2006	EPA	N/A	
R4	Town of Wagener WWTP	SC0026204	9/29/2004	2/1/2006	EPA	12/1/2010	
R4	Honeywell Nylon, LLC Columbia Site	SC0065557	8/18/2004	9/22/2008	EPA	N/A	
R4	Million Aberdeen Plant	SC0030353	8/18/2004	3/1/2006	EPA	6/1/2010	
R4	SCRG/Copa Station	SC0045772	9/22/2004	9/1/2006	EPA	11/1/2009	
R4	Eastley/Middle Branch WWTP	SC0039853	9/29/2004	7/29/2006	EPA	N/A	
R4	HSL, Inc.	SC0001155	7/23/2004	see Comments	EPA	N/A	Facility Closed.
R4	Welcore, Inc.	SC0043419	8/18/2004	11/1/2006	State	11/1/2006	
R5	Isabella County Landfill	M0054603	6/4/2004	5/17/2005	EPA (Triball)	N/A	Discharge terminated, permit inactive since 11/9/05
R5	TPP Petroleum, Inc.	M0056537	11/5/2001	9/3/2002	EPA	N/A	

EPA Specific Permit Objection - CY2000 to present							
Facility ID	Name of Facility in respect of specific EPA objection	NPDES permit number	Date of Specific Permit Objection	Date of Permit Issuance following specific permit objection	Permit was issued by State or EPA?	If EPA issued, when did permit & enforcement oversight revert back to state?	Comments
R5	Darton Power and Light	OH0004316	9/28/2010	Not yet issued	N/A	N/A	
R5	Wausau-Mosinee Paper Corporation	WI0003671	7/8/2005	7/7/2005	State	N/A	
R5	US Steel Gary Works	IN0000281	10/16/2007	1/22/2010	State	N/A	
R5	General Permit Inrv. Sewage Treatment Systems	ILG4	11/21/2007	Not yet issued	N/A	N/A	EPA is preparing to federalize this permit
R6	Burling.	AR0048801	6/10/2003	10/31/2003	State	N/A	
R6	Benton Packing Company	AR0049526	06/20/03	9/29/2003	State	N/A	
R6	Henonville	AR0022403	06/20/03	11/20/2003	State	N/A	
R6	Chesville	AR0022187	06/20/03	11/20/2003	State	N/A	
R6	Eastman Chemical Company	AR0033386	09/20/03	10/31/2003	State	N/A	
R6	El Dorado Chemical	AR0000754	2/3/2005	2/28/2007	State	N/A	
R6	El Dorado Joint Pipeline	AR0050356	02/03/05	2/28/2007	State	N/A	
R6	International Paper - Pine Bluff	AR0001970	11/15/04	05/31/05	State	N/A	
R6	Jonesboro - West Plant	AR0037907	09/10/04	01/31/05	State	N/A	
R6	Maumelle SD #650	AR0033626	06/10/03	09/30/03	State	N/A	
R6	Osage Bison	AR0050024	4/9/2004	12/31/2004	State	N/A	
R6	NACA	AR0050024	1/18/2005	10/7/2009	State	N/A	
R6	Russellville	AR0021768	07/28/04	02/28/05	State	N/A	
R6	Sand and Gravel and Rock Quarry Facilities	AR0000000	03/12/04	05/31/05	State	N/A	
R6	Small MSA	AR0040000	09/25/03	12/31/03	State	N/A	
R6	Springdale	AR0022463	10/20/03	02/29/04	State	N/A	
R6	Shell Oil Company*	TX0024863	4/16/2004	7/29/2004	State	N/A	
R6	City of Seguin	TX0022386	3/13/2002	3/22/05	State	N/A	
R6	K-3 Resources (Lba Biosolids)	TX0025909	7/26/2002	9/10/2002	State	N/A	
R6	Petroleum Bulk Storage*	TX0400000	8/23/2004	4/23/2007	State	N/A	
R6	City of Newville*	TX0113859	4/16/2002	3/17/2005	State	N/A	
R6	Temple Island*	TX0102156	9/9/2003	8/4/2005	State	N/A	
R6	Harris County MUD*	TX0100161	4/18/2002	10/19/2004	State	N/A	
R6	City of Henderson	TX0091910	10/1/2002	9/27/2004	State	N/A	
R6	North Mission Glen MUD*	TX0087271	10/15/2002	9/29/2005	State	N/A	
R6	Cibola Creek Municipal Authority	TX0077432	11/22/2002	4/25/2005	State	N/A	
R6	City of Cooperas Cove*	TX0098950	3/14/2002	7/23/2002	State	N/A	
R6	City of Seagoville*	TX0056426	3/27/2002	6/29/2002	State	N/A	
R6	City of Houston	TX0034886	3/6/2002	12/29/2005	State	N/A	
R6	City of Houston*	TX0034875	8/1/2002	6/24/2003	State	N/A	
R6	City of Fort Worth*	TX0041235	12/21/2001	11/28/2005	State	N/A	
R6	City of Corpus Christi*	TX0047084	3/7/2002	11/22/2002	State	N/A	
R6	City of Austin*	TX0046981	3/9/2002	5/31/2005	State	N/A	
R6	ARKLA	LA0123432	6/22/2007	Not yet issued	EPA	N/A	EPA is preparing to federalize this permit
R6	City of Garland	TX0001001	3/10/2005	12/22/2005	State	N/A	
R6	City of San Antonio TXDOT, SAWS	TX0001301	10/17/2003	9/28/2007	State	N/A	

EPA Specific Permit Description: C7200 to present							
R	Name of Facility in case of specific EPA objection	NPDES permit number	Date of Specific Permit Objection	Date of Permit issuance following specific permit objection	Permit was issued by State or EPA?	If EPA issued, when did permit & enforcement oversight revert back to state?	Comments
R6	City of Bridge City	T00025500	2/7/2002	Not yet issued	N/A	N/A	Expired as of 3/1/2001
R6	City of Midlothian*	T00025411	4/2/2002	11/12/2002	State	N/A	
R6	City of Port Lavaca*	T00047562	10/21/02	12/2/2002	State	N/A	
R6	Steeley Lumber*	T00133421	9/2/2003	6/26/2007	State	N/A	
R6	City of Logansport*	T00022317	10/21/2001	5/7/2002	State	N/A	
R6	San Jacinto River Authority	T00054186	1/6/2006	4/12/2006	EPA	N/A	In Appeal.
R7	Metcalfe, IA	I00042650	3/17/2008	3/1/2010	State	N/A	
R7	Johnson County, KS (JCCO) - Nelson	K50055491	5/19/2006	Not yet issued	N/A	N/A	Administratively Continued
R7	JCCO - Douglas Smith	K50113601	3/2/2009	Not yet issued	N/A	N/A	Administratively Continued
R7	JCCO - Tomshawk	K50055484	3/2/2009	Not yet issued	N/A	N/A	Administratively Continued
R7	St Charles, MO	MO0095831	5/1/2008	2/12/2009	State	N/A	
R8	Pumkin Creek Watershed General Permit for CDM	WYG280000	3/13/2009	Not yet issued	N/A	N/A	Pending
R8	Willow Creek Watershed General Permit for CDM	WYG290000	3/13/2009	Not yet issued	N/A	N/A	Pending
R10	SHORELINE SANITARY DISTRICT TREATMENT FACILITY	OR0022550	3/9/2009	11/19/2009	State	N/A	
R10	CITY OF CHILOQUIN WWTP	OR0023220	5/1/2009	Not yet issued	N/A	N/A	
R10	CITY OF COBURG WASTEWATER RECLAMATION FACILITY	OR0044628	3/20/2009	7/20/2009	State	N/A	
R10	CITY OF PORTLAND BUREAU OF ENVIRONMENTAL SERVICE FA	OR0026505	4/20/2006	Not yet issued	State	N/A	
R10	CITY OF ALANVILLE SEWAGE TREATMENT PLANT	OR0023721	5/1/2006	2/8/2010	State	N/A	
R10	CITY OF TILLAMOOK WWTP	OR0020664	3/2/2009	11/23/2009	State	N/A	
R10	SUNDOWN SANITARY DISTRICT TREATMENT FACILITY	OR0027218	3/2/2009	11/16/2009	State	N/A	
R10	USDALUS FOREST SERVICE COLUMBIA RIVER GORGE NATION	OR0040310	3/2/2009	11/19/2009	State	N/A	
R10	WESTPORT SEWER SERVICE DISTRICT TREATMENT PLANT	OR0031496	3/2/2009	Not yet issued	State	N/A	
R10	CITY OF WARRENTON TREATMENT FACILITY	OR0020817	3/2/2009	Not yet issued	N/A	N/A	
R10	CITY OF SPOKANE RIVERSIDE PARK WATER RECLAMATION FA	WA0022473	12/3/2007	Not yet issued	N/A	N/A	
R10	LIBERTY LAKE SEWER AND WATER DISTRICT	WA0004514	12/3/2007	Not yet issued	N/A	N/A	
R10	INLAND EMPIRE PAPER COMPANY	WA0000892	12/3/2007	Not yet issued	N/A	N/A	
R10	KAISER ALUMINUM FABRICATED PRODUCTS LLC	WA0000892	12/3/2007	Not yet issued	N/A	N/A	
R10	CITY OF PORTLAND COLUMBIA BOULEVARD WWTP	OR0026805	4/6/2006	Not yet issued	N/A	N/A	



Resolution Number 11-1
Approved March 30, 2011
Alexandria, Virginia

As certified by
R. Steven Brown
Executive Director

**OBJECTION TO U.S. ENVIRONMENTAL PROTECTION AGENCY'S IMPOSITION
OF INTERIM GUIDANCE, INTERIM RULES, DRAFT POLICY AND
REINTERPRETATION POLICY**

WHEREAS, protection of public health and the environment is among the highest priorities of governments, requiring a united and consistent effort at all levels of government; and

WHEREAS, U.S. Congress has provided by statute for delegation, authorization, or primacy (hereinafter referred to as delegation) of certain federal program responsibilities to states; and

WHEREAS, states that have received delegation have demonstrated to the U.S. Environmental Protection Agency (U.S. EPA) that they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies; and

WHEREAS, states have developed and demonstrated the capability to maintain existing and assume new delegations; and

WHEREAS, U.S. Congress in environmental statutes and the Administrative Procedure Act (APA) establishes a formal rulemaking process to provide a mechanism for public comment, offering amendments, or allowing states to object, and providing standards for judicial review of agency actions; and

WHEREAS, it is a fundamental responsibility of U.S. EPA to work cooperatively and collaboratively with the states as co-regulators to ensure that regulations and programs can be effectively implemented; and

WHEREAS, some states are required by state law to conduct their own rulemaking prior to implementing federal regulations; and

WHEREAS, some states are prohibited by state law from implementing any requirement more stringent than the federal requirement; and

WHEREAS, the states have limited options to challenge U.S. EPA imposition of objection authority based on interim guidance, interim rules, draft policy or reinterpretation policy, and the Courts are inconsistent in their findings for judicial review in these cases; and

WHEREAS, the processes, rather than the environmental substance of the underlying rules, U.S. EPA may be using to impose interim guidance, interim rules, draft policy or reinterpretation policy, may result in a state agency being forced to choose whether it will comply with either U.S. EPA's policy or its own state laws; and

WHEREAS, U.S. EPA interim guidance, interim rules, draft policy or reinterpretation policy may not be legally binding and states using these as the basis for issuing permits or other actions may result in delays and potential job losses; and

WHEREAS, U.S. EPA's continued imposition of interim guidance, interim rules, draft policy or reinterpretation policy may lead to uncertainty regarding actions taken by state and federal regulatory bodies; and

WHEREAS, ECOS published an ECOS Green Report, "Recent U.S. EPA Positions on Interim Guidance, Rules, and Policies", in December 2010 that presents known cases of these policies and discusses some of their implications for state and federal roles in implementing national environmental policies.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Believes that U.S. EPA should adhere to the requirements of federal environmental statutes, the APA and its own guidance governing rulemaking to provide for adequate public notice and comment on proposed and final actions;

Believes that U.S. EPA should engage the states as co-regulators prior to and during the rulemaking process seeking early, meaningful, and substantial involvement from states to ensure high quality regulations that can be effectively implemented by delegated states;

Believes that U.S. EPA should minimize the use of interim guidance, interim rules, draft policy and reinterpretation policy and eliminate the practice of directing its regional or national program managers to require compliance by states with the same in the implementation of delegated programs;

Urges U.S. EPA, when interim guidance, interim rules, draft policy or reinterpretation policy is deemed necessary, to consult with states and require its regional and national program managers at the earliest possible opportunity to engage in meaningful and consultative discussion with each of their states about the content of interim guidance, interim rules, draft policy or reinterpretation policy and the practicalities of implementation;

Urges U.S. EPA to make its guidance, rules and policies final prior to seeking state adherence and implementation;

Believes U.S. EPA should not use its objection authority when based entirely or in part on interim guidance, interim rules, draft policy or reinterpretation policy;

Requests that for formal objections to state-issued permits, U.S. EPA modify its processes to designate that its objection is a final agency determination subject to judicial review;

Further requests that U.S. EPA establish firm and timely deadlines for it to issue or deny those permits to which it has objected; and

Request that a copy of this resolution be transmitted to the appropriate U.S. Senate and House of Representatives committees and to the U.S. EPA Administrator.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL MINING ASSOCIATION,)	
)	
Plaintiff,)	
)	
v.)	
)	
LISA JACKSON Administrator,)	Civil Action No. 10-1220 (RBW)
U.S. ENVIRONMENTAL PROTECTION)	
AGENCY, et al.,)	
)	
Defendants,)	
)	
SIERRA CLUB et al.,)	
)	
Defendant-Intervenors.)	

MEMORANDUM OPINION

The plaintiff brings this action against the federal defendants pursuant to the Clean Water Act, 33 U.S.C. § 1251 (2006), the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (2006), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006), challenging a series of memoranda and a detailed guidance released by the Environmental Protection Agency ("EPA"). The parties appeared before the Court on December 15, 2010, for argument on the federal defendants' motion to dismiss, Defendants' Motion to Dismiss ("Defs.' Mot. to Dismiss"), and the plaintiff's motion for a preliminary injunction, Plaintiff's Motion for a Preliminary Injunction ("Pl.'s PI Mot."). For the reasons that follow, the Court denies both the motion to dismiss and the motion for a preliminary injunction.¹

¹ In deciding these two motions, the Court also considered: the Complaint for Declaratory and Injunctive Relief ("Compl."); the Defendants' Memorandum in Support of their Motion to Dismiss ("Defs.' Mem. re: Dismiss"); the Plaintiff National Mining Association's Memorandum in Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp'n re: Dismiss"); the United States' Reply Memorandum in Support of its Motion to Dismiss (Continued . . .)

I. Statutory Background

This section summarizes the relevant Clean Water Act permit granting scheme.

Clean Water Act Section 404 Permits

Section 404 permits are issued by the United States Army Corps of Engineers ("Corps") "for the discharge of dredged and fill material into navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Corps has sole authority to issue Section 404 permits, but in doing so it must apply guidelines that it develops in conjunction with the EPA.² Id. § 1344(b). In addition to providing the EPA with the responsibility to develop the guidelines in conjunction with the Corps, the Clean Water Act grants the EPA authority to prevent the Corps from authorizing certain disposal sites.³ Id. § 1344(c). In the absence of a specific regulatory exception, the Corps must reach a decision on a pending application for a Section 404 permit no later than 60 days after receipt of the application for the permit. See 33 C.F.R. § 325.2(d)(3) (2010) (providing that "[d]istrict engineers will decide on all applications not later than 60 days after receipt of a complete application, unless" one of six exceptions applies).

(... continued)

("Def.' Reply re: Dismiss"); the Plaintiff's Memorandum in Support of a Motion for Preliminary Injunction ("Pl.'s PI Mem."); the United States' Memorandum in Opposition to National Mining Association's Motion for a Preliminary Injunction ("Def.' PI Opp'n"); the Plaintiff National Mining Association's Reply Memorandum in Support of Motion for Preliminary Injunction ("Pl.'s PI Reply"); the United States' Surreply Brief in Opposition to the National Mining Association's Motion for a Preliminary Injunction ("Def.' PI Surreply"); and the Memorandum of Sierra Club et al. in Opposition to the Plaintiff's Motion for a Preliminary Injunction ("Def. Ints.' PI Opp'n").

² The EPA-promulgated 404(b)(1) guidelines, codified at 40 C.F.R. Part 230, guide the Corps' review of the environmental effects of proposed disposal sites. The guidelines provide that "[n]o modifications to the basic application, meaning, or intent of these guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act." 40 C.F.R. § 230.2(c) (emphasis added).

³ To exercise its authority to prevent the Corps from authorizing a particular dumpsite, known as the 404(c) veto authority, the EPA must determine, after notice and an opportunity for public hearing, that certain unacceptable environmental effects would occur if the disposal site were approved by the Corps and granted a permit.

Clean Water Act Section 402 Permits

Known as National Pollutant Discharge Elimination System ("NPDES") permits, Section 402 permits are typically issued by states for the discharge of non-dredged and non-fill material. 33 U.S.C. § 1342(a)(5). These permits govern pollutants that are assimilated into receiving waters by establishing limits placed on the make-up of wastewater discharge. Once the EPA approves a state permitting program, states have exclusive authority to issue NPDES permits, although the EPA does have limited authority to review the issuance of such permits by states. 33 U.S.C. § 1342(d). All of the Appalachian States allegedly impacted by the EPA actions at issue in this litigation (Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia) have EPA-approved Section 402 permit authority.

Clean Water Act Section 303 Water Quality Standards

Section 303 of the Clean Water Act allocates primary authority for the development of water quality standards to the states. 33 U.S.C. § 1313. A water quality standard designates uses for a particular body of water and establishes criteria for protecting and maintaining those uses. 40 C.F.R. § 131.2 (2010). These standards can be expressed as a specific numeric limitation on pollutants or as a general narrative statement. See 40 C.F.R. § 131.3(b). While states have the responsibility to develop the water quality standards, the EPA reviews the standards for approval. 40 C.F.R. §§ 131.4, 131.5. The EPA may promulgate water quality standards to the exclusion of a state only if (1) it determines that a state's proposed new or revised standard does not measure up to the Clean Water Act's requirements and the state refuses to accept EPA-proposed revisions, or (2) a state does not act, but in the EPA's view a new or revised standard is necessary. 33 U.S.C. § 1313(a)(2).

II. Factual Background⁴

Plaintiff National Mining Association ("NMA") alleges that recent actions taken by the EPA and the Corps have unlawfully obstructed the Clean Water Act permitting processes for coal mining. Complaint ("Compl.") ¶ 2. The plaintiff identifies two series of documents that it asserts unlawfully changed the established permitting process: (1) the June 11, 2009 Enhanced Coordination Process ("EC Process") Memoranda, and (2) the April 1, 2010 Detailed Guidance Memorandum ("Guidance Memorandum"). Id. The plaintiff represents that its member companies are "not seeking to shirk their responsibilities under any environmental protection laws or regulations; rather, they are merely asking [the] EPA and the Corps to regulate" within the bounds of the law. Pl.'s PI Mem. at 41-42.

The plaintiff asserts that the EC Process memoranda formalized an "extraregulatory" practice that commenced in January 2009. Id. at 7. At that time, the EPA issued a series of letters to the Corps raising questions about the legality of Section 404 permits that, the plaintiff claims, the Corps was poised to issue imminently. Id. According to the plaintiff, the EC Process memoranda then "imposed substantive changes to the Section 404 permitting process by creating a new level of review by [the] EPA and an alternate permitting pathway not contemplated by the current regulatory structure." Id. The plaintiff represents that the EC Process utilizes the Multi-Criteria Integrated Resource Assessment ("MCIR Assessment") to screen pending Section 404 permits and determine which of those pending permits will proceed for standard review by the Corps and which will be subject to the EC process. Id. at 8. The plaintiff contends that once a permit is designated for the EC Process, it faces a burdensome review process wholly different

⁴ The following facts are drawn from the allegations contained in the plaintiff's complaint and in the plaintiff's memorandum supporting its motion for a preliminary injunction.

than that contemplated by the Clean Water Act.⁵ *Id.* Ultimately, the EPA announced, in September 2009, that through the MCIR Assessment it had identified 79 coal-related pending Section 404 permits that would be subjected to the EC process. *Id.* at 9.

Then, in April 2010, the EPA released its Guidance Memorandum in which, the plaintiff asserts, the EPA "made sweeping pronouncements regarding the need for water quality-based limits" in Section 402 and 404 permits. *Id.* The plaintiff maintains that the Guidance (1) effectively established a region-wide water quality standard based on conductivity levels it associated with adverse impacts to water quality, (2) was being used by the EPA to cause indefinite delays in the permitting process, and (3) caused various permitting authorities to insert the conductivity level into pending permits. *Id.* at 9-10. Further, the EPA used the Guidance to reopen previously issued permits to impose the conductivity limit, which, the plaintiff alleges "halt[s mining] projects in their tracks." *Id.* at 10-11. In contrast to the MCIR Assessment and the EC process, which apply only to pending Section 404 permits, the Guidance covers both Section 402 and 404 permits associated with surface mining projects in Appalachia. Defs.' Mem. re: Dismiss at 17 n.7.

III. The Defendants' Motion to Dismiss

A. Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the dismissal of claims for which the complaint does not set forth allegations sufficient to establish the court's jurisdiction over the subject matter of the claims presented. Fed. R. Civ. P. 12(b)(1). In deciding a motion to dismiss challenging the Court's subject matter jurisdiction under Rule 12(b)(1), a

⁵ The plaintiff alleges that the EC process adds a minimum of 60 days, and perhaps many months, to the Section 404 review process.

court "must accept as true all of the factual allegations contained in the complaint" and draw all reasonable inferences in favor of the plaintiff, Brown v. District of Columbia, 514 F.3d 1279, 1283 (D.C. Cir. 2008), but courts are "not required . . . to accept inferences unsupported by the facts or legal conclusions that are cast as factual allegations." Rann v. Chao, 154 F. Supp. 2d 61, 64 (D.D.C. 2001). Further, the "court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case." Scolaro v. D.C. Bd. of Elections & Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000). Ultimately, however, the plaintiff bears the burden of establishing the Court's jurisdiction, Rasul v. Bush, 215 F. Supp. 2d 55, 61 (D.D.C. 2002), and where subject matter jurisdiction does not exist, "the court cannot proceed at all in any cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

B. Legal Analysis

The federal defendants assert three separate but related jurisdictional grounds for dismissal: (1) the lack of final agency action; (2) the plaintiff's claims are not ripe for review; and (3) the plaintiff's lack of standing. The Court will address each argument in turn.

1. Final Agency Action

The APA limits judicial review to "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. In other words, finality is a "threshold question" that determines whether judicial review is available. Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 18 (D.C. Cir. 2006). The Supreme Court has explained that, "[a]s a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision[-]making process," Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (quotation marks omitted), and second, "the action must be one by which rights or

obligations have been determined, or from which legal consequences will flow."⁶ *Id.* at 178 (quotation marks omitted).

Here, the federal defendants assert that none of the EPA's actions—the MCIR Assessment, the EC Process, or the Guidance Memorandum—qualify as final agency action within the meaning of the APA, and that the plaintiffs' claims must therefore be dismissed. Defs.' Mem. re: Dismiss at 13. They maintain that the EPA used the MCIR Assessment to screen permit applications as only the first of several steps in the permitting process, and that the MCIR Assessment therefore did not mark the consummation of the decision-making process or give rise to legal consequences. *Id.* at 14. The federal defendants similarly argue that neither the EC Process nor the Guidance Memorandum mark the consummation of the decision-making process or give rise to any legal obligations. *Id.* at 15, 17. Throughout their filings with the Court, the federal defendants emphasize what seems to be their core finality argument: that the EPA's actions are not final because they do not mark the grant or denial of the various permits at issue. *See id.* at 15 (quoting *Chem. Mfrs. Ass'n v. EPA*, 26 F. Supp. 2d 180, 183 n.2 (D.D.C.

⁶ In deciding the question of finality, the Court must also assess the question of whether the EPA's actions constitute a de facto legislative rule, promulgated in violation of the APA's notice and comment requirements. This is so given the similarity between the second aspect of the finality assessment—whether the action gives rise to legal obligations or is one from which legal consequences flow—and the standard for determining whether a challenged action constitutes a regulation or a mere statement of policy—"whether the action has binding effects on private parties or on the agency," *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999), or, in other words, "whether the agency action binds private parties or the agency itself with the force of law," *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002). Indeed, the District of Columbia Circuit has recognized the manner in which these standards become intertwined:

In order to sustain their position, appellants must show that the [challenged guidelines] either (1) reflect "final agency action," . . . or, (2) constitute a de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by [the APA]. These two inquiries are alternative ways of viewing the question before the court. Although, if appellants could demonstrate the latter proposition, they would implicitly prove the former, because the agency's adoption of a binding norm obviously would reflect final agency action.

Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006). Agency action, however, can meet the first prong of the *Bennett* test without meeting the second. *See, e.g., id.* at 431 ("The guidelines are nothing more than general policy statements with no legal force. . . . Therefore, the guidelines cannot be taken as 'final agency action,' nor can they otherwise be seen to constitute a binding legal norm.").

1998), where the Court stated: "the relevant question is not whether the action concludes a decision[-]making process . . . but whether the action concludes the decision[-]making process"), 17 ("As with the [MCIR] Assessment and the EC Process, the Guidance does not mark the consummation of the relevant decision[-] making process here, i.e., the review of permit applications pursuant to the [Clean Water Act]. That process consummates in final agency action only when a permit is issued, denied, or vetoed.").

The plaintiff counters that the federal "defendants' interpretation of finality is too restrictive, as it encompasses only the last possible agency decision." Pl.'s Opp'n re: Dismiss at 24-25. It asserts that the issuance of the MCIR Assessment reflects the EPA's settled, final position concerning how it would screen all pending Section 404 permit applications; that the creation of the EC process reflects the settled, final position to establish an alternate permitting framework, thus changing the legal landscape set forth in the 404(b)(1) guidelines; and that the Guidance Memorandum marks the consummation of the decision-making process and has had practical effects that have changed the legal obligations of the permitting authorities, i.e., the Corps and the state regulators, and the plaintiff's members who are seeking permits. *Id.* at 26-27.

The plaintiff points to both Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000), and CropLife America v. EPA, 329 F.3d 876 (D.C. Cir. 2003), as supporting its assertions that the EPA's actions here constitute final agency action. In Appalachian Power, power companies alleged that an EPA guidance document imposed unauthorized requirements on states in connection with the operation of permit programs under the Clean Air Act. 208 F.3d at 1015. There, as here, the EPA argued that the guidance was not subject to judicial review because it was neither final agency action nor a binding legislative rule. *Id.* at 1020. The District of Columbia Circuit, however, disagreed, concluding that

The short of the matter is that the guidance, insofar as relevant here, is final agency action, reflecting settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by petitioners who must obtain [Clean Air Act] permits in order to continue operating.⁷

Id. at 1023. There was evidence in Appalachian Power that "State authorities, with EPA's guidance in hand, [were] insisting on continuous opacity monitors," id., i.e., compliance with the standards set forth in the guidance. Next, in CropLife, the District of Columbia Circuit determined that an EPA directive, which had been published in a press release and changed the established practice of relying on third-party studies, was a binding regulation. 329 F.3d at 876. The court held that "the directive clearly establishe[d] a substantive rule declaring that third-party human studies are now deemed immaterial in EPA regulatory decision[-]making," id. at 883, and further concluded that the "disputed directive concretely injures petitioners, because it unambiguously precludes the agency's consideration of all third-party human studies, i.e., studies that petitioners previously have been permitted to use to verify the safety of their products." Id. at 884.

The federal defendants argue that the EC Process memoranda here can be distinguished from the actions in Appalachian Power and CropLife because the EC process memoranda are not binding on their face and the EPA explicitly stated they were not binding. Defs.' Reply re: Dismiss at 3-4. The federal defendants further attempt to distinguish the Guidance by pointing out that it was issued as an interim document and clearly stated, on its face, that it would be issued in final form in 2011. Id. at 9-10. The federal defendants assert that the Court should

⁷ The court acknowledged that the concluding paragraph of the guidance contained a disclaimer of sorts, indicating that the policies set forth in the document were intended solely as guidance, did not represent final agency action, and could not be relied upon to create enforceable rights, but then pointed out that "this language is boilerplate; since 1991 EPA has been placing it at the end of all of its guidance documents." Appalachian Power, 208 F.3d at 1023.

follow Gem County Mosquito Abatement District v. EPA, 398 F. Supp. 2d 1 (D.D.C. 2005), in which the court held that an interim EPA guidance advising a county mosquito abatement entity that it did not need an NPDES permit to apply pesticides to waters was not final agency action. In Gem County, although believing it did not need one, the plaintiff nonetheless sought an NPDES permit because it had been threatened with being sued and was then sued by organic farmers who asserted that the pesticides used to abate the mosquitoes threatened their certification as organic farms. Id. at 4. The EPA advised the abatement entity that its position that it did not need an NPDES permit was correct, which ultimately led to dismissal of the case due to the absence of a case or controversy, as both parties agreed that a permit was unnecessary. Id. at 8. In its rejection of the plaintiff's argument that the interim guidance was a final rule, the court found that the EPA had "made clear that the Interim Guidance was just that: interim guidance on which public comment would be solicited and considered before issuing a final interpretation and guidance. In its interim form, [the] guidance is interlocutory and does not finally determine legal rights or obligations." Id. at 11. The court did explain, however, that "the 'finality' element is interpreted in a 'pragmatic way.'" Id. (quoting FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980)). Drawing from its analysis of the case and controversy prerequisite to its authority to exercise jurisdiction in the matter, the court concluded: "To regard EPA's interim guidance as final where it does not impose a legal obligation to obtain permits would improperly and prematurely interfere with the process by which an agency reaches a final position on matters committed to its discretion." Gem Cnty., 398 F. Supp. 2d at 11. Therefore, the Court's finality assessment seems to have had more to do with what had actually occurred in response to the guidance—the preservation of the status quo—and not the mere fact that the EPA had stated that the document it issued was interim and interlocutory.

Here, because the agency actions more closely resemble those at issue in Appalachian Power and CropLife than was the situation before the Court in Gem County, the MCIR Assessment, the EC Process, and the Guidance Memorandum all meet the criteria of final agency actions. The federal defendants' view of what amounts to finality is too narrow, as it is possible for an agency to take final agency actions during a permit assessment process prior to actually determining whether to grant or deny an application for a permit. Although the federal defendants stress in their filings, and vigorously reiterated at the December 15, 2010 hearing, that the MCIR Assessment, the EC Process, and the Guidance Memorandum impose no new substantive requirements on permit applications, see, e.g., Defs' Mem. re: Dismiss at 18 (asserting that the "Guidance does not . . . establish any new standards that supplement or amend the existing statutory and regulatory requirements"), it is clear to the Court that the EPA has implemented a change in the permitting process.

It appears obvious on the current record that the MCIR Assessment reflects the EPA's final decision to evaluate pending permits to determine whether they would undergo the EC Process. As shown in Appalachian Power, a reworking of the permitting process gives rise to legal consequences for companies that must obtain those permits to operate. 208 F.3d at 1023. From the moment a permit is screened pursuant to the MCIR Assessment, the EPA seems to be imposing an additional step to the permitting process that is not contemplated or set forth in the 404(b)(1) guidelines. This is also true for the EC Process itself. Again, like the documents at issue in Appalachian Power, the EC Process Memoranda impose unequivocal requirements on the exercise of regulatory authority regarding the pending permit applications.⁸ Accordingly, as

⁸ For example, the June 11, 2009 EC Process Memorandum begins by explaining that the "EPA and the Corps hereby establish a process for enhanced coordination." Pl.'s Pl Mot., Ex. 1 (June 11, 2009 Memorandum to the Field on Enhanced Coordination Procedures) (emphasis added).

in CropLife, the EC Process "reflects an obvious change," 329 F.3d at 881, in the permitting regime set forth in Section 404 of the Clean Water Act and in the regulations implementing that provision. Thus, despite the fact that the 404(b)(1) guidelines provide that "[n]o modifications to the basic application . . . of these [g]uidelines will be made without rulemaking . . . under the [APA]", 40 C.F.R. § 230.2(c), it seems quite apparent that the MCIR Assessment and the EC Process enacted a change in the basic application of the permitting procedures for Section 404 permits. Accordingly, these changes to the statutorily established process give rise to the legal consequences necessary to satisfy the second prong of the Bennett finality analysis.

While the Guidance Memorandum is perhaps a closer call than the MCIR Assessment and the EC Process, it too, qualifies as final agency action because, despite the representation that it is an interim document, it is nonetheless being applied in a binding manner and has been implemented in its current version even though the EPA continues to receive comments about it. Therefore, based on the record before the Court at this time, it appears that the EPA is treating the Guidance as binding. See Pl.'s PI Mem. at 21 (quoting an EPA official as saying that the "guidance stands" and "will continue to [be used to ensure] that mining permits issued in West Virginia and other Appalachian states provide the protection required under federal law"). The EPA official's statement can only be interpreted as reflecting the EPA's settled, final stance on its current application of the Guidance Memorandum, even if this position may change at some point in the future once the EPA promulgates a new version of the Guidance Memorandum. See Appalachian Power, 208 F.3d at 1022 (noting that the "EPA may think that because the Guidance . . . is subject to change, it is not binding and therefore not final action," but concluding that "all laws are subject to change The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.").

Thus, unlike the guidance in Gem County, which merely had the effect of preserving the status quo, the Guidance Memorandum here has a practical impact on the plaintiff's members seeking permits. In other words, despite the EPA's assertions that the Guidance Memorandum is only an interim document, the Guidance Memorandum is being treated and applied in practice as if it were final. The practical impact imposed upon permit applicants by the recent actions of the EPA are sufficient to satisfy the Bennett finality test because the "'finality' element is interpreted in a 'pragmatic way.'" Gem Cnty, 398 F. Supp. 2d at 11 (quoting FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980)); accord Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005) ("Finality resulting from the practical effect of an ostensibly non-binding agency proclamation is a concept [this Circuit has] recognized in the past.") (citing Gen. Elec. Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002)).

2. Ripeness

"[R]epresent[ing] a prudential attempt to balance the interests of the court and the agency in delaying review against the petitioner's interest in prompt consideration of allegedly unlawful agency action," Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1420-21 (D.C. Cir. 1998), the ripeness doctrine requires courts to consider the framework set forth by the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). First, a court must "evaluate the 'fitness of the issues for judicial decision.'" Fla. Power & Light, 145 F.3d at 1421 (quoting Abbott Labs., 387 U.S. at 149). If a challenged decision is not "fit" for review, "the petitioner must show 'hardship' in order to overcome a claim of lack of ripeness." Fla. Power & Light, 145 F.3d at 1421. In assessing the fitness prong, courts evaluate "whether the agency action is final; whether the issue presented for decision is one of law which requires no additional factual

development; and whether further administrative action is needed to clarify the agency's position." Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 940 (D.C. Cir. 1986).

The federal defendants assert that the plaintiff's claims should be dismissed because they are not ripe for review. Defs.' Mem. re: Dismiss at 19. Specifically, the federal defendants again argue that the MCIR Assessment, the EC Process, and Guidance Memorandum are not final agency actions, and further, that their review "outside the context of a specific permitting decision would entangle the court in abstract considerations." Id. at 21. The plaintiff in turn again contends that the three actions at issue here constitute final agency actions and present primarily, if not purely, legal questions for which further factual development in the context of a specific permitting decision is unnecessary. Pl.'s Opp'n re: Dismiss at 30, 34.

As explained above, based on the record currently before the Court, the MCIR Assessment, the EC Process, and the Guidance all appear to constitute final agency actions. Moreover, the claims raised by the plaintiff, i.e., whether the actions constitute legislative rules and whether the EPA violated the notice and comment requirement of the APA, present purely legal questions. See Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 215 (D.C. Cir. 2007) (explaining that it is "well-established that claims that an agency's action is . . . contrary to law present purely legal issues . . . [s]o, too, do claims that an agency violated the APA by failing to provide notice and opportunity for comment."). The federal defendants' insistence on "specific permitting decisions," Defs.' Mem. re: Dismiss at 21, echoes their argument that their actions could not be final as they had not granted or denied any permits it has subjected to the EC process. This, however, misses the point of the plaintiff's claim: that the process itself is unlawful, and not simply any decisions that may result from the application of that process. See Pl.'s Opp'n re: Dismiss at 31 ("NMA's contention is that Defendants acted contrary to law in

issuing the EC Process Memoranda, which unambiguously dictated that the memoranda—and not existing regulations—would govern [pending] permit applications."). Thus, no factual developments would clarify these issues or assist the Court in evaluating the plaintiff's claims. See Appalachian Power, 208 F.3d at 1023 n.18 ("Whether EPA properly instructed state authorities to conduct sufficiency reviews of existing state and federal standards and to make those standards more stringent if not enough monitoring was provided will not turn on the specifics of any particular permit."). Accordingly, the Court finds the plaintiff's claims ripe for review on the defendants' dismissal motion.⁹

3. Standing

The irreducible constitutional minimum of standing contains three elements: (1) injury in fact, (2) causation, and (3) the possibility of redress by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). These requirements apply whether an organization asserts standing on its own behalf, or on behalf of its members. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982). "[A]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." Bennett, 520 U.S. at 168 (internal quotations omitted).

The federal defendants assert that the plaintiff has failed to establish the requisite injury-in-fact prong of the test for standing because it has not shown that its members have suffered a particularized and concrete injury traceable to the MCIR Assessment, the EC Process, or the Guidance Memorandum. Defs.' Mem. re: Dismiss at 30. They again rely on the fact that "none

⁹ Because the Court, pursuant to the first element of the ripeness doctrine set forth by the Supreme Court in Abbott Laboratories, 387 U.S. 136 (1967), and clarified by this Circuit in Florida Power & Light, 145 F.3d 1414 (D.C. Cir. 1998), concludes that the issues presented in this litigation are "fit" for review, it need not address the second, hardship factor of the ripeness test. See Fla. Power & Light, 145 F.3d at 1421.

of the permit applications subject to the process has been denied by the Corps or vetoed by EPA." Id. The federal defendants' acknowledge that the plaintiff "may allege procedural injury based on its notice and comment claims," id., but assert that deprivation of a procedural right without some concrete interest affected by the deprivation is insufficient to create standing. Id. The plaintiff, however, asserts that "being subject to this additional, illegal process is itself sufficient injury for standing purposes," Pl.'s Opp'n re: Dismiss at 40, an injury which in turn is "threatening the financial viability of proposed mining projects." Id. The plaintiff further alleges that the delays in the permitting process its members have experienced are attributable to the EC Process and that a favorable decision—declaring the EC Process and Guidance Memorandum illegal—would redress the injuries its members are incurring. Id. at 41-42.

The Court agrees that the procedural injury alleged by the plaintiff is more than just that stemming from the claimed notice and comment violations. While the plaintiff does allege notice and comment violations, its main point of contention is that the additional process created by the EPA's actions has and will continue to cause its members "injury that is concrete and particularized." Id. at 39; see id. (asserting that the "EC Process Memoranda have allowed [the] Defendants to restart and pause the clock with respect to Section 404 permit applications pending on March 31, 2009, even in instances where [the] EPA did not comment during the Corps' designated comment period"). As noted above, on the record currently before the Court, it seems clear that the EPA has imposed additional processes—the MCIR Assessment and the EC Process—to the permitting procedures, and that these additional processes are not contemplated or set forth in the 404(b)(1) guidelines. It also appears that the Guidance Memorandum is being applied in a binding manner. There is therefore support for both the plaintiff's allegations of injury in the form of notice and comment violation and, more importantly so far as standing is

concerned, in the form of "additional, illegal process." Pl.'s Opp'n re: Dismiss at 39. Thus, on the record currently before it, and in light of the fact that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," Bennett, 520 U.S. at 168, the Court can and does conclude that at this stage of the proceedings the plaintiff's allegations are sufficient to establish that it has standing to maintain this suit.

IV. The Plaintiff's Motion for a Preliminary Injunction

A. Standard of Review

District courts have the power to grant preliminary injunctions under Rule 65 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 65. As a general matter, preliminary injunctions are "extraordinary" forms of relief and should be granted sparingly. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). "An injunction is designed to deter future wrongful acts," United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953), and thus, while past harm is relevant, the ultimate inquiry remains "whether there is a real and immediate threat of repeated injury." D.C. Common Cause v. District of Columbia, 858 F.2d 1, 8-9 (D.C. Cir. 1988).

In evaluating a motion for preliminary injunctive relief, courts must balance: "(1) the [movant's likelihood] of success on the merits; (2) the threat of irreparable injury in the absence of an injunction; (3) the possibility of substantial harm to other interested parties from the issuance of an injunction; and (4) the interests of the public." Wagner v. Taylor, 836 F.2d 566, 575 (D.C. Cir. 1987). Although a particularly strong showing on one factor may compensate for a weak showing on one or more of the other factors, id. at 576, the movant must show that the threat of irreparable harm is "likely," as opposed to just a "possibility." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

B. Legal Analysis

1. Likelihood of Success on the Merits

Unsurprisingly, the plaintiff argues that it is likely to succeed on the merits of its claims. The plaintiff first asserts that the EC Process Memoranda and the Guidance are legislative rules that were promulgated in violation of the APA. Pl.'s PI Mem. at 12. The plaintiff further maintains that the EPA has exceeded its statutory authority under the Clean Water Act, the National Environmental Policy Act, and the APA. Id. at 24.

a. Whether The EPA's Actions are Legislative Rules

As previously noted, the standard for determining whether an agency pronouncement is a legislative rule is very similar to the second element of the Bennett finality analysis. A legislative rule is agency action that has "the force and effect of law." Appalachian Power, 208 F.3d at 1020. Such a rule "grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests;" "narrowly constrict[s] the discretion of agency officials by largely determining the issue addressed"; and "[has] substantive legal effect." Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980). A rule that effectively amends a prior legislative rule is a legislative, not an interpretative rule. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). "[N]ew rules that work substantive changes . . . or major substantive legal additions . . . to prior regulations are subject to the APA's procedures." U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (citations omitted). If an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required. Id. at 35.

As explained above in regard to the Court's finality analysis, based on the record currently before the Court the MCIR Assessment, the EC Process Memoranda, and the Guidance

Memorandum all appear to qualify as legislative rules because they seemingly have altered the permitting procedures under the Clean Water Act by changing the codified administrative review process. Thus, the MCIR Assessment, the EC Process, and the Guidance Memorandum all seem to "effectively amend" the Clean Water Act's permitting process, Am. Mining Cong., 995 F.2d at 1112, and represent the EPA's adoption of a new position inconsistent with an existing regulation. U.S. Telecom Ass'n, 400 F.3d at 34-35. The plaintiff has therefore established that it is likely to succeed on the merits of its claim that the challenged EPA actions are legislative rules that were adopted in violation of the APA's notice and comment requirements.

b. Whether The EPA Exceeded its Statutory Authority

Under the APA, courts must hold unlawful and set aside agency actions found to be in excess of the agency's statutory jurisdiction, authority, or limitations. 5 U.S.C. § 706(2)(C). To determine whether an agency exceeded its statutory authority under the APA, the Court must engage in the two-step inquiry adopted by the Supreme Court in Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). Under Chevron, if the text of a statute shows that Congress has directly addressed the question at issue, then the court and the agency must give effect to the clearly expressed intent of Congress. See id. at 842-43. If, however, the court determines that an agency's enabling statute is silent or unclear with respect to the issue at hand, the question for the court then becomes whether the agency's action is based on a permissible construction of the statute. See id. at 843.

The plaintiff maintains that the EPA and the Corps are violating the plain language of the Clean Water Act. Pl.'s PI Mem. at 25. Specifically, it alleges that the MCIR Assessment and the EC Process Memoranda violate the congressional statutory division of authority between the two agencies as set forth in Section 404 of the Clean Water Act because they improperly expanded

the EPA's role in Section 404 permitting decisions. Id. Similarly, the plaintiff maintains that the Guidance Memorandum requires permitting authorities to require adherence to the conductivity levels designated in the Guidance Memorandum, thus resulting in the EPA overstepping the authority it was granted under Section 303 of the Clean Water Act. Id. at 28. By promulgating this region-wide water quality standard and by applying it to Section 404 permits, in addition to Section 402 permits, the plaintiff asserts that the EPA has significantly exceeded its statutory authority. Id. at 30-31.

The federal defendants respond that the Clean Water Act authorizes coordination between the EPA and the Corps during the permit review process and expressly requires the agencies to enter into an agreement to facilitate such coordination. Defs.' PI Opp'n at 23. They contend that nothing more than this has been done and assert that the Corps remains the final decision-maker with respect to issuance of permits, subject only to the EPA's exercise of its 404(c) veto authority. Id. at 24.

Again, for reasons that mirror its finality analysis, the Court finds the plaintiff's arguments more persuasive and agrees that the plaintiff is likely to prevail on its claim that the EPA has exceeded its statutory authority. As to the MCIR Assessment, the EPA, and only the EPA, evaluates pending permits to determine if they will be subject to the EC Process. Pl.'s PI Mem. at 8. It seems clear, however, that Congress intended the EPA to have a limited role in the issuance of Section 404 permits, and that nothing in Section 404 of the Clean Water Act gives the EPA the authorization to develop a new evaluation or permitting process which expands its role. Likewise, it seems clear that with the implementation of the Guidance Memorandum the EPA has encroached upon the role carved out for the states under the Clean Water Act by setting region-wide conductivity standards. In short, the EPA has modified the Section 404 permitting

scheme, authority not granted to it under the Clean Water Act, and has similarly taken an expansive role beyond what was afforded to it in determining Section 303 Water Quality Standards. Accordingly, the plaintiff has also established that it will likely succeed in showing that the EPA has exceeded its statutory authority under the Clean Water Act by adopting and implementing the MCIR Assessment, the EC Process, and the Guidance Memorandum.

2. Threat of Irreparable Harm

A preliminary injunction should issue only when irreparable injury is likely to occur in the absence of an injunction. See Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 12 (D.D.C. 2009) (explaining that the Supreme Court in Winter rejected as sufficient for the purpose of acquiring a preliminary injunction the plaintiff's showing of a "possibility" of irreparable harm). The failure to demonstrate irreparable harm is "grounds for refusing to issue a preliminary injunction, even if the other three factors entering the [preliminary injunction] calculus merit such relief." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). "[P]roving 'irreparable' injury is a considerable burden, requiring proof that the movant's injury is 'certain, great and actual—not theoretical—and imminent, creating a clear and present need for extraordinary equitable relief to prevent harm.'" Power Mobility Coal. v. Leavitt, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (Walton, J.) (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)) (emphasis in original). In this Circuit, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." Wis. Gas Co., 758 F.2d at 674. However, economic loss that threatens the survival of the movant's business can amount to irreparable harm. Power Mobility Coal., 404 F. Supp. 2d at 204.

Here, the plaintiff asserts that its members face likely irreparable harm in three respects:

(1) its "small business members are likely to be driven out of business by the delays in permitting

... resulting from the Guidance"; (2) its "members are likely to incur substantial economic losses as a result of [additional] permit[ting] conditions being imposed under the Guidance [Memorandum]"; and, (3) "the EC Process and Guidance [Memorandum] are impermissibly interfering with the exercise of private property rights." Pl.'s PI Mem. at 35-36.

The federal defendants counter all three of these arguments. First, they point out that the president of Best Coal, whose declaration the plaintiff offers to support its small business argument, fails to satisfy the irreparable harm standard because it merely states that his "company will be out of business within [eighteen] months if" it does not receive the requisite mining permits. Defs.' PI Opp'n at 30, 33. Second, the federal defendants assert that the alleged economic losses identified by the plaintiff are "compliance costs," *id.* at 35, and that the plaintiff has not demonstrated these costs threaten the survival of the plaintiff's member's businesses to the degree required to overcome this Circuit's rule that economic losses do not constitute irreparable harms. *Id.* at 35-36. Third, the federal defendants argue that a finding by this Court that the type of environmental regulations at issue in this case amount to an infringement on property rights would "create de facto irreparable harm across much of the field of environmental regulation, given that environmental regulations often place conditions on the use of private property." *Id.* at 38-39. Lastly, the federal defendants contend that the plaintiff's "delay in seeking injunctive relief, though not dispositive, can militate against a finding of irreparable harm." *Id.* at 40 (quoting *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000)).

The Court agrees with the federal defendants' position that the plaintiff has not shown that its small business members face irreparable harm in the form of certain or imminent business closings due to delays in receiving permits caused by the Guidance Memorandum. In

Power Mobility Coalition, a case in which a national association whose membership included manufacturers and suppliers of motorized wheelchairs sought an injunction enjoining enforcement of the Department of Health and Human Services regulations that changed the reimbursement structure under Medicare for motorized scooters, 404 F. Supp. 2d at 192, this Court held that the plaintiff had not demonstrated that the new regulation would cause any of its members irreparable harm as a result of being forced out of business. Id. at 205. There, this Court considered a declaration from the president of one member company in which he stated that "if the new rule take[s] effect as planned . . . [it is anticipated] that Mr. Mobility will wind-down its operations and stop doing business as a supplier of mobility equipment in [five or six months]." Id. at 204 (quoting Declaration of Philip DeLernia). The Court determined that because the plaintiff was "basically predicting that many of their claims for reimbursement" would be denied, the "plaintiff's claim of imminent harm [was], at best, remote and speculative." Id. at 205.

Here, as the federal defendants aptly recognize, the plaintiff's only support for its claim that its small business members will be driven out of business by the permitting delays being occasioned by the EPA's actions is the declaration of Randy Johnson, president of Best Coal, Inc.¹⁰ Mr. Johnson asserts that

[o]ur company is in a crisis. We want to finish our [ten] year plan but we are not mining the tonnage sufficient to support even our equipment payments. We survived to this point in 2010 with cash from prior years profit but that cash is now gone. We literally exist from week to week. We have cost[s] that cannot be recovered if the NPDES and Section 404 permits are not issued. Today, we are mining every possible ton to pay our employees, vendor bills, and bank note payments. If these permits are not issued, we will be out of business within [eighteen] months.

¹⁰ Indeed, this small business argument consumes only two paragraphs of the plaintiff's 45-page memorandum in support of its motion for a preliminary injunction, and is not mentioned whatsoever in its reply in support of its motion for a preliminary injunction. See Pl.'s Pl Mem. at 37.

Pl.'s PI Mem., Ex. 4 (Declaration of Randy Johnson ("R. Johnson Decl.)) ¶ 19. Mr. Johnson further maintains that (i) the company's total lost revenue from 2009 and 2010 was nearly \$6.7 million; (ii) the company laid off five of its twenty-eight employees; and (iii) the company will likely need to lay off more employees and "sell[] equipment to lower [its] cost[s] and loan debt in the very near future." Pl.'s PI Mem. at 37 (quoting R. Johnson Decl. ¶ 18). Although, Mr. Johnson claims that Best Coal has lost revenues totaling \$6,686,751, Pl.'s PI Mem., Ex. 4 (R. Johnson Decl.) ¶ 18, he does not offer a projection of anticipated future losses, tie that to an accounting of the company's current assets, or explain with any specificity how he arrived at the conclusion that he would be forced out of business in eighteen months.

While Mr. Johnson's representations raise legitimate concerns about the current and future health of his company, his declaration falls short of what is necessary to merit a finding of irreparable harm. Much like the plaintiff in Power Mobility Coalition, the plaintiff here is offering nothing more than a "predict[ion]" that is "at best, remote and speculative." 404 F. Supp. 2d at 205. Something more than Mr. Johnson's conclusory projection is necessary to show that any of the plaintiff's small business members currently face certain, imminent business closings. Accordingly, there is no "clear and present need for extraordinary equitable relief to prevent harm." Id. at 204 (quoting Wis. Gas Co., 758 F.2d at 674).

Likewise, the Court finds that the plaintiff has not shown to the degree required by law that its members are likely to incur substantial economic losses as a result of the additional permitting conditions imposed by the Guidance Memorandum. While it is true that "if a movant seeking a preliminary injunction 'will be unable to sue to recover any monetary damages against' a government agency in the future because of, among other things, sovereign immunity, financial loss can constitute irreparable injury," Pl.'s PI Mem. at 38 (quoting Brendsel v. Office of Fed.

Hous. Enter. Oversight, 339 F. Supp. 2d 52, 66-67 (D.D.C. 2004), the fact that economic losses may be unrecoverable does not absolve the movant from its "considerable burden" of proving that those losses are "certain, great and actual." Power Mobility Coal., 404 F. Supp. 2d at 204 (quoting Wis. Gas Co., 758 F.2d at 674) (emphasis in original).

Although this Circuit has not specifically addressed the issue of how recoverability of economic losses should fit into the irreparable harm analysis, this Court has confronted the issue and repeatedly held that recoverability of the claimed losses is but one element for consideration. First, in Bracco Diagnostics, Inc. v. Shalala, 963 F. Supp. 20 (D.D.C. 1997), a case in which medical device manufacturers sought a preliminary injunction to enjoin FDA action, the Court found that the "plaintiffs' greater financial costs, which are on-going, can never be recouped. Id. at 29. The Court went on to find that while the injury to plaintiffs was 'admittedly economic,' there [wa]s 'no adequate compensatory or other corrective relief' that [could] be provided at a later date, tipping the balance in favor of injunctive relief." Id. (quoting Hoffmann-Laroche, Inc. v. Califano, 453 F. Supp. 900, 903 (D.D.C. 1978)) (finding that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm"). In Bracco, however, the court also determined that the plaintiffs had shown "two primary sources of non-speculative, on-going, and imminent harm." 963 F. Supp. at 28-29. Next, although this Court held in Feinerman that "where . . . the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity, . . . any loss of income suffered by the plaintiff is irreparable per se," Feinerman v. Bernardi, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (Walton, J.) (emphasis in original), the Court also recognized that "the alleged injury must be of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Id. at 50 (quoting

Wis. Gas Co., 758 F.2d at 674). Lastly, in Sherley v. Sebelius, 704 F. Supp. 2d 63 (D.D.C. 2010), a case in which the plaintiffs sought to enjoin the Department of Health and Human Services from applying National Institute of Health guidelines regarding the funding of medical research that used embryonic stem cells, the Court concluded "[t]here is no after-the-fact remedy for this injury because the Court cannot compensate plaintiffs for their lost opportunity to receive funds Accordingly, plaintiffs would suffer irreparable injury in the absence of the injunction." Id. at 72. However, earlier in its opinion, the court noted that "[f]irst . . . the alleged injury must be of 'such imminence that there is a 'clear and present need' for equitable relief to prevent irreparable harm [and s]econd, the plaintiff's injury 'must be beyond remediation.'" Id. (quoting Wis. Gas Co., 758 F.2d at 674) (emphasis in original). Bracco, Feinerman, and Sherley demonstrate that recoverability of monetary losses can, and should, have some influence on the irreparable harm calculus, but that recoverability is but one factor the court must consider in assessing alleged irreparable harm in the form of economic losses. In other words, the mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm.¹¹

If a plaintiff has shown that financial losses are certain, imminent, and unrecoverable, then the imposition of a preliminary injunction is appropriate and necessary; here, however, the

¹¹ Moreover, the Tenth Circuit case cited by the plaintiff in its memorandum supporting its motion for a preliminary injunction seems to confirm this conclusion. Although the court in Chamber of Commerce v. Edmondson, 594 F.3d 742, 770-71 (10th Cir. 2010), found that "imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury," it cited as authority for that finding an earlier Tenth Circuit case which determined that "[a]n irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damage." Id. at 771 (quoting Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003)) (emphasis added). Edmondson can be further distinguished from the plaintiff's situation in this case because it dealt with the actual imposition of fines on businesses that failed to comply with a state law on the employment of illegal immigrants, i.e., the actual payment of money by the plaintiff to the authority from which it was then unrecoverable, whereas here, the plaintiff claims that the injury is economic loss due to (1) delay in continuing or starting mining projects, and (2) in one instance, the cost of conducting additional tests to comply with the Guidance.

plaintiff has not demonstrated the certainness or the imminence of any of its members' losses. In fact, and perhaps most importantly to this discussion of the role of recoverability in the irreparable harm calculus, the plaintiff has not even shown that the losses are wholly unrecoverable. While the plaintiff has correctly asserted that it cannot recover economic losses in the form of money damages from the EPA and the Corps due to sovereign immunity, the plaintiff has not demonstrated how or why these losses cannot ultimately be recovered if and when the mining projects in question are permitted to proceed. See Defs.' PI Surreply at 4 (recognizing that the Higgins Declaration, Pl.'s Opp'n re: Dismiss, Ex. 24 (Declaration of James C. Higgins ("Higgins Decl.") ¶ 9, itself asserts that the resolution of this case in favor of the plaintiff would allow reinstatement of his company's mining plans, and arguing that this would allow the company to recoup all or most of the alleged lost revenue).¹²

Nonetheless, even assuming arguendo that the purported losses are totally beyond remediation, the plaintiff has still not shown that they are imminent or certain. The Court has no reason to doubt Mr. Higgins's assertion that the "coal mined from the Paynter Branch South Mine could have produced revenues of about \$189 million at today's current sales price," Pl.'s Opp'n re: Dismiss, Ex. 24 (Higgins Decl.) ¶ 8, or his statement that "other costs . . . as a result of [the decision to forego the removal of the coal reserves at Paynter Branch South Mine] include the costs of relocating two spreads of equipment, . . . the relocation of about 20 employees to other mines[,] and the severing of about 20 employees," id., Ex. 24 (Higgins Decl.) ¶ 8. These,

¹² Mr. Higgins is the Chief Engineer for Simmons Fork Mining, Inc. and provides services to Paynter Branch Mining, which operates the Paynter Branch South Mine in West Virginia and whose Section 404 permit application is one of those subject to review under the EC Process. Pl.'s Opp'n re: Dismiss, Ex. 24 (Higgins Decl.) ¶¶ 1, 5. Mr. Higgins asserts that since January 2010, Paynter Branch Mining has gathered water quality data in an attempt to meet the conductivity level set forth in the Guidance, an endeavor that has cost it \$114,000. Id., Ex. 24 (Higgins Decl.) ¶ 7. Mr. Higgins further maintains that the permitting delays have rendered infeasible proceeding with the Paynter Branch South Mine project, forcing Paynter Branch Mining to forego the retrieval of coal reserves from that mine. Id., Ex. 24 (Higgins Decl.) ¶ 8.

however, are examples of past harm, resulting from a decision made before this case ever reached this Court. Mr. Higgins does not provide any information on currently planned or future projects in jeopardy or at risk of incurring losses.¹³ While the plight of the workers allegedly fired by Paynter Branch Mining purportedly due to the delay in the permitted process is unfortunate, that does not change the fact that "the purpose of an injunction is the prevent future violations." W.T. Grant Co., 345 U.S. at 633 (emphasis added). Thus, while past harm is relevant, the ultimate inquiry remains, "whether there is a real and immediate threat of repeated injury." District of Columbia Common Cause, 858 F.2d at 8-9 (quoting O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (emphasis added). Accordingly, whether or not they may ultimately be recovered, the plaintiff has not shown that there is a threat of future substantial losses that warrant the imposition of the "extraordinary" remedy of injunctive relief. Mazurck, 520 U.S. at 972.

To conclude its examination of the plaintiff's allegations of irreparable harm, the Court need merely state that it agrees with the federal defendants that the plaintiff's argument that the EC Process and Guidance are impermissibly interfering with the exercise of private property rights is "baseless." Defs.' PI Opp'n at 38. Indeed, the cases relied upon by the plaintiff do not support a finding that enforcement of the type of environmental regulations at issue here qualify as an infringement on the property interests of the plaintiff's members. See RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1211 (10th Cir. 2009) (finding that the record clearly established that

¹³ The same is true of the re-mining projects described in the declaration of William Wells, the Vice President of United Coal Company. Pl.'s PI Mem., Ex. 9 (Declaration of William Wells, Jr.) ¶¶ 25-26. But even assuming, for the sake of argument, that Mr. Wells had identified pending future losses, it is unclear that the losses would be of the magnitude required in this Circuit to warrant the imposition of injunctive relief, i.e., the losses would threaten the survival of the business. See Power Mobility Coal, 404 F. Supp 2d at 204 (observing that only economic loss that threatens the survival of a movant's business amounts to irreparable harm); Defs.' PI Opp'n at 36 & 36 n.20 (noting that although the Wells declaration does not provide a numeric figure or describe the losses purportedly suffered from the decision to forego the reclamation project, United Coal's revenues totaled more than \$500 million in 2008).

RoDa was being denied its right to interest in its real property because it had been "denied unfettered ownership" due to the defendant's refusal to transfer record title, and concluding that "while being denied record title, RoDa simply cannot participate in the everyday operations of its own interests, and the damages arising from that are incalculable"); Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989) (in a suit seeking to bar demolition of buildings on the plaintiff's land, the court noted that "[a]s a general rule, interference with the enjoyment or possession of land is considered irreparable [because] land is viewed as a unique commodity for which monetary compensation is an inadequate substitute," but found that a similar rule should not necessarily apply to buildings located on a piece of real estate as buildings, unlike land, can be repaired or replaced). Clearly, these two cases do not present issues even remotely comparable to those presented in this case.

While the plaintiff's assertion that a preliminary injunction "in this case will do nothing more than restore the regulatory environment that existed prior to the unlawful application of the EC Process and the Guidance to coal mining operations," Pl.'s PI Mem. at 41, may be true, the fact remains that the plaintiff has made an inadequate showing of irreparable harm. The issuance of a preliminary injunction to "restore" the previously existing regulatory environment would not be in line with the purposes of injunctive relief, as the ultimate inquiry would still remain "whether there is a real and immediate threat of repeated injury." D.C. Common Cause, 858 F.2d at 8-9.

3. Possibility of Substantial Harm to Other Interested Parties

Having concluded that a showing of irreparable harm is lacking, it is not necessary to engage in a lengthy discussion of the remaining two factors, see Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (holding that the failure to demonstrate harm provides "grounds for

refusing to issue a preliminary injunction, even if the other three factors entering the [preliminary injunction] calculus merit such relief"), and the Court will therefore address them only briefly. See id. at 304-05 (observing that "[i]t is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with [Federal Rule of Civil Procedure] 52(a)," which provides that when denying a preliminary injunction a district court "shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." Fed. R. Civ. P. 52(a)).

The plaintiff maintains that a preliminary injunction in this case will not harm the federal defendants or the defendant intervenors as it "will do nothing more than restore the regulatory environment that existed prior to the" MCIR Assessment, the EC Process, and the Guidance Memorandum. Pl.'s PI Mem. at 41. Both the federal defendants and the defendant intervenors, on the other hand, assert that "significant environmental interests are at stake here." Defs.' PI Opp'n at 41. While it may be true that the challenged EPA actions were "designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal laws," id., these environmental interests—the actual environmental impact of surface mining—are not currently before the Court. It may well be the case that the MCIR Assessment, the EC Process, and the Guidance Memorandum are necessary to protect the environment, especially considering the assertion made by counsel for the defendant intervenors that the substantive requirements of the Clean Water Act were essentially ignored by the prior Administration, but the Court need not make that assessment now. Whether the current or the prior Administration's actions are in compliance with the APA and the Clean Water Act is an inquiry that can be left for another day. And the most the Court can say about whether other interested parties would be harmed by the

issuance of an injunction is that none of the parties before the Court, based on the record currently before it, have made a sufficiently compelling case to tip the scales in their favor.

4. The Interests of the Public

The plaintiff maintains that a preliminary injunction is in the public interest as it would protect "the integrity of the administrative regulatory process" and because the public has a strong interest in developing domestic sources of energy and job growth. Pl.'s PI Mem. at 42-43. On the other hand, the federal defendants assert that the public interest is served by allowing the Corps and the EPA to complete their review and consideration of permit applications in a thoughtful and considered manner. Defs.' PI Opp'n at 42. The Court, however, finds neither of these arguments determinative of whether preliminary injunctive relief should be granted in this case.

V. Conclusion

For the above reasons, the federal defendants' motion to dismiss and the plaintiff's motion for a preliminary injunction are both **DENIED**.¹⁴

/s/
Reggie B. Walton
United States District Judge

¹⁴ The Court has issued a contemporaneous Order consistent with this Memorandum Opinion.