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EPA'S EXPANDED INTERPRETATION OF ITS PERMIT VETO AUTHORITY UNDER THE CLEAN WATER ACT

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HEARING

BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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

Bill Shuster Chairman	Washington, DC 20515	Nick J. Rahall, II Ranking Member
Christopher P. Bertram, Staff Director	July 11, 2014	James H. Zoia, Democrat Staff Director

SUMMARY OF SUBJECT MATTER

TO:	Members, Subcommittee on Water Resources and Environment
FROM:	Staff, Subcommittee on Water Resources and Environment
RE:	Water Resources and Environment Subcommittee Hearing on "EPA's Expanded Interpretation of its Permit Veto Authority under the Clean Water Act"

PURPOSE

The Water Resources and Environment Subcommittee is scheduled to meet on Tuesday, July 15, 2014, at 10:00 a.m., in 2167 Rayburn House Office Building, to receive testimony on the Environmental Protection Agency's (EPA) expanded interpretation of its veto authority under the Clean Water Act.

BACKGROUND

Clean Water Act

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

The U.S. Environmental Protection Agency (EPA) has the basic responsibility for administering and enforcing most of the CWA, including the NPDES permit program, and the U.S. Army Corps of Engineers (Corps) has the lead responsibility for administering the dredge or fill (wetlands) permit program under section 404 of the CWA. The EPA has a complementary role in administering section 404, both in the development of environmental guidelines to provide a means of evaluating whether any discharge of fill is environmentally acceptable, and through its review of the program's implementation under section 404(c). Under the wetlands permitting program, the Corps has authority to issue dredge or fill permits (typically for a permit term of five years) for the discharge of materials into jurisdictional waterbodies at specified

disposal sites. It is unlawful for a facility to discharge dredge or fill materials into a jurisdictional waterbody unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps.

Section 404 of Clean Water Act

Under Section 404 of the Clean Water Act, the Corps has authority to issue dredge and fill permits for the discharge of materials into navigable waterways at specified disposal sites. The Corps develops and issues these disposal site permits with oversight by the EPA. Congress intended for expeditious decisions on Section 404 permits. Specifically, it instructed that, to the maximum extent practicable, decisions on Section 404 permits will be made within 90 days.

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

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

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

The EPA's Assertion of 404(c) "Veto Authority"

Recently, the EPA has asserted more broadly its veto authority under section 404(c) of the CWA. EPA's broad interpretation has evolved into the authority to veto before a permit is applied for, while an application is pending, or after a permit has already been issued. It was Congress' intent that the issuance of a federal permit should come with certainty that the activity can go forward unencumbered but within the bounds of the permit. The EPA's new broad interpretation has led to uncertainty throughout the business communities that rely on 404 permits. Businesses and investors start to raise the question, if an agency is given the authority to revoke an already issued permit that has not been in violation of any precondition terms – is any permit ever actually final?

A recent example of the EPA's new assertion of its veto authority is Spruce Mine. In 2007, the Corps of Engineers issued a section 404 permit in connection with the Arch Coal, Mingo Logan, Inc., Spruce No. 1 Surface Mine, located in Logan County, West Virginia.

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

Even though the mine operated pursuant to, and in compliance with, their section 404 permit, on April 2, 2010, the EPA Region III published a Proposed Determination to prohibit, restrict or deny the authorized discharges to certain of the waters associated with the Spruce project site. The notice was followed by public comment and hearings. In addition, the notice prompted a legal challenge in the federal district court where Mingo Logan Coal Company, Inc. challenged the agency's unlawful attempt to revoke a CWA Section 404 permit more than three years after the permit's issuance.

On September 24, 2010, the EPA Region III Regional Administrator signed a Recommended Determination recommending the EPA withdraw the discharge authorization. In response, Mingo Logan Coal provided the EPA with substantial technical comments to support its opposition to the Recommended Determination. The Final Determination of permit veto was signed on January 13, 2011.

In March 2012, a U.S. District Judge sided with Mingo Logan Coal, Inc. and overruled the 2011 permit revocation of Spruce Mine's 404 permit. The judge stated that the veto was "a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute." This ultimately led to an appeal by the EPA.

In April 2013, a decision by the U.S. Court of Appeals for the District of Columbia overruled a U.S. District Judge's conclusion that the EPA lacked the legal authority to veto a Clean Water Act 404 permit. The appeals court said the Clean Water Act contains "unambiguous language" that "manifests the Congress' intent to confer on EPA a broad veto power extending beyond the permit issuance." As of now, the Supreme Court has declined to take up the Spruce Mine case.

The EPA has not only asserted itself after a permit has been issued, it has recently been preempting potential applicants. A recent example of the EPA exercising its veto authority before someone even applies for a 404 permit is Pebble Mine, Bristol Bay, Alaska. In this case, without ever receiving an application describing a proposed action, the EPA has declared that no permit can ever be issued in a designated area. To date, there have not been any judicial rulings on this practice by the EPA.

Some public and private entities that rely on section 404 permits to conduct their business are concerned about the EPA expanding its interpretation of its veto authority to include before an application is submitted and after a permit has been issued. Until recently, the EPA had only

exercised its veto a few times and only after an application had been received and when it appeared that the Corps was about to issue a permit over the EPA's objections. Some are concerned that this has brought uncertainty to the development process that could chill future investments in vital infrastructure and other projects that require section 404 permits. Considering that, according to David Sunding, a professor at University of California – Berkley, approximately $220 billion worth of projects are dependent each year on section 404 permits, the potential exists for this new practice by the EPA to have a significant impact to local, regional, and national economies.

WITNESSES

Mr. William Kovacs
Vice President – Environment, Technology and Regulatory Affairs
U.S. Chamber of Commerce

Mr. Harold P. Quinn, Jr
President and CEO
National Mining Association

Mr. Nick Ivanhoff
Senior Vice Chairman
American Road and Transportation Builders Association

Ms. Leah F. Pilconis, Esq.
Senior Environmental Advisor
Associated General Contractors of America

Mr. Richard Faulk
Senior Director, Energy and Environment
George Mason University School of Law

Patrick Parenteau
Professor of Law
Vermont Law School

EPA'S EXPANDED INTERPRETATION OF ITS PERMIT VETO AUTHORITY UNDER THE CLEAN WATER ACT

TUESDAY, JULY 15, 2014

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

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

Mr. GIBBS. Good morning. The Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure will come to order.

A couple of housekeeping items. First, I ask unanimous consent that the hearing record be kept open for 30 days after this hearing in order to accept other submissions of written testimony for the hearing record.

Are there any objections?

[No response.]

Mr. GIBBS. Hearing none, so ordered.

Today we have one panel. I welcome the witnesses. I will start off here with my opening statement.

I again would like to welcome everybody to the hearing today. We are here meeting to examine the EPA's expanded interpretation of its permit veto authority under the Clean Water Act.

Today we will hear from multiple stakeholders on the potential economic and job creation impacts of the EPA's new interpretation of their veto authority under the Clean Water Act. The Army Corps of Engineers has the lead responsibility for implementing the Wetlands Dredge and Fill Permitting Program under section 404 of the Clean Water Act.

Under the Wetlands Permitting Program, the Corps is responsible for receiving and reviewing section 404 permit applications and issuing wetland permits. Section 404 assigns the EPA a limited review role in regard to section 404 permits. EPA may comment on section 404 permit applications during an interagency review period for each permit, and EPA also has the limited authority under section 404(c) to prevent the Corps from issuing a permit to authorize a particular disposal site or to restrict the terms of the permit, if the EPA determines that the permit would result in certain unacceptable environmental effects.

Consistent with this process, in 2007, the Corps issued a section 404 permit for the Spruce No. 1 Mine project in West Virginia. Prior to the issuance of the permit, the project applicant conducted an extensive 10-year environmental review in which EPA fully participated and agreed to all of the terms and conditions included in the authorized permit.

Subsequently, the mine operated pursuant to and in full compliance with the section 404 authorization and made substantial investments in the project in reliance on the permit.

However, in 2009, the EPA unilaterally changed the rules of the game after the fact and took steps to revoke parts of the Spruce project issued permit even though they were in full compliance with the conditions of the permit. More than 3 years after the permit's issuance, EPA finalized the permit revocation in early 2011, halting development of the mine, jeopardizing jobs and the substantial investments and injected uncertainty into any industry impacted by section 404 permitting.

After the permit holder challenged EPA's permit revocation action in the Federal courts, the U.S. Supreme Court has decided not to review the 2013 Appeals Court decision that the EPA did not exceed its power when it stripped the Spruce Mine of its 404 permit.

Revoking a permit after such has been issued and when no violations of the permit—I want to make that key—no violations of the permit have occurred is unsettling. It is an arbitrary and irresponsible way for Government to act.

The EPA has not only asserted itself after a permit has been issued. It has recently been preempting potential applicants. A recent example of the EPA perhaps illegally exercising its veto authority before someone even applies for a 404 permit is in the Pebble Mine, Bristol Bay, Alaska project.

In this case, without ever receiving an application describing the proposed action, the EPA has declared that no permit, regardless of conditions and potential public benefits, can ever be issued in that designated area.

I consider this regulatory overreach to be a fundamental property rights issue. With this new and broad interpretation of its powers, EPA is setting itself up as the ultimate manager of land use and economic development in the Nation. This is an example of Government that thinks it has no limitations on its power.

The EPA's newly expanded interpretation has the possibility of becoming a very dangerous precedent by opening the door for revoking not just 404 permits, but perhaps other permits as well.

This new action by EPA will affect both public and private development and raises the question: what does it really mean to get a permit? What does it mean to get a final decision from the Federal Government?

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

I look forward to the testimony from our witnesses today, and at this time I yield to Mr. Bishop for a statement or any comments he may have.

Mr. BISHOP. Thank you very much, Mr. Chairman. I appreciate you holding this hearing, and I appreciate you yielding to me.

I recognize that there is a difference of opinion among Members of this panel on the activities of the executive branch to protect public health and the environment. However, I am troubled by the tone taken by this Congress in carrying out its oversight activities of the current administration. Too often these days we have let the rhetoric surrounding controversial issues overtake the reality, and this seems especially true when it comes to talking about actions of the Corps of Engineers and the Environmental Protection Agency.

Today's hearing is an example of this. The title of this hearing talks about the EPA's expanded interpretation of its Clean Water Act authority, as though this agency is creating new authority by its actions where none previously existed.

Our former Senator from the State of New York, Daniel Patrick Moynihan once said everyone is entitled to his own opinions, but not his own facts. And so as we begin this hearing, it is important that we all have the same set of facts from which to work.

Here are the facts. Fact No. 1, Congress enacted the Clean Water Act in 1972 and provided the Corps and the EPA complementary roles in the implementation of the Federal section 404 permit authority over discharges of dredged or fill material at specific sites in waters of the United States, including the adoption of the EPA's 404(c) oversight responsibility.

Fact No. 2, since enactment of the Clean Water Act, the Corps of Engineers has processed on average 60,000 section 404 permit applications per year, resulting in over 2.5 million approved permits since 1972.

During that same period of time, the Environmental Protection Agency has exercised its section 404(c) authority a total of 13 times, 13 times in 2½ million permit applications.

Fact No. 3, of the 13 actions taken by the EPA under section 404(c) since 1972, 12 were under Republican administrations and only 1, the 1 that we are discussing this morning, was under a Democratic administration. I will note that 8 of the 12 under Republican administrations were during the Presidency of Ronald Reagan.

Fact No. 4, of the 13 times EPA has previously exercised its section 404(c), 3 of these 404(c) actions were taken after a Corps of Engineer permit was already issued, 2 under Republican administrations and once under a Democratic administration. An additional two 404(c) actions were taken in the time period before a Clean Water Act permit was issued by the Corps, both under a Republican administration.

Fact No. 5, one of the projects that was blocked by a 404(c) action of a Republican administration was finally resolved and approved by this current administration.

So as history has shown, the Environmental Protection Agency of both Republican and Democratic administrations has used its congressionally authorized oversight authority over the section 404

program in a limited and relatively consistent manner. To characterize the Agency's recent actions related to section 404(c) as an expanded interpretation is simply not supported by the facts or the historical record.

Now, it is fair for Members to have a difference of opinion on how the Corps and the EPA have carried out their Clean Water Act responsibilities. However, when we use that difference of opinion to mischaracterize or, worse, to demonize the intentions of these agencies, I believe we fail to uphold our larger congressional responsibilities.

In my view, the EPA seems to have exercised its section 404(c) authority since 1972 with restraint, acting only when the activities in question would have had an unacceptable adverse effect on the local environment, the very test that Congress established for the agencies back in 1972.

While I recognize that those who may have been affected by these actions may have a different view, I believe that these groups will have a difficult time in arguing that the Federal agencies have abused or expanded this authority over the years.

I thank all of the witnesses for being here today. I look forward to your testimony.

I yield back. Thank you.

Mr. GIBBS. Other Members may submit written testimony for the record.

Today I welcome the witnesses. Our first witness is Mr. William Kovacs. He is senior vice president, environment, technology and regulatory affairs of the U.S. Chamber of Commerce.

And then we have Mr. Harold Quinn, Jr., president and CEO of the National Mining Association; Mr. Nick Ivanoff, senior vice chairman of the American Road and Transportation Builders Association; Ms. Leah F. Pilconis, senior environmental advisor to the Associated General Contractors of America; Mr. Richard Faulk, senior director, Initiative for Energy and the Environment, George Mason University School of Law; and Patrick Parenteau, professor of law at the Vermont Law School.

Welcome all, and we will start off with Mr. Kovacs.

The floor is yours.

TESTIMONY OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE; HAROLD P. QUINN, JR., PRESIDENT AND CEO, NATIONAL MINING ASSOCIATION; NICK IVANOFF, SENIOR VICE CHAIRMAN, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; LEAH F. PILCONIS, ESQ., SENIOR ENVIRONMENTAL ADVISOR, ASSOCIATED GENERAL CONTRACTORS OF AMERICA; RICHARD O. FAULK, SENIOR DIRECTOR, INITIATIVE FOR ENERGY AND THE ENVIRONMENT, GEORGE MASON UNIVERSITY SCHOOL OF LAW; AND PATRICK PARENTEAU, PROFESSOR OF LAW, VERMONT LAW SCHOOL

Mr. KOVACS. Thank you, Chairman Gibbs and Ranking Member Bishop, for inviting me here to discuss EPA's expanded interpretation of the permanent veto authority under section 404 of the Clean Water Act.

I do recognize——

Mr. GIBBS. Mr. Kovacs, can you pull your microphone a little closer?

Mr. KOVACS. Oh, sure.

Mr. GIBBS. Is it on?

Mr. KOVACS. Yes.

Mr. GIBBS. OK.

Mr. KOVACS. While I do recognize that EPA permanent authority under section 404(c) has been upheld by the DC Circuit, I would like to focus on the practical implications of EPA's expanded new policy by discussing first the real work impacts of EPA's use of a retroactive veto policy authority and, second, the problems that arise when an agency, such as an EPA but there are others, stretches its authority under broadly written statutes enacted decades ago, many of which have not been formally reauthorized by Congress in decades.

In the practical world, securing a permit, and I think this is our biggest problem with the retroactive veto, is a multiyear effort involving complex studies, engineering reports, compliance with over 30,000 pages of regulations covering air, water, waste, endangered species, and environmental impact statements. When a permit is granted, the developer has complied with literally every regulatory detail. The developer goes through this torturous process to develop a significant project with the expectation that the project will add economic value to the community, create jobs, and increase shareholder value.

The developer enters the permitting process believing that once it proves it can meet every condition imposed by the Government, that it will hold the permit for a specific number of years to both complete and operate the project.

EPA's retroactive veto means that a permit no longer is granted for a specific period of time. Rather, a permit has value only as long as the Administrator believes that it should not be revoked. Under EPA's new policy, a developer, in effect, only applies for a contingent permit, one that might be revoked whenever the Administrator desires.

And I raise this in the context of the retroactive authority is completely unnecessary in this environment. First of all, should the developer violate any condition of the permit, EPA has massive administrative, civil, and criminal enforcement authority, emergency powers, injunctive relief, and it can even revoke the State's authority to retain full jurisdiction over the project.

So a retroactive permit authority creates such great uncertainty in the permitting process the developers will be extremely cautious before risking millions of dollars when needed to apply for a permit that they think can be revoked. And I say that because it is millions of dollars to get one of these permits.

And while the DC Circuit's decision invoked a coal mine, and that is a very controversial issue, the fact is that the retroactive permit authority can be used in any 404 permit, including ports, pipelines, waterways, highways, airports, housing authorities, industrial facilities, and even big box stores. So we are moving into a path that might be much more disruptive than the political controversy over a coal mine.

But EPA's retroactive permit authority is only one of the many ways in which the Agency is unilaterally expanding its regulatory authorities. The claim of retroactive authority is merely the latest. In the case of Pebble Mine, which the chairman mentioned, in Alaska, the developer spent over one-half billion dollars and it has not even yet been able to apply for a permit. In this situation, the activists petitioned EPA requesting that the permit be preemptively denied before even Pebble could apply for it.

To appease the activists, EPA undertook a watershed assessment using outdated models and operations of a mine. While EPA has not yet preemptively prohibited the permit application, it has formally started the process to prohibit it.

So we have a combination right now of EPA asserting a retroactive authority on a permit, a prospective authority on a permit, and when EPA moves forward with its "waters of the U.S." and this greatly expanded area that they are going to have 404 jurisdiction over, it literally places most of the land mass that is near water in some kind of restriction that they do not have now.

Couple these powers with EPA's other powers under other statutes, and then add into that Fish and Wildlife's efforts in expanding the habitat for endangered species, and the result is the Government is developing policies that will actually regulate most of the land in the United States. This type of regulatory structure is literally shutting down our ability to build infrastructure or large industrial projects anywhere. This is serious, and the Nation will not begin to grow and create jobs until we can start building again.

And I want to finish with the fact that several years ago we did a project called Project, No Project, and we just looked at the number of facilities trying to get permits in March of 2010, and there were 351 private facilities that wanted to put in almost $600 billion worth of investment, and they could not get permits. The permitting process is probably one of the most important things Congress can look at.

Thank you.

Mr. GIBBS. Thank you.

Mr. Quinn, welcome.

Mr. QUINN. Good morning. Thank you, Mr. Chairman, Ranking Member Bishop, and members of the subcommittee. Thank you for the invitation to appear today and testify, and we appreciate your efforts and time to look at this important questions about restoring predictability and certainty with the Clean Water Act permitting process.

The United States has several advantages when it comes to attracting capital for investments need to grow and sustain our economy. We have deep capital markets, a global leading workforce in terms of productivity and skills, a strong platform for innovation and technology development, a world leading transportation infrastructure to get products to market quickly, and low-cost and reliable energy, though I must say even that may be in jeopardy now with recently policies that we saw bring our electric grid close to the edge of breaking this past winter.

The point being is that all of these advantages can be erased with regulatory policies that create delays and uncertainty for capital intensive projects. Let me just speak to the mining industry.

Finding and developing our mineral resources in this country requires substantial investments, hundreds of millions and even billions of dollars. As a consequence, regulatory certainty is an essential and a highly valued commodity. Lengthy delays and regulatory do-overs and permitting decisions compromise the commercial viability of projects. They increase costs, reduce the net present value of projects, and impair potential financing sources.

So the efficiency and predictability of the permitting process matters in decisions about where to invest. The choice could be stark: invest in countries with a predictable pathway for receiving permits within 2 or 3 years, or perhaps the United States where it may take three or five times longer.

Over the years, the process for obtaining Clean Water Act permits has become longer, more complicated and more expensive. To make matters worse, we have now entered unchartered water for regulatory certainty with EPA's claim that it can, one, revoke a permit issues by another agency after the fact, the example the chairman used in his opening statement, a project that met the test of a 10-year environmental review and obtained EPA's prior consent; or instruct State and Federal agencies not to consider any permit application until it decides whether development in that State is appropriate; or change the process for reviewing permits after applications have been filed and pending for several years and, as a result, effectively force companies to abandon their applications out of frustration.

In short, it appears that in EPA's role it can never be too late or too soon to inject itself in the process or change the rules for reviewing project permit applications. Let me be clear. Valid concerns about environmental protection should be fully considered and addressed. At the same time, they should not serve as an excuse to trap projects in a limbo of duplicative, unpredictable and endless review or carry a prospect that decisions will be revisited when there's a change in leadership at an agency.

There is a time and place for EPA to engage the permitting process and raise legitimate issues it does not believe are being evaluated. That opportunity arises between the time a permit application is filed and prior to a decision.

Since the enactment of the Clean Water Act and until now that opportunity has proven more than adequate to the task. Words can debate whether the language of the Clean Water Act accommodates EPA's recent breathtaking claim of authority, but the fact that such authority was not apparent for 40 years should raise red flags as this subcommittee considers the questions before it today: is this what the Clean Water Act intended? And is this good public policy?

In the wake of EPA taking such extraordinary actions, the Agency issued statements that it only plans to do so very rarely, but for all practical purposes that is not a guarantee any project can take to the bank.

Thank you very much for your attention today.

Mr. GIBBS. Thank you, Mr. Quinn.

Mr. Ivanoff, welcome. The floor is yours.

Mr. IVANOFF. Thank you very much.

Chairman Gibbs, Representative Bishop, members of the subcommittee, my name is Nick Ivanoff, and I am president and CEO

of Ammann & Whitney, an engineering company based out of New York. I am here today on behalf of the American Road and Transportation Builders Association where I currently serve as the senior vice chairman.

ARTBA, now in its 112th year of service, represents all sectors of the U.S. transportation construction industry which sustains more than 3.3 million American jobs. ARTBA members must directly navigate the regulatory process to deliver transportation improvements, including obtaining Clean Water Act permits.

The permitting process is essential for balancing the need for protecting our natural environment with the need to improve our transportation networks. ARTBA members benefit from a well-run permitting system because it lets them know their responsibilities upfront and allows them to plan ahead during construction.

However, in order for a permitting system to function properly, there must be certainty. Once a permit is issued, we need to be able to rely upon the fact that the permit's conditions will not change.

EPA's decision to revoke Arch Coal's Clean Water Act permit in January of 2011 sets a very dangerous precedent which threatens to remove this certainty from the permitting process. Major transportation projects can take years, if not decades, to complete. In order for these projects to move forward, planners need to know permits received at the beginning of a multiyear construction process will be valid throughout the project's life span.

While the EPA's decision was directed at a single mining operation, its impacts have been felt throughout multiple industries. As a result of EPA's actions, permit holders could be in danger of losing their permits through no fault of their own, but simply because EPA changes the rules in the middle of the game.

Certainty in the permitting process is also integral to the financing of transportation projects. As you know, public-private partnerships are being eyed more and more frequently as a means of project delivery. In order for parties to invest in transportation improvements, they need some level of certainty. The prospect of a valid permit being rescinded at any time increases risk for project investors, making the project much less appealing or increasing the entity's required rate of return on their capital.

EPA's permit veto is even more troubling in light of the Agency's recent regulatory attempt to expand its jurisdiction under the Clean Water Act. If EPA's proposed jurisdictional rule is implemented, the universe of water bodies requiring Federal permits will expand. This would be a one-two punch for transportation improvements as their permitting burden would increase, and even if those permits are obtained, the length of their validity would certainly be in doubt.

It should also be noted that there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. If EPA's retroactive permit veto is allowed to stand, this progress as well as any other benefit from future reforms would be diluted. Any reduction in delay gained from improvements to a project delivery process could be negated by the increased uncertainty in the regulatory process for wetlands.

ARTBA was pleased to see this committee introduce the bipartisan Regulatory Certainty Act of 2014, which would curb EPA's ability to retroactively veto a valid permit. ARTBA supports this measure and sees it as a means to restore certainty to the permitting process.

Mr. Chairman, Representative Bishop, ARTBA deeply appreciate the opportunity to take part in today's discussion, and I certainly look forward to answering any of your questions.

Thank you very much.

Mr. GIBBS. Thank you.

Ms. Pilconis, the floor is yours. Welcome.

Ms. PILCONIS. Thank you.

Chairman Gibbs, Ranking Member Bishop, and members of the subcommittee, thank you for inviting the Associated General Contractors of America to testify today.

AGC represents over 25,000 construction contractors, material suppliers, and related firms. These firms construct buildings, highways, bridges, water and wastewater facilities, and other public and private infrastructure.

My name is Leah Pilconis, and I am a Senior Environmental Advisor to AGC. On behalf of AGC, I maintain liaison with EPA and other Federal agencies that interpret and enforce environmental laws.

Construction activity in "waters of the United States" requires a 404 permit. AGC believes that EPA's authority to modify a section 404 permit does not and should not extend beyond the point at which the Corps issues the permit. Unfortunately, EPA has taken a much more expansive view of its authority, asserting on its Web site that it can modify a section 404 permit before a permit is applied for, while an application is pending, or after a permit has been issued.

EPA's actions are disrupting the longstanding permit process that property owners and construction contractors rely on. The Agency is disregarding the regulated community's reasonable, well settled, and investment-backed expectations. It is taking away the finality of a dually issued permit.

Under a joint EPA and Army Corps proposal to redefine "waters of the United States," AGC expects many more construction projects to require section 404 permits. If EPA has its way, every permit will forever remain subject to modification and even revocation at literally any time simply because EPA unilaterally changes its opinion of information that it has long possessed. AGC believes it is now up to Congress to step in and solve the problem.

The alternative is to allow EPA to render years of development planning and billions of dollars in investments virtually meaningless based on nothing more than a reassertion of concerns that did not prevail in the original interagency review process.

Working without a permit is not a viable option. The penalties for failing to obtain the necessary Clean Water Act permit can be severe, and that is just the tip of the iceberg. Many of today's infrastructure projects cost billions of dollars to construct, and they require huge sums of money upfront just to begin work. Project delays and disruptions can easily cost millions and millions of dollars.

Scarce resources are wasted. Economic benefits are delayed, and workers lose their jobs. The widespread economic damage hits the property owner, the general contractor, the subcontracts, the material suppliers, the individual construction workers and the community.

What is more, those who are opposed to a construction project for whatever reason now have an incentive to bring citizen suits to try to compel EPA to modify or revoke the projects 404 permit. Legal proceedings mean delays, wherein overhead and other costs continue to accumulate. If EPA is allowed to revisit the environmental impact of a 404 permitted project at any time, then the permit holder cannot rely on the sole statutory mechanism for measuring Clean Water Act compliance, the permit.

The Corps regulations specifically address permit modification or suspension and lay out the five factors to be balanced in that inquiry. Those factors promote compliance and protect reliance interests. If EPA continues to assert unconstrained veto power over permits issued by the Corps, it will substantially deter investments in projects that require 404 authorization, which will translate directly into lost jobs and lost economic activity across the whole economy.

Billions of dollars of investments are dependent on the finality that comes with a duly issued Corps permit. Leaving projects unbuilt has consequences far beyond the owners and users who are deprived of the use of that project.

Construction is a major contributor to employment, cross domestic product, and manufacturing. Section 404 projects generate significant indirect and induced benefits to affiliated industries. Reduced levels of investment in those projects translate directly into lost jobs and lost economic activity across the whole economy.

The U.S. currently faces a significant backlog of overdue maintenance across its infrastructure system. The suspension restriction or lack of financial support for 404 projects could result in intolerable delays to the revocation and improvement of public infrastructure, including highway, transit, bridge repairs, and dam repairs.

Finally, the debt rating agencies will account for this risk through lowered bond ratings, particularly on controversial projects, resulting in increased underrating fees and interest rates. In some cases, project proponents may not be able to obtain necessary financing or public funding.

Mr. GIBBS. Thank you.

Mr. Faulk, the floor is yours. Welcome.

Mr. FAULK. Thank you, Mr. Chairman and members of the committee.

Mr. GIBBS. Put the microphone on and pull it a little closer maybe.

Mr. FAULK. Here we are.

Mr. GIBBS. Speak up like the previous witness who did really well.

Mr. FAULK. Absolutely, absolutely. I want to thank you, Mr. Chairman, and your sense of humor and the members of the committee for inviting me to speak to you this morning.

At the outset I want to note that I am not appearing here on behalf of any client or any organization. I have responded to the com-

mittee's invitation as a concerned citizen, and I am going to provide information based upon my experience and my observation.

I am the Senior Director of Energy and Environment Initiative at the Law and Economics Center of George Mason University, where I develop and participate in forums designed to promote constructive dialogue regarding our Nation's energy and environmental issues.

I am also a partner in the Washington, DC, law firm of Hollingsworth, LLP.

I have become familiar with the sources of the Environmental Protection Agency's alleged authority to veto permits issued under section 404 of the Clean Water Act, as well as the disputes that have arisen recently regarding the extent of the authority both before and after permits have been issued by the Corps of Engineers, which is, of course, the primary authority responsible for such actions.

Based upon my review, three situations that have arisen recently, I believe that there's an urgent need for a comprehensive inquiry into whether the current statutory structure can be properly construed to authorize retrospective and prospective vetoes of legitimate business activities.

The risk presented by such vetoes can be examined in these three situations that I've mentioned: the one which has already been discussed at length involving the Mingo Logan Coal Company, Spruce Mine No. 1; the second being the Pebble Mine Project development in Alaska, which involves a prospective veto; and the third that I am aware of is a request that was made in May, May 27th, 2014, to the EPA by a group of Native Americans in Wisconsin who are seeking a prospective prohibition of exploration and extraction by mining companies, particularly the Gogebic Taconite Mine for protecting the water resources associated in those situations.

If the congressional inquiry that I am requesting this committee to recommend reveals that these risks exist, Congress should consider amending the Clean Water Act to preclude these problems. These amendments should require that the EPA's objections and withdrawal of specifications occur only during the normal permitting process, not before the permitting process is commenced and not after the process is concludes.

Without these protections, these practices which are enhanced by deferential judicial review unreasonably expand the EPA's regulatory range and threaten to upset the delicate balance of powers and participation necessary to ensure the administration fairly of the Federal Clean Water Act.

It is worth noting that with respect to the *Mingo Logan* situation, that in the Supreme Court the argument was made in the petition for certiorari that the Supreme Court has already decided the question under the *Coeur Alaska* case, which is cited in my materials, that the Corps of Engineers is entitled to full respect for its decisions, and that they, in fact, have the authority to deal with these issues during the course of the permit issuing process. And that case can be found at 557 U.S. 261. It was decided in 2009.

But aside from these legal arguments, there is a multitude of economic issues that should be addressed here. Giving EPA the unconstrained authority to revoke section permits at any time strips

the permits of the finality and regulatory certainty that Congress clearly intended for them to have, while the Corps is required to consider the impacts on investments as a part of its issuing process.

It is interesting that the EPA claims it has no responsibility to consider these investment opportunities. Certainly there is nothing in the Clean Water Act that suggests that they must do so, and therefore, they have a situation that is left to their complete discretion without even considering or affording any deference whatsoever to these important issues.

Permits are extremely important and regulatory certainty is extremely important in all of these situations, and the threat of deferential judicial review is also a problem. As we know from the recent decisions of the Supreme Court, all of these issues are entitled to dispositive interpretations. EPA's interpretation are dispositive under the Chevron issues. They receive all sorts of recognition.

Scientific issues are entitled to an extreme degree of deference. Under those circumstances you can see that the danger of this situation which deprives parties of opportunities to challenge these issues in the permitting process adequately necessarily precludes any meaningful review of these issues by the courts.

Mr. GIBBS. Thank you.

Mr. Parenteau, welcome. The floor is yours.

Mr. PARENTEAU. Thank you, Chairman Gibbs, Representative Bishop, members of the committee. I appreciate the opportunity to appear here today.

I am, like Mr. Faulk, appearing in my individual capacity as someone who has spent over 40 years dealing with the Clean Water Act, but I do not have a dog in this particular fight.

I would note at the outset, however, I think it is very unfortunate there is not a member of the public from the Bristol Bay community here. The committee is debating a change in the law that could have very dramatic implications for the people that rely on a world-class fishery, a billion-dollar fishery that supports 14,000 jobs, that provides over half of the sockeye salmon that the world consumes. This is a one of a kind resource, and it is in your hands. The fate of this resource is in the hands of this Congress.

So with that let me just say that EPA has interpreted its authority under section 404(c) of the Clean Water Act in precisely the same way it is interpreting it today as it did in 1972, as the Congress did in 1972 when it wrote this law. This law authorizes EPA to exercise this very rare last resort, very carefully crafted authority before, during or after the issuance of a 404 permit.

That was written in the EPA's rules from the very beginning. I was a Regional Counsel with EPA. I am very familiar with these rules. I applied these rules in the *Attleboro Mall* veto case under the Reagan administration, and it has been clear from the beginning that this authority has existed, and EPA has always interpreted it consistently.

It is also true that EPA has very, very rarely exercised this authority. In fact, obviously it is very true that they very rarely exercise 404(c) veto authority at all, on only 13 times out of, as Mr. Bishop said, 2 million permit activities.

It is also true that EPA has been challenged each and every time it has exercised this authority in the courts, and it is true that EPA's position has been upheld by the court each and every time it has been challenged. Its administrative record, its science basis, its consideration of economic impacts, its consideration of alternatives, the reasons it gives for exercising this rare authority, every single facet of every single decision under 404(c) has been vigorously litigated by some of the finest litigators in the country, and each time EPA's position has been upheld, all the way now to the Supreme Court.

So in terms of law, it is well settled that EPA is well within its bounds in the way that is operating under the 404(c) program.

People can legitimately disagree, obviously, as to whether a particular veto ought to have been issued in a particular case, as to whether EPA should invoke the 404(c) authority at all. There are reasonable grounds to disagree and reasonable ways of seeing these things, but the authority to do that is clearly there.

Let me also say having been in the middle of this 404(c) process it is multilayered; it is four steps; it takes months, if not years, to complete. It is preceded by extensive consultations with the Corps of Engineers, with the project applicants, with local officials, with scientific authorities, with local communities, with site specific investigations, with peer reviewed science. All of that is part of these administrative records. It is all transparent. It is all there for anyone to see and anyone to challenge and anyone to debate. It is all on the record. It is all out in front. There is nothing in secret about it.

Finally, I would like to say that the instances in which this authority have been used have produced some very, very positive results. From the small to the large, in the *Attleboro Mall* case not only was the project in question a shopping mall built ultimately in an upland area that saved wetlands, but it led to a revolutionary change in the way that the agencies, the Corps and the EPA, administer the 404 program and specifically the way that mitigation of wetland impacts are handled.

It led to the most comprehensive set of mitigation regulations that we now have that have finally once and for all identified exactly and precisely how applicants can proceed to develop sites responsibly and with mitigation that actually works in accordance with the recommendations of the National Academy of Sciences and others.

That all resulted from that one single veto. Before that point in time there was no agreement between these agencies, lots of arguments, lots of litigation, lots of uncertainty. The veto broke through that. The veto resulted in an agreement that finally resolved that.

In the *Two Forks* case, very quickly, not only did we save Cheesman Canyon, one of the most priceless trout fisheries in the Western United States and very high value; not only did we save the seven towns that would have been flooded had Cheesman Canyon have been dammed, but the Denver Water Board came up with a water conservation policy as a result of that and acknowledged that the 404(c) veto led them to do that, which allowed Denver to grow by 100,000 people with no further water supplies needed.

Section 404(c) is not broken. It works. It is doing what Ed Muskie and the others thought it was supposed to do in 1972. It should be retained.

Thank you.

Mr. GIBBS. Thank you.

I will start off here. First I want to address what Mr. Parenteau just said. In your written testimony, you got the verbiage here for the rule, and then I have the actual section 404(c) that is in the law, and I would respectfully argue that the law was loosely written.

You cited the rule, not the actual law, and I think what we need to do is Congress needs to clarify this a little bit because apparently for nearly 40 years, the EPA did not abuse this authority even though it was not that clear, and now we have seen that.

My questions start to Mr. Faulk. Of the 13 vetoes that the ranking member addressed, would you concur that that was operating within the law, and that is a separate issue to what has happened at Pebble and happened at Spruce.

Mr. FAULK. Yes, yes, I would say so, and the reason I would say so is because the situation at those facilities is substantially more aggravated than most of those particular instances.

Mr. GIBBS. Yes. OK. I do want to make an announcement, too, that for the record both the EPA and the Army Corps denied our request to testify before the committee on this subject. So I wanted to make that clear.

Regarding Mr. Quinn, on those 13 vetoes, would you concur, too, that those were operating within the scope of the Clean Water Act and their jurisdiction, and that is different than what they have done in those other two cases that I just mentioned?

Mr. QUINN. Well, Mr. Chairman, I do not have all of the facts to each of these. So I would say that the veto we saw at Spruce was completely different and extraordinary. Several years after the fact we had a 10-year review process. The project had been adjusted to address EPA concerns. EPA signed off on it.

Here is what I find amazing, is that I listened to the professor's testimony about how transparent the process is for the veto situation, but the question is, and nobody seems to answer it, why is an EPA engaged in the process where it is directed to between the time the permit application has been filed and before a decision has been issued by the court?

It seems remarkable to me that all of a sudden after the decision by the Corps, EPA finally has this remarkable revelation that, oops, we should have told them ahead of time this is not an area we want to——

Mr. GIBBS. So you would argue that the intent of the CWA was for the Corps and the EPA to be involved during the process and they could veto during the process?

Mr. QUINN. That is the context I see in the statute, and I can see that the courts have said that the language is broad enough to accommodate what they are doing. My point is I do not think that is good public policy, and Congress ought to have a question whether that——

Mr. GIBBS. I want to take this a little further. This will be for Mr. Quinn or Mr. Faulk on the expansion of the EPA's rule on the

"waters of the United States." It seems to me that there is a possibility there will be a lot more requests for section 404 permits from all types of different entities, developers, farmers, local governments, townships. Did you see it that way, Mr. Faulk, I guess?

Mr. FAULK. Yes, I really do. I think we are seeing an effort by the EPA here with these proposals to basically bring in basically any place that connects in in any way to waters under the United States jurisdiction to be extended, and we will see farmers, for example, who withdraw water.

We will see other businesses that withdraw water that are from these things, come into the regulatory process. We are going to see a surge of applications for these permits, and all of these people are going to have to rely upon what those permits say in the process of planning their business activities on a daily basis.

And with that it becomes uncertain. The question of how much they can invest, how big their businesses can grow, how intense their business activities can be.

Mr. GIBBS. I want to give Mr. Kovacs a chance. You want to talk about that, too, I think.

Is your mic on?

Mr. KOVACS. I think the thing that troubles me the most is that in the process, EPA was involved. It was actively involved, and in fact, it wrote to the Corps and indicated that it might have some problems, but then it indicated just go forward.

Then the company starts construction, and then 4 years later, they decide to exercise the veto. So I think that is an important issue.

The second part that is really important is I think if you look at Justice Scalia's last discussion in the *UAR* case 2 weeks ago on the greenhouse gases, he is very clear. Congress did two things. One is 40 years ago you delegated a lot of authority to the agencies and much has not been done to look at the authority recently, and there is an institutional problem.

But the second thing is, he said, you know, different definitions can be looked at in different titles of an act, and what you have to do is look at the structure of the act. So when you are looking at this, in this particular case, the Court looked at one word, "wherever," and it did not look at the entire structure of 404(c) and the role of the Court or the role of the Corps and the role of the Agency.

So I think in that sense, and now you are going into "water of the U.S." and other regulatory change which is going to greatly increase the number of facilities that may be in this issue or in this problem.

Mr. GIBBS. Thank you.

My time has expired. I will yield to Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

Let me thank the witnesses for their testimony. I have to confess that I am not entirely sure where to start here, but let me start with a couple of things that I heard.

I heard a lot about this being a dangerous precedent. I heard a lot about expanded jurisdiction. I heard a lot about alleged authority. Let me start with the authority. I am going to read section 404(c).

"The Administrator," by that they mean the EPA Administrator, "is authorized to prohibit the specification, including the withdrawal of a specification, of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification, including the withdrawal of specification as a disposal site whenever he determines."

Now, I am not a lawyer. Perhaps that it is a good thing. I am teasing. But that seems pretty clear to me. That seems pretty clear to me.

Mr. Parenteau, would you agree that that is pretty clear authority?

Mr. PARENTEAU. Yes, and more importantly, the DC Circuit agrees and so apparently does the Supreme Court, which denied review in *Mingo Logan*. Let me read you what the DC Circuit said.

"Using the expansive conjunction 'whenever,' the Congress made plain its intent to grant the Administrator authority to prohibit, deny, restrict, withdraw a specification at any time." And the court emphasized "any."

Mr. BISHOP. OK. So hopefully that disposes of the issue of whether or not the authority being exercised is alleged or whether it is statutorily based.

The second thing I would say is so we seem to have a situation in which the authority that the EPA is exercising is well within its statutory authority and well within the way in which that authority has either been interpreted or validated by the courts.

We also have a situation in which the numbers make the case unmistakably that the authority is rarely exercised. And so when I hear about uncertainty and I hear about not a guarantee, .99999 percent of the time the 404(c) permit that is issued is validated or accepted or not challenged by the EPA.

So I guess my question is: what is new here? There was a revocation of a permit under President Reagan. I do not think anyone's hair was on fire at the time. I do not know. I was doing something else at the time.

One was denied by George H.W. Bush's EPA. I do not remember this being a huge issue that brought about a hearing of this type. So what is new? What is precedent setting about what the Obama administration's EPA has done that was not precedent setting by what the Reagan administration EPA did or the George H.W. Bush EPA administration?

I will go further. This administration has vetoed or overruled an EPA veto of a 404, section C permit. Why is that not precedent setting? Why does that not yield the same kind of uncertainty that I keep hearing about?

And I know I am asking rhetorical questions, but I would invite any of the panel to help me understand what is precedent setting about this, and why is it that if an agency over a 42-year history exercises its veto authority .000001 percent of the time, why does that induce the kind of uncertainty and the kind of sort of doomsday rhetoric about how people cannot possibly plan when the EPA can drop the ax at any time?

Mr. QUINN. I will be happy to try to answer that, Mr. Bishop. I think it is a good thing that you are not a lawyer because I think you bring some fresh perspectives to this.

I have been involved in a lot of this litigation, but I will admit I am a recovering lawyer. So I will try not to derail my recovery on this.

But I think there are a couple of distinctions, and as I have said before, I would agree with your statement that the courts have validated at least part of this interpretation. No question, and I am not here to debate whether the language accommodates it or not. Apparently it does, at least on a retroactive aspect.

But I think there are important factual distinctions, timing distinctions on the Spruce permit occurring with a very extended review period, for a decade, obviously a lot of interaction between the agencies, a final decision, and then years after that final decision, a redo or revisiting on that. So I think that is a clear difference.

I think on the preemptive moves we are seeing now are unprecedented where EPA has gone into a situation and has basically said we do not want any agencies entertaining any application it may receive until we finish doing our own study, and that has actually invited now new requests from outside groups to come and evaluate other areas as well.

Mr. BISHOP. May I just interrupt?

Mr. QUINN. Please.

Mr. BISHOP. There were two preemptive denials pre-the Obama administration, both by Republican administrations. How do those two preemptive denials differ?

Mr. QUINN. Prior to an application being filed.

Mr. BISHOP. Yes, there were two of those prior.

Mr. QUINN. I would have to look and see what the context of that is.

Mr. BISHOP. But is that not important? If what we are dealing with here is an agency's statutory ability to enforce the law that Congress has written and left in place, and one administration does it and it is a freebie, no problem, and another administration does it and we have a hearing with six witnesses and we are talking about expanded authority.

Is it not important that we understand the distinction between those first two and what we are dealing with now? And I do not mean to put you on——

Mr. QUINN. No, no. I do not know the context of that. So I cannot directly answer that question. I think in this case we have a situation where a company has invested $700 million in looking at, explore and develop a mineral resource, and even before it has the opportunity to file some engineering plans, specifics, and have it evaluated whether it can balance these different needs, it is being pushed out and the State is being pushed out of any role in deciding what is a balanced approach on this.

Here is what I would say, Mr. Bishop, is that I think in the end of the day the real question is: can we not accomplish what we are all looking for under the process that has been typically adhered to for 40 years, which is when an application is filed, this is when the interaction occurs, and before you reach a decision if EPA wants to say, "This decision by the Corps is going to be wrong. I have talked to them ahead of time, and now I am going to commence a proceeding"——

Mr. BISHOP. And I guess that is my point. I accept what you say, and I guess my point is: how does one occurrence constitute atypical?

You know, there have been 60,000 permits applied for a year in the 5 years of the Obama administration, 300,000 permits and change. Once, once, how does that constitute something that now businesses cannot reasonably count on?

In the 8 years—I am sorry. Did I run over my time?

Mr. GIBBS. Yes, you are over your time.

Mr. BISHOP. I am way over my time.

Mr. GIBBS. Yes, you are way over.

Mr. BISHOP. Thank you, Mr. Chairman.

OK. I will come back to it.

Mr. GIBBS. I was trying to allow the witnesses to respond to your rhetorical questions.

Mr. BISHOP. Thank you.

Mr. GIBBS. But just a comment. The bills we are looking at tomorrow in markup, I think, in reference to my bill, try to put a reasonable time period for the 404(c) to come into effect, not 3 years later. So I think it is a commonsense, reasonable time, and that is what we are trying to address in the legislation.

Mr. Markwayne Mullin from Oklahoma, do you have questions?

Mr. MULLIN. Yes, sir. That caught me a little off guard though.

It is a privilege and honor to be here and have the panel in front of us.

I had some deep concerns about it. I have dealt personally with the EPA. I have dealt personally on these permit issues. I have personally run into hurdles when we were trying to build such things as retention ponds for drilling sites, when we are trying to do dirt work and control the runoff where the will come in and start making different permit issues, different requirements, and overrunning DEQ.

And as Mr. Bishop was trying to allude to, he was simply saying, "Why now?" Well, as a business owner I can answer that and say it is because it is politically motivated, and we cannot judge that. We cannot simply stay up and say there are rules and common sense that apply to this.

In 1972, Mr. Parenteau—is that how I am saying that?

Mr. PARENTEAU. Parenteau.

Mr. MULLIN. Parenteau. I am sorry.

In 1972, the initiative was to try cleaning up the waters because we were abusing it. The overreach now of the EPA has become so absurd that I do not think anybody in this room can deny that there is some political motivation behind this, and that is where the uncertainty as a business owner comes into play.

When you know what rules you have to play by, but then when no rhyme or reason can come in and say, "No, we are just not going to do it," after we as business owners are investing millions of dollars to get a project done, and they do not even have to give us an explanation of why, there is a difference between 40 years ago and today.

And I do not think even you, sir, can disagree with that. When we have a President that openly says that he is for something and completely against something else, there is a problem with that.

And as an entrepreneur, what we simply want to do is say let there be certainty in it. Tell us why. Where are you going with this, not just because you feel a certain way? Where is the balance between the good of the people and your agenda?

And I would like you, sir, to expand a little bit on where the difference even in Congress, where we are at today versus 1972, and where the EPA has grown from 1972 to where it is today, and where is the certainty as a business owner. As the gentlelady said, because I am not even going to try saying your last name, from AGC, the permitting process and the fines have become absurd. And how can we predict the future and how can we adequately prepare for the cost of the infrastructure that this committee is all about?

Mr. PARENTEAU. One of the greatest uncertainties that we are dealing with has been given to us by the United States Supreme Court in two very controversial decisions.

Mr. MULLIN. I agree with that.

Mr. PARENTEAU. And if you are asking what can Congress do about it, what I would tell you is what the Supreme Court said you can do about it, which is the clarify the scope of the jurisdiction of the Clean Water Act.

There is going to be tremendous disagreement about what the scope of that act ought to be. Let me just say this.

Mr. MULLIN. Well, the EPA came in and they made their own reach of what the U.S. waters are.

Mr. PARENTEAU. That is correct.

Mr. MULLIN. And they are moving way upstream, way above navigable waters. Now we do not even understand what "navigable waters" really means.

Mr. PARENTEAU. The proposal that is on the table would actually reduce the extent of the Federal jurisdiction as it existed before these two decisions were handed down. The Fourth Circuit of the United States——

Mr. MULLIN. Hold on. Reduce?

Mr. PARENTEAU. Yes, reduce.

Mr. MULLIN. They are moving further upstream.

Mr. PARENTEAU. No, sir.

Mr. MULLIN. Sir, I will beg to differ on first-hand experience because I had the farmer that had moved upstream where they have denied us the ability to even fertilize their own ground because they are saying runoff is now part of navigable water.

Mr. PARENTEAU. Runoff is activities.

Mr. MULLIN. Activities are considered a ditch? Say you have got to be 1,000 feet away from a watershed, and a watershed is within 1,000 feet of a ditch?

When you live in northeast Oklahoma, everything is on a hill. You are within 1,000 feet of a waterway everywhere you go if that is the interpretation.

Mr. PARENTEAU. EPA's role has reduced the scope of the act with regard to ditches. It has, as a matter of fact.

Mr. MULLIN. I would like for you to clarify that.

Mr. PARENTEAU. I would be happy to do so.

Mr. MULLIN. And say how that is even possible.

Mr. PARENTEAU. I would not only be happy to clarify it. I will cite you the case that upheld a broader definition of ditches than EPA is using.

Mr. MULLIN. OK. When they are coming back upstream, sir, and they are saying that now runoff is considered part of a navigable water, if a steam will flow into a navigable water, at least you should be able to put a canoe. When the Congress specifically put in "navigable water" in it and now their interpretation is so much broader, farther upstream, and now they are having a complete different interpretation of what U.S. waterways are, and you are saying they have shrunk?

Mr. PARENTEAU. Yes, they have. Before——

Mr. MULLIN. I do not think there is anybody in this room that can possibly agree with you on that one.

Mr. PARENTEAU. I understand that.

Mr. MULLIN. We just had a hearing about this 3 weeks ago, and even they said they had broadened their reach.

Mr. PARENTEAU. Would you like some authority?

Mr. GIBBS. The gentleman's time has expired.

Mrs. Kirkpatrick.

Mrs. KIRKPATRICK. Thank you, Mr. Chairman. I thank you and the ranking member for having this hearing, and I thank all of our witnesses for being here today.

You know, look. At the end of the day everybody in this room wants clean water. We understand how vital that is, and being from Arizona, I know how important it is to life and to our future economic development. And so I understand the importance of this hearing.

But I also represent a sprawling Arizona district that has coal mining, copper mining, four coal-fired electric plants, and I understand the need for certainty in terms of the EPA regulations.

Mr. Quinn, I also understand math, and I want to congratulate you on these algebraic equations in your testimony. I like that. So thank you. Thank you for that.

But my first question is for you, Mr. Quinn. I mean, in the 40 years since 1972, can you describe for us what kind of changes you have seen in the regular EPA permitting process?

Mr. QUINN. Well, I think the changes we would see would be as following: expanding the reach of what needs to be permitted over the years; more complexity in terms of obtaining those permits; more time to get them; and it being more expensive to put forward the information that is being required now by EPA and the Corps of Engineers.

I think the difference of 40 years and how the process has worked is I know the ranking member and I have had this discussion on the context of various decisions, but I would say I do not think we have ever seen a veto of a preexisting permit decision that has occurred so far after the actual contemporaneous issuance of the decision.

On the previous or a preemptive type situations we have seen now recently in Alaska, I am going to have to concede to the ranking member I am not familiar with all of the facts, though I do believe that maybe the cases he is referring to might be areas where EPA had previously decided or the Corps previously decided were

not appropriate for any filling, and then when a project proponent came back again, they just said, "Hey, we said no the first time. We are not going to say no."

But I have to be careful about that. I have to look at all of the context of those decisions.

But I think the process has become longer and more complex, and I think the regular rule of order had been until recently typically the issues would be worked out within the context of once your application is filed and prior to the final decision being made, and the veto was viewed as a veto of a pending or prospective or decision about to be made about an area that was within the application itself, not after the fact, not after reliance had been made on those decisions.

Mrs. KIRKPATRICK. This question is for anyone on the panel who can answer it.

Do you have any idea about the change in time for permitting and cost for permitting from 1972 till now? Anyone? Yes.

Mr. KOVACS. I believe that there are studies that show that every year the overall permitting process takes longer, and that is just across the board. And if you went from 1972 straight forward, I think you will find several things.

One is it has become much more costly to file a permit because you just have more to do. It not only is costly. It is more complex. It is far more controversial. The use of citizen suits on virtually every project is just expected anymore. It is political, and then if you just look at the sheer number of regulations that have been imposed that a project has to comply with, it has increased since 1976. My recollection is it is about 180,000 new regulations.

So you put all of that together and it is just tougher to move into a new project. That is all, and so that when you get the permit, whatever is going to be decided should be decided within that timeframe.

And EPA actually had looked at this project within the timeframe and passed, and then at a later date said, "Well, we have changed our mind." And I think that is the difficulty. If it was a month later and nothing had happened, maybe somebody would say, "Well, they missed it." But you need to put it in a box, and once the Government approves that they can do the project, it should move forward and they use their enforcement authorities.

Mr. IVANOFF. Mrs. Kirkpatrick, in terms of time.

We just recently completed a study for the Federal Highway Administration to look at the environmental process and the permitting process. In the 1970s, it took about just a little over 2 years to complete the environment process. Now, over the last 7, 8 years, it is closer to 5½ years. So that gives you a context, from about 2 to 5½.

Mrs. KIRKPATRICK. Thank you. I appreciate that.

I am going to yield back the balance of my time. Thank you.

Mr. GIBBS. Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman.

Thank each of you for your testimony.

So let me go a little bit further, Mr. Ivanoff. You said that the time to complete the environmental study has greatly expanded according to your study; is that correct?

Mr. IVANOFF. Yes, sir, it is.

Mr. MEADOWS. All right. So what regulations have changed within a law they got passed back in the 1970s and now to make that process longer? Have there been additional regulations?

Mr. IVANOFF. Well, I think part of the issue is there have been additional regulations, but there also have been interpretations, and if you take a look at interpretations by the Army Corps of Engineers, by EPA, certain definitions can be contradictory and confusing.

Mr. MEADOWS. All right. That is where I thought you might go with it. So let us look at interpretations. The rule of law should give a consistent standard for everybody that is really especially from an administrative standpoint is not subject to individual interpretations. Would you agree with that?

Mr. IVANOFF. Absolutely.

Mr. MEADOWS. All right. So if we have this and we are making preemptive decisions on veto, whether it is under this administration or another administration I could care less. What I want to make sure of is that those who invest in infrastructure, as you do, those who invest in building, as others here at the witness table do, those that invest in manufacturing, as others at the table do, have some consistent standard.

Would you all agree that that is important that we have a consistent standard?

Mr. IVANOFF. Sure, absolutely.

Mr. MEADOWS. Mr. Parenteau, would you not agree that it is important to have a consistent standard?

Mr. PARENTEAU. Well, the saying is consistency can be the hobgoblin of small minds. It all depends on the facts of individual cases.

Mr. MEADOWS. So yes or no, consistent standard or not? Would you agree with that?

Mr. PARENTEAU. Consistent application of statutory authority, yes.

Mr. MEADOWS. All right. How many miles of road have you built, Mr. Parenteau?

Mr. PARENTEAU. I did build——

Mr. MEADOWS. Personally.

Mr. PARENTEAU [continuing]. A driveway of about a quarter of a mile.

Mr. MEADOWS. OK. So a driveway. I built roads, and I have had permits from the Army Corps and EPA, a number of permits, and I have built miles of roads and built bridges, and that interpretation can be very troubling when there is not a standard.

And the chilling effect that it has is I make a determination on whether I really want to make an investment or not, whether I want to risk millions of dollars base on perhaps a standard that may depend on one bureaucrat having a bad hair day. That is not something that you would think would be good for us to do in terms of law, would you?

Mr. PARENTEAU. I am not familiar that EPA has ever made such a decision.

Mr. MEADOWS. Well, I know because you do not live in North Carolina, and you did not do the permits with me, and your only real knowledge might be a driveway that you have built.

So I mean I am telling you that we have built these. We get to see the inconsistencies. So let me put it maybe in a vernacular. You are an attorney, right?

Mr. PARENTEAU. Yes, I confess that.

Mr. MEADOWS. Well, do you think it would be a good thing for a judge, before he hears the case, to say, "I have already made the verdict"? Yes or no. It is an easy question.

Mr. PARENTEAU. Of course not, and EPA is not doing that.

Mr. MEADOWS. I did not say EPA was doing that. I said would it be a good thing for a judge before they hear it.

Mr. PARENTEAU. No, they should hear the evidence.

Mr. MEADOWS. OK. How do we know, and let us take Pebble Mine; how do we know that the decision that the EPA has made, because you talked about transparency earlier——

Mr. PARENTEAU. They have not made a decision.

Mr. MEADOWS. Well, I understand, but their inaction has made a decision.

Mr. PARENTEAU. They have initiated a review, yes.

Mr. MEADOWS. And so they have made some kinds of decisions internally.

Mr. PARENTEAU. They responded to a petition from commercial and native fishermen, yes. They did.

Mr. MEADOWS. OK. Well, and the jury is out whether that was encouraged by some within the EPA. There is all kinds of rhetoric that is out there, and so that may or may not have happened.

Mr. PARENTEAU. No idea.

Mr. MEADOWS. But is it important that we have a set of laws and a set of regulations where everybody can look at this transparently and say this was the decision that was made?

Mr. PARENTEAU. Yes, and we do.

Mr. MEADOWS. OK. With that, when you make a determination by some agency ahead of actually hearing the case and express their veto power, does that not give you some concern that too much power may be within one agency and one particular person?

Mr. PARENTEAU. If that were happening, it might concern me, but it is not happening.

Mr. MEADOWS. OK. So it has never happened?

Mr. PARENTEAU. Not to my knowledge, no.

Mr. MEADOWS. So you have intimate knowledge of some 2 millions applications?

Mr. PARENTEAU. No.

Mr. MEADOWS. I would not think so.

Mr. PARENTEAU. I have knowledge that 2 million activities went forward without a veto, but that is all I know.

Mr. MEADOWS. All right. So for you to not have a dog in this hunt, as you stated, how can you be so opinionated on all of these particular issues to not have a dog in the hunt?

Mr. PARENTEAU. My opinion is based on my experience with the law and the way it has been applied. That is all I am talking about.

Mr. MEADOWS. All right. I am out of time. I will yield back, Mr. Chairman.

Mr. GIBBS. Ms. Edwards.

Ms. EDWARDS. Thank you, Mr. Chairman.

And I would like to ask unanimous consent that a statement that I have from the National Wildlife Federation be entered into the record.

Mr. GIBBS. So ordered.

[The information follows:]

Statement

Of

The National Wildlife Federation

Before the

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

For the hearing on the

EPA's Expanded Interpretation of Its Permit Veto Authority
Under the Clean Water Act

July 15, 2014

Prepared by

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STATEMENT OF MELISSA SAMET
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SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

EPA'S EXPANDED INTERPRETATION OF ITS PERMIT VETO AUTHORITY UNDER THE CLEAN WATER ACT

JULY 15, 2014

Chairman Gibbs, Ranking Member Bishop, and members of the Subcommittee, the National Wildlife Federation appreciates the opportunity to offer our views on the vital importance of the Environmental Protection Agency's Clean Water Act veto authority. On behalf of our more than four million members and supporters we urge you to reject changes to Clean Water Act Section 404(c), including the changes proposed by the bills currently before the Subcommittee. The Clean Water Act veto authority provides important, and much needed protections to the nation's waters.

The National Wildlife Federation is the nation's largest conservation education and advocacy organization with more than four million members and supporters and affiliate conservation organizations in forty-nine states and territories. The Federation has a long history of interest and involvement in the management and protection of the nation's rich array of water resources.

Congress Should Reject Changes to Clean Water Act Section 404(c)

Poll after poll shows that the public overwhelmingly wants the clean, fishable, and swimmable waters promised by the Clean Water Act. Section 404(c) is a vital tool for fulfilling this promise for all communities by ensuring effective oversight of the 404 program and serving as an action of last resort to stop the most unacceptably damaging activities. The National Wildlife Federation urges Congress to reject changes to this important Clean Water Act provision to ensure continued progress in achieving clean and healthy waters for all Americans.

This statement focuses on four key points that we would like to stress for the Subcommittee. First, Clean Water Act section 404(c) is a vital tool for protecting the nation's waters. Second, EPA has not expanded its use or interpretation of this important provision. To the contrary, EPAs use of its veto authority remains extremely limited and wholly within the bounds of the statutory language that has been in place since the Clean Water Act was enacted with overwhelming bipartisan support. Third, Section 404(c) has served – and continues to serve – the Nation well by driving improvements to the entire 404 permitting program and by protecting high value waters from unacceptable harm. Fourth, the bills currently before the Committee, H.R. 4854 and H.R. 524, would needlessly weaken the Clean Water Act and the important protections the Act provides for the Nation's waters.

1. Clean Water Act Section 404(c) Is a Vital Tool for Protecting the Nation's Waters

Poll after poll shows that the public overwhelmingly wants the clean, fishable, and swimmable waters promised by the Clean Water Act. This support is well founded as healthy waters provide critical benefits to the public, form the basis of a vibrant economy, and are vital for fish and wildlife.

For example, healthy rivers, streams and wetlands provide natural protection from floods and storms by acting as natural sponges, storing and slowly releasing floodwaters after peak flood flows have passed, and buffering the onslaught of hurricanes and tropical storms. A single acre of wetland can store 1 to 1.5 million gallons of floodwaters.[1] A watershed that loses just one percent of its wetlands can suffer an almost seven percent increase in total flood volume.[2] Coastal wetlands reduced Hurricane Katrina's storm surge in some New Orleans neighborhoods by two to three feet. California's wetlands provide nearly $10 billion each year in flood control, groundwater recharge, and water purification benefits. The U.S. Army Corps of Engineers estimates that protecting wetlands along the Charles River in Boston saves $17 million annually in potential flood damage.[3]

As the President of the Reinsurance Association of America has said:

> One cannot overstate the value of preserving our natural systems for the protection of people and property from catastrophic events.[4]

Healthy rivers, streams and wetlands are economic drivers for recreation and commercial fishery-based economies. Ninety five percent of commercially harvested fish and shellfish and 90 percent of fish caught by America's recreational anglers are wetland dependent, as are hundreds of species of birds, waterfowl, and wildlife. The U.S Fish and Wildlife Service estimates that in 2011, anglers spent "$41.8 billion on trips, equipment, licenses, and other items to support their fishing activities."[5] That same year, nearly 71.8 million people "fed, photographed, and observed wildlife," spending $55 billion on those activities.[6] In all, nearly 90.1 million Americans participated in some form of fishing, hunting or wildlife-associated recreation in 2011, contributing $145 billion to the national economy.[7]

Clean Water Act Section 404 helps protect these vital resources by placing common sense safeguards on the discharge of fill material into the nation's waters. These safeguards minimize the harm from some 60,000 activities each year, that include large scale mining operations, development projects, water resource projects (such as dams and levees), and transportation projects (such as highways and airports).

Section 404 prohibits the discharge of dredged or fill material into the nation's waters without a valid permit. To obtain a permit, applicants must first avoid impacts, then minimize impacts, and finally mitigate any impacts that cannot be avoided. Discharges are prohibited when other less damaging options are available, where the discharge would violate certain laws, or where the damage would be too great. The public, states, and federal agencies have the opportunity to comment on both general permits and on individual 404 permit requests.

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[1] Environmental Protection Agency, *Functions and Values of Wetlands, EPA 843-F-01-002c* (2001) (factsheet).
[2] Demissie, M. and Abdul Khan. 1993. "Influence of Wetlands on Streamflow in Illinois." Illinois State Water Survey, Contract Report 561, Champaign, IL, Table 7, pp. 44-45.
[3] Environmental Protection Agency, *Wetlands: Protecting Life and Property from Flooding*, (May, 2006) (factsheet), available at http://water.epa.gov/type/wetlands/upload/flooding.pdf.
[4] Restore America's Estuaries, *Jobs & Dollars BIG RETURNS from coastal habitat restoration* (September 14, 2011), available at http://www.estuaries.org/images/81103-RAE_17_FINAL_web.pdf.
[5] U.S. Fish and Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: National Overview, Issued August 2012.
[6] *Id.*
[7] *Id.*

A cornerstone of the 404 program is the oversight role that Congress gave to EPA. While the Corps of Engineers runs the day-to-day management of the 404 program, EPA helps set the program standards, and reviews and comments on permits. EPA also has the authority under section 404(c) to stop an activity that will have unacceptable adverse impacts on municipal water supplies, shellfish beds, fishery areas, wildlife, or recreational areas.

The 404(c) implementing regulations establish a careful and deliberate process for determining whether a veto is appropriate. Under this process, EPA requires a minimum of six months to finalize a veto, and EPA typically takes even more time to ensure that it has reached the appropriate decision.[8] This process gives EPA the ability to carefully evaluate whether a veto is appropriate, whether modifications to the permit could provide the needed protections, or whether the activity can proceed as proposed.

As part of its 404(c) review process, EPA conducts an extensive scientific review of the activity's impacts and develops a voluminous record to support its decision. The process also provides important opportunities for the public, the permittee, and the Corps of Engineers to provide their views. Recent vetoes have garnered the support of tens of thousands of members of the public and hundreds of independent scientists. The process also provides at least two formal opportunities – and unlimited informal opportunities – for the Corps of Engineers and the permittee to revise the planned activity and/or permit conditions to prevent unacceptable harm.

EPA carefully reserves its 404(c) veto authority as an action of last resort for only the most unacceptable cases. EPA has used its 404(c) authority to stop **just 13 of the millions of activities** permitted in the more than 40-year history of the Clean Water Act. The vast majority of these vetoes – 7 out of 13 – were issued under the Administration of President Ronald Reagan.

Fundamentally, 404(c) ensures that EPA can effectively oversee the permitting program. As this Subcommittee is well aware, strong oversight is an important component of any federal program. EPAs 404(c) oversight provides two extremely important benefits. First, it provides a tool for EPA to stop, or substantially improve, projects that are unacceptably destructive. As discussed in Section 3 of this statement, each of the 13 vetoes issued by EPA have protected resources that are nationally and regionally significant.

Second, EPAs 404(c) oversight leads to improvements in the entire 404 program, which translates into important on the ground protections for fish and wildlife, and communities across the country. Despite the rarity of 404(c) vetoes, they have:

> set precedent for strong interpretations of section 404 that have been upheld uniformly by appellate courts, and have reinforced the program's emphasis on the examination of alternatives and the redirection of development away from aquatic sites. Like a lone state trooper on a busy interstate highway, the mere presence of EPA's authority tends to keep the level of speeding down.[9]

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[8] *See* 40 C.F.R. Part 232.

[9] O. A. Houck, & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 at 1256 (1995) (internal footnotes omitted), available at: http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/6.

2. EPA Has Not Expanded its Use or Interpretation of Section 404(c)

The Obama Administration's EPA has not expanded the use or interpretation of Section 404(c). To the contrary, this EPA continues to carefully reserve its 404(c) veto authority as an action of last resort to review and, where necessary, stop only the most unacceptable activities.

The Corps of Engineers currently processes approximately 60,000 permit actions each year,[10] issuing more than 99 percent of all permits requested.[11] Despite these numbers, the Obama Administration EPA has issued only one 404(c) veto and is currently considering another. This is far fewer vetoes than were considered or issued by either the Reagan or George H.W. Bush Administration. As noted in Sections 1 and 3 of this statement, the Reagan Administration issued seven 404(c) vetoes, more than all other Administrations combined. The George H.W. Bush Administration issued three 404(c) vetoes. The George W. Bush Administration and the Carter Administration each issued one 404(c) veto.

The Obama Administration also has not expanded the interpretation of when the 404(c) authority can be used. First, it is well settled law that 404(c) can be utilized "before a permit is applied for, while the application is pending or after the permit is issued."[12] The courts have uniformly held that the Clean Water Act provision allowing EPA to utilize 404(c) "whenever" the Administrator determines that unacceptable adverse effects will occur means just what it says: Congress granted the Administrator the authority to issue a veto at <u>any</u> time.[13] Since the Supreme Court has recently refused to review this issue (in its denial of *certiorari* in *Mingo Logan Coal Company v. EPA)*, it is undeniably settled law that EPA has, and has always had, the authority to issue a 404(c) veto whenever the Administrator determines that there will be "unacceptable adverse effects" to designated resources.

Second, the Obama Administration EPA is not the first to issue a 404(c) veto either prior to or after issuance of a Corps of Engineers permit. In 1988, the Reagan Administration EPA used its authority to veto two permits that had already been issued and to proactively restrict any further disposal on three separately owned wetland properties totaling 432 acres in the Everglades.[14] That same year, the Reagan Administration EPA also vetoed permits that had already been issued by the Corps of Engineers to Russo Development Corporation to protect vital resources in the Hackensack Meadowlands of New Jersey. This post-permit veto was upheld by the Federal District Court in New Jersey.[15]

In short, EPA is not overusing the 404(c) veto process and has not expanded the interpretation of its applicability. As a result, efforts to reign-in the use of 404(c), including through the bills before this Subcommittee, are as unnecessary as they are inappropriate.

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[10] Environmental Protection Agency, *Clean Water Act Section 404(c) "Veto Authority"* (fact sheet) (citing Corps of Engineers permit data), available at http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf.

[11] National Academy of Sciences, *National Water Resources Challenges Facing the Corps of Engineers, Appendix B,* (March 2011).

[12] *City of Alma v United States*, 744 F.Supp.1546, 1588 (S.D. Ga. 1990).

[13] *Mingo Logan Coal Company v USEPA*, 714 F.3d 608, 615 (D.C. Cir. 2013); *cert denied*, _US_, March 14 2014 (this case has been remanded to the District Court for a hearing on the merits of EPA's decision); *City of Alma v United States*, 744 F.Supp.1546, 1588 (S.D. Ga. 1990).

[14] In Re Henry Rem Estate, 53 Federal Register 30093, August 10, 1988.

[15] *Russo Development Corp. v. EPA*, 20 ELR 20938, 39 (D. N.J. 1990)

3. Section 404(c) Has Served the Nation Well by Driving Improvements to the Entire 404 Permitting Program and by Protecting High Value Waters from Unacceptable Harm

As discussed in Section 1, the oversight provided by Section 404(c) has led to significant improvements to the 404 program overall, including increasing the program's emphasis on avoiding damage to aquatic sites in the first instance. The 404(c) veto process has also protected tremendously valuable and nationally significant resources:

- In 2011, the Obama Administration used Section 404(c) to protect **6.6 miles** of some of the last remaining high quality headwater stream and riparian habitat in Appalachia.[16] These headwater streams provide critical hydrologic and biological functions and important habitat for many wildlife species (2,278 acres of forested habitat were also protected). Spruce No. 1 Surface Mine, WV

- In 2008, the George W. Bush Administration used Section 404(c) to protect **67,000 to 200,000 acres**[17] of some of the richest wetlands in the country located in the heart of the Mississippi River Flyway. Wetlands protected by this veto include 20,845 acres of publicly protected wetlands, including wetlands managed at the federal taxpayers' expense for fish and wildlife habitat. This veto also saved federal taxpayers more than $220 million in direct construction costs and more than $2 million in annual operating expenses. Yazoo Backwater Area Pumps Project, MS

- In 1990, the George H.W. Bush Administration used Section 404(c) to protect **300 acres** of wetlands and **30 miles** of the South Platte River, including 14 miles designated by the State of Colorado as a "gold medal" trout stream, 281 acres of riffle and pool complexes, and the Cheesman Canyon wilderness area. Two Forks Reservoir, VA

- In 1990, the George H.W. Bush Administration used Section 404(c) to protect **575 acres** of exceptional and diverse natural wetlands with provide habitat for a large assemblage of wildlife species. Big River Reservoir, RI

- In 1989, the George H.W. Bush Administration used Section 404(c) to protect a **425 acre** mosaic of high quality and regionally significant aquatic resources in the Chesapeake Bay watershed, including critical fish nurseries and Black Duck habitat. Ware Creek Reservoir, VA

- In 1988, the Reagan Administration used Section 404(c) to protect **1,155 acres** of bottomland hardwood wetlands that provide important habitat for a large assemblage of species. Lake Alma, GA

- In 1988, the Reagan Administration used Section 404(c) to protect **432 acres** of wetlands in the Everglades that provide vital fish and wildlife habitat, including habitat used by the Florida panther and four other threatened and endangered species. Henry Rem Estates, FL

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[16] The impacts information discussed in this section can be found in each project's Final Determination Under Section 404(c), available at http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm.

[17] The Corps of Engineers concluded that 67,000 acres of wetlands would be damaged by this project but also acknowledged it had not evaluated the full scope of the wetland impacts from the Yazoo Pumps. While EPA adopted this number for its 404(c) determination, EPA and independent reviewers had concluded that the Yazoo Pumps would actually have drained and damaged 200,000 acres of ecologically significant wetlands.

- In 1988, the Reagan Administration used Section 404(c) to protect **58 acres** of wetlands within the Atlantic Flyway used by a multitude of State threatened and endangered species. Russo Development Corp., NJ

- In 1986, the Reagan Administration used Section 404(c) to protect **45 acres** of New England red maple forested swamp, including high-quality habitat for a variety of wildlife. Attleboro Mall (Sweeden's Swamp), MA

- In 1985, the Reagan Administration used Section 404(c) to protect **3,000 acres** of wetlands that are essential to the health of the Barataria Bay and that provide vital habitat for at least 70 species, including the American alligator, osprey, and wood duck. Bayou aux Carpes, LA

- In 1985, the Reagan Administration used Section 404(c) to protect **900 acres** of coastal intertidal marsh including valuable spawning and nursery grounds for blue crab and shrimp. Maybank Site, Jehossee Island, SC

- In 1984, the Reagan Administration used Section 404(c) to protect **25 acres** of forested and emergent wetlands that constitute one of the last remaining wetlands in the Mobile area. M.A. Norden Co., Inc., AL

- In 1981, the Carter Administration used Section 404(c) to protect **103 acres** of wetlands and other aquatic resources adjacent to North Biscayne Bay, including essential nursery grounds for marine fish and invertebrates and important feeding grounds for two endangered species, the Eastern brown pelican and the West Indian manatee. North Miami Landfill, FL

While each of these proposed activities should have been stopped or modified by the Corps of Engineers before they ever reached the stage of requiring a veto, they were not. EPAs ability to conduct a comprehensive review and utilize 404(c) to stop these activities ensured that these critical resources would not be needlessly destroyed.

EPAs current evaluation of the potential impacts of Pebble Mine is clearly appropriate under 404(c). The resources at risk from the potential mining operations include one of the most biologically rich fisheries on earth, the source of over half of the world's supply of sockeye salmon, and a vital economic asset for Native Alaskan communities and many others in the region.

4. H.R. 524 and H.R. 4854 Would Needlessly Weaken the Clean Water Act and the Important Protections the Act Provides for the Nation's Waters

As discussed in detail in this statement, Clean Water Act Section 404(c) has been used in only the rarest of circumstances to stop projects that should never have received approval under the 404 program in the first instance. EPAs ability to issue vetoes has also acted as an important driver for improving the entire 404 program.

The bills currently before the Subcommittee, H.R. 524 and H.R. 4854, seek to severely limit the use of 404(c). These changes would needlessly weaken the important protections provided by the Clean Water Act and appear designed to severely restrict EPAs oversight in order to push through any and all permit requests, regardless of the harm they may cause to resources that are critically important to the health, safety, and welfare of people, communities, and wildlife.

H.R. 524: H.R. 524 would prohibit EPA from using its veto authority once a permit has been issued. As a result, EPA would not be allowed to utilize its oversight authority even if new information comes to light demonstrating the unacceptable nature of the discharge, if the activities being carried out exceed the scope of the permit, or if the permit conditions prove insufficient to protect vital water resources.

In the most recent – but, as addressed in Section 2, not the only – example of a 404(c) veto issued after a permit was granted, it is clear that the Corps of Engineers should have denied the Spruce Mine permit in the first instance, but it did not. If EPA had not stepped in, the mountaintop mining activities would have obliterated miles of vitally important headwater streams and riparian areas in violation of longstanding requirements of the Clean Water Act. EPA appropriately vetoed this permit to uphold the law, protect the public, and preserve some of the last remaining high quality streams in Appalachia.

While H.R. 524 has been promoted as providing important "certainty" for the regulated community, it is clearly not needed for that purpose. As noted above, EPA has utilized 404(c) to stop only 13 of the millions of activities permitted under the 404 program in the more than 40-year history of the Clean Water Act. Given this track record, it strains credulity to suggest that the 404 program does not provide certainty to the regulated community.

H.R. 4854: H.R. 4854 would establish an arbitrarily short time period during which EPA could consider and issue a 404(c) veto. It would allow EPA to issue a 404(c) veto only during the period that begins on the date the Corps of Engineers notifies EPA that all necessary procedures for processing a permit application have been completed and the Corps is ready to make a decision and that ends on the date the permit is granted. The bill limits this period to 30 consecutive days (which typically translates into just 22 working days), unless the Secretary of the Army grants a longer period at his or her sole discretion. The bill also requires the Secretary of the Army to give EPA at least 30 days' notice before issuing any 404 permit.

H.R. 4854 would eliminate EPA's ability to conduct a deliberate, careful, assessment to determine whether or not a veto is appropriate. As discussed in Section 1 of this statement, the 404(c) implementing regulations establish a careful and deliberate process for determining whether a veto is appropriate. This process takes a minimum of 6 months to complete, and EPA typically takes longer to ensure that it has reached the appropriate decision.

To meet the arbitrary and unreasonably short 30-day deadline established by H.R. 4854, EPA would be forced to eliminate most of the important steps in the current veto process, including steps that provide for permittee, public, and Corps of Engineers input into the veto process. EPAs ability to conduct the necessary scientific review would also be severely compromised.

H.R. 4854 also adds an extra and significant layer of paperwork to the permitting process. In Fiscal Year 2010, the Corps of Engineers issued 55,970 permits (including 3,700 standard permits and letters of permission).[18] If H.R. 4854 had been in place the Corps would have required to send a written notice to the EPA Administrator 30 days before issuing each of these 55,970 permits.

Passage of either of these bills would have real world, lasting and harmful consequences to our waterways and the people, communities, and wildlife who depend on clean and healthy waters.

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[18] National Academy of Sciences, *National Water Resources Challenges Facing the Corps of Engineers, Appendix B,* (March 2011).

Passage would also send a strong message that Congress is not interested in stopping even exceptionally destructive activities that will harm the public, the economy, and the environment.

Conclusion

The National Wildlife Federation urges Congress to reject changes to Clean Water Act Section 404(c), which has served as a vital tool for cleaning up our waters, restoring vital fish and wildlife habitat, protecting drinking water sources, reducing wetland losses, and promoting the development of water-based recreational economies. Congress should instead maintain the integrity of Section 404(c) and the entire Clean Water to ensure the Act's promise of clean, fishable, and swimmable waters can be achieved for all Americans.

Ms. EDWARDS. Thank you, Mr. Chairman.

And I want to thank all of the witnesses, too, because even when I do not agree with you, I do not think it is our job to harass you.

I want to thank the witnesses today, and just a reminder that on April 9th, our full committee marked up H.R. 524, and that would have amended section 404(c) of the Clean Water Act to limit the authority of the Administrator of the EPA to veto the specification of the Army Corps of Engineers or by a State of a site for the discharge of dredged of filled material.

When we held that hearing, I noted at the time that we had not held a single hearing or reviewed any legislation either by subcommittee or full committee on the issue, and yet we were marking up the bill. I pointed out that I thought that if this was such a serious concern, that we would have done that. And so I am glad that we are holding this hearing today.

I just want to note that section 404(c), under that section, actions can be taken if the impact of the permit activity is likely to result in significant degradation of municipal water supplies, including surface and groundwater, and significant loss or damage to the fisheries, shell fishing, wildlife habitat or recreation areas, and that has been true for this section has been vitally important to the implementation of our clean water laws for 40 years.

I just want to note as well that in my home State of Maryland, we have the fourth longest coastline in the continental United States and the Chesapeake Bay, the largest estuary in the country and several of its tributaries, and so we do have a dog in this fight, and the shoreline of our Chesapeake and its tidal tributaries actually stretch for over 2,000 miles with thousands of streams and rivers and acres of wetlands that provide fresh water flows into our bay.

As we have heard the testimony and listening to supporters of the legislation, you would think that the EPA has actually exercised its veto authority frequently, and nothing could actually be further from the truth. As the witnesses know and as my colleagues know, the Army Corps issues about 60,000 permits every year, and yet EPA has used this section of the Clean Water Act only 13 times, 60,000 permits a year, 13 times in the 41-year history of the law.

And in 11 of those instances that was done by a Republican administration. This administration, the Obama administration, the Obama EPA has only exercised that veto authority ones, count it, once, and yet we are holding a hearing to essentially prohibit the EPA from exercising that authority.

It seems quite irresponsible, in my view. I think the act already represents a huge step forward by requiring States to set clean water standards and protect uses, and in my estimation, you know, it is important for the Federal Government to use its authority to do the right thing to protect human health and the environment.

And so respecting the law, I would like to ask the professor here from Vermont Law School, you have studied the implementation of the Clean Water Act and the implications of this provision. Can you just please tell us for the record whether, you know, in permitting over 60,000 permits a year it is even reasonable to say that there has been a gross abuse of the law and the implementation

of the law, given that this veto authority has only been exercised 13 times and, again, one time under the Obama administration?

Mr. PARENTEAU. I do not believe there has ever been a gross abuse of the law in any of the 13 exercises of 404(c), and I think the courts have uniformly ruled that that is the case. So my opinion is basically based on my reading of the way the courts have reviewed the use of that authority and since EPA has consistently been upheld every single time, my only conclusion can be there has been no abuse of the law.

Ms. EDWARDS. Thank you very much, and with that I yield.

Mr. GIBBS. Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman, and thank you to the panel.

This issue concerns me, and it should concern the constituents that I represent in central Illinois. There has been a lot of talk about the past, about previous administrations using authority to change section 404 permits, but the one instance that concerns me is the retroactive use of the veto power, and that is with the mine in West Virginia.

Now, I am here in Congress because 22 years ago I saw that a signature on a piece of paper here in Washington could have a detrimental impact on the largest employer that we had in my home county, in Christian County, Illinois. Our largest employer used to be Peabody Mine No. 10. Many of my friends, their families relied upon that coal mine that provided coal dug out underground in Christian County in Kincaid, Illinois, and Pawnee, Illinois. It was put on a conveyor belt and shipped over the highway to the then Con Ed coal-fired power plant that ironically shipped and still ships power up to the Chicago metro area.

Now, because of amendments to the Clean Water Act that coal mine was shut down because it became more effective, cost effective overnight to bring coal in by rail from out West, in Wyoming and others, the Powder River Basin, by train to burn at the coal-fired power plant across the street from Peabody Mine No. 10.

It was a devastating blow to our economy. Families lost jobs, and this is what scares me about the bureaucracy because it is not just about legislation and amendments through the Clean Water Act that were signed into law back in the early 1990s. This is about a Federal agency taking a retroactive approach to a permit that has already been issued, to possible job creation in West Virginia, and West Virginia could be anywhere.

That is what scares me about this administration's ability to talk about what has been done in the past, but drastically do something different in the instance that they use this same authority.

Now, as a former congressional staffer, I have worked with the Corps of Engineers in the 404 permitting process in the past, and it is a long and arduous process. It frustrates me that my colleagues believe that those who enter into the 404 permitting process always have nefarious reasons to want to get out and not follow any of the rules. I do not think that is the case at all.

I think most who want to follow the rules and go through the 404 permit process only want to do everything that they are being asked to do by the different agencies who have jurisdiction, and to assume otherwise I think is something that goes against the Amer-

ican dream and what people want to do to create opportunities and create opportunities and jobs and grow our economy, which we all say we want to do.

Now, I also understand I do not have a lot of time left, and I want to hear from at least some of you on some concerns. I am going to start with Ms. Pilconis.

I enjoyed your testimony, and can you elaborate further on what you are hearing though from your members?

Construction projects are key now since we do not have as many coal mining jobs in Illinois. A lot of our former coal miners rely upon working on road projects that many of your members actually go out, put the risk. They risk their capital. They risk sometimes their savings, their life savings, to go create jobs for others in my district.

And I want to know have you all at AGC done any analysis as to how EPA and their regulations support or stifle your business and economic output?

Ms. PILCONIS. Sir, I would be happy to comment on that.

Speaking directly to some of our construction members, they have really great concerns about how this process has the potential to delay or stop construction. They have explained a lot to me about all of the millions and millions of dollars that go into a construction project upfront before construction even begins.

And so to the extent that you have delays, you have people who are not working. You have all of the money that has been spent on lining up insurance, bonding, the investors who have put money forth towards the projects, the site designs, the contract documents. All of that money that has been spent is potentially kind of going for naught if the projects cannot move forward.

You know, we have talked a lot about what is different now, and I think one of the things that is different now is we are kind of in the age of information technology. So with so many people it would be difficult to find a person who is involved in business who has not heard about what is going on with this permit that EPA has withdrawn years after. And so that is creating a lot of doubt, maybe more doubt than what investors would have had in the past.

So our members are very, very concerned about the doubt that investors are going to have in putting money towards projects that are going to require 404 permits.

They are also concerned about how many more projects may require 404 permits, and we are not just talking about huge instream channelization projects or massive amounts of fill material or even per the definition of discharge of dredge material. We are talking about just mechanized earth moving activity.

And so it is really hard to find or to conceive any construction project in a sometimes wet area or, you know, in a ditch that is not going to require a 404 permit moving forward.

Mr. DAVIS. Well, thank you. That was a great response to my question, and it actually got to the crux of the issue where many of your members are investing so much of their own money upfront to go through the processes that the Federal Governments, State government, local governments put forth, and they are doing that. And every time they have to go over another hurdle, it raises the cost of the project, which costs taxpayers in this country even more

to move into construction which creates the jobs all of us keep talking about.

You are the ones, your members are the ones who create the jobs in this economy. It is not here in Washington, and thank you. And I think this process and the uncertainty that we give you and your members out here in Washington because of this regulatory environment, because of this administration, and especially with a retroactive decision on an already issued 404 permit is shameful, and I am sorry that we actually have to have this discussion.

And, Mr. Chairman, thank you.

Mr. GIBBS. Mr. Rice.

Mr. RICE. Thank you, Mr. Chairman.

I have said this before, but I think the United States could be the most competitive country in the world, but we have a noose of regulation around our own necks and we strangle our own selves and make ourselves not competitive. I think what Mr. Davis was referring to earlier with the uncertainty created by this veto power just is one more thing that makes us less competitive when it takes now 5 years instead of 2 years in 1972 to get one of these projects approved. It makes us less competitive.

That combined with our highest tax rate in the world and other regulatory burdens that companies have to face when they get here sends more and more jobs overseas every year, and what I want to do is fight that at every turn.

I am curious. What standard does the EPA, Mr. Parenteau, have to meet before they issue one of these vetoes?

Mr. PARENTEAU. Unacceptable adverse impact to five specified resources: water supplies, fish and wildlife habitat, et cetera. So the statute has a very high standard to meet, unacceptable adverse impacts, and a very narrow set of special aquatic resources.

Mr. RICE. Mr. Quinn, do you think that is an objective standard? Is it easily measurable? Is it subject to discretion?

Mr. QUINN. Well, I think standards like that are in the eye of the beholder. What is unacceptable, start with that particular. It has become pretty subjective. What one decisionmaker deems unacceptable could change with a different decisionmaker. That is part inherently in a lot of the process.

I think the discussion here today is, well, as subjective as that might be, when are you going to make that decision. Is it now? And when you make that, are you going to adhere to it or have somebody else come in later and say, "I want to revisit that decision"?

Mr. RICE. Yes. I have personal experience with 404(q) elevation letter that was issued by the EPA out of Atlanta. So to say this has only been done three times, maybe under 404(b) or (c) or whatever we are talking about here, maybe that is true, but here this was issued prospectively out of Atlanta before the environmental reports had even been completed. Before any mitigation plan had ever been submitted, the EPA Regional Administrator sends a letter that says that I–73 will have an unacceptable impact on South Carolina.

It absolutely has a chilling effect without the data in front of them and the fact that any bureaucrat would have that power I think is shocking in this country. I think that if we are going to have any veto power, it needs to be made very, very objective and

clear and when it can be exercised, and I do not think we should have one at all. That is what the Army Corps job is, is to evaluate these things, and it certainly should not be done until all of the facts are in.

So I do not have any other questions other than to say I have seen this impact and it has a huge shilling and anti-competitive effect.

Thank you.

Mr. GIBBS. Mr. Massie.

Mr. MASSIE. I want to start out with a quick observation. All of the successful business owners that I know, whether it is the Mom and Pop shop or a big corporation or entrepreneurs just getting started, they have one thing in common. Although they might be ideologically opposed to the rules that they are playing under, all of the successful ones are pragmatists. I mean, they look at the rules. They say, "I understand. Maybe I do not agree with these rules, but I am going to play by these rules."

But in return all of the ones in my district, and again, this goes for a one-man shop or a big corporation, they ask certain things about these rules. Make sure they are understandable. Do not change the rules during the game while I am playing the game. And make sure my competitors are playing by the same rules.

That is what is troubling about these recent revocations of permits, is that we are changing the rules during the game. We do not know that it is going to be applied uniformly to all of the competitors, and how do you understand it at the end of the day?

Ironically, a lot of these business people who may be ideologically opposed to these rules find at the end of the day that obtaining that permit provides an air of certainty and legitimacy to their endeavor that could actually, although pursuing the permit is hard in getting it, once it is obtained, it makes it easier to get the capital that they go seek.

And let me make another observation about capital and investors. They are all uniformly risk averse. When I went out and sought investment for my own company, I knew it was too risky to go to a bank. So I went to the venture capitalists because I heard, you know, they will invest in risky things, private capital. What did I find out? They spent all of their time trying to reduce the risk because that is the number one attenuating factor on the valuation of your endeavor, is the risk involved.

I think there are observations that business owners make. Mr. Parenteau, you quoted Senator Muskie. I would like to quote him, too. In 1972 during the deliberations of the Clean Water Act, he said there were three essential elements to the Clean Water Act: uniformity, finality, and enforceability.

Do you agree that finality is an important criteria?

Mr. PARENTEAU. Absolutely.

Mr. MASSIE. I do, too, and that is what disturbs me about this. People watching this discussion might say, well, if somebody is a bad actor or they violate the conditions of the permit, I understand it could be revoked, but it seems to me that is not what we are talking about here. It sounds like the EPA is asking to change the rules of the game after the game has started if they decide to change their permitting methodology or maybe they failed to do all

of their due diligence. They want more time after they have issued the permit.

In fact, when Congress passed the Clean Water Act, they intended for expeditious decisions on section 404 permits. Specifically, Congress instructed to the maximum extent practical decisions on section 404 permits will be made within 90 days. This seems to blow a hole, a loophole, in that big enough to drive a truck through. Now the EPA has no onus to complete their due diligence in that 90-day window as Congress intended.

And just quickly, I want to ask a couple questions, but you said that the new definition of the waterways that are affected or under the jurisdiction of the EPA will not change their jurisdiction or expand it, but twice in committee hearings the EPA Director or Assistant Director has testified to me it is going to be a $100 million to $200 million cost to the economy to promulgate the new definition.

So it is hard for me to see how it does not have a bigger authority.

Mr. Kovacs, I had a quick question for you. We have been talking about mining and this in the context of a mining permit, but can you talk about other industries that are affected by 404 permits and how recent treatment of 404 permits within the mining context could have ramifications in other industries and what those other industries are?

Mr. KOVACS. Well, certainly. I mean, the way it is structured right now virtually anyone who moves dirt by a waterway would have that problem, and mining may be controversial, but let us take a big box store, which can also be controversial to a community, but let us say, for example, you go in, you go through the entire permitting process, you have a wetland nearby, and you get a 404 permit. You start construction, and then 3 months later EPA decides, well, maybe we do not like the runoff from the stormwater from the big box store, and maybe they came to that decision because the community decided they did not want the big box store.

All of a sudden you have got the veto available. So they vetoed the permit 3 months in, and there was a mall case, and I think the professor worked on that 10 years ago or 20, but what happens is all of a sudden the permit is revoked. You have to ask: well, does construction have to stop?

Well, yes. How can the company, you know, plan to redo the permit? Well, they are going to have to do that during whatever time they have to deal with the bank. What happens to the financing? What happens to the workers that are on the site?

That is the single problem with the revocation after the permit has been finalized. And in this particular situation, EPA had all of the facts, and it decided to go forward with the permit. It was 4 years later that it changed its mind.

So when you talk about certainty, the certainty is when they review those documents, they are saying that this person or this permit complies with everything, and after that point when it is issued, they have administrative powers to take it back. They have civil fines up to $1 million dollars. They can put the person in jail for a very, very long period of time. I think it is 15 years. During

the process if there is harm to the community, the citizens can sue. You have got emergency powers. You have got injunctive relief.

What is so magic about just stopping the project? And I think that the question I think Congressman Bishop asked, and it is a great question, is why is it different now. I think because there are so many things spinning around. There are more regulations. It is costly. It is taking more time. It is taking 5 years instead of 2 years. You have got citizen suits. You have got sue and settle, and when you put all of this together, when you go through this process, ask Cape Wind, 12 years of trying to get permits and lawsuits.

If you have got the money, maybe you can make it, but the financing is going to walk away well before the permit is approved.

Mr. MASSIE. My time has expired, but just to complete that observation, it is not just mining that is going to be affected.

Mr. KOVACS. It is pipelines, big box stores.

Mr. MASSIE. Home builders.

Mr. KOVACS. Home builders, rail lines.

Mr. GIBBS. The point is delays cost money, right?

Thank you.

Mrs. Capito.

Mrs. CAPITO. Thank you, Mr. Chairman.

And I appreciate the panel.

I wanted to ask a question to kind of set up the context for me, and I will kind of go through the line here starting with Mr. Kovacs, although I realize you are representing a lot of different types of businesses. So maybe I will start with Mr. Quinn.

The average length of time that it takes companies in your business to obtain a 404 permit after they filed an application, do you have any idea what the average length of time is?

Mr. QUINN. Well, a number of years ago a lot of permitting was done under the general permit system because many of our operations have multiple other permits that look at very much the same thing: water, reclamation, and planning, and so forth.

Over the years the policy has been pushed to diminish the availability of the general permits that would take several months to obtain and pushed more into individual permits which can take several years. So we have gone from several months to several years.

I can tell you for a large minerals metal mine in this country we are looking at 7 to 10 years to get all our permits together. So when the length of time already diminishes the value——

Mrs. CAPITO. Right.

Mr. QUINN [continuing]. And you put the uncertainty of now you may go to a meeting with some lenders and they say it is going to take you that long, we say it is worth it because we have the certitude that once this permit is issued——

Mrs. CAPITO. Right.

Mr. QUINN [continuing]. In the United States we live by it. In Indonesia, that may not be the case. Well, these decisions will make that guarantee much——

Mrs. CAPITO. So we are talking in excess probably of 5 years.

Mr. Ivanoff, what about with you all in the road and transportation building?

Mr. IVANOFF. Well, as I mentioned earlier, maybe you were out, but I mentioned to Mrs. Kirkpatrick that we just did a study for

Federal Highway Administration, and the entire environmental review process and approval process has gone from about 2½, just over 2 years back in the 1970s to in the last 5 to 8 years we are more than 5 years. So it has more than doubled.

And part of it also depends on which jurisdiction of the Army Corps you get involved with as well because of the different approvals related to wetland banking, for example, which is one of the mitigating techniques that we use.

Mrs. CAPITO. Right. And I would imagine, too, whatever Corps, for instance, our Huntington Corps is very busy on the coal mine side. So there is a backlog. I know that to be true.

What about Ms. Pilconis?

Ms. PILCONIS. Yes. Thank you.

So the AGC Association represents all different facets of commercial construction. So our members are building everything from buildings, shopping centers, warehouse, and then the highways and other things that we have talked about here today.

So what AGC contractors are telling me is that for a 404 permit, just talking about that permit specifically—

Mrs. CAPITO. Right.

Ms. PILCONIS [continuing]. Generally anywhere between 18 and 24 months. For a general permit, a nationwide permit, 6 to 8 months.

Mrs. CAPITO. Has that increased as well, like Mr. Ivanoff said, over the last several years or is that pretty much steady through the 404?

Ms. PILCONIS. It has increased. It has increased over the last several years.

Mrs. CAPITO. OK. So we talked about the finality of the commitment of having a final recommendation, and I think that not only weighs into the financing aspect of it, but also the predictability of that community, and some of the things that I have been trying to bring forward, particular in speaking with the EPA, is to try to get that consideration for the economic and job impact of the decisions that they are making.

For instance, in the case of Spruce, I mean, that was a huge blow to the economics of that area of the State I represent, West Virginia.

In terms of your companies, Mr. Kovacs, at the Chamber, are you satisfied that this process really does include an economic and jobs review or do you think it would be better served to either enlarge that or remove it or what are your feelings on that?

Mr. KOVACS. Well, actually I am thrilled that you asked that question. Each one of the environmental statutes starting when they were drafted in the 1970s had a provision in there which requires a continuous evaluation of job loss and adverse economic impact. In EPA, we had avoided this in the air area and in the 40 years that they have had that requirement they have never done one, and the same I would assume would be true of water, and I know they have not done any in solid waste.

So that is the first thing, but the second thing is even in terms of regulatory impacts as to looking at jobs, which they do occasionally, EPA does only regulatory impact on about 2 percent of its rules. So if you went back 15 years and you had 7,000 rules, you

might have 146 that they look at something and in only about, I think, only two did they do a whole economy modeling.

So they really are not looking at jobs at all, but more importantly the continuous evaluation of the job impact is something very important because when these regulations hit, they do not hit the whole country. They hit communities, and people have to really appreciate that.

Mrs. CAPITO. I would agree there, and I would contend, too, that maybe that is not what they base their decision on, but it has to be part of the bigger picture when you are looking at what direction you are going to go, and we have found that to be lacking as well.

I thank you all for holding out and letting me be the last, or I think I am the last questioner. Thank you very much.

Mr. GIBBS. Mr. Jolly.

Mr. JOLLY. Thank you, Mr. Chairman.

Mrs. CAPITO. Sorry, Mr. Jolly.

Mr. JOLLY. To the witnesses, thank you.

Mr. Faulk, as a George Mason law graduate, thank you for being here.

I had a quick question for you. Is the prospective veto authority just zoning by another name?

Mr. FAULK. I think it could become that as EPA is applying it because, in fact, what can happen here as they withdraw whole swaths of land and watersheds out of consideration for permitting activities, then you are basically precluding any sort of exploration, production, mining, extraction or any other sort of useful activities taking place on that piece of land.

Mr. JOLLY. Do you think 404(c) should be changed?

Mr. FAULK. I think it should. I think it should definitely be restricted to require the EPA in this extensive permitting process to make its objections known then. To say why now afterwards really presume the fact that they did not have an adequate opportunity to make their points known.

Mr. JOLLY. Mr. Parenteau, do you think the law should be changed?

Mr. PARENTEAU. No. Congress created this situation. You understand this was a political compromise in 1972.

Mr. JOLLY. No, I understand.

Mr. PARENTEAU. If you want to change it, my recommendation would be give it to EPA. Give the whole authority to EPA. Put it where it belongs.

Mr. JOLLY. OK. Mr. Kovacs, the President has been flying around the country taunting the Congress about passing infrastructure bills, which frankly, we will do today and very unceremoniously he has indicated he will sign.

Can you tell us a little bit about your Project, No Project study and the results of what decisions by the administration have done for jobs in the economy?

Mr. KOVACS. Certainly. The Project, No Project did several things. One is it asked a very simple question. In the middle of the recession, the Great Recession, we wanted to know how much investment was out there, the private investment, that was going to go into projects that could not get permits, a very simple question.

So we put it down. We localized it to electric generation, and there were 351 projects in March of 2010 seeking to get a permit, and they were willing to invest $561 billion, which would have created about 1.9 million jobs per year for about 7 years during the construction period. It was all hung up on permits.

About the same time when the Congress was doing the Recovery Act, there were questions around saying we are just going to fund the shovel-ready projects, and we were audacious enough to say there are not any. If you have got a permit, you are building.

So we got provision in the Recovery Act. Senator Barrasso and believe it or not, Senator Boxer, they got a provision in which said that for a Recovery Act project, they have to use the most expeditious way possible, which did not look at all of these "whenevers." It just said we are going to use the most expeditious way possible unless there is a major problem.

We did not know how many it was going to affect, but out of the 214,000 projects that were funded during the Recovery Act, 192,000 of the projects were funded through the most expeditious way possible. Had they all had to go through an entire environmental review, you would not have spent any of that money.

So the entire permit process is broken, and where the administration is is they keep on saying they want permits streamlined, and we all want permits streamlined, but their version of permit streamlining has no deadlines. Our version of permit streamlining or what we think of it as is it has a lead agency. The lead agency coordinates all the other agencies. All the other agencies have 90 days in which to say they are going to be in the project or out of the project, and then they make a decision on the project within 2 years as to whether it gets the permit.

It does not change any substantive laws. It just says the agencies have a duty, and the duty is to review the permits and make a decision, and frankly, after that the courts are going to take over if people want to sue.

Mr. JOLLY. Very good. Thank you.

Ms. Pilconis, this type of delay, what does it mean for exposure of developers, construction companies, contractors, the financial exposure? And I will ask you to be very quick. I have one more question.

Ms. PILCONIS. OK. Financial exposure has to do with all of the money that they are putting in upfront to get the projects going, you know, whether you are talking about the owner of the project or the general contractor, buying the property, getting the financing, the insurance, the bonding.

Mr. JOLLY. Surety bonding.

Ms. PILCONIS. Exposure with bonding is huge. You know, bonding is a guarantee that the project is going to be done, and if you cannot move forward with the project, the construction company is going to have to pay that money back.

Mr. JOLLY. And they bear the risk.

Ms. PILCONIS. The bonding agency.

Mr. JOLLY. The construction company bears the risk.

Ms. PILCONIS. Absolutely.

Mr. JOLLY. OK. One last question. I apologize for running out of time. One last question, Mr. Quinn. Has Senator Muskie's intent been perverted by the EPA's use of retroactive vetoes?

We have heard a lot about it today.

Mr. QUINN. Yes.

Mr. JOLLY. Would you consider Senator Muskie's intent to have been changed by the EPA?

Mr. QUINN. I think the way it has been exercised lately is a departure from what was originally envisioned in terms of the time in process and coordination that was supposed to go on.

Mr. JOLLY. Do you think the law should be changed?

Mr. QUINN. I think the law should be clarified and restore the certainty that preexisted. Yes, I think there is proper context and a proper process to get these decisions made properly and people can rely on those decisions. If they need to be revisited, revisit it for legitimate reasons, not for temporal reasons that somebody else has taken over.

Mr. JOLLY. Thank you very much. Thank you to each of you.

Mr. GIBBS. At this time I will recognize Mr. Bishop for the purpose of a unanimous consent request.

Mr. BISHOP. I ask unanimous consent to enter into the record the statement of the ranking member, Mr. Rahall.

Mr. GIBBS. So ordered.

Mr. BISHOP. Thank you, Mr. Chairman.

Mr. GIBBS. This concludes our hearing. I want to thank our panelists again for coming in and testifying. Thank you very much.

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

Opening Statement by U.S. Representative Nick J. Rahall
Ranking Member, House Transportation and Infrastructure Committee
July 15, 2014

Mr. Chairman, the EPA's actions in recent years, in particular its abuse of the regulatory system and its permitting authority – abuses that the Judiciary has, so far, largely refrained from checking – comprise a vast abuse of the public's trust.

That is why we have convened this hearing today and that is why we will be holding a legislative markup tomorrow.

There may be no more clear-cut example of the EPA's abuse of power, and the havoc it can cause, than the EPA's veto in 2010 of the Mingo-Logan Coal Company's Section 404 permit for its Spruce Fork Number 1 mine – a permit granted by the Corps of Engineers nearly three years earlier.

That veto sent chills down the spines of American businesses far and wide. It sent a message to investors that no lawfully granted permit is ever assured and that money they might be willing to invest in any number of ventures – from mining, to farming, to manufacturing and construction – is akin to playing the lottery.

The Spruce Mine permit was subject to years of negotiations, a detailed EIS process, and extensive public comment period. That permit was granted only after the company made a litany of changes to the mining plan to address environmental concerns raised by the EPA. By vetoing that permit, the EPA has demonstrated that its word is no good, that permit negotiations are a farce, and that its permits are worthless.

The EPA brings to mind a 4-year-old playing a game of Candy Land – changing the rules mid-game to suit its own ends. In doing so, the agency has not only harmed its own credibility, allowing political ideology to trump the needs of the people it was created to serve, but it has also done tremendous harm to the public's view of the government as a whole.

Turning our attention for a moment to EPA's newly proposed Waters of the United States regulations, the agency claims that by redefining which waters are subject to the permitting requirements of the Clean Water Act it will provide businesses and citizens with certainty and clarity. Unfortunately, given the EPA's treatment of the Spruce Mine permit, the agency's defense of its newly proposed Waters of the U.S. rule just doesn't...well...hold water. The agency's actions are certainly not providing clarity or certainty. But they are whipping up yet another political firestorm, scaring the heck out of farmers and businesses already struggling to earn a living.

These are the kinds of actions that lead our coal miners, our farmers, our road builders and manufacturers, and our working families to shake their heads at Washington. Members of Congress – Democrats and Republicans alike – are forced to shake their heads at EPA officials who simply don't get it.

Mr. Chairman, I thank you for convening this hearing today. And I thank our witnesses for coming to testify to provide for us and for the public record a better understanding of just how much the EPA's expanding 404 permitting authorities are threatening our Nation's economic well-being.

Statement of the U.S. Chamber of Commerce

FOR: HEARING ON "EPA's EXPANDED INTERPRETATION OF ITS PERMIT VETO AUTHORITY UNDER THE CLEAN WATER ACT"

TO: HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

BY: WILLIAM L. KOVACS,
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS

DATE: July 15, 2014

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON WATER RESPURCES AND THE ENVIRONMENT

Hearing on "EPA's Expanded Interpretation of Its **Veto Authority Under the Clean Water** Act."

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

July 15, 2014

Good morning, Chairman Gibbs, Ranking Member Bishop and distinguished members of the Subcommittee. My name is William L. Kovacs and I am Senior Vice President for Environment, Technology & Regulatory Affairs at the U.S. Chamber of Commerce. You have asked me to come before the Subcommittee today to discuss "EPA's Expanded Interpretation of Its Veto Authority under the Clean Water Act." To address your request my testimony will focus on:

1. The impact of EPA's retroactive veto of an issued Clean Water Act permit on jobs, investment and infrastructure;
2. How EPA is interpreting the Clean Water Act and other statutes to expand its regulatory reach so far that it is literally becoming a National Zoning Authority that controls the location and operations of businesses nationwide; and
3. How EPA's new regulatory interpretations cause great uncertainty and will chill investment.

I. Background

Securing a permit to build or extract virtually anything in this nation is a multi-year, complex and costly task requiring lengthy studies, engineering reports, air and water sampling, modeling, environmental impact statements, compliance with over 30,000 pages of federal environmental regulations, and proving compliance with federal statutes regulating water, air, solid and hazardous waste, historic preservation and endangered species, to name only a few. And then there are the state and local requirements. The project sponsor must comply with every requirement or be denied a permit by the government. Even after getting a permit, the project sponsor often must stand by when environmental organizations sue the government for failing to thoroughly do its permitting job. Cape Wind is a good example of a permitting effort that took over a decade to secure a permit to build a wind farm. When a permit is issued, the public can be certain that the federal and state governments have analyzed every aspect of a project to ensure it complied with tens of thousands of pages of statutory and regulatory details. When a permit is obtained the company has proven to the government that it can and will comply with all of the conditions imposed on it.

Securing a permit for a large infrastructure or natural resource project can cost millions of dollars for the project sponsor. This investment is made with the expectation that the project will operate for a determined period of time as long as it meets permit conditions. It is during the permit review stage that an agency is expected to raise any objections to a proposed permit. Between 1981 and 2008, EPA has used section 404(c) of the Clean Water Act twelve times to deny or restrict permits for use of certain areas. EPA's exercise of this power was always within the permit review process. In 2009, EPA determined for the first time that it had the authority to retroactively revoke a permit several years after the permit had been issued. The permit in question had been issued by the Army Corps of Engineers to the Mingo Logan Coal Company for a discharge of material from its Spruce Mine No. 1. During the permit review process EPA expressed its concern to the Army Corps of Engineers that the mine could have significant environmental impacts. Nonetheless, EPA clearly stated "we have no intention of taking our Spruce Mines concerns any further from a Section 404 standpoint..."[1] The section 404 permit was subsequently issued to Mingo Logan on January 22, 2007, with a term that extended to December 31, 2031.

Subsequently, EPA developed a new standard to measure water quality, known as conductivity. After evaluating the Spruce Mine permit under the conductivity standard, on January 13, 2011, EPA published a Final Determination prohibiting the discharge of material from the Spruce Mine. Essentially, EPA changed the rules in the middle of the game and revoked an existing permit under section 404(c). It is important to note that there was **no** alleged environmental damage or harm that occurred as a result of operations at the Spruce Mine. EPA based its section 404(c) decision on exactly the same facts and figures that it relied upon when approving the permit four years earlier, only this time EPA applied its new standard to those facts and figures.

Nowhere in the legislative history of the Clean Water Act does it state that the congressional intent was to provide EPA with the unlimited authority to retroactively veto an already-issued permit whose terms and conditions were being fully complied with. Congress created specific roles for EPA and the Corps. EPA would have a clearly limited role and the Army Corps would be the lead.[2] As part of the permitting process, EPA has the authority to veto or require conditions in a permit before it is issued. As such, Congress clearly limited EPA's decision making to the permitting process itself and did not intend to give EPA "retroactive" authority. Nevertheless, the U.S. Court of Appeals for the District of Columbia Circuit concluded – improperly, in our view – that EPA's regulatory decision was entitled to deference. The court considered the language of section 404(c) of the Act:

> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he

[1] *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 610 (D.C. Cir. 2013) *cert. denied*, 134 S. Ct. 1540, 188 L. Ed. 2d 557 (U.S. 2014).

[2] See, e.g., National Mining Ass'n v. Jackson, 42 ELR 20,165 (July 31, 2012) ("The Corps has sole authority to issue Section 404 permits . . . but in doing so must apply guidelines that it develops in conjunction with EPA.").

> determines that, after notice and opportunity for public hearings, that the discharge of such materials into such, will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.[3]

The court focused on the word "whenever" in section 404(c), and found that the Act allows EPA to act at any time it determines that an "unacceptable adverse effect will result.[4] The court failed to consider section 404 in its entirety, however. The section must be considered as a whole, rather than focusing on a single word. The appropriate time for EPA to exercise its section 404(c) veto authority has always been during the initial permit review process, not after the permit has been issued. In the absence of any compelling new evidence of unacceptable adverse environmental impact, EPA should not have been allowed to retroactively veto a valid permit which the permit holder was fully complying with.

The retroactive application by EPA of its section 404(c) authority to revoke a validly issued permit establishes that even full compliance with agency-approved permit conditions no longer guarantees that a permit holder can continue operations. Under EPA's new interpretation, the agency can change its mind 'whenever he (the Administrator) determines the discharge will have an "unacceptable adverse effect' on the environment.' Certainly if Congress meant to give such extraordinary power to EPA, it would have done so very clearly in the statue and discussed it in its legislative history.

II. EPA's Retroactive Veto of a Properly-Issued Permit Was Unnecessary

By reinterpreting the time frame within which it can exercise its veto authority under Section 404(c) from within the permit review process to "whenever" it decides to exercise such authority, EPA has established wholly new agency policy; i.e. that approved permits can be revoked at "will" by the agency. Such a policy creates complete uncertainty for the business community. Seeking a permit becomes an expensive gamble with company and stockholder assets. Moreover, companies will be reluctant to make investments that create jobs since there is no longer any assurance that a project can be operated for the time period needed to make it profitable under normal business conditions.

Perhaps the most troublesome aspect of EPA's reinterpretation and expansion of its permit veto authority is the fact that Mingo Logan was in full compliance with all of its permit conditions. Had Mingo Logan violated any of the terms of the permit or took actions that caused imminent and substantial endangerment to health or the environment, EPA would have been able to use its emergency powers under Section 504 of the Clean Water Act or the environmental community could have filed citizen suits under Section 505; or EPA could have simply revoked the permit for violations of its terms. Moreover, under Section 309 of the Act (33 USC § 1319), EPA has the power to initiate administrative, civil and criminal actions against the permit holder. Finally, EPA could have withdrawn West Virginia's delegated authority to issue section 404

[3] 33 U.S.C. §1344(c).
[4] 714 F.3d at 612.

permits. In summary, Congress provided EPA with immense powers to protect the environment should violations occur.

Despite the agency's immense authority to respond to all legitimate threats to health or safety posed by an existing permit, EPA found it necessary to inflict significantly greater uncertainty by transforming a fully authorized permit into a temporary operating certificate, good only as long as it suits the whims of the agency.

III. EPA Is Expanding Its Authority to Become the National Zoning Authority

EPA's expansion of its regulatory powers using the retroactive veto provision under Section 404 (c) of the Clean Water Act is only one of many regulatory interpretations EPA has recently adopted to increase its regulatory powers over businesses, communities, local governments, and land uses in the United States. Another recent example is the Pebble Mine project in Alaska. In this situation, EPA has managed the Clean Water Act permitting process in a manner that allows it to preemptively veto Pebble's permit application before the application is even submitted. Pebble Mine is the largest known undeveloped copper ore body in the world. The project is currently in the study phase and the project sponsors haven't even finalized their mine plan, let alone applied for a permit. The Pebble Mine is expected to create over 15,000 jobs and produce over $18 billion in revenue for local, state, and federal taxes. The project would potentially increase U.S. copper production by 20%.

Before Pebble can start actual construction, it must first secure roughly 50 state and federal mining permits. Pebble has already invested more than $540 million into the project and has not even reached the point where it can file for a permit. Nevertheless, EPA was petitioned by activists who requested that EPA preemptively shut down the Pebble Project prior to submission of an application. EPA then took the extra-regulatory action of conducting a watershed assessment of the potential mine's area using an outdated and inaccurate model of the mine as the template for the study. Essentially, EPA modeled the characteristics of the mine by using very old assumptions of the workings of a mine that did not take into account technological advancements that have been made in the past few decades. EPA's preemptive veto of the Pebble Mine permit before it has even been formally submitted represents a substantial and dangerous expansion of the agency's regulatory reach.

Another example of EPA's assertion of dramatically expanded Clean Water Act authority is the agency's recently proposed revised definition of "Waters of the U.S." (WOTUS). The proposed revision would define many historically non-jurisdictional areas of the U.S. as jurisdictional waters. This expanded Clean Water Act coverage is expected to result in **at least a twofold to fourfold** increase in the areas of the U.S. that will become subject to new permitting requirements. Businesses, communities, and local governments will be forced to apply for section 404 permits for the first time, along with permits and approvals under sections 402, 303, and 311. This dramatically increased permitting requirement will subject routine activities such as maintaining ditches, roads, and parking lots (and conceivably, soil-disturbing activities on residential properties) to permitting requirements. Regulated entities that fail to secure required permits will be at risk of an enforcement action carrying penalties of up to $32,500 per day per

violation. The expanded WOTUS definition is potentially one of the most significant expansions in an agency's regulatory power in history.

A final illustration of how EPA is expanding its regulatory authority under the Clean Water Act is found in what is called "Sue and Settle" agreements with environmental groups. Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created.

Examples of EPA expanding its regulatory authority under the Clean Water Act are *Fowler v. EPA,*[5] in which EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay by changing its stormwater program. Another example is *Ohio Valley Environmental Coalition v. Army Corps of Engineers,*[6] in which environmental groups challenged the water permitting for surface mining, claiming EPA did not account for the impact on stream function. Rather than defend its position, EPA chose to issue the guidance requested by the environmental group, which effectively settled the case in the environmentalists favor.[7]

While these are only two examples of EPA using the sue and settle process under the Clean Water Act to expand its jurisdiction, EPA has acquiesced to the use of this process by outside groups to implement over one hundred new rules.[8]

The Mingo Logan mine's ***retroactive*** veto, along with the Pebble Mine's likely ***preemptive*** veto, together with the vastly expanded proposed interpretation of "Waters of the U.S." and abusive sue and settle agreements intended to establish sweeping new water rules are clear examples of EPA's quest to enlarge its regulatory power under the Clean Water Act. Likewise, the agency is interpreting its authority under other environmental statutes to rapidly expand its regulatory powers over land uses and commercial activities within the United States. Using the Clean Air Act, the agency is shaping the nation's energy policy by mandating what types of energy can be used and where it can be used. By setting increasingly stringent air quality requirements, more and more areas of the nation fall into non-attainment which restricts economic development in those areas. Couple EPA's activities with those of the Fish and

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[5] Case No. 1:09-00005-CKK, Complaint (Jan. 5, 2009); Settlement Agreement (May 19, 2010).
[6] Civil Action No. 3:05-0784 (Nov. 2, 2005).
[7] U.S. EPA/U.S. Army Corps of Engineers, "Assessment of Stream Ecosystem Structure and Function under Clean Water Act Section 404 Associated with Review of Permits for Appalachian Surface Coal Mining" (July 30, 2010).
[8] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* 43-45 (2013), *available at* www.sueandsettle.com.

Wildlife Service's unprecedented number of new species being added to the endangered species list—together with the massive "critical habitat" areas that must be set aside for those species—and the two federal agencies are imposing such significant new restrictions across the United States that the future economic growth becomes uncertain.

IV. EPA's New Regulatory Interpretations Cause Great Uncertainty and Will Discourage New Investment

Businesses drive our economy. To make the investments that turn into growth and jobs, businesses need greater certainty in the permitting process. Yet EPA's recent regulatory actions have specifically created a lack of certainty in the permitting process. This lack of certainty can best be summed up by asking "is a permit really a permit?" Historically, a permit would provide the permit applicant with some assurance that they could continue to work and make future plans for growth as long as they followed the terms of the permit during the explicit life span of the permit. Now EPA believes it can change its mind on the approval of the permit at any point during the lifespan of the permit. The agency's belief that it can kill a permit "whenever" it choose to undeniably turns the permitting process on its head and creates a tremendous amount of uncertainty for the regulated community. This lack of certainty has a chilling effect on investment, impacting jobs, local and state tax revenues, the health of communities, and further growth.

If the EPA is allowed to continue its use of the "retroactive veto" the results will be disastrous if the agency and the Corps finalizes the revised "Waters of the U.S." definition. That revised definition will vastly expand the areas that will be required to obtain Clean Water Act permits, including section 404 permits. This will lead to more permit applications, since there will be a substantial increase in the areas that are newly covered by federal clean water permitting requirements. EPA will have the opportunity to use its newfound authority to retroactively veto any of these new permits it subsequently decides it dislikes. Thus, EPA's proposed "Waters of the U.S." rule will compound the already existing uncertainty by having a chilling effect on future projects. This will likely wreak havoc on routine but large-scale projects such as dredging and maintaining rivers and ports.

Chamber members are constantly looking to modernize and grow their businesses. This often entails developing new or existing properties. In order to start this development they spend years on advance planning and determining which areas offer the best location. They spend significant financial resources on studies and preparations for the permitting process. They do this knowing full well that they have to comply with our nation's vast and comprehensive set of environmental laws and knowing that there is no guarantee that they will even get a permit. They are willing to take this risk because they have historically had some assurance of continuity if they received a permit. A permit typically grants a relatively short window in which to undertake their project (usually not more than five years). If time runs out they must reapply. So EPA's retroactive veto action has basically made permit certainty illusory. There is no longer any certainty in the permitting process, because EPA now believes it can change the rules of any given section 404 permit "whenever" it wishes.

Our nation's infrastructure is extremely dependent on section 404 permits. Waterways, ports, pipelines, and highways are just a few of the infrastructure examples that at the very least must have a 404 permit in order to begin development. Infrastructure is extremely important to the member companies of the U.S. Chamber of Commerce because it is essential to moving and selling their goods as well as connecting with their customers. This committee has recently passed the Water Resources Development Act and is working on an important revision to the highway bill. The Chamber strongly supports these significant pieces of legislation and appreciates all of this Committee's efforts. A large number of the projects affected by those two bills will be dependent on obtaining Section 404 permits and will face major new uncertainties in the permitting process. When people think of the Clean Water Act retroactive veto they tend to think of it only in terms of the mining industry. However, all industries involved in moving earth will be impacted, especially infrastructure. This uncertainty permeates the entire permit applicant pool regardless of industry. Translated, this means our country will lose potential jobs and investments across the nation.

EPA has a specific role in the section 404 process, and has the authority to support or veto permits being applied for. If a permit is granted and violations subsequently occur, EPA has massive enforcement authority to address the problem – which it uses frequently. Considering the Clean Water Act permitting structure as a whole, the Army Corps of Engineers clearly runs the program with EPA having a prominent role in site selection during the permit process.

V. EPA's Has Failed to Evaluate the Employment Impact of its Water Programs

Troublingly, while EPA expends great effort to expand its regulatory authorities, it completely ignores a longstanding Congressional mandate to continuously evaluate the impact of its regulatory actions on employment and the creation of jobs. Under Section 507(e) of the Clean Water Act, the Administrator:

> [S]hall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order.[9]

After extensive research the Chamber cannot identify even one instance under the Clean Water Act in which the Administrator made any effort to conduct an evaluation of its actions on the potential loss or shifts in employment as a result of its actions. Congress imposed this mandate on the Administrator of EPA on October 18, 1972. Evaluating compliance with a similar provision is of the Clean Air Act,[10] the Chamber filed a Freedom of Information Act request with EPA to determine if the agency ever undertook such an investigation into job loss and shifts in employment. On June 14, 2013 EPA informed the Chamber that it "was unable to find any

[9] 33 U.S.C. §1367(e).
[10] 42 U.S.C. §7621(a).

documents pertaining to your (the Chamber's) request."[11] Congress inserted this mandate in most of its environmental statutes but EPA has refused to conduct any evaluations of the impact of its regulations on jobs or shifts in employment.[12]

Finally, while we could not identify any economic impact studies of the Mingo Logan mine as a result of the EPA veto, the Chamber did undertake a study to estimate the amount of money not invested in new facilities as a result of the unreasonably delayed permits. In 2011, the Chamber unveiled *Project ~~No Project~~*, an initiative that catalogued the broad range of energy projects that were delayed or halted because of the inability to obtain permits and endless legal challenges by opponents of development. Results of the assessment are compiled onto the *Project ~~No Project~~* website (www.projectnoproject.com). The purpose of the *Project ~~No Project~~* initiative was to understand the impacts of serious project impediments on our nation. It remains the only attempt to catalogue the wide array of energy projects being challenged nationwide.

Through *Project ~~No Project~~*, the Chamber identified usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Given that some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to forty-nine states.

The results of the inventory were startling. One of the most surprising findings is that it has been just as difficult to build a wind farm in the U.S. as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified in our study were renewable energy projects. Often, many of the same groups urging us to think globally about renewable energy are acting locally to stop the very same renewable energy projects that could create jobs and reduce greenhouse gas emissions. Activists have blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other delay mechanisms, thereby effectively bleeding projects dry of their financing.

It quickly became clear from our research that the nation's complex, disorganized process for permitting new facilities and its frequent manipulation by opponents constitutes a major impediment to economic development and job creation. Which prompted the next question: what are the economic effects of this problem on the economy and job growth?

According to an economic study that we commissioned, the successful construction of the 351 projects identified in the *Project ~~No Project~~* inventory could have produced a $1.1 trillion short-term boost to the economy and created 1.9 million jobs annually during the

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[11] Letter from Jim DeMocker, Acting Director, *EPA Office of Policy Analysis and Review*, to William Kovacs, Senior Vice President, *U.S. Chamber Environment, Technology & Regulatory Affairs Division* (June 14, 2013) (EPA-HQ-2012-001352).

[12] Clean Air Act, 42 U.S.C. §7621(a); Clean Water Act, 33 U.S.C. §1367(e); Toxic Substances Control Act, 15 U.S.C. §2623(a); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610(e); Solid Waste Disposal Act, 42 U.S.C. §6971(e).

projected seven years of construction. Moreover, after these facilities are constructed, they would continue to generate jobs because they operate for years or even decades. According to the study, in aggregate, each year of operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs.

VI. Conclusion

EPA's retroactive veto of a validly-issued section 404 permit, in the absence of an unacceptable adverse environmental impact, is a prime example of the agency's regulatory overreach. This action, together with EPA's likely preemptive veto of the Pebble Mine in Alaska, the proposed unprecedented expansion of the scope of the agency's Clean Water Act jurisdiction under the revised "Waters of the U.S." definition, and its acquiescence to the abuse of the sue and settle process to spawn expansive new rulemakings, has the effect of eroding trust in the agency's judgment, leaving permit holders in doubt about the value of their permits, making planning for new projects and investments extremely difficult, and casting a chilling effect on development.

Congress has two bills that address this issue that the Chamber supports. The first is Rep. David McKinley's (R-WV) bill, H.R. 524, which specifically addresses EPA's power to retroactively veto a permit. This bill has already passed out of this committee. The second is Rep. Bob Gibbs (R-OH) and Rep. Nick Rahall's (D-WV) bill, H.R. 4854 the "Regulatory Certainty Act of 2014." The Chamber urges this committee to pass this bill. The Chamber also supports any efforts through the Appropriation process to restrict or limit the ability of EPA and the U.S. Army Corps of Engineers to implement or administer any change to the definition of "waters of the U.S."

Thank you for giving me the opportunity to testify before this Subcommittee.

Testimony of
Hal Quinn
President and CEO
National Mining Association
before the
United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

"EPA's Expanded Interpretation of Its Permit Veto Authority under the Clean Water Act"

July 15, 2014

Good morning. I am Hal Quinn, president and chief executive officer of the National Mining Association (NMA). NMA is the national trade association representing the producers of most of the nation's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering and consulting firms, financial institutions and other firms serving the mining industry.

I want to thank the chairman and the members of the subcommittee for holding this hearing on the significant implications of the U.S. Environmental Protection Agency's (EPA) expanded interpretation of its veto authority under Section 404 of the Clean Water Act (CWA). Recently, EPA has taken unprecedented actions under Section 404 to both retroactively veto a permit for an existing operation, and to preemptively veto a project before a company was afforded the opportunity to apply for a permit. Due to these actions, businesses and investors can no longer be sure that lawfully-issued permits will be honored or that permit applications will be fairly evaluated. EPA has dramatically altered the rules of the game with respect to its use of 404(c), and in doing so greatly harmed the U.S.' reputation for maintaining a stable rule of law that fosters the certainty needed to attract and maintain capital investments needed to sustain economic growth.

THE 404 PERMIT PROCESS

The scope of the CWA's regulatory reach has expanded substantially over the years and EPA has recently proposed to extend the law's reach in a manner that will touch many more landowners and businesses. At the same time, the process for obtaining permits to proceed with economic and land use activities has become longer and more complicated. To make matters worse, EPA's recent decisions on the reach and timing of its role under CWA Section 404 have removed the longstanding certitude businesses understood accompanied a permit if one successfully navigated the protracted process.

Many essential and valuable projects involve activities that require Section 404 CWA permits. Section 404(a) of the CWA authorizes the Army Corps of Engineers (Corps) to permit the "discharge of dredged or fill material into navigable waters at specified disposal sites." Under its Section 404 program, the Corps permits thousands of projects each year for activities ranging from construction and transportation to agriculture and

manufacturing, thereby facilitating economic activity worth hundreds of billions of dollars to the U.S. economy.

The regulatory process for obtaining a section 404 permit from the Corps is set forth in great detail in the Code of Federal Regulations and has a long history of well-established practice. The section 404 permitting process serves two important complimentary functions. On the one hand, the permitting process allows the government to evaluate and address unacceptable impacts on navigable waters. On the other hand, the process offers parties the assurance of regulatory certainty that if they obtain a permit they can proceed in accordance with its terms.

That regulatory certainty and assurance that a permit-compliant operation is a lawful operation afford investors the certitude they need to commit the capital required to develop projects, including the significant expense required to go through the permitting process itself. Such capital can be raised only if investors are assured that their investment will not be rendered worthless on a regulatory whim.

EPA's recent actions, however, have gravely undermined the certainty needed to attract investment, particularly with respect to large, capital intensive projects. By retroactively vetoing one project and initiating the veto process preemptively for another, EPA has embarked upon previously uncharted waters in terms of regulatory uncertainty that both chills the appetite for new investment and raises the cost of capital for businesses and landowners. Understandably businesses and investors are less likely to risk their capital if they will not be afforded due process by their government, or if they fear a permit carries a term measured by the next election cycle.

RETROACTIVE VETO

In 2007, after 10 years and millions of dollars spent on environmental reviews conducted by EPA, the Corps, and other state and federal agencies, the Corps – with EPA's concurrence - issued a 404 permit to a mining company. The company then began operations in full compliance with the terms of the permit. Three years later, EPA retroactively and unilaterally invalidated the company's permit. Never before had EPA used 404(c) to veto and revoke an existing permit issued under the law by the Corps. It deserves mention again—EPA had ample opportunity to

participate in the permit review process and did so, as evidenced by the substantial changes made to the project expressly designed to resolve all of EPA's concerns before the Corps issued the permit. EPA's belated and unprecedented action dramatically changed the calculus for anyone that currently holds, or needs to acquire, a Section 404 permit.

In defense of its actions, EPA now asserts that it will use Section 404(c) after a permit has been issued only in rare circumstances. Such assurances carry no value now that the harm is complete, and its implications reverberate throughout the business community. After all, the term "rare" as used by EPA has no discernable boundaries for exercising such breathtaking discretion.

Projects that require significant capital expenditures over a substantial period of time need to generate a certain level of return to justify the investment. Actions that introduce new and increased regulatory risk raise the threshold of the necessary return to undertake the required early-stage investment. Even assuming that EPA would exercise such unbridled discretion in so-called "rare circumstances," the chilling affect remains significant and substantial. Here is how University of California Berkeley Professor David Sunding assessed the costs associated with the risks raised by EPA's unprecedented actions:

- Greater difficulty in obtaining project financing
- Lenders and bondholders will require higher interest rates to compensate for increased risk
- Some credit rationing will occur

Professor Sunding also quantified the impact of a potential veto as follows: if a project proponent faces a one percent chance that EPA would act under Section 404(c) after the permit issues, it would decrease the expected cost-benefit ratio for the project by 17.5%. A two percent chance that EPA would take adverse action—not an unrealistic assumption for a large or controversial project—would decrease the project's cost-benefit ratio by ***30%***. These types of substantial changes in the profile of a project will undoubtedly dissuade numerous businesses from pursuing investments that require them to acquire a Section 404 permit.

Senator Edmund Muskie, who played the most significant role in the design and passage of the CWA, clearly articulated that there are "three essential

elements" to the Act – "uniformity, finality, and enforceability." EPA's retroactive revocation of a lawfully issued Section 404 permit has destroyed two of those essential elements – uniformity, since EPA has no discernable standard for exercising this remarkable authority it claims after the permit process has come to closure; and finality because a permit can never be final when a non-issuing agency remains free to reopen the matter anytime, anywhere and for any reason, including those already fully vetted and addressed when the permit was issued.

PREEMPTIVE VETO

In February 2014, EPA took yet another unprecedented step when it initiated a veto process of a mining project on state lands in Alaska before the company had even applied for their 404 permit. In doing so, EPA bypassed the established lawful procedures of the CWA and the National Environmental Policy Act (NEPA) specifically designed to fully and fairly evaluate potential projects and provide project proponents with the due process of law. EPA's actions trampled the authority of the state of Alaska, preempted the role of other federal and state agencies, and potentially stranded the mining company's $700 million in capital investment. Frankly, EPA's actions here suggest the agency can exercise power akin to local zoning powers—authority the Constitution does not confer upon the federal government.

EPA claims that it initiated the veto process only in response to petitions submitted in 2010, and only after it completed its science report that purportedly shows the project would have significant and irreversible negative impacts on the Bristol Bay watershed. However, internal EPA documents obtained by congressional committees and various media outlets reveal that, as early as 2008, regulators inside EPA were advocating a preemptive 404 veto of the project. In fact, it appears these same regulators secretly worked with tribal and environmental activists to generate the petitions asking EPA to stop the project well before any studies of the environmental impacts were even begun.

The efforts to get EPA to veto the project before the Corps had an opportunity to evaluate a permit application with the mine plan, engineering designs and environmental background data reached all the way to top agency officials in Washington. A presentation prepared in 2010 for then-EPA Administrator Lisa P. Jackson candidly admits that a preemptive veto

"had never been done before in the history" of the CWA, would bypass the processes designed to "generate considerable information informing the [404] decision," and would not "adhere strictly to the regulation." However, that same document observes that, if EPA were to utilize the "established legal framework" under Section 404, the agency would "have less control of the 'spin' and political debate," and could only hope to prohibit "that project" – as opposed to all potential future projects in the area.

Other federal agencies with roles in the permit review process were likewise saying as early as 2010 that an EPA veto was a fait accompli. According to the Fish and Wildlife Service, an EPA regulator indicated he had briefed top EPA officials in Washington and believed EPA leaders have decided to proceed and they are just deciding when. All this occurred before EPA even began the watershed assessment EPA claims is the basis for its decision to proceed in this unusual and unprecedented manner.

Importantly, EPA's decision to initiate a preemptive veto before the Corps, and other state and federal agencies even began their environmental reviews clearly shows that EPA's actions have been neither transparent nor based on the best information or science. The proper and best way to evaluate potential environmental impacts and decide whether a proposed project meets the requirements of CWA section 404 is to proceed with the well-established CWA and NEPA procedures designed to ensure informed agency decision-making and afford due process. Only then can the Corps and EPA have the project-specific information necessary to make lawful, reasoned decisions under the CWA.

PRECEDENTIAL NATURE OF EPA'S EXPANDED INTERPRETATION OF ITS VETO AUTHORITY

EPA has defended its use of its newly claimed 404 retroactive and preemptive veto authority as limited to very "unique" circumstances. However even a very small risk of EPA using its veto authority can have significant impacts on project investment. Furthermore, EPA's assurance that it intends to use its 404 authority sparingly in the future are unconvincing in light of recently publicized internal agency documents. For example, EPA stated in a headquarters briefing that the preemptive use of Section 404 "can serve as a model of proactive watershed planning."

EPA's actions have already emboldened opponents of projects to petition EPA to use this so-called "rare and unique" power in other states. Six Chippewa tribal bands have asked EPA to initiate CWA veto proceedings against a mining project in northern Wisconsin. Their request is similar to the 2010 request in Alaska's Bristol Bay region. Without any discernable or objective criteria governing EPA's claimed authority under section 404, a cloud of uncertainty and delay hangs over any plan to invest and create jobs

We believe legitimate concerns about proposed projects requiring a 404 permit should be addressed. However, the law provides the right place and the right time to do so through the current CWA permitting process that provides ample opportunity to take a hard look at an actual project proposal.

CONGRESS MUST ACT

Under EPA's expansive claim of authority, the very regulatory finality and certainty Congress intended for the CWA permitting process does not—and cannot—exist. The breadth and depth of concern is reflected in a recent communication to Congress by 184 organizations– representing agriculture, construction, housing, manufacturing, utilities, energy production, and transportation sectors –asking that clear limitations be restored to govern EPA's role and authority. In short, under Section 404 EPA's role should be as it has been historically - during the permit review process. EPA must not be permitted to displace a Corps' permit decision until after 404 review processes are completed, but before a permit is actually issued. Such limitations would maintain the longstanding environmental protections provided under the law while at the same time encouraging economic investment and growth by ensuring transparency and certainty landowners and businesses need to invest and grow our economy.

We commend the Chairman of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment Bob Gibbs (R-Ohio) and Ranking Member of the Transportation and Infrastructure Committee Nick Rahall (D-W.Va) and 17 co-sponsors for introducing H.R. 4854, the "Regulatory Certainty Act," which addresses these serious concerns and provides for the clarity so needed by U.S. businesses. Their legislation would put a limit on the EPA's gross overreach and give mining projects the

certainty they need to move forward – stimulating our nation's economic engine when America needs it the most.

CONCLUSION

Thank you again for the opportunity to testify today. In summary, EPA's authority under CWA Sec. 404(c) must be clarified and limited in a manner that provides the regulatory transparency and certainty landowners and businesses deserve. Only then can landowners and businesses have the faith in the federal permitting process necessary to invest in American development and jobs.

The Brattle Group

Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal

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UC Berkeley and The Brattle Group

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1. Introduction

In 2007 the Army Corps of Engineers issued a Section 404 discharge permit to Arch Coal in connection with the Spruce No. 1 Mine located in Logan County, West Virginia. Arch Coal subsequently operated the mine in compliance with its permit. Nonetheless, more than three years after the Corps issued the 404 permit, EPA proposed to withdraw the discharge authorization granted to Arch Coal. Both the Corps and the State of West Virginia disagreed with the EPA decision, finding that there was no reason to take away the permit. This precedential decision by EPA -- to exercise its limited authority to withdraw a discharge authorization so as to effectively revoke the permit over the objections of the Corps and State has the potential to affect a wide range of economic activities that require authorization under Section 404 of the Clean Water Act.

This report discusses the economic impacts of EPA's actions with respect to the Spruce Mine discharge permit. EPA's after-the-fact veto of Arch Coal's permit makes it more difficult for project developers to rely on essential 404 permits when making investment, hiring or development decisions, and proponents must now account for the possibility of losing essential discharge authorization after work on the project has been initiated.

2. Permitting under Section 404 of the Clean Water Act

There are a variety of public and private sector projects permitted under Section 404 of the Clean Water Act. These activities are vital to the American economy, and include: pipeline and electric transmission and distribution; housing and commercial development; renewable energy projects like wind, solar, and biomass; transportation infrastructures including roads and rail; agriculture; and many others. The Army Corps of Engineers issues roughly 60,000 discharge permits annually under Section 404, and estimates that over $220 billion of investment annually is conditioned on the issuance of these discharge permits. Given the breadth of the statute, a large share of public and

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private infrastructure or development projects must receive and depend on the certain operation of the 404 permit.

Public and private activities requiring Section 404 authorization generate significant indirect and induced benefits to affiliated industries. Reduced levels of investment in projects requiring discharge authorization translate directly into lost jobs and lost economic activity across essentially the whole economy. Tables 1 and 1a show the monthly value of new construction put in place in the United States, which is widely used as a measure of new construction spending. Table 2 gives the direct, indirect and induced output multipliers for key activities typically requiring a Section 404 permit.

There are numerous studies in the economics literature detailing the nationwide output and employment benefits various types of construction projects.[2] A study by the President's Council of Economic Advisors found that under the American Recovery and Investment Plan, construction and manufacturing were likely to experience particularly strong job growth from a recovery package emphasizing infrastructure, energy, and school repair.[3] Another study found that "greater use of renewable energy systems provides economic benefits through investments in innovation, and through new job creation, while at the same time protecting the economy from political and economic risks associated with [energy dependence]."[4] The benefits go beyond measures of output and employment – indeed, "research has shown that well designed infrastructure investments can raise economic growth, productivity, and land values, while also providing significant positive spillovers to areas such as economic development, energy efficiency, public health and manufacturing."[5]

As of 2010, commercial construction activity comprised around 2.5 percent of GDP while residential construction makes up another 2 percent. Spending in these industries will grow as the economy continues to recover from the recession. Standard & Poor's forecasts a 14 percent increase (to $44.8 billion) in commercial construction starts and a 1.8 percent increase in residential housing investment in 2011.[6] The National Association of Home Builders forecasts a 42 percent increase in residential construction starts between 2011 and 2012, from 615,000 to 873,000.[7]

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[2] See Heintz, James, Pollin, Robert and Heidi Garrett-Peltier, *How Infrastructure Investment Support the U.S. Economy: Employment, Productivity and Growth*, Political Economy Research Institute, University of Massachusetts Amherst, January 2009.

[3] CEA, *The Job Impact of the American Recovery and Reinvestment Plan*, January 9, 2009, p. 2.

[4] Kammen, Daniel, Kapadia, Kamal and Matthias Fripp, *Putting Renewables to Work: How Many Jobs Can the Clean Energy Industry Generate?*, Energy and Resources Group, University of California at Berkeley, April 13, 2004, p. 3.

[5] Department of the Treasury with the CEA, *An Economic Analysis of Infrastructure Investment*, October 11, 2010, p.1.

[6] S&P, p. 4.

[7] A start is defined as excavation (ground breaking) for the footings or foundation of a residential structure. For a multifamily structure, all units are counted as started when the structure is started. NAHB/Housing Economics, April 2011.

In March 2011, public and private investment in the construction of residential and commercial structures totaled over $300 billion for the previous 12 months.[8] This economic activity stimulates other sectors of the economy. Table 2 shows that every $1 of spending on residential construction, utility and transportation infrastructure or commercial construction generates roughly $3 of economic activity throughout the economy.

Construction spending also generates large numbers of jobs. As shown in Table 3, for each $1 billion spent in new residential construction in the United States, over 10,000 new jobs are created directly and indirectly (i.e., in industries that support construction activity).[9] An additional 5,700 jobs are created through induced effects, meaning the economic activity resulting from increased earnings generated by the direct and indirect economic activity. Thus, in total every $1 billion of residential construction generates around 16,000 jobs. Spending on commercial and institutional facilities such as shopping centers, schools, office buildings, factories, libraries and fire stations has a somewhat larger job-creation effect, at around 18,000 jobs per $1 billion of spending.

Between 1987 and 2007, public spending on transportation and water infrastructure as a percentage of GDP remained steady between 2.3 and 2.6 percent.[10] In 2009, the federal government spent $39 billion on new highway infrastructure.[11] On balance, government spending on highway construction has increased during the past 30 years in real terms.[12] Not only are investments in these kinds of infrastructure critical to quality of life throughout the nation,[13] the multiplier effect on job creation resulting from such investment is substantial. In March 2011, the value of transportation and water infrastructure put in place amounted to roughly $160 billion. As shown in Table 3, every $1 billion in transportation and water infrastructure construction creates approximately 18,000 jobs total.

Renewable energy is an example of an emerging sector of the economy that also relies on discharge permits. The United States spends 0.3 percent of its GDP on the production of clean technologies.[14] The renewables industry, however, has been expanding at a rate of 28 percent per year since 2008.[15] Further, in its 2011 release of the *Annual Energy Outlook*, the U.S. Energy Information Administration forecasts that cumulative additions to electricity generating capacity[16] from renewable sources will exceed 20,000 megawatts

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[8] See Table 1.

[9] Direct and Indirect Effects.

[10] CBO, *Public Spending on Transportation and Water Infrastructure*, November 2010.

[11] CBO, *Spending and Funding for Highways*, January 2011.

[12] *Ibid.*

[13] See for example, Dalenberg, Douglas R. and Partridge, Mark D., "The Effects of Taxes, Expenditures, and Public Infrastructure on Metropolitan Area Employment," *Journal of Regional Science*, Vol. 35, No. 4, 1995, pp. 617-640.

[14] Associated Press, "China Leads Push to Go Green," *New York Times*, May 8, 2011, accessible: http://www.nytimes.com/2011/05/09/business/energy-environment/09clean.html?scp=2&sq=renewable%20energy%20gdp&st=cse.

[15] *Ibid.*

[16] Net Summer Capacity.

by 2020.[17] With fixed costs ranging from roughly $15 to $400 per kilowatt for renewable generation plants,[18] projected near-term future spending on infrastructure for renewables will be substantial.

Table 1. Annual Value of Public and Private Construction Put in Place, as of March 2011[1]

Type of Construction	($'m)
Residential Buildings	237,757
Commercial Buildings and Structures[2]	81,560
Health Care Institutions	39,448
Educational Institutions	80,764
Public Safety Institutions[3]	10,795
Transportation Infrastructure[4]	122,574
Communication Infrastructure	17,387
Power and Electric Infrastructure[5]	81,618
Sewage, Waste and Water Supply Infrastructure[6]	37,427
Total Construction[7]	*768,899*

[1] The annual value is calculated as the unadjusted Census survey estimate of new construction put in place during March 2011 multiplied by 12 and seasonally adjusted.
[2] Includes lodging and office.
[3] Includes correctional and fire/safety structures.
[4] Includes air, rail and water travel as well as highway and street-related infrastructure.
[5] Includes electric transmission and pipelines.
[6] Includes sewage and waste treatment and storage facilities as well as water supply treatment and storage facilities.
[7] The categories listed here do not add up to total construction because some categories have been omitted.
[8] March 2011 numbers are preliminary.

Source: US Census Bureau, *Value of Construction Put in Place*, March 2011.

[17] EIA, Table 9: Electricity Generating Capacity Reference Case, *Annual Energy Outlook 2011*, April 2011.
[18] EIA, *Updated Capital Cost Estimates for Electricity Generation Plants*, November 2010.

Table 1a. Annual Value of Public and Private Construction Put in Place, as of March 2011[1] ($'m)

Type of Construction	Private	Public
Residential Buildings	229,065	8,692
Commercial Buildings and Structures[2]	65,770	15,167
Health Care Institutions	29,111	10,337
Educational Institutions	12,301	68,463
Public Safety Institutions[3]	n/a	10,658
Transportation Infrastructure[4]	9,043	113,408
Communication Infrastructure[5]	17,334	n/a
Power and Electric Infrastructure	70,139	11,479
Sewage, Waste and Water Supply Infrastructure[6]	n/a	36,272
Total Construction[7]	*476,111*	*292,788*

[1] The annual value is calculated as the unadjusted Census survey estimate of new construction put in place in March 2011 multiplied by 12 and seasonally adjusted.
[2] Public does not include lodging as it is not broken out separately but included in total.
[3] Not broken out separately for the private sector but included in the total.
[4] For private, Transportation Infrastructure spending does not include highway and street-related infrastructure as it is not broken out separately, but included in the total.
[5] Not broken out separately for the public sector but included in the total.
[6] Not broken out separately for the private sector but included in the total.
[7] The categories listed here do not add up to total construction because some categories have been omitted.
[8] March 2011 numbers are preliminary.

Source: US Census Bureau, *Value of Construction Put in Place*, March 2011.

Table 2. Output Impacts of $1 Spending in the US for Select Economic Activities

Area of Economic Activity	Corresponding IMPLAN Sector		Direct Effect[3]	Indirect Effect[4]	Induced Effect[5]	Total Effect
	Sector	Description				
Construction of Commercial and Institutional Structures[1]	34	Construction of new nonresidential commercial and health care structures	$1.00	$0.84	$1.16	$2.99
Construction of Utility, Energy and Transportation Infrastructure[2]	36	Construction of other new nonresidential structures	$1.00	$0.88	$1.15	$3.03
Construction of New Residential Housing Structures	37	Construction of new residential permanent site single- and multi-family structures	$1.00	$1.01	$1.00	$3.01

[1] Includes commercial development and public works such as schools, libraries and fire stations
[2] Includes renewable energy projects, pipeline and electric transmission and transportation infrastructure such as roads and rail
[3] The direct effect captures the initial change in economic activity resulting from the new investment
[4] The indirect effect reflects new economic activity that is stimulated by the direct investment in industries that supply inputs to the sector of initial change
[5] The induced effect captures the economic activity that results when the increased earnings generated by the direct and indirect economic activity is spent on local goods and services
Source: IMPLAN version 3

Table 3. Employment Impacts of $1 Billion Spending in the US for Select Economic Activities

Area of Economic Activity	Corresponding IMPLAN Sector		Direct Effect[3]	Indirect Effect[4]	Induced Effect[5]	Total Effect
	Sector	Description				
Construction of Commercial and Institutional Structures[1]	34	Construction of new nonresidential commercial and health care structures	7,843	3,624	6,591	18,057
Construction of Utility, Energy and Transportation Infrastructure[2]	36	Construction of other new nonresidential structures	7,400	3,912	6,550	17,862
Construction of New Residential Housing Structures	37	Construction of new residential permanent site single- and multi-family structures	5,103	5,136	5,718	15,957

[1] Includes commercial development and public works such as schools, libraries and fire stations.

[2] Includes renewable energy projects, pipeline and electric transmission and transportation infrastructure such as roads and rail.

[3] The direct effect captures the initial change in economic activity resulting from the new investment.

[4] The indirect effect reflects new economic activity that is stimulated by the direct investment in industries that supply inputs to the sector of change.

[5] The induced effect captures the economic activity that results when the increased earnings generated by the direct and indirect economic activity is spent on local goods and services.

[6] Employment impacts are given in full-time equivalent jobs, *i.e.*, each job is equivalent to 2,080 hours of work.

Source: IMPLAN version 3

3. Direct Economic Impacts of EPA's After-the-Fact Veto

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.

Permit Uncertainty and the Hurdle Rate

The decisions to undertake an investment in a project can be considered as a comparison of the benefit-cost ratio of the project to a hurdle rate. Letting B denote the present value of net benefits from the project and C denotes the investment cost, the investment condition is to undertake the project when

$$\frac{Benefit}{Cost} > 1 + hurdle\ rate.$$

The hurdle rate represents the expected rate of return a firm requires on its investment. When uncertainty exists on the future benefits and cost of a project, firms and public agencies often use risk-adjusted hurdle rates. For private firms, hurdle rates of three or four times the cost of capital are common (Summers, 1987). For government agencies, with a lower cost of capital and less risk aversion, hurdle rates are typically lower, but are usually well in excess of 1.

It is especially common for firms and public agencies to select high hurdle rates when engaging in a project that involves irreversible investment. In this case, high hurdle rates emerge through inertia as decision makers are forced to trade-off the possibility of making an error in an immediate investment decision against the opportunity cost of delaying the investment. The optimal timing of investment in this case would occur when the expected benefit foregone over the interval before the investment is made exceeds the (probability-weighted) downside losses from a wrong investment. Under a present value criterion, the hurdle rate reduces to the discount rate, which is denoted here by r.

In uncertain investment settings with irreversible investment, Pindyck (1982, 1991) and Dixit (1992) characterize the optimal timing of an investment as the tangency between two curves; one describing the value of investing and the other describing the value of waiting. The equation for the value of investing is based directly on present value calculations: the value of an investment is positive if the discounted present value of expected returns exceeds the present value of the sunk, irreversible investment cost, C. The expression for the value of waiting is determined according to the value of the option to delay investment from the present period to subsequent periods. Doing so allows the firm an opportunity to acquire relevant market information over time, which reduces downside risk. The necessary and sufficient conditions for an optimal investment decision are the so-called "value-matching condition" and "smooth-pasting condition," effects that are described in Dixit and Pindyck (1994).

Abel (1983) shows that greater uncertainty over future market outcomes delays investment in situations where investments are irreversible. This outcome is a common theme in the early literature on quasi-option value (Arrow and Fisher, 1974; Henry, 1974; and Conrad, 1980), and the parallels between this literature and the more recent literature on investment under uncertainty have been demonstrated by Fisher (2000). It is also true for the case of uncertainty over future regulatory actions.

In the context of an investment decision, delaying investment essentially means reducing the level of investment in any given period. Consider a mine where the cost of extracting ore is \$40/ton. With permit certainty, and considering the irreversible nature of investment in the mine, suppose the mine the hurdle rate test if the market price of ore were \$50/ton. Market prices fluctuate and it may take some time for the price to hit this trigger point, but once it is achieved, the mine owner will commence investment. If the

target price increases to \$55/ton, it is less likely that the market price of ore will reach this new, higher level, and investment is delayed, meaning that there is less investment expected in any given period.

It is demonstrated in the appendix to this report that an increase in the threat of permit revocation increases the hurdle rate, thereby delaying investment. The reason for this outcome is twofold. First, as in Abel (1983), delaying investment is valuable because market returns can be earned on financial capital during each period of delay, and this "outside option" is more valuable to firms the more volatile the expected future market returns from the project in relation to returns on the outside asset. Second, and quite unique to the present setting, delaying investment is valuable under the threat of permit revocation because delaying investment reduces the likelihood of stranded capital. This effect is strong --even in the case of small changes in the revocation probability-- as stranded capital can have substantial implications on the rate of return of firms relative to capital that simply earns below-market returns in response to adverse market outcomes. For these reasons, increasing the threat of permit revocation raises the hurdle rate that investors require to engage in projects, delaying investment.

The possibility of permit revocation has highly pernicious effects on investment. Investment, in some cases, is not only delayed, but entirely deterred. Indeed, under various circumstances in which investment would take place absent the threat of permit revocation, investment is deterred, and this is true even for extremely small probabilities of having a permit revoked. The reason is that firms cannot directly control the probability of having a permit revoked when revocation is not based on the firm's own compliance, and this fact introduces a new source of risk that makes investing in sectors of the economy that rely on discharge permits relatively unattractive. To better understand the deterrence effect of permit revocation on new investment, consider the effect of a small probability of revocation represented by the variable p. Taking p to represent the expected annual probability that a discharge permit is revoked, the benefit-cost ratio (derived in the Appendix) of an investment with an expected annual net benefit of \$$B$ and an irreversible one-time capital investment level of \$$K$ is

$$\frac{Benefit}{Cost} = \frac{B}{rK}\left(\frac{r(1-p)}{(r+p)}\right).$$

First consider the case in which discharge permits are certain and can be relied on by project proponents. In this case, the net present value of the benefit stream from the project is B/r and the initial capital outlay for the project is K. These terms, which appear to the left of the term in brackets, represent the standard benefit-cost ratio used in studies of irreversible investment (Dixit and Pindyck, 1994).

Now consider the distortion to the benefit-cost ratio of new investment projects under the threat of permit revocation. The term in brackets is the distortion to the benefit-cost ratio created by this threat. When $p = 0$, the distortion vanishes and the benefit cost ratio returns to the market value in standard case. Notice that this term is concave in the threat of permit revocation: that is, small changes in the threat of permit revocation in

environments with little regulatory threat have larger impacts on investment decisions than small increments in the revocation probability at higher frequencies of government intervention.

An important implication of this result is that small changes in the probability that discharge permits are revoked have large effects on investment incentives even when revocation is infrequent in practice. To see this result, consider the magnitude of the distortion to investment incentives (the term in the brackets of the equation above) in the case of a 5% discount rate.

At a 5% rate of discount ($r = 0.05$), if investors expect a 1% chance per year of permit revocation, the expected benefit-cost ratio of projects involving discharge permits decreases by 17.5%. That is, $\frac{.05(0.99)}{(.06)} = 82.5$ in the term reflecting the regulatory distortion above. If an observed regulatory action subsequently causes investors to expect a 2% chance per year of having a discharge permit revoked, the expected benefit-cost ratio of projects involving discharge permits decreases by 30%, and, if it turns out investors expect a 5% chance per year of having a discharge permit revoked, the expected benefit-cost ratio of projects involving discharge permits decreases by 52.5%. **Thus, small changes in the threat of permit revocation can lead to dramatic reductions in private investment.**

It should also be noted that the possibility of revocation has the largest deterrent effect on large projects. This effect is independent of the fact that large projects are the most likely to be controversial and have a higher chance of having their discharge authorization revoked. Large projects by definition have a higher level of capital outlay than smaller projects. Permit revocation increases the downside risk associated with a project, as revocation results in some level of stranded investment. This principle is demonstrated formally in the appendix,

To summarize this mainly conceptual discussion, raising the possibility that discharge permits can be revoked reduces investment incentives in two essential ways: (i) revoking permits raises hurdle rates among private investors; and (ii) revoking permits reduces the expected benefit-cost ratio of new projects. These effects will dampen investment rates in industries that rely on Section 404 permits, both by delaying and by deterring new projects from being built.

Project Financing

Another issue related to the effect of permit revocation on investment relates to capital formation. It is common for both private and public projects to be debt financed. In this case, corporations and governments raise revenue by issuing bonds. Though some investors have developed their own models for measuring the probability that the borrower will default, there are three principal rating services that have developed their own corporate and government bond ratings: Moody's, Standard & Poor's and Fitch.

Debt ratings are based on a combination of quantitative and qualitative factors that each rating agency considers to estimate the probability of a bond defaulting payment. Of particular relevance to the EPA's actions is that rating agencies typically consider regulatory risk as a principal consideration in its bond ratings:

> The analysis of credit risk may include, for example, business risk and financial risk in the case of rating a corporation or financial institution, or geopolitical risk in the case of a sovereign government. When assessing structured finance issues, the broad fundamental areas we typically consider include: asset credit quality, legal andregulatory risks, the payment structure and cash flow mechanics, operational and administrative risks, and counterparty risk (Standard and Poor's, 2010).

Increased regulatory risks could thus lower a corporation's or government's credit rating. This circumstance in turn could make it much more expensive to access capital.

It is possible that some project developers will be unable to obtain financing due to the increased risk of their investment. The practice of a bank that is unwilling to lend money, even when the borrower is willing to pay higher interest rates, is called credit rationing. There are multiple circumstances that can lead to credit rationing, for example a shortage of credit or a temporary, exogenous shock to the credit market. But, Stiglitz and Weiss (1981) show that credit rationing could be an equilibrium outcome even without a credit shortage.

Land Markets and Incidence of Regulation

Land is an asset that has a fixed location. Regulation that affects the returns to land ownership in defined areas thus has the potential to alter the equilibrium price of land. At present, there are over 100 million acres of land in the contiguous United States that contain wetlands and other waters subject to regulation under the Clean Water Act. Many more acres are within the drainage of waters of the United States and thus potentially come under the jurisdiction of the Army Corps of Engineers.

In a competitive land market, land prices reflect the discounted value of the returns earned from dedicating land to its highest and best use (Capozzaand Helsley, 1998). For undeveloped land, this sum is typically equal to the value of rents when the land is in an undeveloped condition, plus the amount developers are willing to pay for land when they initiate their project.

Regulation that lowers the profits from future development will be capitalized into current land values, meaning that the equilibrium market price of land will be lower as a result. Thus, the EPA's action will, to a degree determined by local market conditions, be borne by landowners in areas containing wetlands and other waters of the United States.

4. 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.

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6. Appendix

This appendix develops the model of expected investment returns under the threat of permit revocation discussed in the report.

Let $c_t(q)$ denote the cost of investment in a project of size q at time t. Investment costs are considered to be divided into an initial and irreversible expenditure at time $t=0$ (the date of project approval), which is denoted K, and a series of recurring costs associated with project operation in the subsequent periods $t=1,\ldots,T$, denoted by the constant c. The present value of cost for a project of known size is

$$c_t = K + \sum_{t=1}^{T}\left(\frac{1}{1+r}\right)^t c\,, \tag{1}$$

where r is the discount rate.

The expected return from the project is positive, in the sense that the expected benefit to the operator exceeds the sum of investment cost and recurring operational costs of the project. Let B denote the expected net benefit of the project in each period of operation, which is defined as the gross benefit less operational costs, c. For a project with an operating lifetime of T periods, the present value of the net benefit of the project is

$$NPV_0 = \sum_{t=1}^{T}\left(\frac{1}{1+r}\right)^t B - K\,, \tag{2}$$

where costs in equation (1) are subsumed into the net benefit function. Equation (2) represents the standard present value criterion for evaluating projects.

Now suppose the regulator introduces threat of permit revocation. If firms perceive the likelihood of having their permit revoked in any given period to be p, then the net present value of a project with an operating lifetime of T periods is given by

$$NPV_0 = \sum_{t=1}^{T}\left(\frac{1-p}{1+r}\right)^t B - K\,. \tag{3}$$

Noting that the factor $(1-p)/(1+r) < 1$, the net present value can be expressed as

$$NPV_0 = \frac{(1-p)B}{r+p}\left(1-\left(\frac{1-p}{1+r}\right)^T\right) - K\,. \tag{4}$$

In the case where a permit has no explicit terminal time, T, it is convenient to treat the discounted net return of the project as the present value of an infinite annuity from the investment. In this case, equation (4) can be expressed as

$$NPV_0 = \frac{(1-p)B}{r+p} - K. \tag{5}$$

Notice that equation (5) reduces to the conventional formula used by Pindyck (1991) and Dixit (1992) for the present value of an infinite annuity with expected return B/r.

Next consider the continuation value, or net payoff of an investment made in period t=1 as opposed to period t=0. To calculate the net payoff from an investment in period t=1, consider a discrete probability model of the form examined by Dixit and Pindyck (1994) and Fisher (2000) in which the expected net benefit function is given by

$$B = V\left[q(1+u) + (1-q)(1-d)\right].$$

In this expression, q is the probability of a high draw from the value distribution, in which case the net value of the project is $(1+u)V$, and $1-q$ is the probability of a low draw from the value distribution, in which case the net value of the project is $(1-d)V$. Thus, if V is defined as net benefit, the value B in equation (5) can be interpreted as the contemporaneous expected net benefit of the project at time t=0.

To calculate option value from delaying investment until time t=1, suppose the true value of the project is revealed at time t=1 as being either $V(1+u)$ or $V(1-d)$ and that the continuation value of the project is driven by high-draws from the value distribution. In this case, when waiting until time t=1 to make the investment decision, the investment is "in the money" only if a high draw is revealed. Under circumstances in which the project is worthwhile in both states of nature, there would be no option value to delaying an irreversible investment and investment would always take place. Irreversibility of investment would not impact the hurdle rate in this was the case.

The expected continuation value for the project must satisfy (in present value terms of period t=0):

$$\left(\frac{1}{1+r}\right)E_0(F_1) = \frac{q}{1+r}\left[\frac{V(1+u)(1-p)}{(r+p)} - (1-p)K\right]. \tag{6}$$

Notice that, by delaying investment it is possible that the discharge permit is revoked between periods t=0 and t=1. The conditional probability of investment at time t=1 is $q(1-p)$.

The value of the option to delay investment is given by

$$OptionValue = \left(\frac{1}{1+r}\right)E_0(F_1) - NPV_0. \tag{7}$$

The formula for option value in equation (7), which is analogous to a call option on a share of stock (Dixit and Pindyck, 1994), is the difference between the continuation value and the net present value of investment from the time t=0 perspective.

Substitution of terms from equations (5) and (6) and simplifying gives

$$OptionValue = \frac{-(1-p)}{(1+r)(r+p)}\left[rB + (1-q)(1-d)V\right] + K\left(1 - \frac{q(1-p)}{1+r}\right)$$

The option value of delaying investment for one period is the sum of two terms. The first term is the foregone benefit from development in period t=0. The term in the square brackets sums the lost interest on expected earnings during the period in which investment is delayed and earnings in the non-investment state associated with a low draw. This term is negative. The second term represents the capital savings from delaying investment. This term is positive, not only because of the one period delay in investment but also because with probability p the permit was revoked during the period in which investment is delayed, stranding capital in the case of early investment. If the first term is larger in magnitude than the second term, for instance if the capital investment, K, is small or if capital is fully recoverable through re-sale in a salvage market, then there is no option value and consequently no return for delaying the investment.

In many settings, capital investment levels are sufficiently large that delaying investment creates a positive option value for firms. This also delays social benefits from arising that are indirectly related to the investment, for instance employment and induced local spending. Introducing the potential for permit revocation compounds this problem. To see this, notice that the option value of delaying investment is larger for larger values of the revocation probability, p:

$$\frac{\partial}{\partial p} OptionValue = \frac{\left[rB + (1-q)(1-d)V\right]}{(r+p)^2} + \frac{qK}{1+r} > 0$$

The implication is that increasing the threat of permit revocation delays investment from taking place. Positive option value increases the hurdle rate that investors require to engage in projects. A greater threat of permit revocation raises the hurdle rate, delaying investment in cases where investment is not deterred.

The possibility of permit revocation has pernicious effects on investment. Under various circumstances where investment would have taken place absent the threat of permit revocation, investment is deterred entirely. To see this, it is helpful to convert net present value in equation (5) into a benefit-cost ratio.

$$\frac{B}{rK}\left(\frac{r(1-p)}{(r+p)}\right), \tag{8}$$

where the net present value of the future benefit stream from operating the project in an environment without threat of permit revocation is B/r and the initial capital outlay for the project is K. The term in brackets is the distortion to the benefit-cost ratio created by the threat of permit revocation. If $p = 0$ the distortion vanishes and the benefit cost ratio returns to the market rate.

Notice that equation (8) is concave in the threat of permit revocation. This implies that small changes in the probability that discharge permits are revoked for reasons unrelated to compliance greatly reduce investment incentives. To see this, consider the magnitude of the distortion to investment incentives (the term in the brackets of equation (8)) in the case of a 5% discount rate.

For $r = 0.05$, if investors expect a 1% chance per year of permit revocation, the expected benefit-cost ratio of projects involving discharge permits decreases by 17.5%; however, if investors expect a 5% chance per year of permit revocation, the expected benefit-cost ratio of projects involving discharge permits decreases by 52.5%. Accordingly, small changes in the threat of permit revocation can lead to dramatic reductions in private investment.

Phil Brna/R7/FWS/DOI
09/23/2010 11:14 AM

To Francas_Mann@fws.gov
cc Ann Rappoport/R7/FWS/DOI@FWS
bcc
Subject Pebble and 404c

I spoke with Phil North. He has now briefed people in EPA all the way up to the assistant administrator. He believes EPA leaders have decided to proceed and they are just deciding when. They say in the next "couple of weeks" but it will probably be after the November election. Trout Unlimited has been talking with many congress people and agency folks at the DC level about this as well. He is sending me contact info for the TU person so we can talk with them. I want to find out who they are talking with at the Service and DOI. Also, Bristol bay commercial fisherman have sent a letter to over 150 fishing groups in the lower 48 and they are getting support to push 404c and oppose pebble. So far he thinks senators and representatives from Washington and Oregon are on board.

Phil says DC is opposed to his plan to do a year of outreach before they make a decision. He thinks they are just going to do this in accordance with the regs and as quickly as they can.

He thinks it is important we proceed with getting regional support. If we get that, Jeff should be talking with Rowan and the group in DC. Lets go ahead and schedule a short briefing for John, Steve, Jenifer and maybe Laverne if we can. If they support going to Jeff, we then need to call Marcia Coombs and ask for a briefing by Phil. We should ask her to come and we definitely want NPS (and maybe Pamela Bergmann) there

FYI, one of my main fishing buddies is an ARD at BLM and he says the new RD is a big fly fisherman and just coming up from Idaho where he has seen the devastation of mining. We should think about asking other RDs like BLM and USGS to participate in the briefing. Something to ask Laverne and company

When do you think we can schedule the first meeting? I will provide the Pebble layout showing road, port and mine as we know it. I also have a map showing 792.6 square miles of mining claims around Pebble

This is going to happen and its going to get bloody I am looking forward to it!

Phil Brna
Fish and Wildlife Biologist
Conservation Planning Assistance Branch
US Fish and Wildlife Service, Anchorage Field Office
605 W. 4th Ave, Room G-61
Anchorage, AK 99501
phone: (907) 271-2440
fax: (907) 271-2786
email: phil_brna@fws.gov

Chultna and Pebble Retreats
Phil North To: Michael Szerlog, Marcia Combes 08/17/2009 02:04 PM
Cc: Hanh Shaw, John Pavitt

From: Phil North/R10/USEPA/US
To: Michael Szerlog/R10/USEPA/US@EPA, Marcia Combes/R10/USEPA/US@EPA
Cc: Hanh Shaw/R10/USEPA/US@EPA, John Pavitt/R10/USEPA/US@EPA

Michael and Marcia,
It looks like the team meetings for these two mines will happen, pending availability of critical team members. We will try to take advantage of the Alaska team members being in Seattle for the Regional Mining Team Retreat on September 18. The NPDES program is retreating on the 17th so we are proposing the two mine teams (which are all the same except for John Pavitt) meet on the 16th. I wanted to extend an invitation to the two of you. Each mine will be discussed for up to half the day.

The draft agenda is:

Overview of parts of the mine - Hanh/John
Quick review of EPA responsibilities
    NEPA issues - Hanh (Hanh on Pebble?)
    NPDES issues - Cindi
    404 Issues - Phil

Quick review of studies relevant to the above.
Discussion about weaknesses, missing information and fatal flaws.
Discussion about the EPA position on all of the above.
Discussion about the appropriate action in response to our position.

As you know I feel that both of these projects merit consideration of a 404C veto. We will discuss this from a technical perspective and staff perspective at these meetings.

Phil

Phillip North
Environmental Protection Agency
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"To protect your rivers, protect your mountains."

EPA-3321

Phil North/R10/USEPA/US
06/25/2010 01:27 PM

To king2rick
cc gparker
bcc
Subject Visit by Dennis McLerran

Hi Rick,
Sorry for the delay in getting you this number. I have been on the phone on this same topic since we talked.

Kendra Tyler is the Regional Administrator's (Dennis McLerran) secretary her phone number is 206-553-0041.

As an introduction: I am an ecologist in the Aquatic Resources Unit (ARU) in the Office of Ecosystems, Tribal and Public Affairs. I was assigned to work on the Pebble mine about five years ago. I have been spending a lot of my time on it. It is my group ARU that has the authority under Clean Water Act 404(c). It is my group that is doing the technical evaluation. If Mr. McLerran visits Bristol Bay this summer, I hope to go along.

I have a fairly long personal history in Alaska including some time in Bristol Bay. Starting in 1975, before college, I worked for my uncle on salmon tenders around Alaska. He had a fish buying station in South Naknek so that is where I spent the early part of every summer. Then we went on to Kodiak, Prince William Sound and Cook Inlet. I fished crab in the Bering Sea one year, but that was the year of the crash. It was on to college for me after that.

I am now a fish biologist by training and, having attended college on the west coast, salmon has always been the focus. I have worked for EPA in Alaska since 1989, with a few years at the Fish and Wildlife Service (FWS) in California before that. While at FWS my job was to figure out how much water to release from dams to maintain the remnant salmon in California streams. It is much more satisfying to work to maintain healthy salmon runs.

Tribes have a special role in Pebble issues because of government-to-government relations. EPA takes that very seriously. I encourage you to develop that relationship as much as you can. I look forward to talking with you more in the future.

Phil

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"To protect your rivers, protect your mountains."

EPA-3243

Phil North/R10/USEPA/US
08/12/2010 02:45 PM

To "Peter Van Tuyn"
cc
bcc
Subject Re: Bristol Bay Native Corporation 404c letter

Hi Peter,
We have been discussing 404(c) quite a bit internally at all levels of EPA. This letter will certainly stoke the fire. I look forward to talking with you in the near future.

Phil

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"To protect your rivers, protect your mountains."

"Peter Van Tuyn" Phil, 08/12/2010 01:35:2

From: "Peter Van Tuyn" [redacted]
To: Phil North/R10/USEPA/US@EPA
Date: 08/12/2010 01:35 PM
Subject Bristol Bay Native Corporation 404c letter

Phil,

Attached to this email please find a letter from the Bristol Bay Native Corporation requesting that EPA use its authority under Clean Water Act Section 404(c) to prohibit the discharge of mine waste material into certain lands in the watershed of Bristol Bay. Pebble Limited Partnership is proposing a massive mine in this area, and BBNC believes that the proposed mine has an unacceptable risk of adverse impacts on critical area resources. I also attach a press release on the matter.

Please let me know if you have any questions, and I look forward to catching up with you in the coming days.

Best,
Peter Van Tuyn

Peter Van Tuyn
Bessenyey & Van Tuyn, L.L.C.
310 K Street, Suite 200
Anchorage, AK 99501

EPA to Seek Service Support When They Use Section 404(c) of the Clean Water Act

PURPOSE OF AFWFO/RO OCTOBER 1, 2010 DISCUSSION

To inform Regional Office management about the status of the Environmental Protection Agency's (EPA) involvement in the potential Pebble Mine development and EPA's anticipated request for support from Region 7 of the U.S. Fish and Wildlife Service (Service).

SUMMARY OF LIKELY ACTION

The U.S. Environmental Protection Agency (EPA) is seeking Service support as they initiate a formal process to issue a determination that the waters of the U.S., including wetlands, within the potential Pebble Mine action area are unsuitable for the placement of fill material. This action would be conducted under the authority of Section 404(c) of the Clean Water Act (CWA), and would effectively prevent the project from receiving the necessary federal permits to develop a mine in the Nushagak and Kvichak watersheds. The CWA authorizes the U.S. Army Corps of Engineers (Corps) or an approved state to issue permits for discharges of dredged or fill material at specified sites in waters of the United States. Section 404(c), however, authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

As of last week, it is our understanding that EPA has tentatively decided to initiate the 404(c) process but they have not yet determined when this will occur. It is likely a final decision will be made after the November election. EPA Alaska staff have briefed all the way up to just below the EPA Administrator. Trout Unlimited and Alaskans from the Bristol Bay area have been visiting lawmakers in Washington D.C. (see Anchorage Daily News article dated 9/24/10). Originally EPA was contemplating a 404(c) action for the area associated with Pebble, but they are now considering a much larger area in southwest Alaska.

BACKGROUND ON 404(C)

Under Section 404 (c), EPA may exercise a veto over Corps' or a state's authorization of a site for the discharge of dredged or fill material. Under Section 404(c), EPA may also prohibit or otherwise restrict the specification of a site to be filled before a permit application has been submitted to, or approved by, the Corps or a state. In effect, Section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued. Because Section 404(c) actions have mostly been taken in response to unresolved Corps permit applications, this type of action is frequently referred to as an EPA veto of a Corps permit.

An EPA Regional Administrator initiates a 404(c) action if he or she determines that the impact of a proposed permit activity is likely to result in:

- significant degradation of municipal water supplies (including surface or ground water),
- significant loss of or damage to fisheries, shellfisheries, wildlife habitat, or recreation areas.

EPA has used its Section 404(c) authority very sparingly, issuing only 12 final veto actions since 1972 (see attachment 1 for a list of actions). A recently concluded action was Yazoo Pumps, an action that was strongly supported by the Service. Currently, there are two mines (Spruce No. 1 mine in West Virginia, and Big Branch Mine in Kentucky) which are in the preliminary phases of 404(c) determinations.

WHAT COULD FWS INVOLVEMENT LOOK LIKE?

The success of a 404 (c) determination is dependent upon the support of stakeholder groups, but a critical piece is support from the other Federal agencies that have a recognized role in the Corps regulatory process.

The EPA would take the lead by issuing a "Notice of Proposed Determination" to withdraw, prohibit, deny, or restrict use of a defined area for the placement of fill material for the Pebble Mine project. The EPA notifies the project proponent and the Corps of their intent to make a 404(c) determination, and then issues a public notice in the federal register to seek input. A public hearing is usually held. Information obtained during the public notice and the public hearing processes is then used by the EPA Assistant Administrator to make a decision to affirm, modify, or rescind the recommended determination.

Through our authorities[1], the Service in R7 could support this action by:

- providing information to the EPA Regional Administrator prior to the "Notice of Proposed Determination" to assist them as they decide whether to go forward or not. Such information would include assessments, based upon the best available data and science, about the amount of habitat to be lost; potential adverse effects on habitat and species including listed species and encompassing direct, indirect, and cumulative adverse impacts; effects of contaminants on fish and wildlife species and water quality; information on the known and documented effects of mining on water quality,
- providing formal input during the public notice and public hearing processes;
- ensure that the Service's leaders in WO are aware and supportive of this action.

WHY PEBBLE MINE?

The EPA's reasons for potentially making a 404(c) determination at the Pebble mine site are primarily related to salmon. The Service shares those concerns. Additionally, significant adverse impacts to other species, such as marine mammals, migratory birds, listed species, and their habitats, are inevitable from a development on the scale of that described for the Pebble mine. However, salmon are the heart of Bristol Bay, and much of the areas' importance relates to salmon: subsistence, commercial fishing, sport fishing, the aquatic and terrestrial ecosystem and the ecosystem of the North Pacific.

- The mine is located on a divide between the Nushagak and Kvichak River watersheds – these two watersheds produce one in eight Alaska salmon.
- Bristol Bay currently produces more salmon than any other watershed on earth, and the Nushagak and Kvichak have the lion's share of salmon runs in Bristol Bay (69%).

Bristol Bay 404(c) Discussion Matrix
HQ Briefing 9/08/2010

I. Timing	Pros	Cons
A. During the permitting process	1. Traditional process 2. Permit and NEPA processes will generate considerable information informing the decision.	1. Proponents will have spent tens of millions of dollars. 2. Little EPA involvement in determining information to be collected and analyzed. 3. If EPA vetoes the resulting permit, only that project would be prohibited, potentially setting up subsequent rounds of permitting, vetoing, etc. 4. Political backlash will be much worse after NEPA and 404 processes.
B. Proactive before permit applications	1. Preamble to the regulations expresses preference for advance 404(c) action. 2. A proactive 404(c) will provide the regulated community clarity on what can and cannot be permitted allowing for more efficient and timely development of permitted projects. 3. An advanced process can facilitate targeted information collection and better planning by project proponents. 4. Promotes sustainability goals. Can serve as a model of proactive watershed planning for sustainability. Similar to "alternative futures" watershed planning being used in Region 10. 5. Responsive to Tribal concerns.	1. Never been done before in the history of the CWA. 2. Immediate political backlash from Alaska. 3. Immediate dedication of resources, however, we would refocus work to address highest priority. 4. Litigation risk.

II. Process	Pros	Cons
A. Regulatory decision making mode – 404(c) process	1. Established legal procedure. 2. EPA control of the process and decision.	1. There is no real public discussion – public involvement is to comment then sue if they have the resources (NEPA, 404 permit, 404(c). 2. EPA would have less control of the "spin" and political debate.
B. Inclusive public discussion : 1) Address three key questions 2) Hold three public information sessions 3) Develop decision document for RA as output	1. EPA can begin the process in a neutral position, collect information, provide information to public, and building a position iteratively. 2. Starting in a neutral position can deflect political backlash. 3. Building a position iteratively by breaking the process into questions to be addressed can help build a public position and derail opposition. 4. Can involve State and Tribes upfront and work to meet their needs.	1. Possible FACA complications, however, process could be structured to alleviate those concerns. 2. Longer timeframe than just starting the 404(c) process 3. More Resources
i. As part of the 404(c) process	1. Established legal/regulatory process/framework	1. Sets precedent for future 404(c) actions. 2. Not adhering strictly to the regulation.
ii. Leading to a decision whether to initiate the 404(c) process.	1. Starts in a neutral position 2. Open and transparent process leading to a public recommendation. 3. Helps to develop a stronger record upfront. 4. Expands on Lisa Jackson's priorities – Protecting America's waters; Expanding the Conversation on Environmentalism and working for Environmental Justice; and building strong State and Tribal Partnerships	1. May have to address complications in representing 36 Tribes.

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Proposed Pebble Mine Project Alaska

Briefing for Administrator Lisa Jackson

EPA Region 10
Seattle, WA

January 13, 2010

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United States
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Presentation Overview

- Description of the proposed Pebble Mine
- Description of resources at risk
- Issues of concern
- EPA's regulatory role – current and future
- Future options to positively impact project

2

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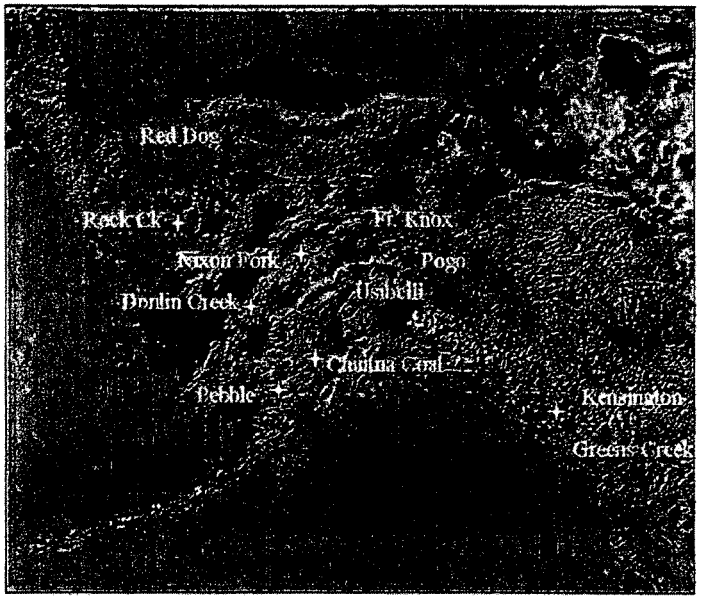
Key Messages

- Would be one of the largest mines in North America
- Located in a remote, environmentally sensitive location within the headwaters of a world class salmon fishery
- Unique, high-value Native Alaskan subsistence uses
- Project beyond the capability of current resources
- EPA has Key Regulatory Review Role

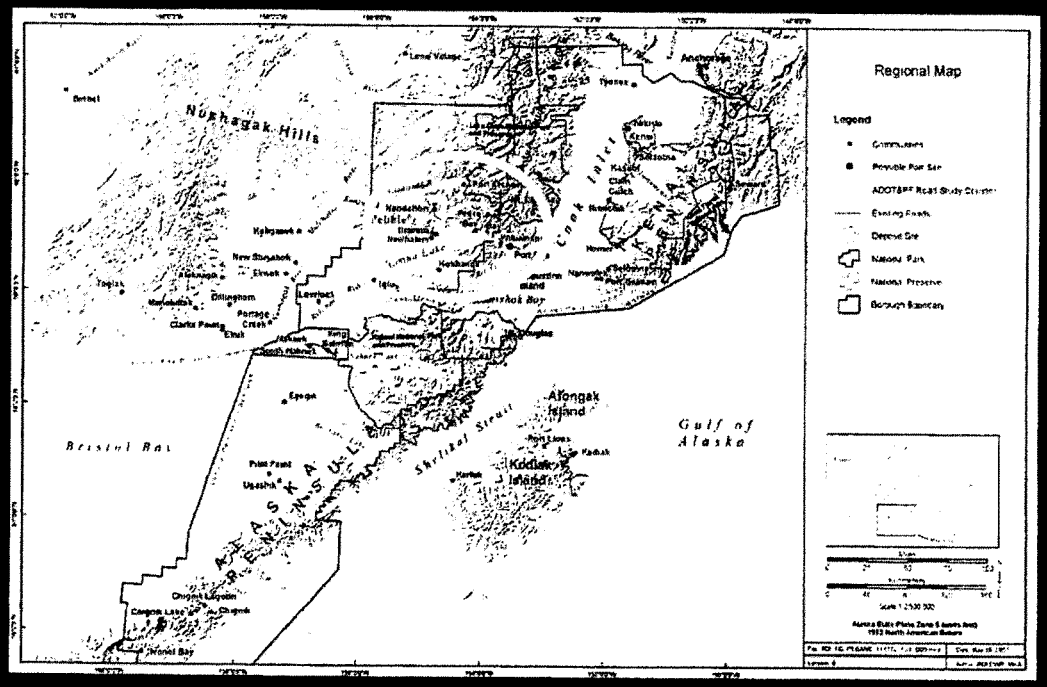
Alaska Operating and Proposed Mines

★ Producing mine

✧ Developing and major exploration projects



Pebble Location



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Proposed Pebble Mine

- Project Proponent: Pebble Partnership
  - Joint venture between Northern Dynasty and Anglo American LLC
- Land Ownership:
  - State land
  - Pebble Partnership holds mineral rights on 153 square miles
  - Proposed road would cross native allotments

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Pebble – Current Status

- Exploration
- Environmental baseline data collection
- Mine permit applications have not been submitted
- Possible submittal date – 2011?

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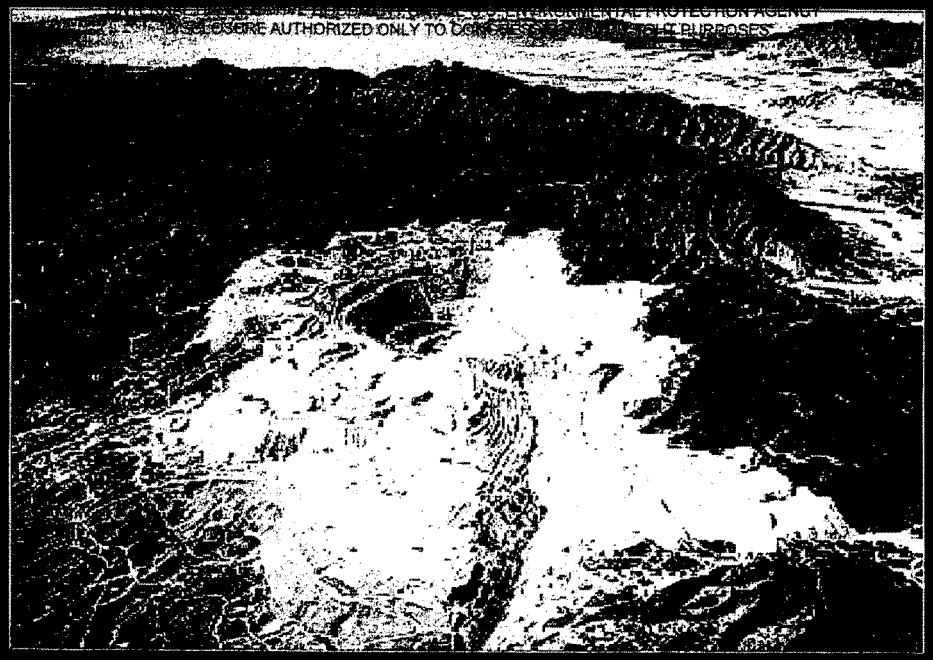
Pebble Project Proposal

- Current proposal:
  - 120,000 to 220,000 tons of ore processed/day
  - 30 + year mine life
  - Produce copper and molybdenum concentrates, gold and silver

- Project components:
  - Mine and mill
  - Access to/from the mine site (road)
  - Power



Bingham Canyon, UT

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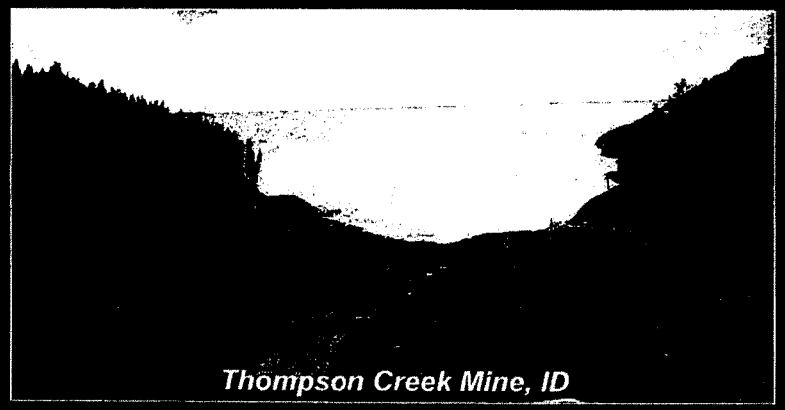
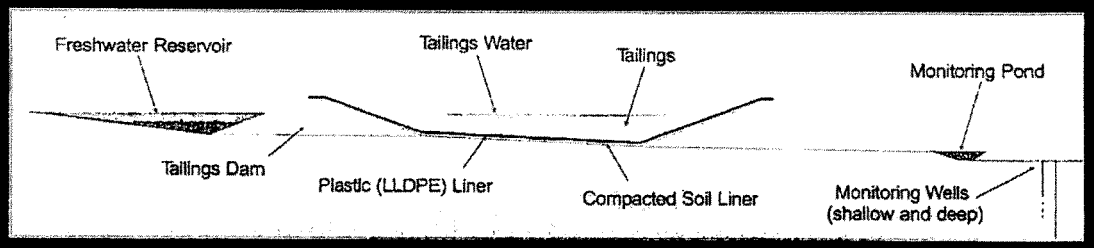
Proposed Pebble Tailings Disposal

- Tailings are ground up wastes from processing; includes solids and process wastewater.
- Amount = approx. 4.5 billion tons
- Tailings proposed to be disposed in ponds created by damming valleys.
- Approx. tailings pond size: > 700 foot-high and 6 mile long dam(s)

Tailings Impoundment





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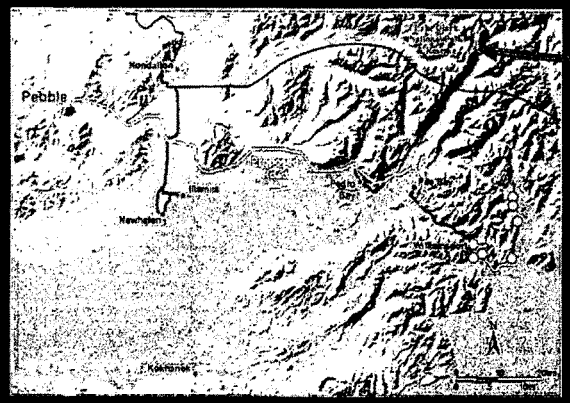
Pebble Mine Access

- Port site in Cook Inlet
- 86 to 104 mile road from port to mine site and adjacent pipelines



Lake Clark National Park and Reserve

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Resources at Risk

- Located in headwaters of pristine Bristol Bay watershed and world class fishery.
- Potential for impacts to wetlands, surface waters, aquatic resources, wildlife (caribou and moose), vegetation, ESA-listed species
- Important subsistence and traditional use area for native Alaskan communities

Surface Waters

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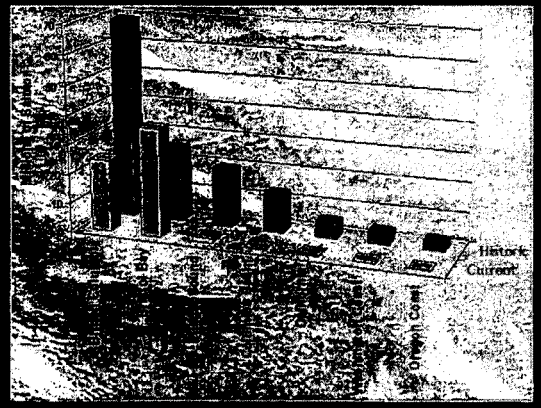
Salmon Fishery

- Nushagak and Kvichak rivers produce 13% of Alaska's salmon & 1.6 billion salmon smolts which influence the biomass of North Pacific Ocean
- Commercial value of salmon from these rivers range $30 – ~70 million annually
- In all of North America, only Bristol Bay maintains historic levels of wild salmon



Historic and Current West Coast North American Salmon Run Size

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Wetlands

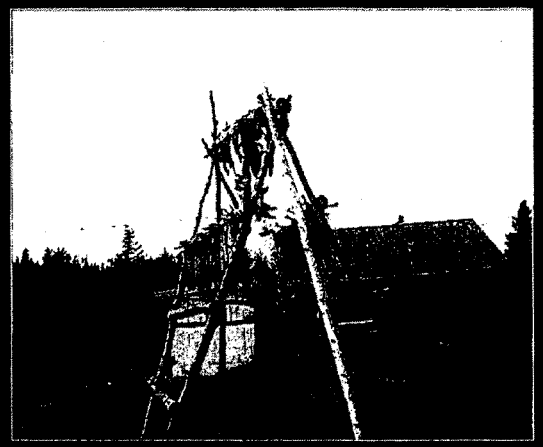
- Estimated 5,000 – 9,000 acres of wetlands impacts

Alaska Native Villages

EPA
United States
Environmental Protection
Agency

Tribal Concerns

- Important subsistence and traditional use area – salmon, caribou, berry-picking, etc.
- State NPDES authorization
- Corps as the EIS lead
- Mixed tribal viewpoints



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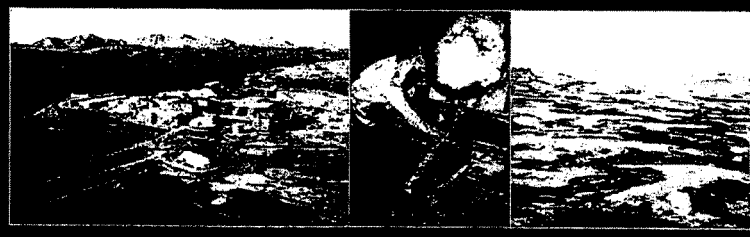
Regulatory Process & Future EPA Role



EPA Region 10
Seattle, WA

EPA
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Multiple Agencies Regulate Mining

- Federal Agencies
  - Land Management Agencies: USFS, BLM, NPS
  - EPA
  - Army Corps of Engineers
  - USFWS
  - NOAA
- State Agencies
  - Environmental Department
  - Natural Resources Department
  - Fish and Game
  - Department of Law
  - Historic Preservation Office
- Tribal Governments
- Local
  - Counties and (in Alaska) Boroughs

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United States
Environmental Protection
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Many Permits and Authorizations Required for Mining in Alaska

STATE

- Plan of Operations (DNR)
- Reclamation and Bonding (DNR)
- Waste Management Permits and Bonding (ADEC)
- Certification of NPDES and ACOE Permits (ADEC)
- Sewage Treatment System Approval (ADEC)
- Air Quality Permits (ADEC)
- Fish Habitat and Fishway Permits (ADFG)
- Water Rights (DNR)
- Right of Way/Access (DNR/DOT)
- Tidelands Leases (DNR)
- Dam Safety Certification (DNR)
- Cultural Resource Protection (DNR)
- Monitoring Plan (Surface/Groundwater/Wildlife) (DNR/DEC)
- Coastal Zone Consistency Determination (DNR)

FEDERAL

- US EPA Section 402 NPDES Water Discharge Permit
- US EPA Air Quality Permit review
- US ACOE Section 404 Dredge and Fill Permit
- US ACOE Section 10 Rivers and Harbors Act
- US ACOE Section 106 Historical and Cultural Resources Protection
- NMFS Threatened and Endangered Species Act Consultation
- NMFS Marine Mammal Protection Act
- NMFS Essential Fish Habitat
- NMFS Fish and Wildlife Coordination Act
- USFWS Threatened and Endangered Species Act Consultation
- USFWS Bald Eagle Protection Act Clearance
- USFWS Migratory Bird Protection
- USFWS Fish and Wildlife Coordination Act

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How is EPA Involved in Review and Permitting of Mining?

- National Environmental Policy Act
- Clean Water Act
- Safe Drinking Water Act
- Clean Air Act

- **EPA Does Not Regulate:**
- Exploration Activities
- Solid Wastes from mining
- Reclamation and closure
- Financial assurance

- *These are regulated by states and, on federal land, by US Forest Service and BLM*

EPA
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NEPA

- Corps of Engineers likely to be NEPA lead agency *

The EIS will assess:

- air quality
- surface water quality
- ground water quality
- wetlands
- vegetation
- wildlife
- fish & aquatic resources
- geochemistry
- geotechnical stability
- socioeconomics
- land use & recreation
- subsistence
- cultural resources
- visual resources
- health
- environmental justice
- cumulative impacts
- noise

* PLP, State, tribes, and the Corps would prefer EPA lead.

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CWA 402 NPDES Permits

- NPDES permits required for the discharge of pollutants from point sources to waters of the U.S.
- Needed for discharges from tailings ponds, mine drainage, storm water.
- EPA delegated NPDES program to AK. In Nov. 2010, AK will begin writing mining permits.

- EPA role = oversight of state

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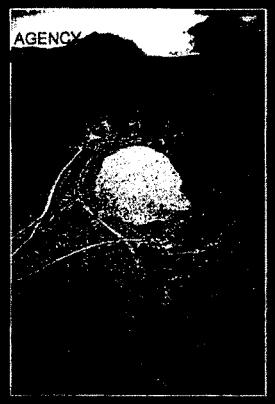
CWA 404 Wetlands Permits

- Permits issued by Corps for dredge or fill activities in wetlands and waters of the U.S
- Will be required for roads, gravel sites, tailings facility, etc.
- Corps must select least environmentally damaging alternative
- EPA can veto under 404(c)
- Tribal consultation



Kensington (AK)

Lower Slate Lake

Parallel Process

EIS Process	Federal Process	State Process	Local Process
Notice of Intent	Corps Wetlands E.O. 13175 Tribal Consultation	SHPO National Historic Preservation Act 106 Consultation	Borough Plan City Plan Tribal Village Plan
Scoping	E.O. 12898 Environmental Justice	ADFG Fish Habitat ADNR Operation Plan Reclamation Plan	
Draft EIS	USFWS/NMFS Endangered Species Act Consultation	ADEC APDES Permit Waste Management Air Quality Monitoring Plan 401 Certification	
Final EIS	NMFS Magnuson-Stevens Fisheries Management Act EFH Assessment		
Record of Decision	Federal Permit, Certification, Approval	State Permit, Certification, Approval	Local Consistency

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EPA Involvement To-Date

- Established project manager & project review team
- Review baseline environmental data & submit comments to PLP
- Coordinate with other agencies
- Site visits
- Meetings with tribes and other groups
- Summer 2010 – Tribal Mining Training in villages

EPA
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Pebble - Issues

- Technical/Scientific
  - Very large mine site and waste sites
  - Located in headwaters of world class salmon fishery
  - Potential for acid rock drainage
  - Long-term closure and financial assurance
  - Transportation risks associated with road and port traffic
- Tribal
  - Subsistence and socio-cultural impacts
  - How to effectively involve 20+ tribes in the region
- Regulatory
  - One of first new mines that will be subject to APDES
  - Loss of tribal consultation, EPA lead NEPA role

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Future Options

- Project-specific options to influence project:
  - Assign lead role in developing EIS
  - 404(c) veto either pre-emptive, during EIS, or after EIS

- Regulatory change that could influence project:
  - Change existing CWA 402/402 permitting framework that was upheld in the June 2009 Kensington Supreme Court decision (404 applies to discharge with the "effect of fill" notwithstanding otherwise applicable effluent limitation guidelines developed under CWA section 306).
  - EPA cross-office workgroup exploring options for improving CWA regulation of hard rock mining.

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Options for Improving CWA Regulation of Hard Rock Mining

- Options include:
  - Strengthening 404(b)(1) Guidelines review process & clarifying technical review factors under current approaches.
  - Revising the 2002 Fill Rule to require compliance with applicable ELGs.
  - Revising the waste treatment exclusion (WTE) to prohibit or limit use of waste treatment systems in WUS.
- High level meeting with Army/Corps on 11/20/09 to discuss options.
- Follow up meeting to be scheduled.

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EPA Workgroup Recommendation

- **Require compliance with applicable ELGs; WTE invoked on narrow case-by-case basis.**
  - Significant environmental benefit due to application of ELGs, in combination with additional scrutiny in evaluating use of WTE.
  - Continues to provide disposal options, but with additional restrictions or conditions and a more prominent EPA role in applying WTE on a case-by-case basis.

- **Implementation Considerations:**
  - All options result in rescinding EPA 2004 Mining Memo.
  - Requires narrow amendment to Fill Rule; rulemaking and/or guidance to clarify and limit WTE.
  - Essential that EPA and Army Corps coordinate effectively in this policy review; recommended approach requires joint rulemaking.
  - Timing is critical due to implications on future mining projects (like Pebble).

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

FY11 Proposed Investment: **Bristol Bay 404(c)**

Funding Gap = $312k

Activity/Proposal: Initiate the process and publish a CWA 404(c) "veto" action for the proposed permit for the Pebble gold mine in Bristol Bay, AK.

Background: EPA is on a fast track to evaluate the potential harm of a proposed gold mine to the natural resources of Bristol Bay, AK. The Bay is the largest sockeye salmon fishery on the Pacific Coast; the fishery itself is larger than the combination of all other Pacific Ocean fisheries, and provides income to residents and food to Alaskan native villages. The mine, if permitted, would be the largest gold mine in the US, and would generate six times the tailings as the current largest mine.

While resorting to exercising EPA's 404(c) authority is rare (only 12 actions since 1981), the Bristol Bay case represents a clear and important need to do so given the nature and extent of the adverse impacts coupled with the immense quality and vulnerability of the fisheries resource. Threat of impacts will also harm all other investment in Bristol Bay. Six Alaskan tribes and 14 other stakeholders have requested that EPA initiate a 404(c) veto based on their concerns that the mine would irreversibly adversely affect the fishery. Region 10 believes that additional information gathering and analysis must be completed in order to support a decision to formally initiate of 404(c). It's still possible that a veto will not prove necessary, but a decision to move forward has created the need for upfront analysis and outreach regardless.

Additional FY11 resource needs funds for travel to Anchorage and the permit site; and contractor support to conduct specific scientific/technical analysis on the characteristics of salmon resource, the ecological and economic significance of salmon, stressors and threats to watershed health, and success or failures of potential mitigative measures. This work will support a decision in June 2011 whether to proceed with the 404(c) veto. If yes, then additional resources will be needed in FY12 to issue the Recommended Determination, respond to comments, and issue the Final Determination by the summer of 2012.

Impact/Rationale: Given the magnitude of proposed project's environmental impact and the Administration's decision to proceed, we have no choice but to support this work.

Decisions to date/shortfall: Funding has already been provided for one SEE staffer in Region 10, along with $64k in FY10 funds to initiate the risk analysis. The work that EPA has already committed to (i.e., pre-404(c) activities) will require an additional $312k in the Region and HQ. Conduct of the 404(c) action itself (anticipated in FY12) will require an additional $187k.

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
NOT RELEASED OUTSIDE EPA OR PROVIDED TO CONGRESS FOR OVERSIGHT PURPOSES

Subset of OW Priorities resource gaps identified at Management Retreat		FY 11 Need Above Base	FY 12 Need Above Base	FY 11 FTE Need Above Base	FY 12 FTE Need Above Base
		Dollars in thousands			
1					
OW Priorities resource gaps identified subsequent of the Management Retreat:					
Bristol Bay	OWOW	$312.0			
Overall Total					

List of Program Areas identified as Potential Sources of Resources for Priorities:		FY 11 Redirection	FY 12 Redirection	FY 11 FTE Redirection	FY 12 FTE Redirection
		Dollars in thousands			
1					

Testimony of

Mr. Nick Ivanoff
President & CEO
Ammann & Whitney

On Behalf of the
American Road & Transportation Builders Association

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

Hearing on "EPA's Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act."

July 15, 2014

American Road & Transportation Builders Association
1219 28th Street, NW
Washington, DC 20007
(202) 289-4434

"EPA's Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act"

Testimony Presented to the Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
United States House of Representatives
July 15, 2014

Mr. Nick Ivanoff, President and CEO
Ammann & Whitney

Subcommittee Chairman Gibbs and Ranking Member Bishop, thank you for holding this hearing on "EPA's Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act (CWA)." My name is Nick Ivanoff. I am president & CEO of Ammann & Whitney in New York, NY—we provide design and construction services to public and private sector clients around the world. I also serve as the senior vice chairman of the American Road and Transportation Builders Association (ARTBA) and am appearing before you today in that capacity.

ARTBA, now in its 112th year of service, provides federal representation for more than 6,000 members from all sectors of the U.S. transportation construction industry. ARTBA's membership includes private firms and organizations, as well as public agencies that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than $380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members must navigate the regulatory process to deliver transportation improvements. Specifically, ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. ARTBA actively works to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources and vital habitats. Further, ARTBA supports the protection of environmentally-sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements.

Part of the environmental review and approval process for transportation construction projects includes section 404 of the CWA which authorizes the issuance of permits for "the discharge of dredged or fill material into the navigable waters [of the United States]." The permitting responsibility for CWA section 404 is shared between the United States Army Corps of Engineers (Corps) and the EPA. Annually, roughly 60,000 section 404 permits are issued.[1]

[1] Economic Incentive Effects of EPA's After-the Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal, Professor David Sunding, University of California at Berkeley and the Brattle Group (May 30, 2011).

Transportation improvements must obtain section 404 permits when they impact wetland areas during construction.

Ideally, permits should provide a sense of certainty for both the regulating authority (in this case the Corps and EPA) and the project sponsor. Conditions are outlined in the permit, which, if met, allow the project in question to move forward and the environment to be protected. From the viewpoint of the project sponsor, the main benefit of a permit is predictability. The project sponsor knows that as long as the terms of the permit are met, project construction can commence without fear of time-consuming litigation.

Unfortunately, the sense of fairness and predictability in the CWA permitting system has recently been placed in jeopardy. The EPA in January of 2011 retroactively vetoed a 404 permit issued to the Mingo Logan Coal Company for a coal mine in West Virginia. Mingo Logan had lawfully obtained the permit in 2007 and had been operating in compliance with all permit requirements for over three years. Despite the fact that Mingo Logan had not violated the terms of the permit EPA decided to change the permit conditions more than three years after it was issued, rendering Mingo Logan's operations out of compliance.

While the EPA's decision was directed at a single mining operation, its impacts have been felt throughout the regulated community in all sectors of the economy. Indeed, multiple industry associations, including ARTBA, challenged EPA's actions in court. While a favorable decision was obtained in federal district court, EPA's decision was ultimately upheld at the appellate level and the Supreme Court declined to review the case. As things stand currently, project sponsors now face the potential uncertainty of losing a valid wetlands permit, through no fault of their own, simply because the EPA changes its mind.

For the transportation construction community, EPA's permit revocation is particularly unsettling. According to Federal Highway Administration data, every $1 billion spent on highway and bridge improvements supports almost 28,000 jobs. Given these broad direct and indirect economic contributions, potential impacts on transportation development should be taken into account when analyzing EPA's actions.

Major transportation projects, such as new roads, bridges or transit systems, can take years, if not more than a decade, to complete. In order for these projects to move forward, planners need to know that permits received at the beginning of a multi-year construction process will be valid throughout the entire time the project is being built. Further, planners also need to know that the specific conditions and mandates in a particular permit are not going to change after the permit is issued.

Certainty in the permitting process is also integral to financing transportation projects. With public-private partnerships being eyed more frequently as a means of project delivery, private investors considering financing transportation projects have become very concerned with properly analyzing risks in project delivery. In order for parties to invest in transportation improvements, they need a level of certainty. The prospect of validly issued permits being rescinded is precisely the type of scenario that could increase the perceived risk of a project to potential investors and make the project less appealing or increase the entities required rate of return.

EPA's permit veto decision is made even more troubling by the agency's recent attempts to expand its overall jurisdiction under the CWA. Currently, EPA is taking comments on a proposed rule which would alter the definition of "waters of the U.S." ARTBA recently provided a written statement to this committee detailing our concerns with EPA's proposed rule. In regards to this hearing, if EPA's proposed rule is implemented, the universe of water bodies requiring federal permits will expand. This will be a "one-two" punch for transportation improvements as the permitting burden will increase and even if those permits are obtained, the length of their validity will always be in doubt.

It should also be noted there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. Members of both parties agree that transportation improvements can and should be built more quickly without sacrificing necessary environmental protections. The current surface transportation reauthorization law, the "Moving Ahead for Progress in the 21st Century" (MAP-21) Act contained significant reforms to the project delivery process aimed at reducing delay. Recently, the Obama Administration released the ""Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America" (GROW AMERICA) reauthorization proposal which continues MAP-21's efforts at improving project delivery.

Absent legislative action to prohibit EPA's actions, the progress of MAP-21 and the potential progress of the project delivery reforms in GROW AMERICA could be jeopardized. Any reduction in delay gained from improvements to the project delivery process would be negated by the increased uncertainty in the regulatory process for wetlands.

Instead of increasing uncertainty in the regulatory process, ARTBA has urged EPA on multiple occasions to establish clarity in CWA regulation by developing a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a "de minimis" level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A "de-minimis" standard for impacts would be particularly helpful for transportation projects, as it could reduce needless paperwork, delay and regulatory requirements where a project's impacts do not rise to the level of having a significant effect on the environment.

ARTBA is pleased this committee has recently introduced bipartisan legislation, H.R. 4854, the "Regulatory Certainty Act of 2014," which would curb EPA's ability to retroactively veto valid CWA permits. ARTBA supports this legislation in the interest of regulatory fairness and sees it as a means of restoring certainty to the transportation construction community who obtain such permits in order to deliver sorely needed transportation improvements. A permit is akin to a promise, and once a permit is issued, both the regulator and the regulated entity should be expected to hold up their ends of the bargain.

Subcommittee Chairman Gibbs and Ranking Member Bishop, thank you for allowing me to appear before you today. ARTBA looks forward to continuing to work with the committee in

order to continue to protect, sustain and improve our nation's infrastructure while maintaining the integrity of the CWA.

I would be happy to answer any questions from you or other members of the subcommittee.

Statement of

Leah F. Pilconis, Esq.

on behalf of

The Associated General Contractors of America

to the

Subcommittee on Water Resources and Environment

Committee on Transportation and Infrastructure

U.S. House of Representatives

For a hearing on

"EPA's Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act"

July 15, 2014

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 25,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
2300 Wilson Boulevard, Suite 400 • Arlington, VA 22201 • Phone: (703) 548-3118 • FAX: (703) 548-3119

Statement of Leah F. Pilconis, Esq.
The Associated General Contractors of America
Transportation and Infrastructure Committee
Subcommittee on Water Resources and Environment
United States House of Representatives
July 15, 2014

Chairman Gibbs, Ranking Member Bishop, and members of the Subcommittee, thank you for inviting the Associated General Contractors of America (AGC) to testify on the U.S. Environmental Protection Agency's (EPA) reinterpretation of its authority under the Clean Water Act and the implications for the construction industry. My name is Leah Pilconis, and I am the Senior Environmental Advisor to AGC. The association represents over 25,000 construction contractors, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of 93 chapters in all 50 states, DC, and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, highways, bridges, water and wastewater facilities and more.

AGC's Environmental Program

One of my core functions for AGC is to monitor, summarize, and regularly comment on federal legislation and regulations that may implicate either the scope or nature of the construction industry's obligations to the environment. On behalf of AGC, I maintain liaison with EPA and other federal agencies that interpret and enforce federal environmental laws.

In a pro-active effort to help AGC members meet federal environmental requirements, I also develop and disseminate practical "compliance tools" for construction contractors, and help to organize and hold environmental seminars, forums, and other programs for such contractors. I serve as the editor of AGC's monthly newsletter on clean water laws and other environmental issues that affect construction. I also develop and distribute fact sheets on environmental requirements, and brochures and flyers highlighting the association's environmental initiatives.

AGC also tracks and summarizes data on the size and scope of the construction industry and its numerous segments, including the variety of economic and policy influences on each one. The association also advises lawmakers, regulators and the media of the impact that various economic forces and policy choices are likely to have on the construction industry.

The Clean Water Act Section 404 Permitting Process

In carrying out my work for AGC, I have been following the debate surrounding CWA jurisdiction and Section 404 permits for quite some time. The Federal Water Pollution Control Act Amendments of 1972, better known as the Clean Water Act (CWA), requires anyone who wants or needs to perform *work* in "waters of the United States" to get a Section 404 permit from the U.S. Army Corps of Engineers (Corps). Specifically, that permit authorizes the discharge of dredged material (i.e., addition of dredged material into water, including redeposits from

mechanized landclearing or other excavation)[1] or fill material (i.e., material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes)[2] into a water of the United States. It is hard to conceive a construction activity in U.S. waters that would not need a Section 404 permit. CWA Section 404(a) provides that the Corps, "may issue permits ... at specified disposal sites" for the dredging or filling of navigable waters. Section 404(c) grants EPA the power to veto or place restrictions on the areas designated as disposal sites, if the proposed discharge would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishing areas, wildlife, or recreational areas.[3] The Corps is the permitting agency, but again, EPA has certain veto authority.

The question is how much. As a matter of law and policy, AGC believes that EPA's authority does not – and should not – extend beyond the point at which the Corps issues a Section 404 permit. Once the Corps issues a permit, the contractor needs to have confidence that it can lawfully proceed without concern that EPA will unexpectedly halt a project. AGC has been troubled to see EPA take a much more expansive view of its authority and argue that it can come in before, during, or after the Corps has issued a permit and unilaterally frustrate a permitee's reasonable, well-settled and investment-backed expectations. EPA is disrupting a well established and legitimate process that gives a contractor permission to work. This is fundamentally unfair to the business community, for it provides no protection for the community's legitimate interest in finality and conflicts with the broader public interest in both public and private infrastructure.

Unfortunately, one court has sided with EPA. AGC believes that it is now up to Congress to step in and solve this problem. AGC believes it is up to Congress to relieve the construction and real estate development industries of the uncertainty that is deterring necessary investment in the nation's infrastructure. It is up to Congress to ensure that the business community will continue to make the investments needed to support the physical infrastructure on which all Americans are heavily dependent.

AGC Members Rely on Section 404 Permits to Build the Nation's Infrastructure

Collectively, AGC member firms build much if not most of the nation's public and private infrastructure.[4] Many of their highway, bridge, building and other construction projects unquestionably lie in "waters of the United States," within the meaning of the Clean Water Act, and therefore require federal permits. In the near future, many other projects may or may not lie in such "waters," depending on the precise contours of that term, which continues to be a source of much discussion and debate among regulators and the regulated community, not to mention ongoing rulemaking processes.

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[1] 33 C.F.R. Part 323.
[2] *Id.*
[3] 40 C.F.R. Part 231.2(e).
[4] While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

Many AGC contractors currently seek coverage under Section 404 permits authorizing the discharge of dredged or fill material into U.S. waters. AGC members are required to comply with the permitting process and they are directly affected by the issues currently before this committee. Construction professionals, as well as private real estate developers and public stewards of both transportation and other critical infrastructure ALL need to be able to rely on their Section 404 permits to protect themselves from liability under the CWA for making unlawful discharges into jurisdictional waters of the United States.

Working without a permit is not a viable option. The penalties for failing to obtain a necessary CWA permit can be severe. The civil fines can reach $37,500 per day per violation and the criminal penalties for "negligent" violations can include $50,000 per day, three years' imprisonment, or both. As the "operators" of construction sites, courts have found both property owners and their construction contractors to be responsible for compliance, at least where the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit. As such, both owner and contractor risk such fines and penalties for any failure to comply with the CWA. In addition to CWA penalties, an assertion that land contains "waters of the United States" subject to CWA jurisdiction exposes project proponents to third-party litigation pursuant to the CWA citizen-suit provision.

And the potential penalties and litigation costs are just the tip of the iceberg. Many of today's infrastructure projects cost billions of dollars to construct. Just the direct costs of major disruptions of the work on these projects can reach easily tens if not hundreds of millions of dollars. Scarce resources are wasted. Economic benefits are delayed. And construction workers lose their jobs.

Construction contractors are sensitive to the many risks of environmental degradation, and they therefore seek to comply with their environmental permits. When they do, they are entitled to the confidence that they are meeting their environmental responsibilities.

The Changing Landscape

The precise contours of the key jurisdictional term "waters of the United States" (which is defined only via regulatory text) are currently being revisited by EPA and the Corps – and AGC fully expects the scope of federal jurisdiction over wet areas to significantly increase in the near term.[5] Under a joint EPA and Corps proposal[6] to revise the definition of "waters of the United States" under the CWA, virtually any public or private sector construction project that involves the creation of dry, flat areas for construction (where even an occasionally or seasonally wet area exists) or any mechanized earth moving activities (where even an occasionally or seasonally wet area exists) will likely require a Section 404 permit from the Corps.

[5] Although the CWA describes the applicable waters for Section 404 permitting as "navigable," the CWA defines that term to simply mean "waters of the United States." 33 U.S.C. § 1362(7).

[6] 79 *Fed. Reg.* 22188-22275 (April 21, 2014).

This is an issue that Congress has also taken an increasing interest in addressing, and has been the subject of multiple recent hearings in the House of Representatives, including this Committee, for which AGC is grateful.

As we enter an era where more and more public and private infrastructure or development projects will depend on the issuance – and guaranteed operation – of the Section 404 permit, recent actions indicate EPA may be seeking to expand its Section 404(c) role. First, the decision in *Mingo Logan*[7] to retroactively nullify a Corps permit several years after it was issued represents the first time the agency had ever blocked a project after the permit was approved. Second, EPA recently announced that it intends to preempt the Pebble Mine project in Alaska, even before a Section 404 permit application was filed for that project.[8] Third, as stated above, EPA proposed a rulemaking that would expand which water features are subject to federal jurisdiction, and thus the number of potential projects that must obtain Section 404 permits.

Indeed, EPA's website currently proclaims that its "Section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued."[9]

Threat of Losing Permit Authorization

Every project with a Section 404 permit is under threat of losing its permit authorization if EPA unilaterally determines, at any time, that the project could have adverse effects on the environment—even where EPA itself was involved in and approved of the permit in the first instance.

The idea that EPA has unbounded authority to retroactively revoke or modify existing permits already approved by the Corps, which has the job of issuing Section 404 permits, has sparked considerable concern and action from AGC members. AGC members are gravely concerned that EPA can render years of development planning and billions of dollars in investments for naught based on nothing more than a reassertion of concerns that did not prevail in the inter-agency review process.

EPA's asserted authority to nullify existing permits or to obstruct incoming applications has serious implications for all construction projects requiring a Section 404 permit. Under this regulatory regime, any entity that acts as the owner, contractor, lender, investor, insured or surety for any project requiring a Section 404 permit will face a continued legal and financial risk even after a permit has been issued. This risk may even extend to subcontractors and construction craft workers.

EPA is denying the regulated community certainty that is a central goal of the CWA. It is denying investors in both public and private infrastructure of the certainty they need to invest in

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[7] *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, No. 13-599, *cert. denied* (U.S. Mar. 24, 2014).
[8] *See* Letter of EPA Regional Administrator to Thomas Collier, *et. al.*, Feb. 28, 2014.
[9] *See* Section 404(c) "Veto Authority" Factsheet, *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf.

critical job-creating sectors of the economy. It is delaying and deterring the necessary effort to repair, replace and upgrade public infrastructure. It is inhibiting project financing. These harmful effects will be felt throughout the economy.

AGC simply seeks to ensure contractors can continue their critical work that both sustains and enhances the nation's productivity and its quality of life.

Delays and Work Stoppages

Businesses routinely incorporate the permit application and approval processes into their strategic planning. Ensuring compliance with environmental, preservation, zoning and building permit requirements at the federal, state and local levels is an extremely costly and time consuming process. Businesses assume the validity of these permits in their financial forecasting, and plan their business activities around the sanctity of these permits. In addition, many construction projects are designed before being built. Businesses regularly invest millions of dollars upfront on property, technology, personnel, and machinery on the assumption that their activities can continue unabated so long as they comply with the terms of their Section 404 permit. However, right now, all Section 404 permits – those in discussion, in process, and already issued – are vulnerable to the possibility of an EPA veto.

Many of today's infrastructure projects cost billions of dollars to construct. Just the direct costs of major disruptions of the work on these projects can easily reach tens if not hundreds of millions of dollars. Scarce resources are wasted. Economic benefits are delayed. And construction workers lose their jobs.

Further, it is likely that opponents of controversial construction projects will bring citizen suits to attempt to compel EPA to modify or revoke the Section 404 permits. Such opponents may seek a preliminary injunction against continued construction while their information is being considered; but even a short delay can mean the loss of an entire construction season in areas where weather conditions or U.S. Fish and Wildlife Service restrictions limit the time that contractors can work. During any delay, overhead costs continue to accumulate. Construction workers are idled. Economic benefits are postponed. And contactors can face liquidated or other penalties for the consequential damages that result from not completing a project on time.

Construction Surety Bonding

Most public owners require their construction contractors to post performance bonds that commit a third party, known as a surety, to step in and meet the contractors' contractual obligations if they should fail to do so. A bond constitutes a legal guarantee to the project owner. If a bonded contractor fails to perform, its surety has to provide a remedy, generally by arranging for another contractor to complete the work. Unlike an insurance carrier, the surety will then seek reimbursement of all of its costs from the bonded contractor, under an indemnification agreement that the surety will require of the contractor, as a condition of issuing the bond.

If a project is halted in mid-stream because EPA has vetoed a lawfully issued Section 404 permit, there may be no surety remedy other than cash restitution to the project owner. By

extension, the contractor will need to return that money to the surety. The adverse credit impact on the contractor could be significant, company accounts and equipment will be liquidated and limits will be placed on working capital needed for other projects and/or incurring bank debt and interest fees.

Even if these unfortunate circumstances can be avoided, for instance via *force majeure* provisions in the underlying contract, the contractor will still face the unanticipated loss of liquidity resulting from the aborted project, the costly and uncertain reassignment of its resources and workers, and similar consequences borne by its subcontractors, suppliers, and their workers. The negative financial effects may cause sureties and lenders to raise their rates, reduce capacity, or withdraw capacity. As most government entities mandate bonding on construction contracts, the contractor's ability to bid and perform to its full potential and public benefit may unnecessarily constrict on account of the work stoppage alone.

EPA's Unconstrained Veto Power Dismantles the Regulatory Certainty That Is a Central Goal of the CWA

As contract delivery methods evolve, more and more permitting responsibilities are shifting from the project owner/developer (e.g., Bid-Build method) to the general contractor (e.g., Design-Build and general contractor/construction manager or GC/CM method). Importantly, the contractor is therefore assuming more and more of the risk burden of the permit, and will risk great financial hardship, if not ruin, if EPA changes its mind about the merits of a particular permit.

Allowing EPA to revisit the environmental impact of Section 404 permits at any time leaves the permittee, often the general contractor, in the untenable position of not being able to rely upon the sole statutory mechanism for measuring CWA compliance: the permit. The purpose and effect of a government-issued permit is to induce certain behavior by declaring it lawful. As explained above, the fines, penalties and threat of third-party actions for discharging dredged or fill material without a permit are significant.

Section 404(p) establishes a safe harbor for regulated entities, assuring them that they will not face liability under the CWA so long as they comply with a Corps-issued permit.[10] Indeed, once a CWA permit is issued, the recipient is assured that it generally will not be modified even to reflect subsequent regulatory developments. As EPA has emphasized, "[i]n general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the [EPA] during the term of the permits."[11]

Yet, EPA's assertion of an unconstrained veto power means that any Section 404 permit could be vulnerable, regardless of the permit-holder's compliance with the permit or the State's or Corps's views. Having invested substantial resources in a project requiring a Section 404 permit (including substantial resources in the permitting process itself), the permit holder would have no assurance, contrary to Section 404(p), that it would be allowed to reap the benefits of its

[10] 33 U.S.C. § 1344(p).
[11] 49 *Fed. Reg.* 37,998, 38,045 (Sept. 26, 1984).

investment if it complies with the permit and be shielded from CWA liability. Instead, there would be great uncertainty and regulatory limbo regarding whether any permit was going to be vetoed and whether validly permitted projects will be able to be completed.

The Corps consistently has respected Congress' call for regulatory certainty. Corps regulations specifically address permit modification or suspension and lay out five factors to be balanced in that inquiry.[12] EPA should not have the ability to eviscerate issued permits. Once the permit is issued, the Corps—not EPA—determines whether the permit should be modified or revoked, and it does so by applying regulatory standards that fully protect Congress' interest in finality. If EPA continues to assert this "broad veto power" over permits issued by the Corps, it will disregard Congress' explicit choice to give the Corps primary authority over the Section 404 permitting process.

EPA's position means that it has continuing jurisdiction to oversee Section 404-permitted construction activities and to continually evaluate the impact those projects may have on the surrounding municipal water supplies (including surface or ground water), fisheries, shellfishing, wildlife habitat, recreation areas, etc. EPA asserts that the agency has the unfettered option to change its mind at any time, up until project completion. All parties to the construction and development processes face the ongoing threat that at any point during the course of a project, EPA may decide to revisit the discharge authorization, and perhaps reengage on any of the issues raised during the Section 404 permit application process. Permittees now have the additional burden of being prepared at all times to address these after-the-fact objections, or face the risk that EPA will unilaterally decide to withdraw (or deny or restrict the use of) previously approved disposal sites, effectively revoking all or part of the permit.

EPA's Unconstrained Veto Power Will Chill Private Investment and Negatively Impact the Economy

The Corps reportedly issues roughly 60,000 discharge permits annually under Section 404 and more than $220 billion of investment annually is conditioned on the issuance of these discharge permits.[13] This represents a huge share of the $911 billion in public and private investment in the construction of residential and nonresidential structures that occurred in 2013. If EPA continues to assert a broad and unconstrained "veto power" over permits issued by the Corps, it will substantially deter investment in projects requiring Section 404 authorization, which will translate directly into lost jobs and lost economic activity across the whole economy. This will have a disproportionate and negative impact on gross domestic product (GDP). Billions of dollars of investment are dependent on the finality that comes with a duly-issued Corps permit.

Leaving projects un-built has consequences far beyond the owner and users who are deprived of the use of that project. Construction is a major contributor to employment, GDP and

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[12] These five factors include whether any "circumstances ... have changed since the permit was issued," "any significant objections to the authorized activity which were not earlier considered," and "the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit." 33 C.F.R. Section 325.7(a).

[13] *See e.g.*, David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011).

manufacturing. An extra $1 billion in nonresidential construction spending adds about $3.4 billion to GDP, about $1.1 billion to personal earnings and creates or sustains 28,500 jobs.[14] Two-thirds of those jobs occur outside of construction—in industries ranging from mining and manufacturing to a host of services, locally and across the country.

Overall employment in the construction industry peaked at 7.73 million in April 2006, fell to 5.44 million (down 30%) by January 2011 and has recovered only a quarter of the losses since then, reaching 6.02 million in June 2014. This gradual and still-fragile recovery would be severely threatened if EPA is able to revoke Section 404 permits at any stage.

Construction is an important source of orders for U.S. manufacturing. In 2013 U.S. manufacturers shipped $517 billion in construction materials and supplies (9% of total factory shipments) and $55 billion in new construction equipment (13% of total machinery shipments). A precipitous drop in investment in projects that require a Section 404 permit would cut deeply into these shipments and potentially end the recovery that has occurred in recent years in manufacturing employment. Similarly, the cancelation of these projects would result in significant job losses in industries that supply raw materials, design and other professional services to construction, as well as businesses that depend on purchases by the workers and owners of construction companies and their suppliers.

Investors expect the permitting process to be followed, so that a project has a full opportunity to present its plans, defend its science, and modify the project to meet any legitimate regulatory concerns. The financial risk of backing a project that requires a Section 404 permit is significantly increased if a possibility exists that EPA can veto a project (1) even before an applicant has an opportunity to propose a specific project or to demonstrate its ability to meet the CWA criteria or (2) years after the permit has been duly issued and relied upon by the permittee.

EPA's Unconstrained Veto Power Will Disrupt Vital Infrastructure Projects and Impact Public Health and Safety

Raising new obstacles to public and private infrastructure investment, as EPA has done by asserting unconstrained veto power over Section 404 permits, will exacerbate the difficulty of achieving the necessary funding level.

The United States currently faces "a significant backlog of overdue maintenance across [its] infrastructure system" and "a pressing need for modernization."[15] The suspension, restriction or lack of financial support for Section 404 projects could result in intolerable delays to the renovation and improvement of public infrastructure, including highway and transit construction projects, bridge construction and repairs, and dam repairs. Forty-two percent of America's major urban highways remain congested. Disruptions that delay highway construction projects could

[14] This breaks down as follows: 9,700 jobs direct construction jobs; 4,600 jobs indirect jobs from supplying construction materials and services; and 4,300 jobs induced when workers and owners in construction and supplier businesses spend their additional wages and profits.

[15] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013). The report thoroughly documents the condition of the nation's water, transportation, energy and public infrastructure. Cumulatively, ASCE's 2013 report gave the nation's infrastructure a "D+"— signaling a need to substantially increase public investment in a wide range of infrastructure.

also delay numerous safety-related projects, resulting in increased potential for injuries and fatalities to the traveling public. Highway improvement projects improve traffic flows and reduce congestion, which decreases air pollution associated with idling. The Federal Highway Administration estimates that $170 billion in capital investment per year is needed to significantly improve conditions and performance; the current level of investment is approximately half of that number. Even a temporary freeze on new highway construction could prevent states from "obligating" their federal highway funds, which could, in turn, result in a loss of those federal dollars. The long-term impacts of losing federal funding would have substantial impacts on the states' ability to keep highways safe and prevent accidental deaths and injuries.

Among other examples of infrastructure needs that should be urgently addressed:

- One in nine of the nation's bridges are rated as structurally deficient[16] – and 15 states have had their number of structurally deficient bridges increase since 2011;
- There are 14,000 high-hazard dams, and 4,000 deficient dams, in the U.S.;
- The reliability of the nation's massive levee system, which increasingly protects developed communities, is essentially unknown;
- Water and wastewater infrastructure systems are aging rapidly and require roughly $1 trillion of investment to meet current public health and environmental standards;
- Some sewer systems are 100 years old and many treatment facilities are past their recommended life expectancy.[17]

EPA's Unconstrained Veto Power Will Inhibit Project Financing

Also, the risk of permit revocation will drive up the cost of municipal bond financing, a common funding vehicle for projects requiring large capital outlays. The debt rating agencies will account for this risk through lowered bond ratings, particularly on controversial projects, resulting in increased underwriting fees and interest rates, the cost of which could be quite sizable. In some cases project proponents may not be able to obtain necessary financing or public funding.

As a result, AGC members are concerned that the increased level of uncertainty on projects that require a Section 404 permit will reduce investment in vital infrastructure such as roads, pipelines and rail lines. Communities and jurisdictions in need of this infrastructure may find it an untenable, as the cost of servicing the municipal bond debt outpaces any reasonable economic benefit they can expect from the improvements.

Thank you again for this opportunity to testify on behalf of AGC.

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[16] "Structurally deficient" – Bridges require significant maintenance, rehabilitation, or replacement.
[17] *Id.*

Testimony of Richard O. Faulk

Senior Director, Initiative for Energy and the Environment
Law & Economics Center, George Mason University School of Law, Arlington, Virginia
Partner, Hollingsworth LLP, Washington, DC

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

July 15, 2014

Thank you for inviting me to speak to you today. At the outset, let me note that I am not appearing here on behalf of any client or organization. I have responded to the committee's invitation as a concerned citizen, and I will provide information based upon my experience and observation.

I serve as the Senior Director of the Initiative for Energy and the Environment for the Law & Economics Center at George Mason University School of Law, where I develop and participate in forums designed to promote constructive dialogue regarding our nation's energy and environmental concerns. I am also a partner in the Washington DC law firm of Hollingsworth LLP, where I maintain a trial and appellate practice that includes environmental litigation matters. For most of my 37 years of practice, I have focused on complex toxic tort and environmental litigation.

Over my years of practice, I have become familiar with the sources of the Environmental Protection Agency's alleged authority to veto permits issued under Section 404 of the federal Clean Water Act, as well as the disputes that have arisen recently regarding the extent of that authority both before and after permits have been issued by the Corps of Engineers – the primary regulatory body responsible for such actions.

Based upon my review of three situations that have arisen recently, I believe there is an urgent need for a comprehensive inquiry into whether the current statutory structure authorizes – or

can be construed to authorize – abusive retrospective and prospective vetoes of legitimate business activities. The risk presented by such vetoes can be evaluated by reviewing three recent situations:

(1) EPA's revocation of section 404 permit that the Corps issued to the Spruce No. 1 Mine, a surface coal mine in Logan County, West Virginia. Mingo Logan Coal Company;

(2) EPA's threat to use Section 404(c) prospectively to withdraw large geographic areas from any extractive development by Pebble Mine partnership in Alaska even before the company seeks a permit for extractive activity in that area. *See* http://corporate.pebblepartnership.com/news-article.php?s=lawsuit-targets-overreaching-epa-pre-emptive-veto-process (last visited July 13, 2014); and

(3) The request made on May 27, 2014 to the EPA by a group of Native American tribes in Northern Wisconsin's Penokee Hills to use Section 404(c) prospectively to protect treaty rights, aquatic resources, fisheries, wildlife, subsistence and public use in the Bad River Watershed and western Lake Superior Basin from metallic mining, including a potential mine by Gogebic Talconite – again before a permit has even been requested.

If the Congressional inquiry reveals that such risks exist, Congress should consider amending the Clean Water Act to preclude such abuses. Such amendments should require that EPA's objections and withdrawal of specifications occur only during the normal permitting process – not before the permitting process is commenced, and not after the process is concluded. Such reforms will preclude the prejudice sustained when permits are "withdrawn" after operations have commenced, and also ensure that all issues and arguments are considered as part of the permitting process – rather than exercised preemptively. Without such protections, these practices – enhanced by deferential judicial review – unreasonably expand the EPA's regulatory range and threaten to upset the delicate balance of powers and participation necessary to ensure fair administration of the Clean Water Act.

Retrospective Veto: Mingo Logan

After more than two years of litigation in federal courts, the authority of the U.S. Environmental Protection Agency ("EPA") authority to "veto" permits issued under Section 404 of the Clean Water Act ("CWA") remains a highly contested issue. Section 404 permits, which are issued by the U.S. Army Corps of Engineers ("Corps"), authorize the discharge of dredged or fill

material into navigable waters at specified disposal sites identified in the permit. Such permits are required for a broad range of industrial activities including the extraction of natural resources and the development of energy infrastructure. EPA has taken the position that it may "veto" a Section 404 permit after the permit is issued by "withdrawing" the permitted disposal sites.

Last year, in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*,[1] the U.S. Court of Appeals for the D.C. Circuit agreed that EPA had such authority. Mingo Logan then sought certiorari in the Supreme Court. Although the Supreme Court denied review, Mingo Logan's arguments frame many issued relevant to this hearing.

Mingo Logan argued that, read in the context of the broader statutory scheme, and as supported by the legislative history, section 404 does not allow EPA to exercise post-permit withdrawal authority that "effectively nullif[ies] a permit properly issued by the Corps [of Engineers].."[2] In support of this argument, Mingo Logan appealed to the Supreme Court's recognition in *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009), that the Corps, and not EPA, has primary authority to issue section 404 permits. As in that case, Mingo Logan argued, overlapping permitting authority between the Corps and EPA for section 404 permits would create regulatory burdens and confusion unintended by Congress.

Aside from the legal arguments, Mingo Logan and a multitude of *amici curiae* also argued that retrospective vetoes raised significant economic problems. Giving EPA the unconstrained authority to revoke section permits at any time strips the permits of the finality and regulatory certainty intended by Congress. While the Corps is required to consider impacts on investment-backed expectations before revoking a permit, EPA exercised its "veto" authority with no such constraints.

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[1] 714 F.3d 608 (D.C. Cir. 2013).

[2] Petition for Writ of Certiorari in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency* (No. 13-599), at i, 9-22 ("Mingo Logan Cert. Petition").

Such authority would have a devastating chilling effect on investment in industries that rely on section 404 permits and would have a negative ripple effect across the nation's entire economy. For example, the regulatory uncertainty created by the D.C. Circuit decision jeopardized millions of dollars of investments in the construction and maintenance of energy infrastructure that requires section 404 permits.[3] Reduced investment makes it harder to develop energy infrastructure, thus reducing the reliability of energy delivery and resulting in higher costs for ratepayers in every sector of the economy.

Mingo Logan and the *amici* also raised broader constitutional and federalism concerns. First, they argue that because tremendous investments are staked on the expectation of certainty and finality of the section 404 permit, the sudden revocation of such permits raises constitutional takings concerns. Additionally, EPA's veto would disrupt the balance of state and federal authority to regulate water. Mingo Logan, and West Virginia and other states filing as *amici curiae*, noted that EPA's post-permit revocation of specifications based on purported impacts to water quality usurps the states' primary authority to regulate water quality.

Prospective Veto: Pebble Mine and Gogebic Talconite

Although retrospective vetoes of section 404 permits effectively preclude continued operations, prospective vetoes preclude development without the information typically generated in the permitting process – thereby depriving potential extractors and operators from meaningful participation in EPA's decision-making process. Under section 404(c), the only appropriate time for EPA to consider such veto authority is *after* a company has sought a section 404 permit from the U.S. Army Corps of Engineers. Although section 404(c) provides an opportunity for "notice and public hearing" before withdrawal, it does not allow Corps to consider the permit application and perform a review under the National Environmental Policy Act (NEPA). As a result, the process is

[3] Brief for the American Petroleum Institute, et al in Support of Petitioner in *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency* (No. 13-599) (filed Dec. 16, 2013) ("API Brief").

subverted on the basis of a "hypothetical" situation, thereby enabling withdrawal may occur without a participatory factual record.

These practices raise concerns that EPA may use this "authority" as a form of "zoning" to preclude exploration and production of minerals, including oil and gas, before plans to extract those minerals are announced. Such tactics would preempt any efforts by the Corps and the prospective extractors to reduce or eliminate environment effects – something the permitting process is designed to encourage.

More alarmingly, EPA's interpretations of the Clean Water Act are presently entitled to deferential judicial review – which the U.S. Supreme Court deems "dispositive" so long as the interpretation is "reasonable."[4] Even if the controlling provision or regulation is vague or ambiguous, the High Court commonly defers to the regulator's interpretation.[5] Finally, when complex questions of scientific issues and conclusions are involved, administrative agencies conclusions are entitled to "extreme deference."[6] These deferential evaluations enhance the unfairness and prejudice of EPA's decisions by precluding meaningful judicial review of objections to EPA's conclusions. They also diminish the circumstances under which the EPA may be held accountable for arguably "reasonable" but economically unsound interpretations. Although problems of "deference" are not unique to the Clean Water Act, the problems examined in today's hearing provide excellent examples of the need for more active judicial review that constrains the President and his executive agencies within their proper Constitutional sphere.

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[4] *See EPA v. Homer City Generation LP*, 572 U.S. ___ (April 29, 2014)(Slip. Op. at 20), available at http://www.supremecourt.gov/opinions/13pdf/12-1182_553a.pdf (last visited July 13, 2014).

[5] *See Auer v. Robbins*, 519 U. S. 452, 461–463 (1997).

[6] *See City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003).

Committee of Transportation and Infrastructure

Subcommittee on Water Resources and Environment

Oversight Hearing

"EPA's Expanded Interpretation of Its Permit Authority Veto under the Clean Water Act"

July 15 2014

Statement of Patrick Parenteau

Professor of Law Vermont Law School

Chairman Gibbs, Representative Bishop and members of the Subcommittee, my name is Patrick Parenteau and I want to start by thanking you for the opportunity to present these views on one of the important tools provided by the Clean Water Act (CWA) to protect the quality, biological integrity, and economic productivity of our nations' waters.

By way of background I have been involved in various ways with the CWA for over forty years. While working at the National Wildlife Federation from 1976-1984 I participated in many of the legislative debates, judicial actions, rulemakings, and other administrative proceedings during the formative stages of the Act's programs including in particular the section 404 permit program that is the subject of today's hearing. During the Reagan Administration I served as Regional Counsel for EPA's New England office and was directly involved in the Attleboro Mall 404 (c) action. Following that I served as Commissioner of the Vermont Department of Environmental Conservation with responsibility for implementing the CWA at the state level. After that I was with the Perkins Coie law firm in Oregon providing advice and representation to business interests on permitting, compliance, enforcement and other regulatory matters. For the past 21 years I have been on the faculty of the Vermont Law School, the top ranked environmental law program in the nation, where I teach the CWA, conduct training programs for judges and practitioners, research and publish articles, write amicus briefs in cases before the Supreme Court and other courts, and frequently give presentations and media interviews on the latest developments under the Act.

There are four points I'd like to share with the subcommittee.

1. <u>EPA has not expanded its interpretation of its authority under section 404 (c)</u>

With respect, I believe the title of this hearing is based on a misunderstanding of how EPA has interpreted and applied its authority under section 404(c) since the beginning. First, the statute grants EPA very broad authority to "prohibit, deny, restrict or withdraw" any "defined area" as a disposal site for dredged or fill material "whenever" the Administrator determines that the discharge of such materials would have an "unacceptable adverse impact" on specified resources such as municipal water supplies, fisheries and wildlife. EPA's regulations have always provided that this authority can be exercised either before or after a permit is issued by the Corps of Engineers. 40 CFR §231.1 states:

> "Under section 404(c), the Administrator may exercise a veto over the specification by the U.S. Army Corps of Engineers or by a state of a site for the discharge of dredged or fill material. The Administrator may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state."

The regulations further define the terms withdraw, prohibit, and deny as follows

> "(a) Withdraw specification means to remove from designation any area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the section 404 program, or any portion of such area.
>
> (b) Prohibit specification means to prevent the designation of an area as a present or future disposal site.
>
> (c) Deny or restrict the use of any defined area for specification is to deny or restrict the use of any area for the present or future discharge of any dredged or fill material."
>
> 40 CFR §231.2

In its recent decision upholding EPA's use of section 404 (c) authority to veto the permit for the Spruce Mine in West Virginia the DC Circuit stated:

> "Section 404 imposes no temporal limit on the Administrator's authority to withdraw the Corps' specification but instead expressly empowers him to prohibit, restrict or withdraw the specification "whenever" he makes a determination that the statutory "unacceptable adverse effect" will result. Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time. (emphasis original)[1]

[1] Mingo Logan Coal Company v USEPA, 714 F.3d 608, 615 (D.C. Cir. 2013); cert denied, _US_, March 14 2014. The case has been remanded to the District Court for a hearing on the merits of EPA's decision.

In an earlier case involving a challenge to EPA's veto of a permit for a dam in Georgia the court said that EPA may exercise its authority "before a permit is applied for, while the application is pending or after the permit is issued."[2]

With the Supreme Court's denial of certiorari in *Mingo Logan*, it is fair to say that the issue of EPA's authority to exercise the 404 (c) authority whenever the Administrator determines that there will be "unacceptable adverse effects" on the designated resources is settled law. That still leaves important policy questions of whether and how the Administrator should exercise this authority but there can no longer be any doubt that EPA has had this authority since the 1972 CWA amendments and has consistently interpreted the statute as granting that authority since the first regulations were written.

Further, assertions that EPA has "never" used 404 (c) in advance of a permit application are simply wrong. In 1988, during the Reagan administration, EPA used its authority to restrict the designation of three separately owned wetland properties totaling 432 acres in the Everglades as disposal sites in order to protect endangered wildlife including the Florida Panther.[3] Nor is it true that EPA has "never" vetoed a Corps permit after the fact. Also in 1988, in the Russo Development Corporation case, EPA vetoed Corps permits for disposal of fill into the Hackensack Meadowlands of New Jersey. The developer sued and EPA's after the fact veto was upheld by the New Jersey Federal District Court.[4]

What is certainly true is that EPA rarely exercises its 404 (c) authority at all (only thirteen times in over 40 years) and even more rarely does it do so either before permit applications have been filed or after permits have been issued. But to say that it has never done so in the past is factually incorrect and to suggest that it should not have the authority to do so in the future could lead to unnecessary damage to aquatic resources that the CWA is supposed to protect. Forcing EPA to make decisions within artificial time constraints that cannot take account of the unique situations presented by the wide variety of projects that must be evaluated will inevitably lead to less informed decisions that will not serve the purposes of the law or the public good.

2. The 404(c) process is apolitical, science based, and transparent.

Eleven of the thirteen 404 (c) vetoes to date were issued by Republican administrations. President Ronald Reagan holds the record for the largest number of vetoes at seven, more than all of the other administrations combined. Point being this is not a liberal or conservative issue.

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[2] City of Alma v United States, 744 F.Supp.1546, 1588 (S.D. Ga. 1990)
[3] In Re Henry Rem Estate, 53 Federal Register 30093, August 10, 1988. In this case EPA vetoed two permits that had been issued and also acted proactively to restrict any further disposal on the properties.
[4] Russo Development Corp. v. EPA, 20 ELR 20938, 39 (D. N.J. 1990)

This is a tool designed to protect water quality and special places for everybody. Pollution does not respect political affiliation. When drinking water supplies are contaminated, when breeding and spawning habitat is destroyed, when wetlands that nurture wildlife and protect communities from storms and floods are filled, when rivers and lakes used by millions are polluted by poorly designed developments, everyone suffers. The reason that 404 (c) exists is that the prescient framers of the landmark 1972 legislation thought it was important to provide a backstop, a safety net, to ensure that permits to dispose of dredged and fill material, which can encompass everything from plain dirt to toxic mine tailings, did not result in unacceptable impacts on a select list of critical resources. Edmund Muskie, considered by many to be the father of the Clean Water Act and who saw firsthand the environmental degradation that results from poorly regulated industrial discharges to his beloved Androscoggin River, explained why Congress decided to vest EPA rather than the Corps with final authority on 404 permits affecting these special resources:

> "[T]he[Conference] Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either the site to be selected or the specific soil to be disposed of in a site. Thus the conferees agreed that the Administrator of the Environmental Protection Agency should have the veto power over the selection of the site for dredge spoil disposal and over any specific spoil to be disposed of at any specific site."[5]

With no disrespect to the dedicated professionals in the Corps that administer the 404 permit program, Congress chose EPA to be the final arbiter in those few cases where important resources were at stake and special expertise was required to judge whether the impacts to water quality were "unacceptable." This is inherently a value judgment that must be informed by the best available science through a fair and open process. As the principal agency of the federal government whose mission is to protect the environment Congress wisely chose to vest this important function in EPA. The safety net concept that underlies 404 (c) remains critical in today's world where water resources are under even greater stress from polluted runoff, atmospheric deposition, nutrient enrichment, dead zones, and looming threats of climate change and ocean acidification. Maintaining the resilience of natural systems in the face of these daunting challenges should be of paramount concern to members of Congress.

3. <u>The 404(c) authority has been used judiciously, with extensive public involvement, development of strong science-based administrative records that have withstood every legal challenge, and with positive results for water quality and society as a whole—exactly as Congress intended.</u>

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[5] Congressional Research Service, 93d Cong., "A legislative History of the Water Pollution Control Act Amendments of 1972" (Comm. Print 1973) at 177

There have been 13 actions under 404(c). No two are exactly alike. The cases run the gamut from small commercial developments to major dams and mining operations. I will discuss three that I am most familiar with to illustrate how the process has worked to successfully accomplish the goals of the law.

Attleboro Mall/Sweedens Swamp (1986)

As mentioned I was Regional Counsel for Region One with responsibility for overseeing the legal work on this case. It involved a proposed shopping mall in in Attleboro Massachusetts. The Pyramid Corporation proposed to build the mall in a 50 acre wetland known as Sweedens Swamp. After a long permit process that took over two years the New England District of the Corps proposed to deny the permit but was overruled by HQ and the permit was issued. Region One initiated the veto process which took another year and featured several public hearings, two rounds of public comments, development of an extensive administrative record, meetings with the applicant, consultations with EPA headquarters and many site visits to gather data on the functions and values of the wetland. In the end the decision to veto the permit was based on a combination of the value of the wetland in a watershed that had seen a huge loss of wetland functions and the fact that there were other upland sites available to Pyramid when it first began looking for a place to build the mall. One of the key policy issues raised by the case was whether an applicant for a 404 permit had duty to avoid filling a wetland where there were practicable alternatives available. EPA and the Corps disagreed on the role of avoidance in the permit process. The Corps took the position that applicants could mitigate impacts without going through a practicable alternatives analysis. EPA took the position that avoidance should be the first priority. After three years of litigation the Second Circuit upheld the veto and endorsed EPA's avoidance first rationale.[6] Having lost in court Pyramid did what EPA had recommended all along which was to negotiate a deal with another mall developer who had acquired an alternative upland site that would serve the same market. The upshot is that the mall was built and Sweedens Swamp was saved.

Perhaps the most important outcome of this veto action was what happened afterwards. EPA and the Corps finally resolved their differences through a Memorandum of Understanding setting forth a new "sequencing" approach to mitigation that incorporated the avoidance first principle. In due course this MOU became the full blown Compensatory Wetland Mitigation Rule that we have today.[7]

Two Forks Dam (1989)

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[6] Bersani v Deland, 850 F.2d 36 (2d Cir. 1988)
[7] 40 CFR Part 230

This is one of the more well-known 404 (c) vetoes. It was initiated during the administration of George HW Bush and was personally overseen by Administrator Bill Reilly. Briefly, it involved the proposed construction of a water supply dam in Cheesman Canyon in the headwaters of the South Plate River high in the Rocky Mountains of Colorado. Cheesman was a wilderness canyon with a "gold medal" trout fishery. The dam, as big as Hoover Dam, would flood six towns as well as much of Cheesman Canyon, and would have turned the canyon into a 7,300-acre reservoir, creating the largest lake in Colorado. Reilly cited the fact that the stretch of the South Platte flowing through the canyon was unsurpassed in the West as a natural habitat and recreation area, and that far less expensive and destructive alternatives were available. His prediction ultimately came true as the Denver Water Board (DWB) the primary sponsor of the project, turned to more aggressive water conservation and groundwater management alternatives that addressed the water supply needs of the Denver metropolitan area in a more cost effective and environmentally sound way. In 1990, the DWB served 890,000 people within Denver and its surrounding suburbs. In 1999, it served an additional 95,000 people with the same amount of water. Monte Pascoe, head of the DWB at that time, recalls: "One of the good things about the Two Forks discussions was that it created cooperation. That was when we got the cultural facilities tax passed, and a large number of other cooperative arrangements."[8]

Once again the 404 (c) process led to a change in policy that resulted in more environmentally and economically sound use of water resources.

Yazoo Pumps (2008)

This veto occurred during the George W Bush administration. It involves a flood control project that would have destroyed between 67,000 and 200,000 acres of bottomland hardwood wetlands in the Lower Mississippi River Watershed. Located near the confluence of the Yazoo and Big Sunflower Rivers north of Jackson, Mississippi, the Yazoo Backwater Area contains some of the richest wetland and aquatic resources in the nation, and serves as critical fish and wildlife habitat. After an extensive evaluation, EPA concluded that the project would result in "unacceptable damage to these valuable resources that are used for wildlife, economic, and recreational purposes." The Project would have cost more than $220 million for construction, with an annual operational cost of more than $2 million. The Mississippi Levee Board sued arguing the project was exempt under 404 (r) but the Fifth Circuit disagreed and upheld EPA's veto ruling that the exemption did not apply.[9]

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[8] High Country News, "Water Pressure "Nov. 20, 2000, uploaded 7/12/14 from http://www.hcn.org/issues/191/10100

[9] Board of Mississippi Levee Commissioners v EPA _F3d _ No. 11-60302 (March 6, 2012); http://www.ca5.uscourts.gov/opinions%5Cpub%5C11/11-60302-CV0.wpd.pdf

EPA's veto wasn't heavy-handed, nor did it come out of the blue. EPA engaged in protracted negotiations with the Corps of Engineers over ten years, trying to reach agreement on a less environmentally damaging alternative. Finally in 2008, after inviting comment, holding a local public hearing, informing members of the state's congressional delegation, and consulting one last time with the Corps and local officials, EPA vetoed the Corps' approval of the project. The veto not only saved a priceless complex of unique wetlands generating millions of dollars' worth of ecosystem services each and every year, it also saved the American taxpayer well over $200 million.

EPA has been sued multiple times over the use of its 404(c) veto and it has won every case. This is a remarkable record, almost unheard of in the annals of environmental law, and it speaks to the care with which the agency chooses to exercise this last resort measure and builds administrative records that have been vindicated by the judiciary all the way to the Supreme Court.

4. The controversy over the Pebble Mine 404 (c) action is misdirected at EPA which is proceeding exactly as the law envisions instead of at the project proponents who for whatever reason have failed to follow through on their promises to file a permit application.

In the current controversy over the Pebble Mine in Alaska the charge has been leveled that EPA has launched a "preemptive veto" before an application for a 404 permit has been submitted. Pebble Limited Partnership (PLP) the project proponent has even filed a lawsuit seeking to block EPA from proceeding with its detailed review of the impacts of potential mining scenarios in the Bristol Bay Watershed, one of the most biologically rich fisheries on earth, the source of over half of the world's supply of sockeye salmon, and a vital subsistence, cultural and economic asset for Native Alaskan communities and many others. The suit is groundless and should be dismissed as premature.[10]

First, PLP can file an application for a permit anytime it wants. Instead as pointed out by Senator Murkowski in a letter dated July 1, 2013 PLP has been promising to file an application and mining plan for over eight years.[11] Senator Murkowski notes that "For nearly a decade Alaskans have been told that these actions are imminent. Yet today after years of waiting it is anxiety frustration and confusion that have become the norm in many communities..." There is nothing preventing PLP from filing its application and having the Corps process it at the same time EPA is conducting its 404 (c) review. As mentioned the statute and regulations give EPA

[10] Newport Galleria v Deland, 618 F. Supp. 1179 (D.D.C., 09/25/1985) (The court dismissed Pyramid's attempt to enjoin the 404 (c) veto process on the ground that there was no final agency action.)
[11] http://www.energy.senate.gov/public/index.cfm/2013/7/sen-murkowski-calls-on-pebble-partnership-to-release-mining-plan

the authority to initiate 404 (c) before, during or after the permit process. Indeed the work that EPA is doing will facilitate the ultimate resolution of this matter. Rather than creating uncertainty as PLP is doing through its foot-dragging, EPA is actually working to provide greater certainty about what is and is not acceptable mining in this pristine watershed.

Second, EPA did not act unilaterally here. Alaska Native tribes, Native Corporations, commercial and recreational fisher organizations, and local officials formally petitioned EPA to initiate the 404 (c) process as a way of removing the uncertainty created by PLP's failure to move forward with its proposal. According to Bob Waldrop, executive director of the Bristol Bay Regional Seafood Development Association, "The Bristol Bay fishermen are weary and exasperated by the economic cloud of uncertainty that Pebble brings to our world-class fishery."[12]

Third, EPA has not vetoed anything at this point. In fact EPA is at step one of a four step process that will take many months to complete. EPA has a broad array of options, including "restricting" mining through detailed performance standards governing what kind of mining could take place without doing unacceptable harm to a resource that supports the subsistence and cultural practices of indigenous peoples, a $1 +billion fishery and its 14,000 jobs, and a world class sport fishery. In this process EPA must consider such things as what is the toxicity of the mining wastes from various kinds of ore deposits, where will this material be dumped in relation to where the salmon runs go and what kind of long term monitoring, management and seepage controls will be needed to ensure not future harm once the mining is over. This should be viewed as a positive step to ensure that whatever mining takes place does not jeopardize an irreplaceable natural resource of immense value to Alaskans and the nation as whole.

I also would like to say that it is unfortunate that the committee does not have a witness from the Bristol Bay region, as they are the ones that asked EPA to help protect the waters in their region and they know the most about what is stake there.

Conclusion

Vermonters have a saying: "If it ain't broke don't fix it." Section 404(c) is not broken. It is doing what Congress intended. And so is EPA. Rather than shooting the messenger I would submit that a more productive approach would be to address the merits of each project that falls under the aegis of the 404 permit program and find ways to "maintain and restore the chemical, physical and biological integrity of the nation's waters" in keeping with the common sense objectives of the Clean Water Act.

Thank you.

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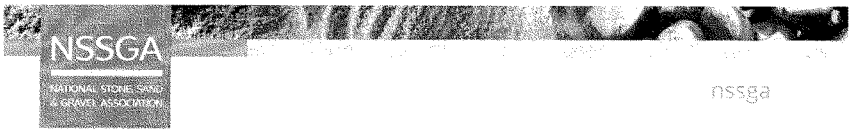
[12] Commercial Fishermen for Bristol Bay http://fishermenforbristolbay.org/2014/01/final-epa-bristol-bay-assessment-concludes-pebble-wrong-mine-wrong-place/



STATEMENT FOR THE RECORD
OF THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND THE ENVIRONMENT

HEARING ON

"EPA'S EXPANDED INTERPRETATION OF ITS PERMIT VETO AUTHORITY UNDER THE CLEAN WATER ACT"

SUBMITTED BY THE

NATIONAL STONE, SAND & GRAVEL ASSOCIATION

JULY 15, 2014

On behalf of the National Stone, Sand and Gravel Association, we appreciate the opportunity to submit testimony to the Committee on Transportation and Infrastructure Water and the Environment Subcommittee hearing on "EPA's Expanded Interpretation of its Permit Veto Authority under the Clean Water Act." The EPA's recent actions indicating an increasing willingness to veto a permit have caused a great deal of uncertainty in the aggregates industry, and concern for its ability to operate in the future.

NSSGA is the world's largest mining association by product volume. NSSGA member companies represent more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the U.S., and there are more than 10,000 aggregates operations across the United States.

Aggregates are the chief ingredient in asphalt pavement and concrete, and are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates operations are returned to the community as a variety of positive land uses from wetlands to lakes, wildlife habitats, recreational centers and even amusement parks and golf courses. While Americans take for granted this essential natural material, they are imperative for construction of our infrastructure, homes, and for positive growth in our communities.

Our industry is concerned by the EPA's veto of an existing permit and recent threat to veto a 404 permit before it was even submitted, and these decisions have cast a pall over all extractive industries. The aggregates industry, like other natural resource industries, depends on the certainty and permanency of permitting. Once a permit has been applied for, we expect it to be evaluated fairly on the basis of merit. When it is granted, we expect to be able to operate within the bounds of that permit for its duration. Our industry plans decades in advance for many sites, so a reliable permitting system is a cornerstone of our ability to operate. The recent decisions by the EPA have created doubt regarding all permit applications.

As the committee is aware, the courts have decided EPA has the authority to veto a permit almost three years after its issuance, and while the location was operating in full compliance with that specific permit. As the committee is also aware, the EPA now is threatening an unprecedented, preemptive veto for Pebble Mine in Alaska. EPA's pre-permit report on the effects of a potential mine allowed the operators no opportunity to make their case in an unbiased manner.

These actions by the EPA undermine the certainty industries must have to operate. EPA's abuse of its veto authority will chill development of new sites and make operating in current sites fraught with unknowns. Is any permit sacrosanct? Is any permit ever final? Will a site be allowed to submit a permit? NSSGA hopes that these and other concerns will be examined by the committee as they seek to bring certainty to this issue.

NSSGA is grateful for the opportunity to submit a statement for the record, and looks forward to being a resource should the committee require additional information about the effects these actions will have on the American aggregates industry and American infrastructure.

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