AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

OBAMA ADMINISTRATION'S ACTIONS AGAINST THE SPRUCE COAL MINE: CANCELED PERMITS, LAWSUITS AND LOST JOBS

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

Friday, June 1, 2012

Serial No. 112-113

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.fdsys.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PRINTING OFFICE

74-441 PDF WASHINGTON : 2013

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 NATURAL RESOURCES

DOC HASTINGS, WA, *Chairman*
EDWARD J. MARKEY, MA, *Ranking Democratic Member*

Don Young, AK
John J. Duncan, Jr., TN
Louie Gohmert, TX
Rob Bishop, UT
Doug Lamborn, CO
Robert J. Wittman, VA
Paul C. Broun, GA
John Fleming, LA
Mike Coffman, CO
Tom McClintock, CA
Glenn Thompson, PA
Jeff Denham, CA
Dan Benishek, MI
David Rivera, FL
Jeff Duncan, SC
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Kristi L. Noem, SD
Steve Southerland II, FL
Bill Flores, TX
Andy Harris, MD
Jeffrey M. Landry, LA
Jon Runyan, NJ
Bill Johnson, OH
Mark Amodei, NV

Dale E. Kildee, MI
Peter A. DeFazio, OR
Eni F.H. Faleomavaega, AS
Frank Pallone, Jr., NJ
Grace F. Napolitano, CA
Rush D. Holt, NJ
Raúl M. Grijalva, AZ
Madeleine Z. Bordallo, GU
Jim Costa, CA
Dan Boren, OK
Gregorio Kilili Camacho Sablan, CNMI
Martin Heinrich, NM
Ben Ray Luján, NM
Betty Sutton, OH
Niki Tsongas, MA
Pedro R. Pierluisi, PR
John Garamendi, CA
Colleen W. Hanabusa, HI
Paul Tonko, NY
Vacancy

Todd Young, *Chief of Staff*
Lisa Pittman, *Chief Counsel*
Jeffrey Duncan, *Democratic Staff Director*
David Watkins, *Democratic Chief Counsel*

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

DOUG LAMBORN, CO, *Chairman*
RUSH D. HOLT, NJ, *Ranking Democratic Member*

Louie Gohmert, TX
Paul C. Broun, GA
John Fleming, LA
Mike Coffman, CO
Glenn Thompson, PA
Dan Benishek, MI
David Rivera, FL
Jeff Duncan, SC
Paul A. Gosar, AZ
Bill Flores, TX
Jeffrey M. Landry, LA
Bill Johnson, OH
Mark Amodei, NV
Doc Hastings, WA, *ex officio*

Peter A. DeFazio, OR
Madeleine Z. Bordallo, GU
Jim Costa, CA
Dan Boren, OK
Gregorio Kilili Camacho Sablan, CNMI
Martin Heinrich, NM
Betty Sutton, OH
Niki Tsongas, MA
Paul Tonko, NY
Vacancy
Edward J. Markey, MA, *ex officio*

CONTENTS

	Page
Hearing held on Friday, June 1, 2012	1
Statement of Members:	
Benishek, Hon. Dan, a Representative in Congress from the State of Michigan, Prepared statement of	47
Hastings, Hon. Doc, a Representative in Congress from the State of Washington I606	
Prepared statement of I607	
Holt, Hon. Rush D., a Representative in Congress from the State of New Jersey	3
Prepared statement of	5
Lamborn, Hon. Doug, a Representative in Congress from the State of Colorado	1
Prepared statement of	3
Markey, Hon. Edward J., a Representative in Congress from the State of Massachusetts	32
Prepared statement of	34
Statement of Witnesses:	
Darcy, Hon. Jo-Ellen, Assistant Secretary of the Army (Civil Works), U.S. Army Corps of Engineers—Invited—did not testify	
Eisenberg, Ross, Vice President, Energy and Resources Policy, National Association of Manufacturers	17
Prepared statement of	19
Gunnoe, Maria, Organizer, Boone County, West Virginia	24
Prepared statement of	25
Harbert, Karen A., President & CEO, Institute for 21st Century Energy, U.S. Chamber of Commerce	12
Prepared statement of	14
Jackson, Hon. Lisa P., Administrator, U.S. Environmental Protection Agency—Invited—did not testify	
Kirkendoll, Hon. Art, Senator, West Virginia State Senate	8
Prepared statement of	10
Pizarchik, Hon. Joseph, Director, Office of Surface Mining Reclamation and Enforcement—Invited—did not testify	

OVERSIGHT HEARING ON THE "OBAMA ADMINISTRATION'S ACTIONS AGAINST THE SPRUCE COAL MINE: CANCELED PERMITS, LAWSUITS AND LOST JOBS."

Friday, June 1, 2012
U.S. House of Representatives
Subcommittee on Energy and Mineral Resources
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:09 a.m. in Room 1324, Longworth House Office Building, Hon. Doug Lamborn [Chairman of the Subcommittee] presiding.

Present: Representatives Lamborn, Broun, Thompson, Benishek, Duncan of South Carolina, Flores, Johnson, Hastings, Holt, Tonko, and Markey.

Also Present: Representative McKinley.

Mr. LAMBORN. The Committee will come to order. The Chairman notes the presence of a quorum, which under Committee Rule 3(e) is two Members.

The Subcommittee on Energy and Mineral Resources is meeting today to hear testimony on the "Obama Administration's Actions Against the Spruce Coal Mine: Canceled Permits, Lawsuits, and Lost Jobs."

Under Committee Rule 4(f), opening statements are limited to the Chairman and Ranking Member of the Subcommittee.

I ask unanimous consent to include any other Members' opening statements in the hearing record if submitted to the Clerk by close of business today. Hearing no objection, so ordered.

Mr. LAMBORN. I also ask unanimous consent to have Congressman David McKinley of West Virginia's First District with us on the dais today and to participate in today's hearing. Hearing no objection, so ordered.

I now recognize myself for five minutes.

STATEMENT OF THE HON. DOUG LAMBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. LAMBORN. Today we will hear an update on the ongoing legacy, that is the Spruce Coal Mine in Logan County, West Virginia. This saga is one of the most disappointing legacies of Federal bureaucracy in American history.

This is the story of how one agency, the Obama Administration's Environmental Protection Agency, can attempt to single-handedly decide to retroactively pull permits, which destroys jobs and cripples our economy, and try to do this without consequence.

At the heart of this issue is the lack of confidence in permitting by the Federal Government.

If without cause an agency can retroactively veto issued permits, then how can any company, contractor or concessioner have confidence to invest in America when their permit is not worth the paper it is written on?

Fortunately, U.S. District Judge Amy Jackson found that the EPA's actions in this matter were essentially a stunning power grab, not justified by the statute.

Yet, even with such a staunch rejection by the Court, the Obama Administration is committed to a war on coal and is appealing this clear decision.

This appeal will consume tax dollars and time in our courts and for what? To destroy good and important jobs for Americans. Yes, that is the goal of this Administration's appeal. They want to destroy jobs and expand the power of the EPA to have extra legal new power to revoke permits.

This Subcommittee frequently hears discussion about certainty, how domestic investment requires certainty in order for investors to create jobs.

Should the Administration win this case and grant EPA the power to retroactively revoke permits, it would destroy all certainty in permitting for projects across the United States. This would be terribly destructive for the American economy.

Unfortunately, this permit is not the only one the EPA has withdrawn that has cost jobs and destroyed the livelihood of hard working Americans.

In 2009, the EPA withdrew the permit issued to the Desert Rock Energy Plant on the Navajo Nation. That $4 billion investment would have created thousands of jobs, generated tens of millions in revenues for the Navajo Nation, and supplied power to the hundreds of thousands of homes in the West.

One added bonus would have been the electrification of a broad section of the Navajo Nation where people currently live without electricity.

That permit, after being issued, was withdrawn by the EPA.

The Obama Administration's war on coal can be felt throughout the country, East, West, Appalachia, Rocky Mountains, Logan County, West Virginia, and Farmington, New Mexico.

Americans should be deeply concerned with this trend and the Administration's ongoing effort to retroactively pull permits, destroy jobs and hurt the economy.

Today we will hear from folks who are interested in talking about other topics then the reckless disregard for the law, as demonstrated by the EPA in this instance.

There will be discussions about selenium, water quality, and the general process of mining. None of that is the topic of today's hearing.

Today is about a reckless Administration and an agency that believes it is above the law as they crusade against domestic jobs and domestic energy. I will now recognize the Ranking Member from New Jersey, Representative Holt, for five minutes for his opening statement.

[The prepared statement of Mr. Lamborn follows:]

Statement of The Honorable Doug Lamborn, Chairman, Subcommittee on Energy and Mineral Resources

Today we will hear an update on the ongoing legacy that is the Spruce Coal Mine in Logan County West Virginia. This saga is one of the most disappointing legacies of federal bureaucracy in American history. This is the story of how one agency—the Obama Administration's Environmental Protection Agency—can attempt to singlehandedly decide to retroactively pull permits, destroy jobs, and cripple our economy without consequence.

At the heart of this issue is the lack of confidence in permitting by the federal government. If without cause an agency can retroactively veto issued permits, then how can any company, contractor or concessionaire have confidence to invest in America when their permit is not worth the paper it is written on. Fortunately, U.S. District Judge Amy Jackson found that the EPAs actions in this matter were essentially a stunning power grab not justified by the statute.

And yet, even with such a staunch rejection by the courts, the Obama Administration is committed to their "war on coal" by appealing this clear decision. This appeal will consume tax dollars and time in our courts and for what? To destroy good, important jobs for Americans. Yes that is the goal of this Administration's appeal, they want to destroy jobs and expand the power of the EPA to have "extra-legal new power" to revoke permits.

This subcommittee frequently hears discussion about certainty, how domestic investment requires certainty for investors to create jobs. Should the Administration win this case and grant EPA the power to retroactively revoke permits, it would destroy all certainty in permitting for projects across the country. This would be terribly destructive for the American economy.

Unfortunately,this permit isn't the only one the EPA has withdrawn that has cost jobs and destroyed the livelihood of hard working Americans. In 2009 the EPA withdrew the permit issued to the Desert Rock Energy Plant on the Navajo Nation. That $4 billion investment would have created thousands of jobs, generated tens of millions in revenues for the Navajo Nation, and supplied power to the hundreds of thousands of homes in the West. One added bonus would have been the electrification of a broad section of the Navajo nation were people currently live without electricity. But that permit, after being issued was withdrawn by the EPA. The Obama Administration's "war on coal" can be felt throughout the country, east—west, Appalachia-Rocky Mountains, Logan County, West Virginia and Farmington, New Mexico.

Americans should be deeply concerned with this trend and the Administration's ongoing effort to retroactively pull permits, destroy jobs and our economy.

Today we will hear from folks who are interested in talking about other topics than the reckless disregard for the law as demonstrated by the EPA in this case. There will be distractions about selenium (sa-LE-ne-um), water quality, and the general process of mining. None of that is the topic of today's hearing. Today is about a reckless Administration and an agency that believes they are above the law as they crusade against domestic jobs and domestic energy.

STATEMENT OF THE HON. RUSH HOLT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. HOLT. Thank you, Mr. Chairman. Mountaintop removal mining can be one of the most destructive practices on earth for the health of local communities, our climate, and our environment.

According to the Environmental Protection Agency, since 1992, nearly 2,000 miles of Appalachian streams have been filled with debris resulting from mountaintop removal mining.

Streams in Appalachia are being buried at a rate of 120 miles per year. Mountaintop removal mining has also de-forested an area the size of Delaware.

The proposed Spruce No. 1 Mine in West Virginia would cover an area roughly seven times the area of the National Mall, just to give you a sense of the scale.

It would be one of the largest individual surface mines ever authorized in West Virginia, and waste from the mining operation would bury more than six-and-a-half miles of a couple of streams

that according to the EPA "represent some of the last remaining, least disturbed, high quality stream and riparian resources" in the region.

The EPA has concluded that this mine will "transform these headwater streams from high quality habitat into sources of pollutants."

Since the Bush Administration approved the permit for Spruce Mine in 2007, which may have been unwise then, additional peer-reviewed scientific information has become available, which according to the EPA, "reflect a growing consensus of the importance of headwater streams and a growing concern about the adverse ecological effects of mountaintop removal mining."

We increasingly understand the effects, the impact, that this sort of mining has on our environment and on the health of local communities.

This morning, scientific understanding of the impacts of this mine and others like it—I beg your pardon—this mounting scientific understanding of the impacts led the EPA to withdraw the permit for filling these streams with mining waste under the Clean Water Act.

The coal company, a subsidiary of Arch Coal, challenged the EPA decision, and a District Court sided with the coal company by ruling that the EPA's interpretation was illogical.

In reading the Clean Water Act text, it seems clear that what is really illogical is the Court's interpretation of the statute and EPA's authority.

EPA has appealed this decision and agreed to an expedited schedule to resolve the appeal and remove any uncertainty, for example, that the Chair refers to.

The Majority may claim that EPA's effort to protect the environment and the health of communities in Appalachia from mountaintop removal mining are somehow evidence of a larger attack on the coal industry, but the reality is that the threat to coal use right now in today's economy is not coming from the Administration, it is coming from the market.

Surging domestic natural gas production, including from shale formations, has caused U.S. natural gas prices to plummet, low natural gas prices are good for American consumers. They are good for American manufacturing and for other American industries, such as agriculture and steel.

Fallen natural gas prices have, as one might expect, had an impact on our electricity mix. Over the last four years, the amount of electricity produced from coal has fallen from roughly half to a little more than a third.

Meanwhile, over the last five years, we have added more than 41,000 megawatts of natural gas generation as a nation. We have added more than 36,000 megawatts of wind. The shift is not the result of the EPA or anyone else in the Administration, it is simple economics.

Indeed, just this week, American Electric Power abandoned plans to ask state regulators in Kentucky to approve a 30 percent increase in electricity rates from consumers to pay for a $1 billion retrofit to keep a coal plant that is nearly 50 years old in operation.

Our domestic natural gas production is at an all time high. That is a fact, and that is what is going on here.

Utilities are increasingly moving to natural gas and renewables to generate electricity, yet the majority continues to support destructive mountaintop removal mining, a process that produces a product that companies are not choosing at this time, and it makes no sense.

I yield back.

[The prepared statement of Mr. Holt follows:]

Statement of The Honorable Rush D. Holt, Ranking Member, Subcommittee on Energy and Mineral Resources

Thank you, Mr. Chairman.

Mountaintop removal mining is one of the most destructive practices on Earth for the health of local communities, our climate and our environment. According to the Environmental Protection Agency, since 1992, nearly 2,000 miles of Appalachian streams have been filled with debris resulting from mountaintop removal mining. Streams in Appalachia are being buried at a rate of 120 miles per year. Mountaintop removal mining has also deforested an area the size of Delaware in the Appalachian region.

The proposed Spruce No. 1 Mine in West Virginia would cover an area roughly seven times the size of the National Mall. It would be one of the largest individual surface mines ever authorized in West Virginia. Waste from the mining operation would bury more than 6.5 miles of two streams that according to the EPA "represent some of the last remaining, least disturbed, high quality stream and riparian resources" in the region. The EPA has concluded that this mine "will transform these headwater streams from high quality habitat into sources of pollutants."

Since the Bush Administration approved the permit for the Spruce Mine in 2007, additional peer-reviewed scientific information has become available which "reflect a growing consensus of the importance of headwater streams" and "a growing concern about the adverse ecological effects of mountaintop removal mining." We increasingly understand the impacts that this sort of mining has on our environment and the health of local communities in the region.

This mounting scientific understanding of the impacts of this mine and others like it led the EPA to withdraw the permit for filling these streams with mining waste under the Clean Water Act. The coal company—a subsidiary of Arch Coal—challenged the EPA's decision, and a District Court sided with the coal company by ruling that the EPA's interpretation was illogical. But in reading the Clean Water Act text, it seems clear that what is really illogical is the court's interpretation of the statute and EPA's authority. EPA has appealed this decision and agreed to an expedited schedule to resolve the appeal.

The Majority may claim that the EPA's efforts to protect the environment and the health of communities in the region from mountaintop removal mining is somehow evidence of a larger attack on the coal industry. But the reality is that the threat to coal use in our country is not coming from the Administration, it is coming from the free market.

Indeed, surging domestic natural gas production, largely from shale formations, has caused U.S. natural gas prices to plummet. Low natural gas prices are good for American consumers, for American manufacturing, and for other American industries such as agriculture and steel. Falling natural gas prices have also had an impact on our electricity mix. Over the last four years, the amount of electricity we produce from coal has fallen from roughly half to a little more than one-third. Meanwhile, over the last five years we have added more than 41,000 megawatts of natural gas generation. We have added nearly 36,000 megawatts of wind. That shift is not the result of the EPA, it is the result of economics.

Indeed, just this week, American Electric Power abandoned plans to ask state regulators in Kentucky to approve a 30 percent increase in electricity rates from consumers to pay for a $1 billion retrofit to keep a coal plant that is nearly 50 years old in operation.

Our domestic natural gas production is at an all-time high. Utilities are increasingly moving to natural gas and renewables to generate electricity, yet the Majority continues to support destructive mountain top removal mining—a process that produces a product that fewer and fewer energy and power companies are choosing to invest in. This makes no sense.

I yield back.

Mr. LAMBORN. Thank you. Also, as is our practice, whenever the Chairman or Ranking Member of the Full Committee are here, they are invited to give a five minute statement also, so I will now recognize the Chairman of the Full Committee, Representative Hastings of Washington.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you very much, Mr. Chairman. Thank you for your courtesy as you have given that to me several times this year.

There is no question that over the course of President Obama's term in office, he and his Administration have taken aim at shutting down coal production and coal fired electricity plants across the country.

These direct attacks on America's hard working coal families have threatened tens of thousands of jobs and promise to increase the cost of energy for millions of Americans at a time when they can least afford it.

While some of the Administration's action against coal mining have been deliberately slow to develop, such as the unnecessary rewrite of coal regulations known as the "Stream Buffer Zone Rules," others have been more bold and direct.

The Obama Administration's EPA decision to retroactively withdraw a previously issued permit was certainly a bold and direct assault on American coal production.

In fact, a Federal Court ruled, and I quote, "EPA exceeded its authority," under the Clean Water Act to revoke an already issued coal permit, and such action required "Magical thinking."

Yet, after such a strong rebuke from the EPA's reckless decision making, the Obama Administration is appealing the Judge's ruling and once again trying to inflict economic damage on an already struggling region.

The Spruce Coal Mine in Logan County, West Virginia is a great opportunity for coal mining families who are desperate for job creation. It is also an opportunity for more American energy production that will help support other American industries.

Unfortunately, this Administration has tried everything to take this opportunity away from these hard working American families.

This hearing was supposed to give Committee members an opportunity to question Obama officials about the "magical thinking" and better understand their decision making process.

Unfortunately, the Obama Administration officials that were invited to testify refused the invitation and refused to send anyone in their place.

We have heard a lot about openness and transparency from this Administration. To me, it is very disappointing to see high ranking officials or any officials for that matter from his Administration ignore the opportunity to keep the public informed.

I would like to thank the second panel that will be called for taking time out of their busy lives and busy schedules to be here today to answer questions about this important topic.

I just wish that the Obama Administration had shown the same courtesy.

Mr. Chairman, I would like to take a moment to express how saddened we were to hear of the passing of your father, Mr. Robert Lamborn, on Tuesday.

I understand your father served with honor in the Second World War and was one of the five guards that participated in the Nuremberg trials. Clearly, his public service was passed on to the second generation. Know that our thoughts and prayers are with you and your family as you go through this difficult time.

I yield back my time.

[The prepared statement of Mr. Hastings follows:]

Statement of The Honorable Doc Hastings, Chairman, Committee on Natural Resources

There is no question that over the course of President Obama's term in office, he and his Administration have taken aim at shutting down coal production and coal fired electricity plants across the country. These direct attacks on America's hardworking coal families have threatened tens of thousands of jobs and promise to increase the cost of energy for millions of Americans at a time when they can least afford it.

While some of the Administration's actions against coal mining have been deliberately slow to develop, such as the unnecessary rewrite of a coal regulation known as the Stream Buffer Zone Rule, others have been more bold and direct. The Obama Administration's EPA's decision to retroactively withdraw a previously issued permit was certainly a bold and direct assault on American coal production.

In fact, a Federal Court ruled that the EPA "exceeded its authority" under the Clean Water Act to revoke an already issued coal permit and that such an action required "magical thinking." Yet, even after such a strong rebuke of the EPA's reckless decision making, the Obama Administration is appealing the judge's ruling and once again trying to inflict economic damage on an already struggling region.

The Spruce Coal Mine in Logan County West Virginia is a great opportunity for coal mining families who are desperate for job creation. It's also an opportunity for more American energy production that will help support other American industries, small businesses, family farms and jobs creators through affordable energy. Unfortunately, the Obama Administration has tried at every turn to take this opportunity away from these hardworking American families.

This hearing was supposed to give Committee Members an opportunity to question Obama Administration officials about the "magical thinking" and better understand their decision making process. Unfortunately, the Obama Administration officials that were invited to testify refused the invitation and refused to send anyone in their place. We've heard a lot about openness and transparency from President Obama, so it's very disappointing to see high ranking officials, or any officials, from his Administration ignore the opportunity to keep the public informed.

I would like to thank our second panel for taking the time out of their lives and busy schedules to be here today to answer questions about this important topic—I only wish the Obama Administration had shown the same courtesy.

Mr. LAMBORN. Thank you, Mr. Chairman.

Moving on, at this point I would like to introduce the invited first panel, which was The Honorable Lisa Jackson, Administrator of the Environmental Protection Agency, The Honorable Joseph Pizarchik, Director of the Office of Surface Mining Reclamation and Enforcement, and The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works representing the U.S. Army Corps of Engineers.

Unfortunately, it appears that not a single individual from the Obama Administration could take the time out from their ongoing work of laying burdens on the American economy to attend our hearing today.

It is extremely disappointing that they declined our invitation to speak and answer questions on an important issue that directly impacts the jobs and livelihood of many Americans.

Even if they are extremely busy today, which I would understand, they could have sent someone in their place.

Since the Obama Administration has no time for us today to answer questions, we will call forward the second panel.

State Senator Art Kirkendoll, a West Virginia State Senator, The Honorable Karen Harbert, President and CEO, Institute for 21st Century Energy of the U.S. Chamber of Commerce, Mr. Ross Eisenberg, National Association of Manufacturers and VP for Energy and Resources Policy, and Ms. Maria Gunnoe, Boone County, West Virginia organizer.

As you come forward, I will lay out the ground rules. Like all our witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to five minutes as outlined in our invitation, and under Committee Rule 4(a).

Our microphones are not automatic so you have to press the button to start. I also will explain how the timing light works. You see the clock in front of you that starts at five minutes. When it is down to one minute, a yellow light appears, and after the five minutes are all up, the red light comes on.

Senator Kirkendoll, you may begin. Thank you for being here.

STATEMENT OF THE HON. ART KIRKENDOLL, STATE SENATOR, STATE OF WEST VIRGINIA

Mr. KIRKENDOLL. Mr. Chairman, I want to thank you and the Committee for the opportunity. My name is Art Kirkendoll. I am a Senator from West Virginia representing the 7th Senatorial District, which is in the deep south, including Logan, Boone, Lincoln, Mingo and Wayne Counties.

Prior to being nominated to the Senate, appointed to the Senate, and I am the Democrat nominee this year, I was on the County Commission of Logan for 30 years.

So disturbing, regarding the law permit back in 1998, we had a real tussle about the opportunity to mine coal. As a Commissioner, you set the budget for all the constitutional office holders in the county. The Sheriff, everybody else, all the public depends on you, the school kids, everybody depends on the ability to have life in a rural county.

When this permit was disbanded, Dal-Tex shut down, and we lost 400 quality jobs, $29 million back in 1998 in direct payroll.

If you take into account the other jobs that support the coal industry, we probably lost $100 million total in that particular area.

Our coal severance at that time was about $400,000 a quarter. I had to start cutting the budget and tighten things up because we got down to $72,000 one quarter.

When 20 percent of your budget is derived from coal tax in an energy producing county, it is pretty, pretty tough.

During the years—we are in almost the 14th year, we are still not mining coal. There are still 230 jobs today in question that would be mining the surface mine.

When we talk about the devastation of surface mining, let's look at the plus side of surface mining. We are in a challenged terrain

in Logan County. I think they say 20 degrees slopes. We have no flat land.

By having post-mined land, some of the parcels where we extracted the coal, we now have a jail, an industrial park, an airport, a shopping mall, and other things that give us a little diversification and ability to be something other than just coal.

I want to tell you, I do not know about some of the other counties, but Logan has done a pretty good job with parcels of post-mined land.

Being also on the Commission, we set up what they called a master land usage program. What that meant was we could put in language in a mine permit to where we could take people out of flooded areas and put them upon a surface mine and leave the power and sewage there instead of taking it all out and starting over.

That is where you need to get when you mine coal in areas that need to be surface mined.

Take care of people's livelihood. Let these people have a life. We have gone through two tremendous floods in Logan County in the last few months. Millions of your dollars come into our area, Army Corps, everybody, the troops, cleaning up our area. If those people had been on some of these surface mined areas that we have, that would not have happened.

If you think you cannot get killed, go back to the Buffalo Creek flood a few years ago, 124 people.

What we are talking about today is the ability to (1) produce energy that keeps America safe; (2) gives us the ability to compete with other markets financially.

When you cannot get a permit, guess what happens? A lot of people do not understand. A few years from now, it is going to be supply and demand.

When we start depending on coal coming across the Atlantic and Pacific like we do oil, they are going to have the supply and we are going to have the demand. We are 20 years away from alternative energy and fuel to where we do not need coal. We may not have domestic coal, that is the problem.

We are going to sit back and watch the rest of the world flourish economically. They laugh at what we do. We are sitting here putting our own selves out of business.

We know how to do it environmentally sound. I am an environmentalist, too. I want to do it the right way.

It used to be AOC. That is original contour. Plan out what you want to do with that property after extraction of the coal. Beautify it. Put a school on it. Put a community on it.

What people do not realize, if we mined all the coal in Southern West Virginia mountaintop removal that needs to be mined, it would be three percent. I am telling you we could make it on 97 percent of the mountains.

Second fact, I chair one of the most instrumental groups in America, the ATV Hatfield-McCoy Trail System. We occupy that trail system in the same mountains that we mine coal on a daily basis.

If it is so devastating, then why have we had visitors from all 50 states and almost 30 foreign countries.

We are trying to diversify. We want to be a tourist area and mine coal, too. The way we do it, with the environmental soundness we are doing it with now, we can do both.

Do not be duped. Come down to West Virginia and see how we can do it and what we do. Do not take data and get in a committee and put the onus back on us where we cannot compete.

Bring that committee down. Let me take you to some post-mined land that has been redone, the beauty of it.

I had the 60 Minutes crew in a helicopter. They asked me where is the reclaimed area, and I said you have been over it for 12 minutes. They still would not believe what I told them.

The deer, the life and everything is better on post-mined land than the land before.

With that, thank you for the opportunity, and let's be sensible and put America back to work. Thank you very much.

[The prepared statement of Mr. Kirkendoll follows:]

Statement of The Honorable Art Kirkendoll, Senator, West Virginia State Senate

Good morning and thank you for the opportunity to address this Committee. My name is Art Kirkendoll and for the past 30 years I've had the distinct pleasure of serving the people of Logan County, West Virginia first as a county commissioner and now as state senator. I am also here on behalf of 63,000 men and women that show up every day at a working mine in West Virginia as well as the Legislative and Executive branches of state government. Logan County has been called the 'heart of the coalfields" and it is that. Coal and Logan County are almost synonymous. I honestly don't know how you could separate the two.

I've had the responsibility and pleasure of administering a county budget based on coal tax revenues for schools and important government services for the seniors and less fortunate. I've also had the daunting task of preparing that same budget when coal revenue disappeared due to arbitrary judicial and administrative actions that affected the continued viability of a coal mining operation in my county such as EPA's post-issuance veto of the Spruce permit.

As a lifelong resident and a public servant, I am uniquely aware of the importance of coal to our community, and I am well aware that coal mining depends on a stable and predictable regulatory environment.

EPA's revocation of a legal, valid permit three years after it was issued by the Corps of Engineers shatters the trust that must underlie the relationship between citizens, businesses and their government.

Not only has the EPA's actions shattered that essential relationship between the people and their government, but in their politically motivated zeal to invalidate an existing, legal permit, the agency trampled on the relationship of the states to their federal government, destroying the very spirit of the Federal Clean Water Act so much so that a federal judge was inspired to characterize EPA's actions as "magical thinking."

Ladies and gentlemen, it is important that you understand this issue isn't just about a single mine permit—nor is it about a single community. Some of you may believe this is just a "regulatory matter" but it is not. It is about real people and the impact these decisions by EPA and others like them are having on families and their communities in Logan County. . .my home. . .my state and across this nation. So concerning are EPA's actions to the citizens of West Virginia that the West Virginia Legislature has twice adopted resolutions condemning EPA's behavior with respect to the Spruce mine permit. By disregarding 13 years of environmental analysis that went into the Spruce mine permit with the stroke of its veto pen, EPA has essentially chilled the permitting process not only for mining operations but any development that needs Clean Water Act authorization from the Corps of Engineers.

Each year, more than 13 million tons of coal is mined in our county. There are a bit more than 1,500 coal miners working in the county, and using the standard economic multiplier, that means the industry provides employment for about 5,000 Logan County residents. Consider that for a moment—5,000 out of a total population of a little more than 35,000. To put that into a bit better perspective, most of those coal miners and service industry employees are married and are in their

prime family years—so it is safe to say that those 5,000 people represent 5,000 families—about 20,000 people out of 35,000 –something like 70 percent.

Now, the average West Virginia coal miner makes about $70,000 a year, which means that the coal industry pays out about $105 million in wages each year in our county alone. The average salary of our coal miners is almost twice that of the average per capita income across the state. In fact, mining jobs are some of the best jobs people can have in our state.

Historically coal and the coal-related industries have provided higher paying jobs resulting in a higher standard of living and greater access to a better education. Consider the impact on Logan County School System and our families.

- The property tax on coal and coal-related industries in Logan County generates approximately $7.5 million in excess levy tax revenue for Logan County Schools.
- This revenue provide over a million dollars for textbooks, academic travel for students, and school libraries;
- $260,000 for bands, groups, student accident insurance policies and mini grants;
- $300,000 for technology equipment, wiring and supplies; over a million in construction, security, and repairs;
- $360,000 of playgrounds, public libraries, county health departments;
- $4,981,000 in service and professional salaries.

Not only do the coal industries pay these taxes, employees of these industries work and live in our communities, and they support our schools with their personal property taxes as well. What cannot be overlooked when we discuss the financial impact of levy tax revenue is the personal dimension to this discussion for our school system, the emotional devastation that occurs when coal and the families who are dependent on coal no longer have a viable income.

We understand the importance of the coal industry to our county—just in terms of the economic impact alone—but it goes far beyond that.

I can remember back in 1981 when we began to take a longer view of what our county needed, thank goodness we had coal companies that provided the taxes and revenue and jobs that enabled us to do that.

When I first started, 15 percent of the people in Logan County had potable water. As we speak today, 99 percent have it. We recently started our second phase, our main sewers in southern West Virginia, and Logan County.

We're making great strides but we remain way behind the rest of the nation, I am asking that you don't allow the EPA to destroy the industry that provides us the revenue to get to that next level.

I often hear the opponents of coal talk about the land that is left once mining is finished. They claim we don't do anything with it.

Well, I don't know what they do in the rest of the country, but in Logan one of our biggest problems is a lack of readily developable land. The development and diversification of our economy is severely limited by the lack of flat, readily developable land. Our people try to make a living, build homes and businesses on the only flat land available—the valley floors—but the problem is that these valley floors are also often 20-year flood plains. Who would make a significant investment on a 20-year flood plain? Who would build a home or business?

Coal mining—particularly surface mining such as proposed at Spruce—can provide us jobs today and possibilities for tomorrow. It can do so even as it dramatically reduces the cost of site preparation for major projects—something that is one of the most important limiting factors.

Today, we have an airport, an industrial park, a regional jail, a wood products plant, a conference and recreation center among other things in Logan County, **because** we took this land and did the right thing with it after the extraction of coal.

As I stated earlier, this is about more than a single permit or a single mining operation but it is important to understand the impact that even a single mine has on a community and county like Logan County. Unfortunately, we've been here before—in 1999 a federal Judge halted mining at the Dal-Tex site where the Spruce permit is located. The mine closed, jobs were lost and communities and families were ripped apart. That decision, which was reversed on appeal, set in motion the 13-year permitting process that led to the issuance of the Spruce mine permit in 2007. When the permit was finally issued, the company mobilized investment to initiate coal production, restoring life and economic vitality to these previously-decimated areas. All of that promise and potential is now threatened by an EPA that is willing to reach beyond its statutory authority to target an industry and a region without regard for impacts to real people.

This EPA claims its dedication to the concept of environmental justice, that no single community or group should unequally bear the burden of public policy deci-

sion with respect to environmental protection. In the case of the Spruce permit and coal mining in West Virginia and Appalachia, EPA has warped this concept of environmental justice to one of ***environmental injustice***—where jobs, lives and communities are targeted and ultimately destroyed in the blind pursuit of a purely political agenda. In EPA's distorted world of ***environmental injustice,*** unelected bureaucrats in office buildings in Philadelphia and Washington substitute their judgment for the will of the elected West Virginia Legislature and the Congress.

I come to you today seeking nothing more than true justice for my county and my state. As two federal Judges have recently observed, EPA is an agency that begs for Congressional intervention. As Judge Amy Berman Jackson observed, EPA's actions on the Spruce permit represent "stunning power" for an agency to assume when there is no mention of it in the authorizing statute. The House has taken appropriate measures to restore balance and rationality to EPA and force them to respect the lines of federal and state responsibility with the passage of H.R. 2018, the Clean Water Cooperative Federalism Act. This same body should immediately begin consideration of H.R. 457, which will forever prevent EPA from revoking an issued and operating permit.

As I said, I am asking for nothing more than justice. . .and for fairness. I am asking you, our elected representatives, to stand beside the working coal miners of my state and, indeed, this nation. They have given so much and by their hard work, we have built an economy that is the envy of the world.

Please don't turn your backs on the proud, hard-working, devoted West Virginia coal miner and outsource their jobs as we have so many others. God forbid that ever happens. I never thought that in 2012, as State Senator, I would spend 80 percent of my time focusing on the uncertainty of whether people know on Monday if they have a job next week. That's not America.

Thank you for your time. . .

Mr. LAMBORN. Thank you for your testimony, Senator Kirkendoll. Ms. Harbert, you may begin.

STATEMENT OF KAREN HARBERT, PRESIDENT AND CEO, INSTITUTE FOR 21ST CENTURY ENERGY, U.S. CHAMBER OF COMMERCE

Ms. HARBERT. Thank you, Chairman Lamborn and Ranking Member Holt, members of the Committee.

I am Karen Harbert, President and CEO of the Institute for 21st Century Energy, an affiliate of the U.S. Chamber of Commerce, which is the nation's largest business federation.

First, let's be clear what the Spruce Mine discussion is not about. It is not about mountaintop mining. It is not about whether coal should or should not be part of our energy mix.

It is about the rule of law and whether America is a safe place for long term investment. It is about the integrity of our regulatory process. It is about whether America is open for business. That is why this hearing is so important.

One of our great strengths as a country is that we hold the rule of law sacrosanct. If we move to a system embodied by the stance taken by the EPA in the Spruce Mine case, commerce as we know it would grind to a halt. Hundreds of businesses would be questioning if they, too, could have their permits retroactively rejected.

New investments would dry up because there would be no way to accurately calculate risks associated with the regulatory agency that can simply change its mind at will.

The U.S. Chamber supports environmental safeguards and we recognize the clear, transparent and predictable regulatory system is valuable to both business and to the environment.

We also believe that Government must honor the decisions it makes and operate within the law.

In the case of Spruce Mine No. 1, a Federal Judge has clearly demonstrated that the EPA did not.

To give a sense of scale and magnitude put at risk by EPA's actions, it should be noted that the Army Corps of Engineers issues approximately 60,000 discharge permits annually under Section 404, and estimates that covers about $220 billion of annual investments conditioned on those permits.

It is not just a matter of mining or energy projects, it is for industry broadly. It covers a significant component of our economy, including residential and commercial buildings, roads, renewable energy and other projects.

A reduction or constriction on investment in these key infrastructure areas will limit job growth.

In fact, a study by the Brattle Group estimates that for every billion dollars of construction spending, we generate 18,000 jobs. With today's unemployment rate at 8.2 percent, we cannot afford our Government to restrict job growth.

With after ten years of review, EPA did not even identify need to withhold the approval for Spruce Mine No. 1 when it had the opportunity and legal ability to do so.

Attempting to withdraw their approval retroactively, veto the permit almost two years after issuance, would not only cause immediate economic loss to the mine owner, the State of West Virginia, and the workers, but it would really create a substantial negative and economic chilling impact on the economy as a whole, setting a precedent that Section 404 permits can be revoked or changed at will.

If permits become subject to arbitrary treatment, the result will be significantly reduced capital investments, fewer jobs, and more expensive infrastructure.

The United States is still an attractive market for investments, but to the extent the Government increases risks, the United States becomes less attractive.

According to the World Economic Forum's global competitive report, the U.S., which long held the top global position, has continued its three year decline, and now holds fifth place.

Two of the factors cited for this decline were a reduction in the transparency of Government policy making and second, the increase in burdensome regulations.

When a Government agency takes unprecedented action to attempt to revoke a legal permit issued by another agency, this action sends a message to the entire business community that it cannot count on the Government permits.

Businesses of all sizes are not asking for no regulations, they are asking for transparent and enduring regulations upon which they can make decisions on investments.

It would require a process that makes sense, a process that has clear time frames, and a process where once a decision is made, it is honored and its investments can go forward and hire people.

Without such confidence, capital will go elsewhere, and that undermines not only our competitiveness but the ability to get America back on its feet and Americans back to work.

Fortunately, the U.S. system still has checks and balances, and in this case, the system worked.

Judge Amy Jackson issued a striking rebuke to the EPA's overreach. She called the EPA's interpretation illogical, impractical, refers to the logic as "magical thinking," and noted "It is unreasonable to sew a lack of certainty into a system that was expressly intended to provide finality."

At the onset of this case, the EPA sought to silence its critics, including the Chamber, by objecting to the very filing of our brief. Now the Court has ruled against EPA but EPA continues, and it is troubling to waste the taxpayers' dollars to defend an indefensible policy that is transparently bad for the economy and inconsistent with the principles of law.

Business can and should adhere to laws and regulations governing its industry, but we need to know the rules of the road and the regulators have an obligation to provide a clear and transparent process to follow.

Congress and the judicial system must ensure that EPA exercises only the authority it has and not the authority it wishes it has, nothing less, or the integrity of our commercial economy is at stake.

Thank you.

[The prepared statement of Ms. Harbert follows:]

Statement of Karen A. Harbert, President & Chief Executive Officer, Institute for 21st Century Energy, U.S. Chamber of Commerce

Thank you, Chairman Lamborn, Ranking Member Holt, and members of the Committee. I am Karen Harbert, President and CEO of the Institute for 21st Century Energy (Institute), an affiliate of the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region.

The mission of the Institute is to unify policymakers, regulators, business leaders, and the American public behind common sense energy strategy to help keep America secure, prosperous, and clean. In that regard we hope to be of service to this Committee, this Congress as a whole, and the administration.

I appreciate this opportunity to discuss the Spruce No. 1 mine (Spruce Mine) permit revocation and the potential impact to capital investment and jobs. First, I would like to clarify that this is not about mining, and specifically whether strip mining should be permitted under federal law. This is not about whether coal which supplies 40 percent of our electricity should or shouldn't be part of our energy mix. This case is about the rule of law and regulatory certainty and the type of regulatory regime that the law allows for and that we wish to have in the United States. Even more fundamentally, the outcome of this case will signal whether America is open for business and safe for long term investment.

One of our great strengths as a country is how we hold the rule of law sacrosanct coupled with a regulatory system with appropriate checks and balances to protect the regulated. If we were to move to a system embodied by the Environmental Protection Agency's (EPA) action in the Spruce Mine case, hundreds of projects and businesses in America today could question whether they too might retroactively have their lawful permits revoked or recaptured. New projects will have to determine how to calculate risks associated with changing viewpoints at a future point from a regulatory agency. This will reduce and delay a broad range of projects, increase the cost of doing business, and reduce the number of jobs at a time when job creation is most critical. The Chamber supports environmental safeguards and clear standards that are applied consistently to all businesses. But just as businesses must be accountable for the decisions they make, government must honor the decisions that it makes and operate within the laws established by Congress.

Furthermore, a clear, transparent, and predictable regulatory system is not only valuable to business, but furthers the protection of the environment. When business is provided with the certainty to know what is necessary for compliance, it can be a valuable partner in environmental stewardship.

Background and Timeline

The Spruce Creek mine was granted a surface mining permit in 1998 by the State of West Virginia under the Surface Mining Control and Reclamation Act (SMCRA). At the same time permits were pursued under section 402 of the Clean Water Act (NPDES) and under section 404 of the Clean Water Act (dredge and fill). The initial section 404 permit was withdrawn by the Army Corps of Engineers (Corps) because a Federal Court found that an Environmental Impact Statement (EIS) was required. EPA commented on a preliminary draft EIS in August 2001 and the draft EIS in August 2002. In both cases EPA expressed concerns, but committed to work with the Corps to develop an environmentally acceptable project. In 2006, the Corps published the draft EIS and final EIS, and EPA submitted comments in both processes. After further consultation with EPA, the Corps issued the section 404 permit for the Spruce Mine in January 2007.

Please note that the section 404 permit, which is required to begin operations at the Spruce Mine, was issued ***eight years*** after the initial mining permit. Before the initial mining permit was issued, the owner made significant investments to acquire the rights to develop the mine and the necessary engineering work to determine the feasibility of the project. Significant investment was also required to complete the permitting process which ultimately took 10 years to complete. Much of this investment remains stranded today as the company battles in court to defend its right to use the very permit one agency of this government issued and another agency of the same government subsequently revoked.

Almost two years after the Corps granted the section 404 permit, EPA requested the Corps suspend, revoke, or modify the permit in such a way that would prevent the discharge of dredge or fill as allowed by the permit. The Corps declined EPA's request. In March 2010, EPA took the unprecedented action of withdrawing or restricting specifications in the section 404 permit which would have the impact of revoking, or retroactively vetoing, the lawful permit issued by the Corps.

This is a very short summary of a long and complex regulatory record. The key point is that even with the current regulatory process, there is significant investment risk because of the complexity, long permit processing times, and potential challenges and litigation. Adding an arbitrary and capricious and completely unpredictable risk of a permit being revoked or withdrawn after it is issued, greatly increases the challenge of securing capital for any project subject to this process.

Economic Impact of Greater Regulatory Uncertainty

When the risks of a project increase, investors expect a higher return. Therefore, fewer projects meet the return on investment criteria to support funding. These risks can be in the form of many different project impacts, but regulatory risk is clearly one of those criteria. An economic analysis of the Spruce Mine and the broader economic impact of EPA's action was prepared by Professor David Sunding of UC Berkley and The Brattle Group to support a multi-industry amicus curiae brief filed in support of the lawsuit challenging EPA's action. The analysis is attached as an appendix. The conclusion of that analysis provides a good summary of the economic impact:

> *Conclusions*
>
> *The EPA's precedential decision to revoke a valid discharge permit will have a chilling effect on investment across a broad swath of the American economy. Activities ranging from residential and commercial development, roads, renewable energy, and other projects rely on discharge authorization under Section 404 of the Clean Water Act. These activities provide needed infrastructure, housing, and other services, and are a significant part of the annual value of economic activity in the country. They also generate hundreds of thousands of jobs nationwide, and stimulate economic activities in support sectors.*
>
> *The types of projects that require discharge permits are usually capital intensive and involve irreversible investments, meaning that the project proponent cannot recoup costs if the necessary authorization is revoked by the EPA. Revoking discharge permits introduces two essential market distortions: (i) revoking permits raises hurdle rates among private investors; and (ii) revoking permits reduces the expected benefit-cost ratio of new projects. These effects are likely to dampen investment rates in industries relying on discharge permits, both by delaying and by deterring new projects from being built. Importantly, I show that even small changes in the probability of ex post revocation can have a large effect on project investment.*

To give a sense of the scale and magnitude of industries that are put at risk by this EPA action, the Army Corps of Engineers issues approximately 60,000 discharge permits annually under section 404 of the CWA, and estimates that over

$220 billion of investment annually is conditioned on the issuance of these permits. If the investment is conditioned on the permit and the permit is subjected to potential future arbitrary and capricious treatment, it is clear that the result will be significantly reduced capital investment. It is because of actions like EPA's that regulatory uncertainty has risen to a level that many economists estimate some $2 trillion dollars have been "sidelined" instead of being invested and catalyzing economic growth and job creation.

While it is never a good time to unnecessarily restrict investment, it is doubly so during a time when the economy is struggling. We need productive, effective, and environmentally sound investments to create jobs. In almost ten years of review, EPA did not identify a need to withhold approval of the Spruce No. 1 mine when it had the opportunity and legal ability to do so. Attempting to withdraw their approval and retroactively veto the permit almost two years after issuance not only causes immediate economic loss to the mine owner and workers employed to support the mine, but also creates a substantial negative economic and chilling impact on the economy by setting a precedent that section 404 permits can be revoked post hoc or changed at will. This uncertainty has a direct and lasting impact of increasing the risk for all projects that require a section 404 permit.

This is not just a matter for mining or energy projects, but impacts industry broadly including both public infrastructure projects and private industry. As noted by Dr. Sunding, these impacts touch a significant component of the economy; including, residential and commercial development, roads, renewable energy and other projects. A reduction or constriction on investment has a direct impact in limiting job growth. With an unemployment rate of 8.1 percent, we must ensure that government is not restricting job growth.

Will the U.S. remain a low risk investment destination?

According to the World Economic Forum's Global Competitiveness Report 2011–12, the U.S., which long held the top global position as an attractive investment destination, has continued its three year decline and now holds fifth place. Two of the factors cited as reasons for this decline were a reduction in the transparency of government policymaking and the increase in burdensome regulation.

Some of the risks and uncertainties evaluated as part of an investment decision process include risks regarding the business opportunity, commodity prices, and cost management risks. These are just a few of the considerations. Components of risk analysis also include legal, regulatory and government related risks. Historically, the U.S. has had low government or sovereign risk because of the strong rule of law and consistent regulatory systems. This is in contrast to many countries around the world in which the regulatory processes and contract terms are subject to change when the government changes or when one government or bureaucrat changes its mind. The United States is still an attractive market for investment, but to the extent that government increases risk, the United States becomes less attractive than other potential investment markets.

It is not just the regulatory risk but the accumulation of risks for a given project, including other issues such as tax policy, which can increase the perception of sovereign risk. When a U.S. government agency takes unprecedented action to revoke a lawful permit issued by another government agency, this action sends a message to all businesses that government approvals may not be honored.

Businesses of all sizes are not asking for no regulation, they are asking for transparent and enduring regulations upon which they can make decisions and investments against a backdrop of certainty. Simply put, a process that makes sense. A process that has clear time frames. A process where once a decision is made a business and its investors can trust the decision will be honored. Without such confidence, capital will go elsewhere and that undermines not only our competitiveness but the ability to get Americans back to work and the economy on its feet. This is not a one-off problem but a long term challenge to our economic system that we must face head on.

Spruce Mine Case—United States District Court

Fortunately the legal system has provided review and emphatically stopped EPA's unprecedented attempt to retroactively veto a legally issued section 404 permit. On March 23, 2012, Judge Amy Berman Jackson of the United States District Court for the District of Columbia issued a holding that EPA exceeded its authority by issuing its Final Determination on January 13, 2010, purporting to modify Mingo Logan's section 404 permit for the Spruce Mine.

Judge Jackson specifically states: "First and foremost, EPA's interpretation fails because it is illogical and impractical. . ..EPA resorts to magical thinking. . ..Not only is this non-revocation revocation logically complicated, but the possibility that

it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring Clean Water Act compliance: the permit."

Judge Jackson also states: "It is further unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality. . .the concerns the amici raise supply additional grounds for finding EPA's interpretation to be unreasonable."

Judge Jackson also makes specific reference to the importance of the broad implications of the EPA action. This reference acknowledges the concerns and impacts presented by the broad based coalition of business groups presented in our amicus brief.

The Administration went so far to avoid having these broader implications considered that they petitioned the court to preclude this information from consideration by objecting to the filing of the brief. Judge Jackson rightfully denied EPA's attempt to squelch the voice of the broader business community.

Judge Jackson's opinion is unlikely to be the final word on this issue. The EPA has already notified the court that it intends to appeal the decision. It is troubling that the EPA intends to devote even more resources further defending an indefensible policy that is so transparently bad for the economy and so inconsistent with the principles of rule of law and regulatory consistency. And defending that policy after such a strong rebuke from Judge Jackson.

Summary

Again, I would like to highlight that this issue is not about whether one is for or against mountain top mining. This is about an Agency abusing its authority. This action has sent signals to the broadest set of industries that build the things in this country that keep our economy moving. The issue is regulatory certainty—ensuring that the United States maintains a clear, transparent, and predictable regulatory system for a permitting process that is essential for almost every significant project and a large part of the economy. This is a system that Congress envisioned would provide finality to the regulatory process so business can move forward to make investments and grow the economy.

In conclusion, I cannot over estimate the potential impact if EPA's unlawful action remains. As stated earlier, the Corps estimates that approximately $220 billion in annual investment is contingent on section 404 permits. The Brattle Group in their economic analysis estimates that every billion dollars of construction spending generates 16,000 to 18,000 jobs. The process that resulted in the permit of the Spruce Mine adhered to the law even if it took eight long years. If that lawful process can be upended, the reverberations through the economy will be real: restricting, postponing or eliminating investment and jobs. Making infrastructure projects riskier in the U.S. makes them less likely to happen and more costly to the consumer and taxpayer. That is not the foundation for a competitive 21st century economy.

Business can and should adhere to laws and regulations governing its industry. Business needs to know the rules of the road and regulators need to provide a clear, transparent, timely, and fair regulatory process to follow. America's private sector needs the type of clarity to make investment decisions that EPA's retroactive veto of the Spruce Mine just undercut.

Effective and consistent environmentally regulatory management is good for business and good for the environment. In the case of section 404 permits, Congress provided clear direction to EPA. EPA must follow that direction and Congress and our judicial system must ensure they do.

[NOTE: The attachment has been retained in the Committee's official files.]

Mr. LAMBORN. Thank you for your testimony, Ms. Harbert. Mr. Eisenberg, you may begin.

STATEMENT OF ROSS EISENBERG, VICE PRESIDENT, ENERGY AND RESOURCES POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. EISENBERG. Good morning, Chairman Lamborn, Ranking Member Holt, and members of the Subcommittee.

My name is Ross Eisenberg. I am Vice President of Energy and Resources Policy at the National Association of Manufacturers.

I am very pleased to come before the Subcommittee today to discuss Mingo Logan Coal Company's Spruce Mine, and a Section 404 permit, and what the retroactive veto of that permit did and the impact that had on manufacturers.

In order to drive our nation's economic recovery, manufacturers really need predictability from the regulatory process. They must understand the rules of the road so they can make responsible, informed investment decisions.

This lack of predictability is precisely the problem with the Spruce Mine case that we are here discussing today, and it is the main reason that the NAM and other organizations found it so necessary to enter this litigation against EPA and in support of Mingo Logan.

The Spruce Mine veto was at its core a $250 million decision by EPA that created a $220 billion problem. Let's talk first about the $250 million.

Arch Coal, the parent of Mingo Logan, planned to commit more than $250 million and create at least 250 new well paying jobs in Logan County, West Virginia.

Obviously, this project matters there, and you have heard that today from the State Senator.

About that $220 billion problem, as Ms. Harbert noted before me, the Corps estimates that it issues roughly 60,000 discharge permits annually under Section 404, and more than $220 billion of investment annually conditioned on the issuance of these permits.

This includes pipelines, transmission lines, construction, renewable energy, transportation infrastructure, agriculture, and many other sectors.

For as long as the Clean Water Act has been in existence, the exclusive framework under which Section 404 permits might be modified has been the Army Corps' regulations.

EPA's retroactive veto of the Spruce Mine permit introduced for each of these sectors a completely new and undefined threat to their permits.

EPA's decision would have made it significantly more difficult for project developers to rely on essential 404 permits when making investment, hiring or development decisions. Project developers would now have to account for the possibility of having the rug pulled out from under them after work on the project had been initiated.

EPA's retroactive veto brought with it significant investment uncertainty that would inevitably translate into higher risk of borrowing, less investment, lost jobs, and slower growth throughout the U.S. economy.

The precedent set by the Spruce Mine case is a serious threat to manufacturers in its own right. It is only a small part of a broader new set of water policies being pursued by the EPA that have manufacturers concerned.

EPA appears to be testing the outer boundaries of its authority under the Clean Water Act. For instance, EPA right now is on the verge of issuing final guidance that drastically expands its jurisdiction under the Clean Water Act.

Manufacturers are concerned that the guidance is legislative in nature and could significantly impact regulatory certainty by sug-

gesting a wide range of traditionally intrastate waters to Clean Water Act jurisdiction and permitting.

Moreover, by doing this dramatic policy shift through guidance rather than by regulations or the regulatory process, manufacturers feel that EPA is circumventing a lot of the built in regulatory safeguards in the regulatory process to protect the regulatory community, such as economic impact statements, job loss analyses, and considerations of impacts to small businesses.

In addition, EPA is also on the verge of taking another 404 veto action on the heels of its loss in this, the Spruce Mine case.

This time, EPA actually appears likely to issue a preemptive veto for the Pebble Project, a proposed copper and gold mine in Alaska.

If that project were to move forward, it could attract several billion dollars of investment and countless manufacturing jobs. EPA has taken the position that it can say no to this project even before the application for a permit has been filed.

I would like to conclude by saying that it is very clear from this case and other water cases that EPA is involved in that it is uncomfortable with the scope of its authority under the Clean Water Act. It clearly wants more.

By trying to get more through questionable regulatory decisions such as this one, EPA is causing a great deal of uncertainty that goes well beyond the specific project or projects that it seeks to regulate.

It is also ensuring frankly that most of its decisions will be subject to litigation and like Spruce Mine, potentially overturned.

EPA's goal should not be to issue the most aggressive possible water regulations that might theoretically survive judicial scrutiny, it should be to carry out the intent of Congress to restore and maintain the chemical, physical and biological integrity of the nation's waters, as set forth in the plain language of the Clean Water Act.

If EPA wants or needs additional regulatory authority, well, is that not why we have Congress?

EPA should be here asking Congress for this authority and Congress should debate the merits of such a decision.

Manufacturers need predictability from the regulatory process, a proper system of checks and balances will ensure that the Spruce Mine veto and the uncertainty it caused will not happen again.

Thank you for allowing me to testify here today. I look forward to any questions you might have.

[The prepared statement of Mr. Eisenberg follows:]

Statement of Ross Eisenberg, Vice President, Energy and Resources Policy, National Association of Manufacturers

Good morning, Chairman Lamborn, Ranking Member Holt, and members of the Subcommittee on Energy and Mineral Resources. My name is Ross Eisenberg, and I am vice president of energy and resources policy at the National Association of Manufacturers (NAM). I am pleased to come before the Subcommittee today to discuss Mingo Logan Coal Company's Spruce Mine No. 1, its Clean Water Act (CWA) Section 404 permit, and the impact the Environmental Protection Agency's (EPA) retroactive veto of that permit had on manufacturers. On behalf of the NAM and its members, I thank you for the opportunity to testify here today.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its membership includes both large multinational corporations and small and medium-sized manufacturers. Manufacturers are major energy consumers, using one-third of the

energy consumed in the United States. Manufacturers, therefore, strongly support an "all-of-the-above" energy strategy that embraces all forms of domestic energy production, including oil, gas, nuclear, energy efficiency, alternative fuels, renewable energy sources and the natural resource at the center of the Spruce Mine controversy: coal.

Coal is one of the nation's most abundant energy resources and a vital part of our efforts to meet our energy and transportation needs. Coal generates a significant percentage of our nation's electricity, and maintaining coal in a diverse national energy portfolio is in the national economic interest. The NAM believes environmental policies should be reviewed and applied in a manner that balances reasonable environmental objectives with the need to have a diverse fuel portfolio, including continued cost-effective coal use.

It is no secret that the past few years have brought with them a flurry of new regulations on the coal industry. These regulations impose new controls on virtually every part of the coal-fired electricity supply chain, from mining to use to waste disposal. They each bring with them a cost, which mining companies, electric utilities and end users (and employees of each) must absorb. While the costs of many of these new regulations have been substantial, equally difficult has been the uncertainty that each potential new regulation brings, along with concerns over what might be next and whether proposed or existing requirements will change.

In order to drive our nation's economic recovery, manufacturers need predictability from the regulatory process. They must understand the "rules of the road" so they can make responsible, informed investment decisions. Lack of predictability is precisely the problem with the Spruce Mine case and is the main reason the NAM and so many other organizations found it necessary to enter the litigation against the EPA and in support of Mingo Logan.

I. History of the Spruce Mine Section 404 Permit

The Spruce Mine controversy dates back to 1997, when Mingo Logan applied with the West Virginia Department of the Environment (WVDEP) for a permit under the Surface Mining Control and Reclamation Act. WVDEP issued the permit on November 4, 1998. Mingo Logan also applied to WVDEP in late 1997 for a National Pollutant Discharge Elimination System (NPDES) permit under Section 402 of the CWA. The EPA opposed issuance of the NPDES permit unless certain conditions were met, one of which being that Mingo Logan secure a dredge-and-fill permit from the Army Corps of Engineers (Corps) under Section 404 of the CWA.

Mingo Logan first applied for its Section 404 permit in 1998, as part of Nationwide Permit 21. In 1999, the Corps found that Mingo Logan had satisfied Section 404 as part of its Nationwide Permit application. However, before the Corps could issue its final approval, a federal court enjoined the approval as part of a series of legal challenges to Nationwide Permit 21. On June 18, 1999, Mingo Logan decided to apply instead for an individual permit under Section 404(a). The Corps commenced a full environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). WVDEP issued a Section 401 water quality certification for the Spruce Mine Section 404 permit on December 19, 2005. The Corps issued a 1,600-page Draft EIS for the project on March 31, 2006. Mingo Logan, WVDEP and the Corps conducted extensive environmental analysis throughout the permitting process, including volumes of documents analyzing the impact on macro-invertebrates, fish, birds, salamanders and other wildlife.

The Corps issued Mingo Logan a final Section 404 permit for the Spruce Mine on January 22, 2007. The permit authorizes Mingo Logan to discharge dredged or fill material into 8.11 acres of ephemeral and intermittent streams within the mine site in exchange for significant on-site mitigation measures.

On the assumption the project would move forward, Arch Coal, parent of Mingo Logan, planned to commit more than $250 million and create at least 250 new, well-paying jobs in Logan County, West Virginia. These are 250 badly needed jobs in Logan County, where only 39.5 percent of the county's 36,743 residents are employed and 56.6 percent are what the U.S. Census considers "not in the labor force." Median household income in Logan County is $35,465, and 21.8 percent of the people residing there live below the poverty level. About 15 percent of Logan County's workforce is employed in agriculture, forestry, fishing, hunting and mining industries. Add the 250 employees from the Spruce Mine project, and that number grows to 17 percent.

Prior to issuance of the Section 404 permit, the EPA took no steps under CWA Section 404(c) to prohibit the specification of disposal sites in the proposed permit. The EPA wrote to the Corps: "We have no intention of taking our Spruce Mine concerns any further from a Section 404 standpoint." The mitigation plan required by

the permit included comments by the EPA. The permit itself mentioned nothing about the EPA's ability to suspend, modify or revoke it.

As has become common practice for any large project with a federal nexus, several groups challenged the Corps' issuance of a final permit in 2007. It was only after this litigation had been resolved by the U.S. Court of Appeals for the Fourth Circuit—in Mingo Logan's favor, no less—the EPA first asked the Corps to revoke, suspend or modify the Section 404 permit, claiming concerns about "the project's potential to degrade downstream water quality." The Corps asked WVDEP for comment, and WVDEP replied that it saw no reason to take such action as the project was in compliance. On September 30, 2009, the Corps announced that it would not revoke, suspend or modify Spruce Mine's Section 404 permit.

It was at this point that the EPA did something highly unusual—something, in fact, it had never done before in the history of the CWA. The EPA retroactively vetoed Spruce Mine's Section 404 permit. The EPA announced its notice of intent to veto the permit on March 26, 2010; on January 13, 2011, the EPA issued the final veto. Because the Corps is the only agency with statutory authority to revoke, suspend or modify a Section 404 permit, the EPA instead withdrew the *specification* of certain areas defined by the Corps as disposal sites under Section 404(c), something the EPA viewed as available to it by language contained in the statute. But the EPA admitted that by withdrawing the specification, it was in effect vetoing the Section 404 permit.

Mingo Logan challenged the EPA's retroactive veto in the U.S. District Court for the District of Columbia. The NAM and several other industry associations filed *amicus curiae* briefs in support of Mingo Logan. On March 23, 2012, Judge Amy Berman Jackson held the EPA exceeded its authority under Section 404(c) and vacated the EPA's retroactive veto decision. The EPA recently announced its intent to appeal the decision to the U.S. Court of Appeals for the District of Columbia Circuit.

II. Impact of the EPA's Retroactive Veto on Manufacturing

The NAM filed an *amicus curiae* brief in support of Mingo Logan's legal challenge to the EPA's Section 404 permit veto. The NAM made the decision to enter the case because the EPA's retroactive veto sent shockwaves through a wide range of manufacturing sectors, many of whom are members of the NAM.

The Corps estimates it issues roughly 60,000 discharge permits annually under Section 404, and that more than $220 billion of investment annually is conditioned on the issuance of these discharge permits. Projects permitted under Section 404 include pipeline and electric transmission and distribution; housing and commercial development; renewable energy projects like wind, solar and biomass; transportation infrastructure including roads and rail; agriculture; and many others.

For as long as the CWA has been in existence, the exclusive framework under which Section 404 permits might be altered or amended has been the Corps' regulations governing suspension, modification and revocation (33 C.F.R. §325.7). The EPA's retroactive veto of the Spruce Mine permit introduced for each of those sectors a completely new and undefined threat to their permits. As Judge Berman Jackson wrote:

> EPA claims that it is not revoking a permit—something it does not have the authority to do—because it is only withdrawing a specification. Yet EPA simultaneously insists that its withdrawal of the specification effectively nullifies the permit. To explain how this would be accomplished in the absence of any statutory provision or even any regulation that details the effect that EPA's belated action would have on an existing permit, EPA resorts to magical thinking. It posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof! Not only is this nonrevocation revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance: the permit.

Judge Berman Jackson found this argument particularly persuasive when made by the NAM and other *amici.* She continued:

> It is further unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality. Indeed, this concern prompted a number of amici to take up their pens and submit briefs to the Court. They argued that eliminating finality from the permitting process would have a significant economic impact on the construction industry, the mining industry, and other "aggregate operators," because lenders and investors would be less willing to extend credit and capital if every construction project in-

> volving waterways could be subject to an open-ended risk of cancellation. *See* Brief of *Amicus Curiae* The National Stone, Sand and Gravel Association in Supp. of Pl. Mingo Logan Coal Co., Inc. at 5–13; Brief of *Amici Curiae* the Chamber of Commerce of the United States et al. in Support of Pl. at 7–14. EPA brushed these objections away by characterizing them as hyperbole, Tr. at 66, but even if the gloomy prophesies are somewhat overstated, the concerns the amici raise supply additional grounds for a finding EPA's interpretation to be unreasonable.

For the vast majority of these industries, there is no way to reconfigure a project to avoid the need for a Section 404 permit. The EPA's retroactive veto brought with it significant investment uncertainty with respect to currently held permits and permits to be acquired in the future. Inevitably, that uncertainty would translate into higher risks in borrowing, less investment, lost jobs and slower growth throughout the U.S. economy.

The NAM documented the effect of this uncertainty on investment in an exhibit to its *amicus curiae* brief, a report by Dr. David Sunding, Professor in the Department of Agricultural and Resource Economics at the University of California, Berkeley. Dr. Sunding concluded that the EPA's after-the-fact veto of the Spruce Mine permit makes it more difficult for project developers to rely on essential 404 permits when making investment, hiring or development decisions, and project developers must now account for the possibility of losing essential discharge authorization after work on the project has been initiated. Dr. Sunding wrote:

> The EPA's precedential decision to revoke a valid discharge authorization 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. For this reason, the EPA's action has a chilling effect on investment in activities requiring a 404 authorization across a broad range of markets. 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.

Dr. Sunding explained that economically rational investors will not merely make investment decisions based on a simple benefit-cost ratio but will instead calculate the "hurdle rate," the expected rate of return necessary for the project's benefits to exceed its actual costs. The greater the risk, the higher the hurdle rate; the higher the hurdle rate, the more likely the project will be delayed or deterred. Prior to the Spruce Mine veto, Section 404 applicants did not need to include in their hurdle rate calculations the possibility the EPA will revoke their permit. By retroactively vetoing Spruce Mine, the EPA introduced a new risk that causes a distortion in the benefit-cost ratio for new investment projects.

Because the court vacated the EPA's Spruce Mine veto, the fallout from its decision has been avoided—temporarily. The EPA recently decided to appeal Judge Berman Jackson's decision to vacate its retroactive veto. In doing so, the EPA has decided that continuing the battle on Spruce Mine is worth causing regulatory uncertainty for the $220 billion in annual investment that relies on Section 404 permits.

III. Spruce Mine as an Indicator of Future EPA Water Policy

The precedent set by the Spruce Mine case is a serious threat to manufacturers on its own. However, it is only a small part of a broad new set of water policies being pursued by the EPA that have manufacturers concerned. The EPA appears to be testing the boundaries of its regulatory authority under the CWA.

A. Waters of the United States

On May 2, 2011, the EPA and the Corps issued "Guidance Regarding Identification of Waters Protected by the Clean Water Act." The 39-page guidance was prepared for agency field staff to use in identifying "waters of the United States" subject to CWA regulation. The EPA and the Corps routinely lament that recent Supreme Court jurisprudence has made it difficult for the agencies to determine what rivers and streams are subject to their jurisdiction. The 110th and 111th Congresses debated, but did not pass, legislation that would delete the term "navigable" from the phrase "navigable waters" as that phrase is used to define CWA jurisdiction.

When the 112th Congress began, the EPA chose to forego legislation and instead issued the aforementioned "waters of the United States" guidance. The EPA's guidance, among other things:

- Expands the scope of the term "traditional navigable waters" to now cover any body of water that can support *waterborne recreational use,* even if such use only occurred one time for the sole purpose of demonstrating that the water could be used for recreation;
- Regulates all roadside and agricultural ditches that have a channel, have an ordinary high watermark and can meet one of five characteristics (two of the five characteristics include a ditch that has "standing water," or a ditch that drains a "natural water body");
- Applies a broadened view of Justice Kennedy's significant nexus standard not only to wetlands (as Kennedy did) but also to tributaries and isolated waters;
- Finds that a hydrological connection is not necessary to establish a significant nexus;
- Allows the agencies to "aggregate" the contributions of all similar waters (small streams, adjacent wetlands, ditches or certain otherwise isolated waters) within an entire watershed, thus making it far easier to establish a significant nexus between these small intrastate waters and traditional navigable waters;
- Gives new and expanded regulatory status to "interstate waters," equating them with traditional navigable waters, thus making it easier to find jurisdiction for adjacent wetlands and waters judged by the significant nexus test; and,
- Makes all waters not in any of the other categories (also known as the "other waters") subject to the significant nexus standard. According to the agencies' economic analysis, these other waters were previously assumed "non-jurisdictional."

The EPA has sent final "waters of the United States" guidance to the White House Office of Management and Budget for review and approval. Manufacturers are concerned that the guidance is legislative in nature and could reduce regulatory certainty by subjecting a wide range of traditionally *intrastate* waters to CWA jurisdiction and permitting. Moreover, by issuing this dramatic policy shift as guidance instead of a regulation, the EPA and the Corps are circumventing many safeguards built into the regulatory process to protect the regulated community, such as economic impact statements, job loss analyses and considerations of impacts to small businesses.

B. Preemptive 404 Veto Threats

The EPA argued in the Spruce Mine case that the phrase "whenever" in CWA Section 404(c) gives it the freedom to withdraw a specification at any given time. Unless the Spruce Mine case is reversed, the law now holds that "whenever" does not include an after-the-fact, retroactive veto. However, the EPA is in the midst of lining up its first *preemptive* veto under Section 404(c), based again on the Agency's controversial interpretation of the word "whenever." This preemptive veto appears likely for the Pebble Project, a proposed copper and gold mine in southwestern Alaska. In that case, investors have spent nearly $500 million defining a copper deposit, engineering a possible mine and collecting scientific information to try to comply with all of the federal environmental laws so that the Pebble Project can begin the federal NEPA process. If the project were to move forward, it could attract several billions of dollars in investment and countless manufacturing jobs.

However, the EPA appears poised to issue a preemptive 404(c) veto, taking the position that it can withdraw certain areas from being specified for dredge-and-fill permits even before a permit application has been filed. While the EPA has not yet taken this step, it is performing a watershed assessment of ecological risk for the area surrounding the Pebble Project and has not closed the door to a possible preemptive veto of CWA permits for the mine. Environmental groups have already begun calling for a similar assessment of mining activity in the Great Lakes region.

IV. Conclusion: The EPA and the Corps Should Look to Congress to Solve Water Policy Challenges

It is clear from the Spruce Mine case and other recent water actions that the EPA is uncomfortable with the scope of its authority under the CWA. However, by testing the boundaries of this authority through preemptive and retroactive permit decisions and jurisdictional guidance, the EPA is causing a great deal of uncertainty for manufacturers. It is changing the aforementioned "hurdle rate" substantially, distorting the cost-benefit ratio for new projects and creating additional risks to investment for the wide range of sectors subject to the CWA. It is also virtually ensuring

every single one of its decisions will be subject to litigation (and, like Spruce Mine, potentially overturned).

The EPA should not strive to issue the most aggressive possible water regulations that could survive judicial scrutiny. Rather, it should be to carry out the intent of Congress to restore and maintain the chemical, physical and biological integrity of the nation's waters, as set forth in plain language of the CWA. To the extent the EPA wants or needs additional regulatory authority, it should request that Congress enact legislation to provide this authority, and Congress should debate the merits of such a decision. Manufacturers need predictability from the regulatory process. A proper system of checks and balances will ensure the Spruce Mine veto and the uncertainty it caused will not happen again.

Mr. LAMBORN. Thank you for your testimony, Mr. Eisenberg.

We will now hear from Ms. Gunnoe.

STATEMENT OF MARIA GUNNOE, BOONE COUNTY, WEST VIRGINIA ORGANIZER

Ms. GUNNOE. I am Maria Gunnoe. I am from Boone County, West Virginia, and I help to represent the Appalachian communities where coal mining impacts are killing people and de-populating our mountain culture.

I thank each of you for allowing me the opportunity to speak to you again today.

I appreciate your obligations and responsibilities in protecting and serving all U.S. citizens. My hope is that you listen and hear the pleas for our lives in Southern Appalachia where these atrocious mountaintop removal permits are permitted.

The Spruce No. 1 permit is in the headwaters of Pigeon Roost Creek, the stream and the people seem unimportant to most people in this room, but to me and the people of Blair, this stream is a part of our home.

When mountaintop removal is permitted near your home, you will soon be forced to leave what is the birth place of your family and your children's birth rights as heirs to your family land. You are forced by destruction to leave the American dream that our forefathers prepared and fought for.

Why is it acceptable to de-populate the communities and culture, poison our water and air and leave us to die in a post-mining wasteland for temporary jobs and energy?

You should ask yourselves are we knowingly and willingly flipping on our lights and lining our pockets at the expense of the lives, livelihood and health of the people in Appalachia.

The answer to this in my opinion is yes, you are.

The Spruce No. 1 permit is one of the first examples of the steps that the EPA has taken to stop irresponsible mining practices which were ignored during the Bush Administration.

People from all over Appalachia have lobbied the EPA for these protections for the past 15 years. The coal industry was allowed to do as they pleased during the eight years of the Bush Administration.

In 2009, the Obama Administration took steps trying to fix the problems that the Bush Administration created and then ignored.

The coal industry has said that the EPA and the Obama Administration are trying to shut down coal. The coal industry is perpetuating a lie, that there is a war on coal, and that coal mining jobs are under attack.

This is the same false crisis that is created by this industry each time they do not get what they want.

According to recent reports by Ken Ward of the Charleston Gazette, coal mining jobs have actually increased by 7.4 percent since 2009, when the Obama Administration took office. Ted Boettner with the West Virginia Center of Budget and Policy looked at mining jobs over the last two decades, annual West Virginia coal mining jobs were higher in 2011 than any other time in the last 17 years.

Quoting the title of Daniel Weiss' article on Climateprogress.com, the "War on Coal is a lie invented by the coal industry. It is a multimillion misinformation campaign funded by big coal polluters to distract Americans from the deadly effects of coal's pollution on public health."

There is a war in Appalachia, believe this. This war is not on coal. This war is on the people of Appalachia. Coal is not our king, God is. Coal is only the dictator of some.

Expanding any mountaintop removal including the Spruce No. 1 permit means the de-population of yet another mountain community and sickening of the people who live in this community.

How will this affect our culture? We will die as a culture as we suffer with the inability to pass this mountain culture onto our children.

Not even our historic mountain cemeteries are left intact and accessible.

It is not as if this Committee, Congress, the coal industry, and the Obama Administration does not know what mountaintop removal is doing to people. They not only know about it, but they are supporting it and allowing it by not ending it.

After visiting the Central Appalachian communities, the U.N. Women's Tribunal on Climate Change jurist recommendations for Rio+20 included that mountaintop removal should immediately be stopped with a moratorium on any mountaintop removal operations until a full investigation can be undertaken.

Mountaintop removal cannot be silenced. The more people that are impacted, the more that we will continue to stand up to protect all that makes Appalachians free. We will not back down. We know we are doing the right thing in ending this evil that has come in to destroy our very existence.

We Appalachians for many years have lobbied the EPA to enforce the laws that are intended to protect our lives.

The coal industry in Appalachia is anti-life and the enforcement of laws is the only chance that we have to survive as a culture.

My family first settled in this area during the forced removal of the Cherokee known as the "Trail of Tears."

What the coal industry and our Government is doing to our native communities in Southern Appalachia feels much like the second silent forced removal of our people.

[The prepared statement of Ms. Gunnoe follows:]

Statement of Maria Gunnoe, Van, West Virginia

I am Maria Gunnoe from Boone County WV and I (like 100's of others) help to represent the stories of the Appalachian Communities where coal mining impacts are killing the people and depopulating our mountain culture. Thank each of you for again allowing me the opportunity to speak to you. I appreciate your obligations

and responsibilities in protecting and serving all US citizens. My hope is that you listen and hear these pleas for our lives from the Southern Mountains of Appalachia where these atrocious mountaintop removal permits are operating.

The Spruce No. 1 permit is in the headwaters of Pigeon Roost creek. This stream and the people of Blair seem unimportant to most people in this room but to me and the people of Blair this stream is a part of our home. When mountaintop removal is permitted near your home, you will soon be forced to leave what is the birthplace of your family and your children's birthrights as heirs to your family's land. You are forced (by destruction) to leave the American dream that our forefathers prepared and fought for. Why is it acceptable to depopulate our communities and culture, poison our water and air and leave us to die in a post mining waste land for temporary jobs and energy? You should ask yourselves: are we knowingly and willingly flipping on our lights and lining our pockets at the expense of the lives, livelihoods and the health of the people in Appalachia? The answer to this in my opinion is YES you are!

The Spruce No. 1 permit is one of the first examples of steps that the EPA has taken to STOP irresponsible mining practices which were ignored during the Bush Administration. People from all over Appalachia have lobbied the EPA for these protections for the past 15 years. During the Bush Administration the oversight of mountaintop removal permits was non-existent. The Bush Administration sent word to W.Va state Department of Environmental Protection Secretary Stephanie Timmermyer to get these permits pushed through as quickly as possible, In George Bush's words "We need this coal, our homeland security depends on it." The coal industry was allowed to do as they please during the 8 years of the Bush Administration. Then in 2009, in steps the Obama administration's EPA trying to fix the problems that the Bush administration created and then ignored. One of the biggest problems was the lack of enforcement of current regulations on mountaintop removal operation in Appalachia. The coal industry was allowed to run out of control in our mountains and depopulate many of our local communities during this rush to get the coal. In response to this insurgence by the coal industry, impacted community members organized to stop the attack of this industry on us in our homes. The EPA heard from us often and we appreciate that they are listening to the science. We have organized meetings with the impacted community members so that the representatives within the government agencies can see and hear the people's pleas. Still, most of these decision makers walked away thinking that there is some sort of balance to be found in blowing up the mountains over our homes and shoving them into our streams. In reality the fact is mountaintop removal is killing people. These facts are out and available to anyone who wants to see them. Please understand that the majority of people in Appalachia are against mountaintop removal coal mining. The only ones who support it are the ones who are making money from it. These are the ones that should be made to live in our communities and suffer the consequences of their actions. If you support mountaintop removal and what it is doing to us, you are supporting the murder of the people of the Appalachian culture that depends on these mountains and their waters for our very lives.

The coal industry has said that the EPA and the Obama administration are "trying to shut down coal." The coal industry is perpetuating a lie that there is a "war on coal" and that coal mining jobs are under attack. This is the same false crisis that is created by this industry every time they don't get what they want. According to recent reports by Ken Ward of the Charleston Gazette coal mining jobs have increased by 7.4 percent since 2009 when the Obama Administration took office. Ted Boettner with the WV Center for Budget and Policy looked at mining jobs over the last two decades; annual West Virginia coal mining employment was higher in 2011 than at any time over the last 17 years, according to Workforce West Virginia. Quoting the title and text of Daniel Weis's article on climateprogress.com "The War on Coal is a Lie invented by the coal industry. It is a multimillion dollar misinformation campaign funded by big coal polluters to distract Americans from the deadly effects of coals pollution on public health." There is a war in Appalachia, do believe this. This war is not on coal, coal jobs, or the coal industry. This war is on these mountains, our water and the people who depend on it all. Coal is not our King, God is! Coal is only the dictator of some.

Mountaintop removal is not only killing the people who work these jobs but it is also killing the people who live in the surrounding communities. Jobs in any region are important; however ALL of those jobs need to be safe for the workers and for the communities that they operate in. Mountaintop removal is NOT safe for anyone. Science has repeatedly proven this. The facts that mountaintop removal is killing us are in the 19 health studies that have been compiled. This committee, Congress, the coal industry and the Obama administration continue to ignore these studies

and continue to allow the blowing up of our mountains and poisoning of our waters and air to get to the coal that currently powers about 44% of America's electricity.

Expanding any mtr mining including the Spruce No. 1 permit means the depopulation of yet another mountain community and the sickening of the people who live in these communities. Living this depopulation has made me more aware of the large-scale impact of this ousting and killing of people on the culture that I love. We will die as a culture as we suffer with the inability to pass this mountain culture on to our children. Not even our historic mountain cemeteries are left intact and accessible. Our people are being mortally impacted by the fallout from mountaintop removal coal mining in our water and air in our native homes. Do we really need to prove that blowing up mountains over our homes and pushing them into our streams is NOT good for us? It is not as if this Committee, Congress and the coal industry doesn't know what mountaintop removal does to people. They not only know about it but they are supporting and allowing it and by **not ending it**. After visiting the central Appalachian communities The UN Women's Tribunal on climate change jurist recommendation will include that mountain removal should be immediately stopped—an immediate moratorium on any removal operations until a full investigation including health related disease incidence rates can be undertaken.

I had hoped that the last time that I came to speak to this committee that someone would have heard our pleas for our lives in Appalachia but our pleas fell on the deaf ears of coal supporters. We had to request that this committee post our comments on their website for others to view days after the industry's comments were posted. We were timed to the second on our comments, while pro coal supporters were allowed to go minutes over their allotted time to speak. Mountaintop removal cannot be silenced. The more people that are impacted, the more that will continue to stand up to protect all that makes us Appalachians FREE! We will not back down. We know we are doing the right thing in ending this evil that has came in to destroy our very existence. We Appalachians have for many years lobbied the EPA to enforce the laws that are intended to protect our lives in our homes. The coal industry in Appalachia is anti-life and the FIRM enforcement of the laws are the only chance that we have of surviving as a culture after this industry is gone.

Parts of my family first settled this area during the forced removal of the Cherokee known as the "Trail of Tears." What the coal industry and our government is doing to our native communities in Southern Appalachia feels much like the second silent forced removal of our people.

A few notes from community members:

- Selenium discharges downstream from Spruce No 1 are already much higher than EPA standards according to recent water testing. The Spruce 1 permit will allow more selenium to be released into this stream. This is the making for life threatening levels of selenium.
- The community of Blair has NO municipal drinking water available to them. The only water in these communities is the well water which in some cases has already been polluted. The community of Blair needs water infrastructure to supply their homes with healthy water before any area permits are even discussed.
- From what we see on the ground the coal companies have already moved forward in preparing the permit area as if they had an approved permit.
- The Spruce permit is in the Coal River watershed. Mountaintop removal is why American Rivers placed the Coal River on our *America's Most Endangered Rivers®* list this year—because the river is at a decision point—not because it's the most polluted. We can save these precious headwater streams that also serve as drinking water to our communities but we must act now before it is too late.

[NOTE: Attachments have been retained in the Committee's official files.]

Mr. LAMBORN. Thank you. Thank all of you for your testimony here this morning. Members of the Committee may have additional questions for the record, and I would ask that you respond to these in writing.

We will now begin questioning. Members are limited to five minutes in their questions but we may have additional rounds.

I now recognize myself for five minutes for the first set of questions.

Senator Kirkendoll, in your testimony, you discussed the financial benefits to Boone County and West Virginia more broadly.

Did I hear you right that there is a $29 million direct payroll and a total $100 million direct and indirect payroll that is being lost by the non-operation of the Spruce Coal Mine?

Mr. KIRKENDOLL. Mr. Chairman, those are numbers I reflected back in 1998, when Dal-Tex shut down. Loss of revenue that—we could not make it up. We never made it up. We made cuts.

The $29 million was direct payroll to 400 employees that were at Dal-Tex when the permit was no longer there for them to continue to operate and work.

You can systematically do the math. The people that bring the supplies to the mines, for example, tires for the trucks, the bolts, this and that, whatever they do, all the materials, you can estimate it. We have done estimated numbers that it was between $90 million and $100 million of lost revenue for what they call "support vendors."

Mr. LAMBORN. Senator, how many jobs do you think that represents? You said 400 direct. Direct and indirect, how many jobs are we talking about?

Mr. KIRKENDOLL. We have looked at different statistics. Some people say a qualified coal mining job, if a person works his normal hours, is about $65,000 to $70,000 a year. It is between five and seven additional jobs in the surrounding area of activity. Two hundred qualified coal mining jobs could be anywhere between 1,000 to 1,200 jobs of activity with that kind of revenue there to be split among different type needs and services; yes.

Mr. LAMBORN. With the money that would come to the county or the state, is the county or the state able to make water quality and stream quality improvements?

Mr. KIRKENDOLL. Here is the thing. In Logan, I was Commissioner for 30 years starting in 1980, and when I got there, I think we had less than 20 percent of the people who had potable water. It was a coal mining area. Most of the water lines back then were two inch lines.

We formed a PSD, very aggressive in request for funding. When I left the County Commission in 2010, we were over 90 percent of the people in our county, Logan, that had potable water.

We do have a policy and a program now about stream restoration. You simply cannot get in a stream any more from Federal regulations. I do not care what you have in the middle of that stream.

The Guyandotte River just recently had flooding which—the water will flow from upper counties down there. You will have trees and debris lodged in on the connectors of your bridges, from one side of the waterway to the other. You get in that stream and muddy the water to kill a crawdad, you are going to jail.

What we had to do as a Commission is make application to what they call the Soil Conservation Agency in Charleston, and they would come in, send engineers, study how to bring the stream back to what they call "bedrock," bring the water back to the center of the stream and let it restore itself naturally.

We were OK with that. We worked with it. There are avenues to restore streams, but some of the interpretation of "streams" is what the problem is now. A dry ditch is not a stream. A stream is something that flows 70 percent of the year due to annual rainfall. That is a stream.

Mr. LAMBORN. All right. Thank you.

Ms. Harbert, do people working in regulatory agencies have a clear enough understanding in your opinion of the problems caused in our economy by increasing uncertainty?

Ms. HARBERT. In our opinion, absolutely not. The reverberations of decisions like this are not just in one county or one state. They are across the country. They are affecting industries unrelated to mining, unrelated to energy. It is building. It is transportation. It is roads. It is bridges.

These decisions that are taken should not be taken so lightly. We have to understand that these are billions of dollars that are at stake, boards of directors have to make decisions and hire people, and they cannot do it if they think some time down the road somebody might change their mind and revoke their permit.

Mr. LAMBORN. Will this have the result of driving American jobs overseas, with this kind of uncertainty?

Ms. HARBERT. It most definitely has a chilling effect on investment. We have to want investment in the United States. We have to attract it. We have to be inviting, rather than say to capital markets and capital investors take your money elsewhere because you are going to have that type of certainty somewhere else.

Decisions like these look more like Hugo Chavez than George Washington. What do we want to be as a country? Do we want to be some place where we want investment, where it is comfortable and happy here, or do we actually want to scare it to other markets?

Mr. LAMBORN. Thank you. I now recognize the Ranking Member.

Mr. HOLT. Thank you. Let me begin with a comment. This little side show earlier just confirms in my mind that indeed, the officials at the Environmental Protection Agency had important and better things to do with their time this morning than to engage in political theater.

Mr. Chairman, you knew days ago they were not coming. You did not have to print cards to establish a little skit here, to ask where the officials were. As I say, this confirms they indeed have much more important things to be doing this morning.

Ms. Gunnoe, we have, I think, a chart available that is a map of the area. The red in the center, I guess, is the mountaintop area in question. All of the other gray areas are permitted areas.

It is not as if this is the only opportunity in the tri-state region.

Ms. Gunnoe, according to the EPA, there are 257 past and present surface mining permits in the area that collectively occupy 13 percent of the entire land area.

As you can see in the gray, the mines really blanket the region.

Do you think the level of mining that is already occurring in this area means there is more to be done to protect the streams that would be affected by the Spruce Mine?

Ms. GUNNOE. I do. The streams in that area are already above EPA standards on selenium. We know that through recent water testing that has been done.

I need to say that when you look at this mountain, recognizing that the dark gray areas are peaks that have been permitted or proposed, and the people that live in the low lying valleys, when you blow off the mountains, basically what happens is the people

in the valley get flooded, and FEMA comes in and helps to clean up the flooded communities.

There are many reasons to not allow this permit. The Spruce River watershed has an astronomical amount of mining in it already. It has heavily impacted those communities.

These jobs will never benefit the community of Blair. The community of Blair will be de-populated because of the Spruce No. 1 jobs.

Mr. HOLT. Thank you, Ms. Gunnoe.

Mr. Eisenberg, we have heard this has some effect on the people locally. Ms. Gunnoe talked about it. You talk about the need for this coal.

Do you know what happens to the coal from Logan County? How much of that coal is sent to other countries?

Mr. EISENBERG. Off the top of my head, I do not know the answer to that.

Mr. HOLT. I can help you, a third. A question we have to ask ourselves is what are we doing to ourselves. Ms. Harbert said do we want a country that—you described the country where we would want to live in—I think yes, you are getting right at the heart of this question.

Do we want a country that is despoiled and contaminated so that we can send the coal to China and India, and yes, to Venezuela.

There is not much time. Ms. Gunnoe, let me ask you quickly if you think it sounds like the EPA should be using new science as it comes forward to make the best decisions for protecting the streams.

Ms. GUNNOE. Absolutely they should be. I need to say the citizens from Southern Appalachia have lobbied the EPA for these protections. These protections, our lives depend on these protections.

The EPA is doing what they need to do to protect the lives of citizens in our communities.

Mr. LAMBORN. Thank you. The representative from Pennsylvania.

Mr. THOMPSON. Thank you, Chairman. Let me say I am very disappointed in the Obama Administration, even with notice, refusing to come.

I happen to believe that we live in a constitutional republic. This is not a dictatorship. Congress has an oversight function as part of the checks and balances, and just to blatantly refuse, I think raises questions, what are they hiding.

Senator Kirkendoll, what would the potential be for states to expend resources, and I know at this time the economies are not good for the Federal Government or states, but to expend resources permitting mines contemplated by Section 404 permits that were then after the fact essentially vetoed by the EPA?

Mr. KIRKENDOLL. I'm sorry?

Mr. THOMPSON. The impact on the states who are contemplating permitting only to have it vetoed.

Mr. KIRKENDOLL. I can tell you the economic impact, the jobs, number one, but number two, I worked 11 years underground, so I am not a novice to the coal industry, but I can remember back when I worked, when I was getting ready to go to college, we

worked, called red hats back then. Jobs were tough to get but we got some.

Nowadays, it takes $2- to $3 million to qualify permits. To get companies to come in now and put a permit together and spend $2- to $3 million not even knowing if it is approved, it could still be pulled, that is what is throwing everybody off the curve of the road.

If you approve something, you approve it. There is a rule and law that we all have to abide by. As Mr. Holt said, these people had better things to do. I think they should have been here.

We are talking about people's lives, income, and everything else, and that is the reason I am here, I care about people having the ability to wake up on Monday morning as an American and have a job.

We are putting ourselves in a position now to where the next generation is not going to be working.

You see the bottom of the Appalachian power bill where it says you can volunteer money if you choose, to help somebody who cannot afford their electric bill, if we do not use domestic energy inside this country, you are going to pay an energy tax in the next few years and it is going to be mandatory.

They were making conversation about shipping the coal to foreign countries, it is exactly right. We should be using our own coal, our own steel, our own workers, and we should be operating inside of America, and that is what the people in this country need, want, and they think we ought to have.

Why are we exporting coal? Because of the rules and regulations that we have. If we had the right set up, we would be retrofitting these powerplants and making them environmentally sound to burn the coal and do it right.

We are missing the boat on every opportunity, and that is why we are having these types of hearings this morning.

I believe we can mine coal environmentally sound. I do not want the waters to be run to where they are not useable. We are not talking about streams.

Come to Southern Appalachia, any of the panelists up here, and I will take you. I want you to see all those streams we are talking about. They are dry ditches. They only have water when it rains. All these miles of streams are not streams.

On 20 degree slopes, how many streams can you have on a mountain? The water will seek its lowest level.

Let's be very honest about things that are just sensible. Quit listening to all this rhetoric and come yourself and look. I will take you on a tour of post-mined land, before and after. I will talk to you about the good, the bad, yes, we can do things better. We need to do things better.

We sit up here and people's lives are in jeopardy, needing the ability to have a job because we are having committee discussion.

Send people from D.C. down to these regions. You are talking about multimillion and billions of dollars and lives and the daily living of American people that are waiting on a committee to take data.

Come see for yourself. You will find out. We can do it both ways, gentlemen and ladies. Let's be Americans and do it inside the borders of America.

Mr. THOMPSON. Just quickly a follow up question because I do not have that much time left.

What impact has the litigation had on mining in your region?

Mr. KIRKENDOLL. Talking about how many people are working, come to Logan. We have had massive layoff's in numerous mines in Boone County. My county has not had as many because we have a deep mine over there that employs a lot of people, Mountain Laurel, which is actually the owner of said property in question for the surface mine.

It is getting to where when you talk to people, and I always did as a Commissioner, the CEOs of these companies, they are ready to start going to Illinois, Wyoming and other places where they can get permits and mine. They are going to leave the Appalachia region.

It is a question now of do young people buy homes and spend money, take a chance on making a living in an area so volatile to just permits being pulled? If you can pull this permit, you can pull any permits in any job, manufacturing, textiles, anything else where the EPA has any jurisdiction.

Are we going to get to that point?

Mr. THOMPSON. Thanks, Senator. Thank you, Chairman.

Mr. LAMBORN. All right. Thank you. Senator Kirkendoll, let me remind you that in September, this last September, this Subcommittee did go to Charleston and had a field hearing on stream quality issues.

Mr. KIRKENDOLL. That is right.

Mr. LAMBORN. The Acting Governor, now Governor, was there. U.S. Senator Manchin was there. Other witnesses, including Ms. Gunnoe and others testified as well. That was a very good hearing.

We did see some mine operations and reclaimed land later in the day as well.

Mr. KIRKENDOLL. Did you see the golf course?

Mr. LAMBORN. We did not see the golf course.

I would now like to recognize the Ranking Member of the Full Committee, Representative Markey of Massachusetts.

STATEMENT OF THE HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Thank you, Mr. Chairman. The reason that coal has been on a massive decline in recent years has less to do with President Obama than with the inability of the coal industry to innovate and its inability to compete.

There are more than 500 coal fired power generation units operating in this country, 500.

How many of those are more than 50 years old? More than 200 of them are more than 50 years old. How many are at least 60 years old of that 500? Seventy-four. We actually have ten coal units that are at least 70 years old.

Here is a picture of the Perry K powerplant in Indianapolis built in 1925. It is an 87 year old coal fired powerplant. Thomas Edison was alive when this plant was built. The television had just been invented. Air travel was in its infancy. The first transatlantic flight

was still two years away when this plant was built, and still operating today.

We have improved on all the other technologies. We have figured out how to do the same thing but for less money, all with greater speed and with reliability. It is the American way.

New replaces old. Efficient replaces wasteful. Clean replaces dirty. High tech replaces low tech. Our country benefits when this happens.

The 87 year old Perry K powerplant is switching to natural gas beginning in 2014. This is a growing trend in the power sector. Natural gas is cheaper. It burns cleaner.

You are less likely to get asthma or have a baby with birth defects. If you live near a plant that burns it, you are feeling better about the health of your own children because you know there are more dangerous elements coming out of coal than out of natural gas.

You can get natural gas without blowing the tops off mountains and destroying the environment.

Right now, 36 percent of America's electricity is currently generated by coal, 36 percent today, first three months of 2012.

Six years ago, coal was producing half of America's electricity. In six years, it has gone from 50 percent down to 36 percent of electricity.

At the same time, electricity from natural gas has grown from 18 percent of U.S. generation to 27 percent. Wind has gone from producing virtually none of our power to three percent of our power in the last six years.

Newer, cheaper, cleaner technologies are beating coal. The free market is beating coal. Adam Smith is spinning in his grave as we are listening to the Republicans talk about the need to prop up the coal industry against competing technologies like natural gas, like wind.

As a matter of fact, he is spinning so fast in his grave that he would actually qualify as a new energy source. That is how much energy he is giving off right now in his grave listening to the Republicans bleeding about the rise of natural gas and wind as competition to coal, especially with these plants that are 50, 60, 70, and 87 years old.

Here is the interesting thing. In the Waxman-Markey bill that the House of Representatives passed in 2009, we built in $60 billion for the coal industry, $60 billion between now and 2030, for them to be able to install carbon capture and sequestration technology.

The electric utility industry supported it, but the coal industry said no. They said no, we do not want the money. By the way, it was $200 billion up to the year 2050. That is a lot of money.

That is a lot of investment in new technology that the Democrats built into their legislation, so they could innovate, so they could improve, so it could become more competitive with the natural gas industry. The coal industry said no, we are not going to move.

That is $60 billion of funding coming from the Federal Government, $200 billion by the year 2050, so they could innovate. They said no. They said no. They said no over and over again to innovation.

There are now 200 coal plants over the age of 50 that need to be renovated at the cost of billions of dollars.

Natural gas is cheaper. Wind is on the move. Who wants to pay now in the private sector to rehabilitate dinosaur coal units with cleaner, cheaper options available?

Now the free market says if the coal industry did not want that funding, then we look at the cost and we just say we are moving to natural gas, we are moving to wind. You innovate or you die.

Just ask the auto industry. That is what is happening to the coal industry. They refuse to innovate. They refuse to even accept the funding that would have made it possible for them to innovate.

I just hope that the record is clear out there and this gets reported as the real story, that the coal industry refused to move, to help their own people, to be able to compete in this modern marketplace.

I yield back the balance of my time. Thank you, Mr. Chairman.

[The prepared statement of Mr. Markey follows:]

Statement of The Honorable Edward J. Markey, Ranking Member, Committee on Natural Resources

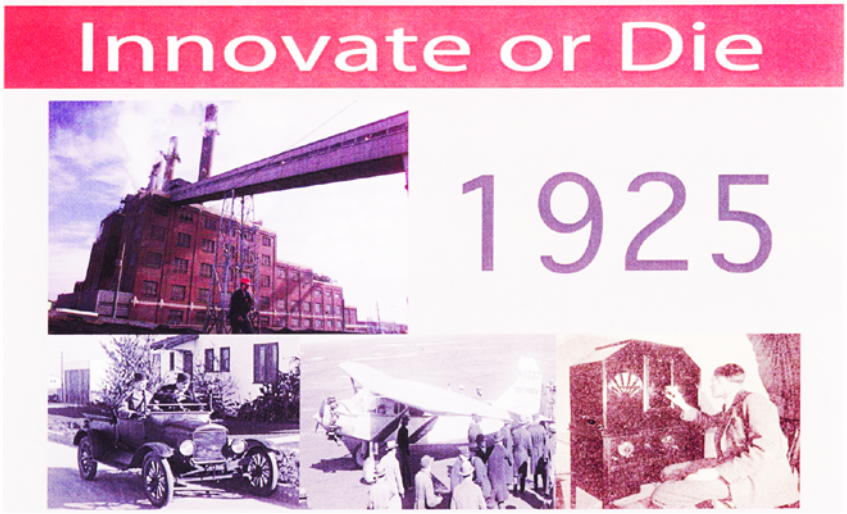
The reason coal has been on a massive decline in recent years has less to do with President Obama and more to do with the inability of coal to innovate and compete.

There are more than 500 coal-fired power generation units operating in this country. More than 200 of those are more than 50 years old.

74 are at least 60 years old.

We actually have 10 coal units that are at least 70 years old.

Here's a picture of the Perry K power plant in Indianapolis, built in 1925. It's an 87-year-old, coal-fired power plant! Thomas Edison was alive when this plant was built. The television had just been invented. Air travel was in its infancy, and the first trans-Atlantic flight was still 2 years away.

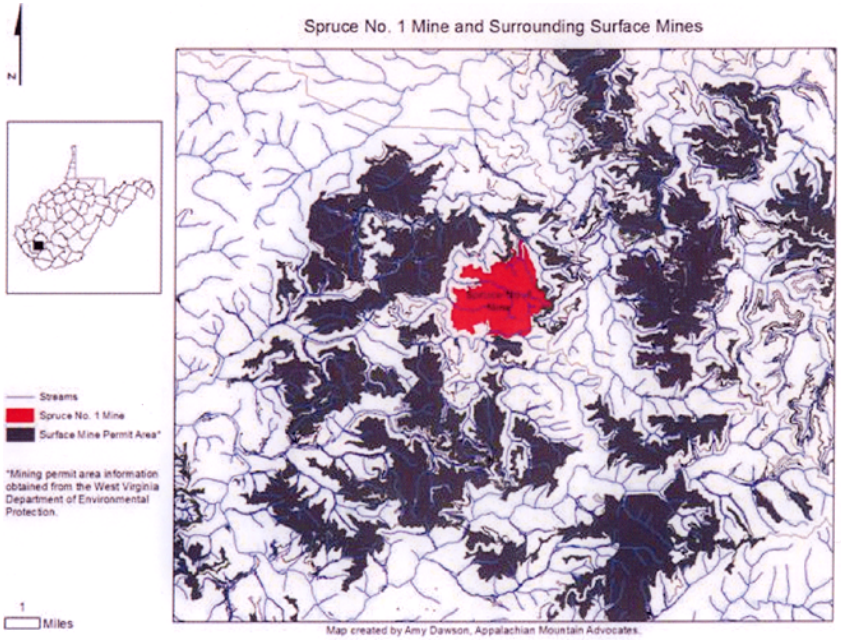


We've improved on these technologies. We've figured out how to do the same thing, but for less money. Or with greater speed and reliability. Or with fewer casualties.

It's the American way. New replaces old, efficient replaces wasteful, clean replaces dirty, high-tech replaces low-tech. And our country benefits when this happens.

The 87-year-old Perry K power plant is switching to natural gas beginning in 2014. This is a growing trend in the power sector. Natural gas is cheaper. It burns

cleaner. You're less likely to get asthma or have a baby with birth defects if you live near a plant that burns it. And you can get natural gas without blowing the tops off of mountains and destroying the environment.



Right now, 36 percent of America's electricity is currently generated by coal. A little over a third. Six years ago, coal was producing half of America's electricity.

At the same time, electricity from natural gas has grown from 18 percent of US generation to 27 percent. Wind has gone from producing virtually none of our power, to 3 percent of our power.

Newer, cheaper, cleaner technologies are beating coal. The free market is beating coal.

I would just like to say, for the record, that Democrats saw this coming. In 2009, the Waxman-Markey bill allocated $60 BILLION to coal. We said "Here, you don't want to use your own money to innovate? No problem, we think a future for coal is important, here's $60 billion to figure out carbon capture and sequestration. Go make clean coal a reality." Waxman-Markey was the single largest investment in coal in the history of Congress.

Democrats from coal country said YES. Utility companies across America said YES. But the coal industry said NO. And Republicans said NO. They said NO to innovation.

And now, there are 200 coal plants over the age of 50 that need to be renovated at a cost of billions of dollars. But today, natural gas is cheaper than coal. Wind is competitive with coal. Who wants to pay to rehabilitate dinosaur coal units with cleaner, cheaper options available? The free market is working its will.

You innovate or you die. Just ask the U.S. auto industry. They fought fuel efficiency for 30 years. They refused to invest money in making vehicles more efficient. Republicans defended them right into bankruptcy.

Democrats saved those jobs in the Midwest. We said "America will partner with you if you start innovating again."

What's happened? We're heading towards 54.5 mile per gallon vehicles and the American auto industry is back on top.

You innovate or you die. That's the bottom line. That's the real story with what's going on with coal right now.

Mr. LAMBORN. OK. I am glad to hear you do not like old coal plants. Let's work on getting some new ones out there.

I would like to recognize the gentleman from Michigan.

Dr. BENISHEK. Thank you, Mr. Chairman. I represent Michigan's First District. We have a lot of minerals in our district, nickel, copper, iron, gold.

I would like to ask Mr. Eisenberg, this regulation here where a permit is going to be revoked, can you expound a little further on what is going to happen to the rest of the harvesting of minerals in my District, for example? What am I going to tell people who are looking forward to a resurgence in mining?

We just had a new mine permitted. I would just like to have you expound a little more about that.

Mr. EISENBERG. Sure. You are talking about the Pebble case up in Alaska. That is an interesting case. I urge the Committee to look at that a little bit closer.

EPA is using the exact same part of Section 404, 404(c). In the Spruce Mine case, what they said was the term "whenever" in 404(c) means they can change a specification whenever. Now they cannot because the decision says you cannot do it retroactively, so EPA is now taking the position that they can do it preemptively, which means before the EIS is done, before NEPA is commenced, before anything.

That has a lot of folks worried about it, the same companies and the same industries that were impacted by the Spruce Mine decision.

Right now, EPA has not done this. They are performing a watershed assessment, but they seem increasingly likely to do it at the conclusion of this assessment.

I noted in my testimony that environmental groups have already started asking for a watershed assessment similar to that for the Great Lakes region.

It is the same thing as what happened in Spruce Mine. If you take away the specification, then you cannot do it. EPA admitted this in the case, you are essentially vetoing the project, which really is the responsibility of the Army Corps.

It could have wide ranging application, and I certainly urge the Committee to look at it.

Dr. BENISHEK. Do you think we are going to need less copper, nickel, iron in the next 20 years in this country?

Mr. EISENBERG. Speaking on behalf of NAM, absolutely not. We are going to need more of it.

Dr. BENISHEK. Do you think we harvest our minerals in this country at a higher standard than around the world as far as the environmental impact of the global environment?

Mr. EISENBERG. I am certain that we do.

Dr. BENISHEK. It just seems to me keeping the jobs here in America and better environmental quality for the globe is our goal here in this country. I think we should be harvesting our materials here at home in a better fashion than occurs in China.

Ms. Harbert, do you have any comments on that analysis that I think is true?

Ms. HARBERT. If you look at the world's appetite for energy and the type of economic growth we hope we are going to see around the world, there is no doubt we are going to need more minerals. We are going to need more infrastructure.

We as a country are going to have to decide whether we are going to be complaisant and import those things or whether we are going to actually cultivate our own resources and have a comparative advantage.

We have a lot of resources here in this country and those resources and the technology to take those resources to market advances every year.

We have the opportunity to use coal, use oil, use gas, all of our resources, including wind and renewables, really effectively in our country, but the EPA is standing in the way.

I would like to address the comment about natural gas. The Sierra Club launched a "Beyond Coal" campaign. They have been successful. Now they have launched a "Beyond Gas" campaign.

We have a movement here that is completely against American resources. We have to be able to figure out who is complaisant in that, and we cannot let the regulatory overreach of EPA stand in the way of getting our economy back on its feet.

Dr. BENISHEK. In order to harvest solar energy and wind energy, we are going to need minerals, it seems to me.

Ms. HARBERT. Absolutely. Certainly, China has that memo. They are seeking rights to those minerals all around the world.

Dr. BENISHEK. Do we have the ability to harvest those minerals needed for those renewable technologies here in this country?

Ms. HARBERT. We certainly have a great deal of minerals. As you referenced in your own District, you have a great deal of them. We have a very prohibitive policy to be able to access those minerals.

If we want to have a domestic, a very vibrant domestic economy, all those inputs are needed for all sources of energy, and we are going to need to be able to have a regulatory regime in place that allows us access to those resources.

Dr. BENISHEK. Thank you very much. I yield back the remainder of my time.

Mr. JOHNSON [presiding]. The gentleman yields back. I think it is my turn. I am going to yield myself question time.

I am sure we were all entertained by the political theater of our Ranking Member and his comments. It is shocking to me to hear comments about the coal industry's—his perception—inability to innovate and compete.

I do not know how we could possibly think the coal industry could innovate and compete up against the massive burden and costly burden of activists, regulatory agencies like the EPA, and the Department of the Interior.

I would remind this Committee and the Ranking Member that those old coal fired powerplants that you are talking about, they provide about 45 percent or 50 percent of America's energy needs today.

In the State of Ohio, they provide 87 percent of the energy, and thousands and thousands of jobs across the country.

I am glad Chairman Lamborn hosted this important hearing today on the Obama Administration's abuse of executive power, particularly in the case of the Spruce Mine and the broader effects this abuse of power could have on the economy as a whole.

The Obama Administration's war on coal is most clearly exemplified in the Spruce Mine case, and that is the reason for this hearing.

However, as Ms. Harbert and Mr. Eisenberg have testified today, the actions taken by the EPA to veto a valid permit by the U.S. Army Corps of Engineers has potentially crippling effects to the rest of the economy if it is allowed to stand.

America's businesses are already being crushed by the uncertainty of regulations coming from Obamacare, other EPA and Interior regulations, and if the EPA suddenly had the power to veto permits justly issued by other Federal agencies, companies could start to move their investments overseas, where they at least have the certainty and finality they need to invest their money.

Ms. Harbert, in your testimony, you cite a Brattle study that says over $200 billion are contingent on Section 404 permits. When EPA asserted the right to withdraw the specification of a disposal site for a Section 404 permit after issuance of it by the U.S. Army Corps of Engineers, U.S. District Judge Amy Berman Jackson, who was in fact appointed to the Bench by President Obama, asked the EPA, "What are the permittees supposed to do tomorrow?"

Specifically under EPA's reasoning, she asked, "So, everybody with a permit has to on a daily basis compare their permit to your list of specified sites. They cannot do what they have been permitted to do by the United States?"

My question to you is what would the practical effect be on a company having their Section 404 permits be subject to EPA's potentially ever changing list of acceptable disposal sites?

Ms. HARBERT. I used to be an infrastructure project developer, and the one thing you do is you look at all of your risks, technological risks, sovereign risks, political risks.

What this introduces into the mix is a whole other level of risk that you have to find a way over, a hurdle.

What does that do? It either causes you to cancel the project because the hurdle is too high, or it causes you to increase the cost of the infrastructure project because you have to take that cost into account, or you take that money and you go elsewhere.

All of those things make it very impractical and a very impactful impact on American infrastructure.

We know we have a crumbling infrastructure in this country and we know we need a lot of investment. Those people who will make those investments now see those investments at risk.

It has a very real, practical, timely impact.

Mr. JOHNSON. Mr. Eisenberg, in your testimony, you talked about a hurdle cost that companies would have to account for in their planning of projects if this EPA action is allowed to stand.

Would many of the members of the National Association of Manufacturers have this same hurdle cost in markets overseas?

Mr. EISENBERG. Probably not. This is a case of duplicative regulations. EPA does not have the authority to do this. The Corps has the authority to modify this permit. EPA just tried to get at the one thing they could, which is where you drop the fill.

It introduces duplicative regulations. It distorts this hurdle rate, which is the calculation that an investor makes when they are going to decide whether or not to invest in a project.

No, certainly not. It gets to the core of my testimony which is if EPA wants more authority, they need to come here and try to get it. If they do not feel comfortable with the bounds of their authority, Congress is the place they need to go to try to get more.

Mr. JOHNSON. OK. Thank you. My time has expired. I will yield now to my colleague from Massachusetts, Mr. Markey. Do you have additional questions?

Mr. MARKEY. I do. It is only to make this point again. For the first three months of 2012, coal only produced 36 percent of the electricity in the country. That is my point, it is declining rapidly because of natural gas and because of wind.

Just in the last five years, just so we get the numbers right in terms of this trend, there were 16,000 new megawatts of coal installed in the last five years in the United States. There were 36,000 new megawatts of wind installed in the United States, and 41,000 new megawatts of natural gas installed in the United States.

In other words, to put it another way, over the last five years, 17 percent of our new electrical generation came from coal, 39 percent came from wind, and 44 percent came from natural gas.

That trend is very clear. You might want to keep looking in the rear view mirror at some numbers from ten years ago or 20 years ago, but it is down to 36 percent of all electrical generation. The market has moved clearly to wind and natural gas. Wind is now totally competitive with new coal as a generating source.

These are numbers that go to free market decisions made by utility executives all across the United States of America in terms of where the new electricity is being generated from.

These are just numbers—I know people want to blame Obama for the free market moving against a technology which is not competitive, but I just think it is unfair and inaccurate historically, and I yield to the gentleman from New Jersey.

Mr. HOLT. I thank the gentleman for his very good statement. He describes very well that market conditions are changing. We want the coal companies to innovate. We do not wish the miners ill by any means.

If they refuse to innovate, they are going to be left behind. I think the Ranking Member has made that point very clearly.

Meanwhile, we have an ongoing obligation to look after the environment. What is not changing is that obligation that we have to provide oversight, to see that the Environmental Protection Agency and the environmental protection laws of this country are working. That is what this is about.

I thank the gentleman for yielding.

Mr. MARKEY. I thank the gentleman very much. This is not unlike the auto industry. The auto industry fought innovation for a generation. Their fuel economy standards just kept getting more and more uncompetitive with the rest of the planet, until they reached a point where their product was not selling, and they neared bankruptcy, and required Federal Government intervention in order to ensure they did not go under.

That was not anything that I wanted to vote for. I am one of the few people that can say I voted twice to bail out Chrysler, 1979 and in 2010.

We were offering the same opportunity to the coal industry in the Waxman-Markey bill. We were saying we will provide the funding for the innovation. We will provide the help for the coal industry. We will give you a bridge to make a transition so you can stay within the competitive framework of new energy sources within the country. The coal industry, in the same way the auto industry did, said absolutely no.

Where is the auto industry today? Well, they have come through their mess and now they are embracing the goal of 54.5 miles per gallon by the year 2026, and they are advertising every 20 minutes on every television show about their new, more fuel efficient and safer vehicles they are selling.

The coal industry said no, let's just keep getting at this. Peabody Coal said no, and in the same way the auto industry did a disservice to its workers, Peabody Coal has done a disservice to its workers. Same disservice. Pretending that they could not innovate, that they could not improve, they could not make themselves more competitive.

Trying to blame some outside source, whether it be the auto industry or the coal industry, is just to defy an analysis of the reality of the marketplace.

The auto industry was losing to international competitors because they were no longer meeting the goals of what the consumer expected, and the coal industry clearly in the last five years, down to only 17 percent of new electrical generation, wind is at 39 percent and new gas is at 44 percent, the coal industry is suffering inevitably because of the bad decisions of the coal industry executives who should be questioned——

Mr. JOHNSON. The gentleman's time has expired. We will now go to Mr. Flores.

Mr. FLORES. Thank you, Mr. Chairman. The only side show here has been the comments by the other side to try to change the subject.

This hearing is not about auto mileage. It is not about coal. It is not about natural gas. It is not about the Waxman-Markey bill or capping tax or capping trade or anything else.

It is about out of control bureaucrats that change the rules after the rules have been passed. It is about out of control bureaucrats that are not following what the law says passed by the people that elected the Congress. That is what this hearing is about. That is clearly what it is about.

I have firsthand experience with this. Before I came here to fantasy land where people can just change the rules whenever they see fit, I worked in the real world. I helped create jobs.

I set up operations all over the world. When I did it, I used to enjoy getting on a plane to come back to the United States of America because I knew we had a clear, transparent, fair and stable regulatory structure.

We have become a Third World banana republic like Ms. Harbert said. That is not what this is about.

We have bureaucrats who invent junk science and bogus analyses and then change the rules to fit whatever their whim is that day. They do it because you have environmentalists that want to

move beyond coal and now they want to move beyond natural gas that the other side waxes so politically about.

You have environmentalists that want to attack crop insurance. Pretty soon, we will not be able to eat because of the environmentalists. We will not be able to heat our homes because of the environmentalists. We will darn sure have no jobs because of environmentalists.

This is out of control. This is not what America is supposed to be. This is a region that has 60 percent unemployment. The unemployment number came out today. The unemployment rate is 14.8 percent. We have one out of every six Americans out of work, and now you have out of control bureaucrats that want to put more people out of work because businesses that hire these employees, that create these jobs, do not know what regulators are going to do when they wake up each morning.

That is an issue for me. That is an issue for the American people. That is the reason we had a big change in this Congress, in this House, in November 2010.

We have to move on and talk about why we are here. Ms. Harbert, the first question is for you. First of all, I agree with your comment that—I will come back to your comment in a minute.

I have a question for you, and that is when you get a permit, you assume that as long as you fulfill the responsibilities under that permit, that permit should stay in existence. Is that correct?

Ms. HARBERT. Absolutely.

Mr. FLORES. What happens if you are an employer or a business and you cannot count on that permit to be in effect or that it can be revoked at a whim, even though you are fulfilling the rules of that permit?

Ms. HARBERT. If it happens before you have made the investment, you give second thought to making the investment. If it happens while something is under construction, do you halt construction and lay off your workers or do you continue at a great deal of risk in the regulatory process?

This is all new territory. I think that is why we are having this hearing, which is the business community was set back by this decision by the EPA.

They were overjoyed to see the justice system step in and say they were overreaching their authority, but at the same time, now we have EPA overreaching their authority in Alaska and preemptively perhaps rejecting a project that has not even gone to final decision.

We are seeing some very scary signs on the wall to the business community and they want to figure a way out of this.

Mr. FLORES. This question is for Mr. Eisenberg. Is there any statutory authority that the EPA has to retroactively revoke permits?

Mr. EISENBERG. Absolutely not. They do not even have the authority to issue the permits. They can only deal with the specification of where to put the fill under 404.

Mr. FLORES. Senator Kirkendoll, I have been to Appalachia. I have helped go and repair and renovate homes for economically disadvantaged people in your part of the world.

I can tell you, it is an economically depressed area. The last thing I would think would be appropriate is to have EPA bureaucrats that are unaccountable and now irresponsible, to have them controlling the life blood of your community, how do you feel about that?

Mr. KIRKENDOLL. In my area, we do have a lot of people that have some under privileged situations. We worked on that through the years. We tried to diversify the economy with tourism. It is working.

To get to the next level, you have to have your main source of income and your taxation to diversify with. You can have visions and dreams and hopes and desires. If you have no money to get there—for somebody to simply put yourself in a position—how do you attract business if one day they can operate and the next day they are pulled, they are pulled before they get to operate.

It is a scary situation. Like I said before, I talked to the CEOs of some of those companies that have been long-standing in my particular region. They do not want to be in the Appalachia region, not because of the ability to mine some of the best coal in the world which is——

Mr. FLORES. Let me interrupt you for a minute. Would the folks in your community rather have paychecks or welfare payments?

Mr. KIRKENDOLL. The ones I deal with would rather work. In fact, some of the rallies we have had, when this stimulus money was handed out in Washington for the auto industry and everybody else, the cry of the people in the coal fields was we do not want the stimulus money, give us work permits. Yes, sir.

Mr. FLORES. Thank you very much. I yield back.

Mr. JOHNSON. I thank the gentleman for yielding back. We will go now to Mr. McKinley.

Mr. MCKINLEY. Thank you, Mr. Chairman. Thank you for the opportunity to participate with this Committee.

I think the previous speaker said it all, what we are here for. There is always electricity in the air when people try to divert our attention for what we are supposed to be talking about here today, because that is what they do a lot in Washington.

I would just like to start by I am one of maybe three or four people in Congress that have a construction background, and I have dealt with permitting agencies for 40 some years.

When they grant a permit, you work with that permit. If the science changes and you change the requirements——

Mr. JOHNSON. Would the gentleman suspend? I am going to ask all Committee members to respect the time that other Committee members have. If we need to have side bar meetings, we have a room or a hallway. I would appreciate that. Thank you. Go ahead, sir.

Mr. MCKINLEY. When they change the rules, on the next permit, you make that apply. You do not go back retroactively.

That is one of the reasons I came here particularly to learn from the EPA what was their grounds for this justification? If it were science, then let's build on the science.

They unfortunately chose not to be here or not to send any representatives within their organization. I am a little surprised by that.

Let's stay focused on why we are here, about a permit. The permit was given. I am told they said they wanted to revoke it because of the science, they felt there was more science that caused that to be considered.

I would like to ask, I suppose, Ms. Gunnoe, to try to give an analogy. In your house, you probably have plywood in your house, you have drywall in your house. Are you aware that the EPA is considering changing the standard on the resin use in plywood to such a level, a tenth of a part per million, and if they do make that change, how would you feel after you have been given a permit to own and build or locate in your house, they knock on your door and say you have to leave your home because we have changed the standard and your house is no longer within the standard?

Would you leave your house willingly?

Ms. GUNNOE. I absolutely would. If I thought my house was making me sick, I would leave.

Mr. MCKINLEY. If I can reclaim my time, the same thing with concrete. In your house, you have fly ash in your concrete. The EPA is now adopting standards that will say that is a hazardous material.

I suppose what you are willing to say in a very humble way, that you are willing to face bankruptcy for your standards and your principles, and I admire you for that, but the bank probably is not going to like that after they have loaned you the money——

Ms. GUNNOE. Can I respond to what you are saying or are you just talking at me?

Mr. MCKINLEY. If I can continue with my time, you may lose your home and the bank may have to foreclose on it because your house does not meet the standards of the EPA.

That is a real threat, when we keep moving the goal post, for people to be able to make a decision.

Ms. Harbert, I like your comments. I wonder whether or not you have any other comments about the report. Before we get to this report, in a real short time frame, I want people to understand that I will play in this court for a little bit, when they will not acknowledge that in the other committee, but let's go back to carbon capture and sequestration.

I have asked time and time again of the EPA, if you are going to set the standard for carbon capture and sequestration, that is under the new source standards, show me one facility that has carbon capture, commercially available technology. There is not one.

We cannot do it in America today, even in a laboratory setting. Yet, the EPA has set that as being the standard of where we need to be. They know very well this is a war on coal. There is no question about it.

When we look at fly ash being called a hazardous material, greenhouse gases, climate change, new source standard, utility act, train act, we can go on and on.

We understand they do not want all of the above energy sources.

Could you say is there anything more on this study that we need to review that was done by Dr. Sunding?

Ms. HARBERT. I think the take away from that report is the impact on the broader business community and the investment community will be huge, and it changes the business model for infra-

structure in America, and was that the intention of the Clean Water Act?

It certainly was not the intention of Congress to change the business model for the American economy, and that is ultimately what this could mean.

Mr. MCKINLEY. Thank you. Apparently, I have run over my time. I did want to ask our Senator from West Virginia about the fact that Longview Coal Company in West Virginia is actually producing power notwithstanding the remarks from our representative from Massachusetts, at a rate lower than the gas production.

The innovation is there.

Mr. JOHNSON. Would the gentleman like to ask unanimous consent for another minute to pursue that?

Mr. MCKINLEY. If he could expand that, I would ask for another minute.

Mr. JOHNSON. Without objection, so ordered.

Mr. MCKINLEY. He is aware of the fact that there are coal companies that are providing innovation but they are being held back because of the threats of over regulation.

Are you aware of the Longview Mine?

Mr. KIRKENDOLL. Yes.

Mr. MCKINLEY. It is producing at a heat rate of 8,700 Btu per kilowatt. For those on the other side of the aisle that are not aware of that, what would you say to that? The coal companies are innovating?

Mr. KIRKENDOLL. I think they are innovating to the best of their ability, utilities, as far as the economic ability to do so; yes.

Mr. MCKINLEY. Thank you very much.

Mr. JOHNSON. I thank the gentleman for yielding back. We will go to Mr. Duncan from South Carolina.

Mr. DUNCAN OF SOUTH CAROLINA. Thank you, Mr. Chairman. I just want to make the point, I was going to ask some of the Administration officials on panel one some questions. They are not here because they did not want to delve into this subject.

We cannot say we were not warned by the Obama Administration about their intent on fighting the coal industry because the President himself said as a candidate in 2008 if someone wants to build a new coal fired powerplant, they can, but it will bankrupt them because they will be charged a huge sum for all the greenhouse gases being emitted. That is the dynamic that is driving the policies of this Administration. We cannot say we were not warned.

With that, I yield to the gentleman from Ohio.

Mr. JOHNSON. I thank the gentleman for yielding. I do have a couple more questions but I would like to point out that we talk about the decrease in the amount of energy being provided by the coal industry.

When we have an Administration, the President of whom acknowledged before he was elected he was going to make it economically infeasible to build new coal fired powerplants, and he has done so. We have a Vice President who in 2007 said coal is more dangerous than high fructose corn syrup and terrorists.

It is no wonder that Americans today are paying $300 more on the average per year to power their homes.

If that is acceptable to the American people, than maybe we are on the right track. I submit we are not.

I want to say that I applaud the coal industry for turning down the opportunity to receive a bail out from the Federal Government in an attempt to choose winners and losers.

We have certainly seen the Federal Government's ability to choose winners and losers, with failed projects like Solyndra.

I think I have made the point.

Ms. Harbert and/or Mr. Eisenberg, is it safe to say we would start to see some of that $200 billion that we talked about earlier start to move overseas where companies can rely on finality of payments?

Ms. HARBERT. Sanctity of contracts is extremely important in any business model. To the extent that the ability to rely on your contracts or your rule of law, that would certainly send a signal for capital to go where it feels more comfortable. If that is overseas, then it is overseas, or it just will not happen at all.

Mr. JOHNSON. Thank you. I find it quite ironic that Vice President Biden was in my District in Ohio just a few weeks ago talking about the resurgence of manufacturing in America when the Administration is taking actions that will only push jobs overseas and attack the very energy sources that are providing that surge in manufacturing today.

Senator Kirkendoll, many states have primacy over their SMCRA permitting programs and as such, many states expend a great deal of time and resources in the mine permitting process.

What effect would a lack of finality in CWA Section 404 context have on West Virginia's SMCRA permitting scheme?

Mr. KIRKENDOLL. The Secretary has gone on record many times that states should have the right in the Clean Water Act, and I think it just creates an entirely different atmosphere when you are talking about the permit process, which states do not have the solvent rights over the Clean Water Act regarding their own permitting process, and it is overridden by the Federal regulators.

I think it just challenges the permit process totally.

Mr. JOHNSON. Thank you. I was afraid that was what you were going to say. As I said at the beginning of my questioning, although this is an egregious case of President Obama's Administration carrying out the war on coal, we have heard today from witnesses that the EPA's actions have major ramifications for all American businesses if the EPA's actions are allowed to stand.

With that, that concludes my questioning.

Mr. DUNCAN OF SOUTH CAROLINA. I reclaim my time.

Mr. JOHNSON. Without objection——

Mr. DUNCAN OF SOUTH CAROLINA. Reclaiming my time real quick. I just want to make a point, Denmark is held out as this epitome of alternative fuels and wind power. They have reduced their carbon footprint that much (indicating). They are still relying on their baseload 24/7 power supply from coal.

It is an important resource. I like wind power. The gentleman from Massachusetts was talking about that earlier.

We cannot continue to talk about wind only. We have to support what works for that 24/7 baseload always on power supply and coal provides that in this country.

I think about what coal technology could do for the African Continent or for Latin America where they use charcoal, which is taken from the wood harvested in the forests that we love.

If we provided coal fired powerplants in other countries, especially Third World, and lessened their dependence on the charcoal, just think about the quality of life issues.

Coal works. It is proven in this country. It can be proven worldwide.

I yield back.

Mr. JOHNSON. I thank the gentleman for yielding back. Votes have been called. Without objection, I am going to yield the final two minutes to our colleague, Mr. Holt.

Mr. HOLT. Thank you, Mr. Chair. Many of the questions that the Committee seemed to want to ask of the EPA are better resolved in court dealing with a particular case.

There have been some general statements made that I think really should be addressed, that have to do with the Clean Water Act and what it actually says.

It actually says that the Administrator is authorized to prohibit the specification including withdrawal of specification of any defined area, and he is authorized to deny or restrict the use of any defined area for specification as a disposal site, including withdrawal, whenever he determines, after notice and opportunity for public hearings, that the discharge will have an unacceptable adverse effect on water supplies, fisheries, wild life, and recreation areas.

It goes on to say that the Administrator must consult with the Secretary and the Corps of Engineers.

The Corps expressed some surprise that Congress would do this, but Congress did that. Our witnesses today seem to disbelieve that Congress did this, but Congress did this.

I think it is worth making that clear. I will yield my remaining time to the Ranking Member.

Mr. MARKEY. I thank the gentleman. Earlier this week, the New York Times reported that the American Electric Power Company was planning to transition a plant in Kentucky from coal to natural gas. The coal companies objected. They organized. They insisted that rate payers should pay 30 percent more so that the plant could continue burning coal instead of much cheaper natural gas.

They actually got the American Electric Power Company to submit that proposal to state public utility commissioners.

Let's be honest. That is welfare for coal executives making rate payers——

Mr. JOHNSON. I hate to call——

Mr. MARKEY. I ask for 30 additional seconds.

Mr. JOHNSON. Without objection.

Mr. MARKEY. I thank you, sir. That is welfare for coal executives making rate payers pay 30 percent more. That is just wrong. That is not free market.

The company finally withdrew this ridiculous proposal after it gained attention.

I would also like to respond to the gentleman's comments about electricity rates being increased. In New England, they are declin-

ing rapidly after thousands of new megawatts constructed of gas, solar, and wind in New England over the last decade.

We just across the board had a 15 percent reduction in our electricity rates. That is without coal.

Again, the coal industry now has 75,000 workers, but the wind industry has 75,000 workers and the solar industry has 100,000 workers.

We just have to say the market is now moving away from coal because the coal industry refused to accept the $60 billion in the Waxman-Markey bill that would have helped them to make the transition.

Mr. JOHNSON. I thank the panel for their testimony today. Members of this Committee may have additional questions for the record, and I ask you to respond to these in writing.

If there is no further business, the Committee stands adjourned.

[Whereupon, at 11:48 a.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Statement of The Honorable Dan Benishek, a Representative in Congress from the State of Michigan

Mr. Chairman, I appreciate you taking the time to explore this very important topic today. As you may be aware, mining is one of the leading industries in Michigan's First District. The Upper Peninsula in particular has a rich mining heritage and serves as a central driver of the local economy. Just last week, the New York Times highlighted the "mining rush in the Upper Peninsula."

As the representative for Michigan's First District and the son of a miner, I am truly proud of the new investments being made in the area—from small businesses to global corporations. These investments bring jobs to the area. Mining companies invest in our tax base, helping local schools and libraries. Mining is an investment in the future of the First District.

Like all industries, mines are highly regulated by the Environmental Protection Agency (EPA). Many companies in my district have been working with the EPA for years to receive permits to operate. I fear many of these regulations are unnecessary and will cost Northern Michiganders their jobs. Under the current climate, mining companies are required to invest heavily in the area before they pull one ounce of product out of the ground. In 2010, the EPA revoked an active mining permit at the Spruce No. 1 Mine in West Virginia. This action is quite worrisome due to the precedent it sets. While the EPA has stated that they do not intend to pursue this route with other mines or industries around the country, it sends a signal to our nation's job creators that investing in America may not be a safe bet.

Mr. Chairman, I thank you for holding this hearing, and ask that Congress pursue all options to restrict the EPA from pursuing this type of arbitrary action in the future.

○