

# EPA'S APPALACHIAN ENERGY PERMITORIUM: JOB KILLER OR JOB CREATOR?

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## HEARING

BEFORE THE  
SUBCOMMITTEE ON REGULATORY AFFAIRS,  
STIMULUS OVERSIGHT AND GOVERNMENT  
SPENDING

OF THE  
COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM  
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## **EPA'S APPALACHIAN ENERGY PERMITORIUM: JOB KILLER OR JOB CREATOR?**

**THURSDAY, JULY 14, 2011**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS  
OVERSIGHT AND GOVERNMENT SPENDING,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 3:27 p.m., in room 2154, Rayburn House Office Building, Hon. Jim Jordan (chairman of the subcommittee) presiding.

Present: Representatives Jordan, Kelly, Kucinich, and Speier.

Staff present: Ali Ahmad, communications advisor; Joseph A. Brazauskas, counsel; Sharon Casey, senior assistant clerk; John Cuaderes, deputy staff director; Adam P. Fromm, director of Member services and committee operations; Linda Good, chief clerk; Christopher Hixon, deputy chief counsel, oversight; Mark D. Marin, director of oversight; Kristina M. Moore, senior counsel; Jeff Solsby, senior communications advisor; Nadia A. Zahran, staff assistant; Ronald Allen, minority staff assistant; Jaron Bourke, minority director of administration; Claire Coleman, minority counsel; and Lucinda Lessley, minority policy director.

Mr. JORDAN. The Subcommittee on Regulatory Affairs and Government Spending will come to order.

We'll do opening statements, get right to our special guest witness on the first panel, the gentlelady from West Virginia—and great to have you with us.

It may come as a surprise to many Americans that the United States' combined energy resources are the largest on Earth, eclipsing Saudi Arabia, China, and Canada combined. Moreover, America's reserves of coal, the source of half of all electrical power in the United States, are unsurpassed, accounting for over 28 percent of the world's total reserves. The United States has approximately 206 billion tons of recoverable coal, which could help satisfy our demand for energy for centuries.

Counter to the claims of the President, coal and other fossil fuels are not, "yesterday's energy." They are central to our economy's productivity and a critical component of our Nation's competitive advantage. Make no mistake, renewable energy is worthwhile. But the fact remains, 85 percent of the global energy is set to come from fossil fuels until at least 2035.

Much of the coal reserves here at home are located in the mountains of Appalachia and are found in West Virginia, Pennsylvania, Kentucky, Ohio, and Virginia. Of the 1.08 billion tons of coal pro-

duced in the United States in 2010, 334 million tons came out of Appalachia. The rest of the coal was produced primarily in the State of Wyoming.

Coal is more than an affordable source of energy. For generations, coal production has provided Americans with good-paying jobs. The average salary of a coal miner is \$60,000. Moreover, the industry supports thousands of service jobs. A study by Penn State University demonstrates that every coal mining job supports 11 others in the community. It is important to remember that when we are talking about this industry, it also includes truckers, railway workers, equipment suppliers, and other service employees.

During this recession, we should be seeking out ways to leverage our abundant natural resources and let private industry and investment create jobs. Unfortunately, this administration has gone to great lengths, I think, to obstruct domestic production of oil, natural gas, and coal.

A committee staff report entitled, "Rising Energy Costs: An Intentional Result of Government Action," detailed the ways in which the EPA, the Department of Interior, and other agencies have implemented policies that have the effect of raising the price Americans pay for traditional sources of energy.

It has become clear that, since the Obama administration failed to pass the cap-and-trade bill, it has relied on regulatory gimmicks and the imposition of new permitting hurdles to punish traditional job-creating businesses in an effort to increase the price of fossil fuels. Combined with massive subsidies for pet projects, this misguided effort aims to make alternative energy cost competitive with traditional carbon-based energy resources.

In the case of coal, in Appalachia, EPA has overstepped its congressionally delegated authority under the Clean Water Act and seized decisionmaking power from the States and from the Army Corps of Engineers. Under the CWA, Congress gave States the authority to issue section 402 permits and the Corps authority to issue 404 permits. Congress gave EPA merely an oversight role. The April 1, 2010, guidance document effectively seized jurisdiction away from the States and the Corps to administer both of these permits.

EPA's actions have created massive uncertainty, putting jobs in Appalachia at risk, threatening our domestic energy security. Moreover, it has imposed a virtual permitorium on new coal projects.

Under EPA's enhanced review process, the Obama administration officials chose 79 Appalachian CWA permits that had been in the application process since 2006 for additional review. Only eight of those permits have been issued—8 out of 79. While 49 have been withdrawn, many of the withdrawals are due to bankruptcy of the operator who was not able to outlast the EPA.

From permitorium on deepwater drilling in the Gulf to permitorium on coal production in Appalachia, the administration has trampled over administrative proceedings, due process, the intent of Congress, and the rights of States in their effort to rein in domestic production of carbon-based energy. We should not sit idly by as the Federal Government wages a stealth war against this essential and job-creating industry.

I look forward to the testimony of our witnesses today, and I look forward to hearing the administration's response.

I now yield to my good friend from Ohio, Mr. Kucinich, for his opening statement.

Mr. KUCINICH. Mr. Chairman, thank you very much for holding this hearing.

While you and I have had the opportunity to work together and find common agreement on many issues, this may be one of those rare occasions where we do not. But, nevertheless, you have my greatest respect for your service, as does Representative Capito.

Scientific research demonstrates that mountaintop removal mining is devastating to both the environment and the health of Appalachian communities. Mountaintop removal mining has created a water quality crisis in streams where the debris and spoil from mining sites have been dumped. Mountaintop removal mining has created an environmental crisis for aquatic life in those streams and for the most biologically diverse forests in the world which are being systematically destroyed by mountaintop removal.

Mountaintop removal mining has created a public health crisis for people depending on those streams. The research shows that Appalachian residents of areas affected by mountaintop mining experience significantly more unhealthy days each year than the average American, and women who live in areas with high levels of mountaintop coal mining are more likely to have low-birth-weight infants and poor birth outcomes.

Under the Clean Water Act, the Environmental Protection Agency is mandated to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In order to fulfill this legal mandate, the EPA has a duty to increase its scrutiny of Appalachian mountaintop mining permits. I, for one, applaud the leadership of the EPA Administrator in this regard.

Not only is mountaintop mining—removal mining environmentally harmful, but it's actually a job destroyer, not a job creator. Studies have shown that mountaintop removal mining has actually had a negative impact on Appalachian employment because mountaintop removal mining relies on enormous machines, instead of individual skilled miners. The number of mining jobs needed to produce each ton of coal has been drastically reduced.

Mountaintop removal mining is essentially eliminating the miners from coal mining, contributing to a decrease in mining jobs. In 1948, there were 125,699 coal mining jobs in West Virginia, 168,589,033 tons of coal mined. In 2010, however, only 20,452 of these jobs remained, despite the fact that almost the same amount of coal, 144,017,758 tons, had been mined.

This job loss did not result from any regulation. Instead, it occurred because coal companies themselves have replaced workers with machines and explosives. The evidence is clear: Mountaintop removal mining destroys both mountains and jobs.

Coal mining in general has experienced a diminishing share of employment in Appalachia as well. The cause is falling demand for coal. According to the Federal Reserve, the capacity of already permitted and active coal mines set an all-time record in 2010 where the utilization of that capacity was at a 25-year low. So while enough permits have been approved to achieve a new record level

of coal mining capacity, there's simply not enough demand for all that coal that these mines can produce.

Demand for coal or the decision by consumers to use cleaner, more energy efficient forms of energy is not something the EPA controls. It is a decision made by electric-generating plant operators and investors. Increasingly, they've chosen to fuel their power plants with natural gas rather than coal.

I'm deeply troubled by the fact that the House passed the Clean Water Cooperative Federalism Act of 2011 yesterday. There's no doubt this bill is intended to undermine the Clean Water Act and cripple the EPA's ability to ensure that States are adequately policing water quality, not just their own citizens but for their neighboring States that share waterways. Ultimately, if this bill becomes law, it would mean more pollution, more dirty water, more health problems for Americans forced to rely on these waters.

But it won't put Appalachian miners back to work. The economics of coal work against that.

Everyone in this room today shares a common desire to put America back to work. But we do not have to choose between safe drinking water and healthy communities or jobs. I hope we can work together to help create sustainable jobs in the Appalachian region that do not destroy the very communities and the lives of those who work in them.

With that, Mr. Chairman, I yield back; and I would also like to request, if I may, unanimous consent to place all of the reports that document the scientific research on environmental public health effects of mountaintop mining that I referenced in my opening statement, if I could put those in the record.

Mr. JORDAN. Without objection.

Mr. KUCINICH. I appreciate that. Thank you, Mr. Chairman.

Mr. JORDAN. We are now pleased to have our friend and colleague with us, the gentlelady from West Virginia, Mrs. Shelley Moore Capito. Congresswoman, go right ahead.

**STATEMENT OF HON. SHELLEY MOORE CAPITO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA**

Mrs. CAPITO. Thank you, Mr. Chairman; and I want to thank my neighbor, the ranking member, Mr. Kucinich, too. It's a pleasure to be here before the Committee on Oversight and Government Reform. I actually haven't been in the room, so I'm pleased to be here and thanks for the opportunity.

This is something that's very near and dear to us who live in Appalachia, live in West Virginia, are very concerned about the EPA's Appalachian energy permissorium, which I believe is leading to a job drought in my home State of West Virginia. I think you're going to hear from a variety of folks from the region today, and all of them can provide valuable insight into how the EPA's affecting their communities and livelihood.

I think it's timely, because we had the debate on the floor yesterday and just I would like to note that I was able to get an amendment in that bill that I think is important, because it says to the EPA that—and I've had this back and forth with the EPA—are you considering jobs and the economy? Are you not considering jobs and



the economy as you move forward in you rules and regulations? And I've had conflicting messages from them.

So, rather than have a conflicting message, I'm asking that they consider jobs in the economic impact of decisions that are made around the Clean Water Act. It doesn't say in the amendment that a certain decision has to be made based on that, but I certainly think that it's one of the factors that we need to weigh.

As you know, the coal industry is heavily regulated under the Clean Water Act, mandating that coal operators obtain a variety of permits prior to beginning their mining operation. The law requires that the permitting process be quarterbacked by the Corps of Engineers, with input from the EPA and our State DEP, using State environmental standards issued under authority delegated to the States. That was the argument yesterday from the EPA.

Earlier this year, we know that EPA retroactively vetoed a previously approved Clean Water Act permit that had been issued for over 3 years and had been worked. It also—the permit was worked for 10 years. And I think it just sends a chilling effect, if you've played by the rules and been approved, that you can claw back 3 years later and remove the permit, thereby nullifying the economic investment and the jobs created related to that.

It's very rare for the EPA to do that. But I think that it does send a philosophical viewpoint of what's going on in southern West Virginia in particular. I think coal operators can no longer safely make investments, because the EPA has removed some regulatory certainty from the permitting process by having them wonder will their permits be revoked after they have invested millions of dollars.

The negative impact, I think of the EPA's action upon jobs, in my view, is obvious. The EPA has been unable to give me a straight answer—and I said this in the beginning—as to whether or not it does consider the negative impacts on jobs prior to making their rules and regulations in force.

Just last month, AEP, which is our local—certainly you know that in Ohio. AEP is a provider of electricity in your great State—announced that it will shut down five plants, coal-burning plants, coal-burning power-generation plants. And the direct effect of this is job loss. It's economic loss. And it also is raising—and this concerns me as well—10 to 15 percent on your energy bill at the end of the month or at the end of the year. And I think for a State like ours with a lot of people on fixed incomes, that's an economic impact that we need to consider.

But, you know, the perimitorium on coal operations is not the only place where EPA has been hurting economic growth under the auspices of the Clean Water Act. Notably, let's talk a little bit about construction and agriculture. Anybody who needs to move dirt or discharge water or water runoff requires a Clean Water Act permit. While many of you don't have coal operations in your particular district, it's likely that industries and projects within your districts could be negatively impacted by these rules and regulations.

Just for instance, family farms. There's a family farm in Pendleton County that, according to a local newspaper, the EPA was going so far as to regulate the type of sheds that family farmers

may build on their cattle operation. They were actually doing, which I could not believe, aerial surveillance on our family farms. And then, when asked, when the local folks asked, are you looking at how much this is going to cost me and where are you looking at, you know, trying to strike that balance between economy and the environment, the person from the EPA said, that's not part of their consideration.

And I think that's been pretty consistent with the way the EPA has been acting. I think their actions are unacceptable, because they are not looking at the full picture. That's all I am saying. Let's have transparency. Let's look at the full picture.

We have the natural resources to help create jobs and protect our economy at the same time. We are truly blessed with an abundant supply of natural resources. And as a native West Virginian, I treasure the beauty of our State and the clean water of our State, and I want to do what we can and should do to protect our State's environment. But, instead of having a push and pull where we're only looking at one side of the story, without the complete picture, I think we endanger job creation, our energy security of the Nation, and I think it's time for us to take a better look.

And I thank you all for giving me the privilege of testifying.

[The prepared statement of Hon. Shelley Moore Capito follows:]

**Testimony of Rep. Shelley Moore Capito**  
**House Committee on Oversight & Government Reform, the**  
**Subcommittee on Regulatory Affairs, Stimulus Oversight, and**  
**Government Spending.**

On behalf of my constituents, I would like to thank the Chairman and Ranking Member of the Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending for holding this hearing on the EPA's Appalachian Energy Permittorium which is killing jobs in my home state of West Virginia. You will hear from a variety of folks from the region today, and all of them can provide valuable insight into how the EPA is affecting their communities and livelihoods.

My home state of West Virginia is one of the largest coal producing states in the nation, and is home to some of the most valuable coal reserves in the world. The coal industry is one of the state's largest source of jobs and tax revenue.

As you know, the coal industry is heavily regulated under the Clean Water Act which mandates that coal operators obtain a variety of permits prior to beginning mining operations, including for both underground and surface mining operations. The law requires that the permitting process be quarterbacked by the Army Corps of Engineers, with input from the EPA and state environmental officials using state environmental standards issued under authority delegated to the states from the EPA.

Earlier this year, the EPA retroactively vetoed a previously approved Clean Water Act permit that had been issued for Arch Coal's Spruce Mine Number 1. It is important to note that the EPA had previously reviewed this permit only a few short years before and it is an extraordinary action for the EPA to retroactively veto a permit. This action has resulted in hundreds

of jobs not being created. Additionally, the retroactive revocation of a permit is particularly concerning because it causes great uncertainty across a variety of industries. Coal operators can no longer safely make investments because the EPA has removed regulatory certainty from the permitting process by making operators wonder whether their permits will be revoked after they have invested millions of dollars in the development of reserves. Also very concerning is that the EPA is currently sitting on hundreds of permits filed by coal operators, holding up investment and therefore job creation.

The negative impact of the EPA's actions upon jobs is obvious. However, the EPA has been unable to give me a straight answer on whether it does or does not consider the negative impact on jobs prior to acting. Instead, this administration's EPA puts ideology first, and hardworking West

Virginians who are working to put food on their family's tables last. Just last month, American Electric Power announced it will shut down five plants in West Virginia and Ohio and retire nearly 6,000 megawatts of coal-fueled power generation. According to AEP, this is a direct response to new and burdensome regulations on coal-fueled power plants levied by the EPA within the last year. As hundreds of AEP workers think about their imminent unemployment, the Administration refuses to reconsider its anti-coal agenda.

The EPA's peremptory on coal operations is not the only place where the EPA has been hurting economic growth in West Virginia under the auspices of the Clean Water Act. Notably, the EPA's peremptory on Clean Water Act permits impacts other industries as well, including the construction and agriculture industries. Any industry who needs to move dirt, or discharge

water or water runoff, requires a Clean Water Act permit. While many of you may not have coal operations in your district, it is likely that there are industries and projects within your districts that are being negatively impacted by the EPA's actions.

The EPA's ideological war on Appalachian jobs is manifesting itself in the eastern part of West Virginia where the EPA is using aerial surveillance of family farms with the goal of ensuring compliance with the Clean Water Act. According to an article in a local newspaper, the EPA is going as far as regulating the type of sheds that family farmers may build for their cattle operations. When asked about the economic impact of this type of regulatory overreach, the EPA's representative made it clear that jobs are irrelevant.

The EPA's actions are unacceptable. West Virginia and Appalachia have the natural resources to help create jobs and bring this economy out of recession. However, this cannot happen in the current regulatory environment. Folks I talk to back in West Virginia keep telling me that they are ready and willing to create jobs if only the EPA would get off their backs.

If the administration thinks their policies are helping folks across the country, I invite them to visit my state to see how their actions are hurting families across Appalachia. It's time to take advantage of the resources found right here in America. Doing so will launch our economy in the right direction and create thousands of good-paying jobs.

West Virginia is truly blessed to have abundant supplies of natural resources. As a native West Virginian I enjoy my State's



beauty and appreciate its pristine water, and want to do what is reasonably necessary to maintain our state's environment. But instead of helping industry and family farmers tap into our full economic potential while implementing common sense environmental regulations, this Administration's EPA would rather do things such as approving de facto regulations that would deem some bottled water a danger to aquatic life.

It is time for this administration to get off the backs of West Virginia's job creators by using common sense and not ideology. Thank you again for holding this very important hearing.

Mr. JORDAN. Thank you for your excellent testimony, Congresswoman.

Now we will get the panel set up, the table set up for our next panel. Thank you again, Shelley.

Staff will take just a minute and get ready for our first panel. We'll move right into those new witnesses. Take a look where your name tag is and jump in.

Do we have our witnesses? All right. Just come right up to the table. We'll get rolling here.

On this panel we have, first, Mr. Tom Mackall, president of Sterling Mining. We have Mr. Chris Hamilton, senior vice president of the West Virginia Coal Association; Mr. Joe Lovett, director of the Appalachian Center for Economy and the Environment; and Mr. Roger Horton, chairman of the Safety Committee of the United Mine Workers Local 5958 and co-chair of the Mountain Top Mining Coalition.

And our fifth witness—I'll yield to the gentleman from Pennsylvania.

Mr. KELLY. Thank you, Mr. Chairman; and thanks for holding this hearing.

I would like to welcome a constituent of mine from Western Pennsylvania, John Stilley, who operates Amerikohl.

I could talk for a long time about John Stilley and what he's been able to do in business. But I think the most important thing that John Stilley has done, he has been such an important part of our community with job creation and also land reclamation. And the land he has reclaimed has been at no cost to taxpayers.

So when we look at these people and understand that they took time out of their private lives to come here today and share with us the situations that they face as they try to run their businesses—and maybe it's unintended consequences, but sometimes I start to wonder of government overregulating and being so involved in a business that it makes it very difficult to operate a business profitably and to keep hiring people.

So, John, I really appreciate your being here today, Mr. Stilley. You've done a great job. Keep up the good work and please give me best to the whole family.

Mr. JORDAN. I know you just got seated there, but, pursuant to committee rules, we need you to stand up, raise your right hand, and we have a swearing in that we do here.

[Witnesses sworn.]

Mr. JORDAN. Let the record show that they all answered in the affirmative.

And we will now move right to our first witness, Mr. Mackall.

Go right ahead. You have 5 minutes. You've got the lights somewhere where you can see them and I think right in front of you, so you get the warning light. When you get the warning light, unlike speeding up—well, no, just like speeding up. Get to the finish line. Get right through it.

So go right ahead, Mr. Mackall.

**STATEMENTS OF TOM MACKALL, PRESIDENT, STERLING MINING; CHRIS HAMILTON, SENIOR VICE PRESIDENT, WEST VIRGINIA COAL ASSOCIATION; JOE LOVETT, EXECUTIVE DIRECTOR, APPALACHIAN CENTER FOR ECONOMY AND THE ENVIRONMENT; ROGER HORTON, CHAIRMAN, SAFETY COMMITTEE LOCAL 5958, CO-CHAIR, MOUNTAIN TOP MINING COALITION; AND JOHN STILLEY, PRESIDENT, AMERIKOHL MINING INC.**

**STATEMENT OF TOM MACKALL**

Mr. MACKALL. Thank you, Chairman Jordan, Ranking Member Kucinich, members of the committee. Good afternoon.

I'm just a coal miner from Ohio, but it's my pleasure to come to Washington and testify in front of Congress, and I really appreciate the opportunity.

My name is Tom Mackall. I'm with the East Fairfield Coal Co. Sterling Mining is also another name, our underground mining company.

We currently have operations in Ohio and Pennsylvania. We employ over 160 hardworking Americans. We have underground mining operations and mine coal, clay, and limestone.

But we're still a small business. I'm proud to say that we're a family business. My father started working for the company in 1934, and I've been there 40 years, and I have now a son that's been there 10 years. So we're trying to continue the family tradition.

When I was preparing my remarks for today I was at the coal mine yesterday, and one of the coal miners came up to me, and he's never said anything like this to me before. But he said, I read a Bible verse that reminds me of the government. And he told me it was Luke chapter 11, verse 46. So I got it out, and I read it, and I'd like to read it to you today. It really summarizes my viewpoint of the government.

"Jesus replied, and you experts in the law, woe to you, because you load people with burdens they can hardly carry and you, yourselves, will not lift one finger to help them."

When I consider your question, it's easy to say the EPA has been a job killer. It's absolutely a job killer, and it's killing jobs across Ohio and Appalachia. But it's not just the EPA; it's the entire administration. They have declared war on coal and specifically on Appalachia coal-related jobs.

I want to highlight three areas where the current administration has hurt Appalachia jobs and job creators, permitting delays, inconsistent enforcement, and new regulations.

First, the extremely burdensome and flawed system of the permit-approval process has been complicated in a purposeful manner by the administration. We have seen the administration insert EPA into the permitting process through the use of what they call guidance documents. These really serve the purpose of usurping the power of our Army Corps of Engineers as well as State regulators.

For example, we have been struggling to obtain a refuse permit at our Brush Creek Mine in Jefferson County, Ohio. Mr. Chairman, a small company like ours cannot afford to keep people employed if we are unable to have some sort of logical permitting process.

That's because the required background studies take nearly a year by themselves, and in the case of this refuse permit it's cost us over \$300,000. In this case, 3 years later we still are no closer to having our permit issue resolved.

The second major weapon that is being used by the current administration is inconsistent enforcement. The Department of Labor's Mine Safety and Health Administration and their actions are particularly troubling. MSHA has proposed a Respirable Dust Standard that is unachievable in underground mine settings and continues to be unable to produce the relevant data that that they claim creates the causation basis for their rule.

There are certainly and importantly some very good inspectors within MSHA's ranks. But the problem is that MSHA is being used strictly as a tool to push for massive fines and charges that suddenly emerge on some days that the exact condition were fine on another day.

The third means by which the Obama administration is waging war on coal is through new EPA regulations. Just last week they unveiled the final Clean Air Transport Rule. When combined with another part of what I call the EPA train wreck, the impacts on the economy are staggering. Recent modeling has shown that the transport rule and EPA's Utility MACT proposal will result in the loss of 1.44 million American jobs, along with costs of \$184 billion to power providers.

And the important thing here is these costs, added to our manufacturers in the United States, they cannot afford more jobs. It's like an additional tax. So I think more jobs will leave the country as we raise our electric rates like that.

Since the recession started, we have lost three major customers. Each of them provided important jobs and products for the economy but were all heavily regulated by the EPA. Two of these companies were cement manufacturers. Now we are importing cement from Peru. It's an important but troubling twist that the Peru cement is being imported through a port in New York using funds from the stimulus.

Let me be clear. This administration's regulatory agencies are destroying jobs in Appalachia while, at the same time, the stimulus funding has made it easier to import competing goods from other countries.

Mr. Chairman, I offer these examples because they are real, and they are really hurting Ohioans and Appalachians. For generations, our reasonable energy costs, powered in large part by coal, led to Ohio being a great industrial State. Now, with the administration's policies, we are seeing this change and our competitive edge decline.

Simply put, the three items I have highlighted—permitting problems, inconsistent enforcement, and new regulations—are destroying what formerly made Ohio and Appalachia so strong.

Thank you for the opportunity to testify, Mr. Chairman, and I stand ready to answer any questions the committee may have. Thank you.

[The prepared statement of Mr. Mackell follows:]

Testimony of Mr. Tom Mackall, East Fairfield Coal Company

**Testimony of Mr. Tom Mackall**  
**President, East Fairfield Coal Company**  
**Before the**  
**House Committee on Oversight and Government Reform**  
**Subcommittee on Regulatory Affairs, Stimulus Oversight & Government Spending**  
**Hearing Entitled: *EPA's Appalachian Energy Permitorium: Job Killer or Job Creator?***  
**July 14, 2011**

Chairman Jordan, Ranking Member Kucinich, Members of the Committee, good morning.

Thank you for inviting me to testify at this important hearing regarding the numerous new regulations that the U.S. EPA and other federal agencies are having on Appalachian jobs. My name is Tom Mackall, and I am President of East Fairfield Coal Company.

We currently have operations in both Ohio and Pennsylvania, and employ over 160 hardworking Americans. We primarily have underground mining operations that mine clay, coal, and limestone. Mr. Chairman, I'm here today to share with the committee the very real impacts of government overreach and how the current Administration's practices have impacted our region. Our company is a small business, and I'm proud to say that my father worked for the company when it was started in 1934. I have been with East Fairfield Coal Company for 40 years, and my son works there today. My fear is that, given the slew of new regulations from the U.S. EPA and other agencies, our company, and the jobs we provide, will not be able to survive. Workers at businesses we supply will also see their jobs be destroyed if we don't stop the regulatory wave that's crushing the American economy.

In my lifetime, I've seen the number of coal companies in my home county go from nearly 30 to almost completely disappearing. While we have been under attack for the last generation by activist environmental groups and government bureaucrats, their efforts have been accelerated by the Obama Administration. They have declared a War on Coal, and specifically on Appalachian coal and related jobs.

The question that you pose in today's hearing topic is both pertinent and easily answered. "Is EPA's Appalachian Permitorium a Job Killer or Job Creator?" It is absolutely a job killer and its killing jobs across Appalachia in particular Ohio and Pennsylvania. But it's not just the EPA; it's the entire Administration.

Testimony of Mr. Tom Mackall, East Fairfield Coal Company

For purposes of my testimony in front of this Committee, I wanted to highlight three areas where the current Administration has hurt Appalachian jobs and job-creators. The agencies have done this damage in the following ways:

- Permitting Delays
- Inconsistent Enforcement
- New Regulations

It is these three weapons that are openly and blatantly putting Ohioans, Pennsylvanians, and others throughout Appalachia out of work.

First, the extremely burdensome and flawed system of the permit approval process has been complicated in a purposeful manner by the Administration. We have a terrible time getting permits through the process in any sensible time frame. In fact, we have seen the Administration insert EPA into the permitting process through the use of what they call "guidance" documents. These really serve the purpose of usurping the power of the Army Corps of Engineers as well as state regulators.

It is my firm belief that these decisions are calculated, and serve as a means to essentially create new regulations on permitting requirements without any formal notice or comment period, or stakeholder input of any sort.

For example, we have been struggling with obtaining a refuse permit at our Brush Creek Mine for nearly three years. Prior deadlines that were rarely met by government regulators are now only being extended. Mr. Chairman, a small company like ours cannot afford to keep people employed if we are unable to have some sort of logical permitting process. That's because the required background studies take nearly a year by themselves and in the case of this refuse permit have cost us over \$300,000. In this case, three years later, we are no closer to having the permit issue resolved.

The result means we are frankly unable to grow the company. Without this permit for where to place mine refuse, we are a prisoner to the perception that we have no place to deposit new mine fill. In turn, without this permit, we are unable to obtain permits to begin new mining operations that could employ many new workers. This example clearly shows that the Government Agencies are leading an effort to violate the traditional state primacy in these permitting matters, and in doing so is destroying the coal and related service jobs in Appalachia.

The second major weapon being used by the current Administration is inconsistent enforcement. The Department of Labor's Mine Safety and Health Administration (MSHA) and their actions are particularly troubling. MSHA has proposed a Respirable Dust Standard that is unachievable

Testimony of Mr. Tom Mackall, East Fairfield Coal Company

in underground mine settings, and continues to be unable to produce the relevant data that they claim creates the causation basis for their rule.

Day to day, our company sees the impacts of how MSHA is being used as a tool to stop coal mining. Our mines are completely at the whim of inspectors. I will state to all of the members of this Committee that there are certainly some very good inspectors within MSHA's ranks. But the problem is that MSHA is being used as a tool to push for massive fines and charges that suddenly emerge on some days but the exact conditions were fine on another day. Sadly, it is my belief that the Administration is using MSHA in this manner which compromises their own inspectors and does nothing for mine safety.

Their work is becoming more about costly legal issues without any checks and balances, and less about the critical goal we all share—and that's the safety of our miners.

The third means by which the Obama Administration is waging a War on Coal is through new EPA regulations. Just last week, they unveiled the final Clean Air Transport Rule. This new rule, if not stopped, will cost our customers billions of dollars, and particularly hurts Ohio's coal operations. When combined with another part of what I call the EPA Train Wreck, the impacts to the economy are staggering. Recent modeling has shown that the Transport Rule and the EPA's Utility MACT proposal will result in the loss of 1.44 million American jobs, along with costs of \$184 billion to power providers. We all know those costs get passed right down to consumers to pay.

In Ohio alone it's going to mean the loss of 53,000 jobs in a state that has shed hundreds of thousands of jobs in the last decade. We'll also face a 13% increase in our electricity bills just from the Clean Air Transport Rule.

The effects of rules like these are tangible. Right now, the Cleveland Medical Center uses coal-fired boilers to run their facility that helps to provide critical health care to so many in our region. Pressures from Obama's EPA regulations combined with the Sierra Club going after them are likely to force them to switch to more costly energy sources just to keep the lights on.

Mr. Chairman, I offer these examples because they are very real, and are truly hurting Appalachians. For generations, our reasonable energy costs, powered in large part by coal, led to Ohio being a great industrial state. Now, with the Administration's policies, we are seeing this change, and our competitiveness decline.

We formerly supplied a number of small companies, now they are going away. Since the recession started, three major companies we supplied have closed. Each of them provided important jobs and products for the economy, but were all heavily regulated by the EPA. Two of those companies were cement manufacturers. The cement is now being imported from Peru.

Testimony of Mr. Tom Mackall, East Fairfield Coal Company

In an important but terrible twist the Peruvian cement is being imported through a port in New York that expanded using funds from the stimulus. Our taxpayer dollars are being used to compliment harmful government regulations—and to the benefit of our foreign competitors. Let me be clear, this administration's regulatory agencies are destroying jobs in Appalachia while at the same time the stimulus funding has made it easier to import competing goods from other countries.

Simply put, Mr. Chairman, the three items I have highlighted—permitting problems, inconsistent enforcement, and new regulations—are destroying what formerly made Ohio and Appalachia so strong.

It is my hope this Committee will tackle these three areas, and do so by bringing in the agency heads that are waging a war on coal across a number of agencies. The EPA, Department of Interior, Department of Labor, and others should have to answer for their coordinated efforts. Mr. Chairman, there is a coordinated effort across these Agencies and Departments and I hope you expose this effort by demanding answers from these agencies. make the EPA justify their regulatory decisions with real cost data, make MSHA show you their health data, which they haven't made public, make the Department of the Interior's Office of Surface Mining explain the real job loss numbers behind their Stream Protection Proposal that they tried hiding from the public by firing their outside contractor.

We can still save Appalachian jobs, and my company seeks to create many more new ones.

I thank you for the opportunity to testify, Mr. Chairman, and stand ready to answer any questions the Committee may have about the Administration's purposeful attack on coal.



Mr. JORDAN. Thank you.  
Mr. Hamilton.

#### STATEMENT OF CHRIS HAMILTON

Mr. HAMILTON. Mr. Chairman, members of the committee, good afternoon, and thank you for the opportunity for us to participate in today's proceeding.

I'm Chris Hamilton with the West Virginia Coal Association, and I appear before you today on behalf of the West Virginia Coal Association, along with the West Virginia Business and Industry Council.

The State of West Virginia is the Nation's leading underground coal-producing State, consistently averaging 155 million tons of annual coal production over the past decade. That comes from approximately 300 underground mines, 230 surface mines, and about 27,000 coal miners.

West Virginia's coal is the most valuable, most desired coal in the world for both electric generation and for the production of iron and steel. Our coal is shipped to some 33 States and 23 foreign destinations, and West Virginia's energy fuels approximately 40 percent of the electrical power needs up and down the entire East Coast.

The coal industry is also the broad-shouldered Atlas of the West Virginia's economy, supporting thousands of supporting jobs and businesses. The coal industry accounts for more than 12 percent of the State's gross State product, \$3.2 billion in direct wages annually, and over \$27 billion in overall economic activity.

Coal is also the backbone of our State's government structure. The taxes collected on coal production provide the majority of funding for vital State and county social programs. In fact, together with the electric utility industry, coal provides upwards of 60 percent of all business taxes collected in the State of West Virginia.

All the direct benefits provided by the coal industry and our State's economy have been clearly placed in serious jeopardy by the actions of the current administration and its EPA. EPA has gone to great lengths to target coal mining operation across the Nation. It seems to have focused specifically on the State of West Virginia and our surrounding States within the Appalachia region.

The Agency's assault begins with the mine-permitting process and continues up to the point where coal is consumed. EPA has virtually halted the orderly processing of mine permits and continues up to the point where coal is actually consumed, including casting a doubtful shadow over the continued use of coal, by processing sweeping revisions to clean air standards and entirely new regulatory programs for coal combustion residuals.

Simply put, the government, our government, today is coming by land, air, and sea to create havoc and cripple the production and use of West Virginia coal. The Federal Government's battering of the industry literally began the moment the current administration assumed office by issuing a series of objection letters to the issuance of new mining permits, followed immediately by a convoluted multiagency enhanced permit review process and sweeping revisions that were not promulgated by lawful administrative rule to the regulatory consideration of mining permits, effectively usurp-

ing the powers of the State and imposing limits for which no promulgated standards exist.

EPA, in our view, has clearly abused its role under the Clean Water Act to essentially bypass and nullify the authority and responsibilities of individual States to regulate activities within their borders. They have done so by way of guidance and policy, disregarding the Federal rulemaking process so carefully crafted by the Congress decades ago within the boundaries of the Clean Water Act.

EPA's interference knows no bounds. EPA will tell the Congress and the public—and we've heard it here already today—that its actions target only large-scale mountaintop mining operations. Nothing is further from the truth. The Federal agency is actively obstructing the issuance of permits for surface mines, small surface mines with absolutely no valley fills, with no discharges in lawful waters of the State, underground mining operations, and practically every surface facility that must be developed to sustain and operate both surface mines and underground, which include the smallest of haulage roads.

Reduced to its essence, what you have is EPA avoiding the rule-making process and lawful boundaries of its authorities under the Clean Water Act to impose the most stringent, impractical, if not impossible-to-meet standards against a selected industry in a handful of States. Despite repeated pleas and requests from our executive, our industry officials, both labor and management, our legislative branch of the government, to engage in a professional discussion of these critical issues, EPA has simply thumbed their nose at every single elected official within our State and has told us repeatedly that they have no interest whatsoever with respect to the jobs or the economic consequences of mining. So egregious is EPA's behavior, the State regulatory authorities, including West Virginia, have sued their Federal counterpart over its abuses of power in Federal court.

Mr. JORDAN. Mr. Hamilton, if you could just conclude real briefly. You can finish if you've got a couple of sentences there. But just conclude quickly.

Mr. HAMILTON. Thank you, Mr. Chairman.

Resolution of this issue cannot wait for judicial adjudication. Every day the permitting backlog at the Corps and EPA grows, and today that universe of paralyzed permits is nearly approaching 1,000 with respect to all permitting actions that must occur in order to sustain our viability.

The buying of coal is so significant——

[The prepared statement of Mr. Hamilton follows:]



## **West Virginia Coal Association**

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**Statement of Chris R. Hamilton  
Senior Vice-President  
West Virginia Coal Association**

**House Committee on Oversight and Government Reform:  
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government  
Spending-  
*EPA's Appalachian Energy Permittorium: Job Killer Or Job Creator?'***

**July 14, 2011**

Good afternoon and thank you for the opportunity to address this Committee. I am Chris Hamilton with the West Virginia Coal Association. We appreciate the opportunity to participate in today's hearing. The West Virginia Coal Association is a trade association comprised of coal producing companies who collectively account for approximately 98 percent of West Virginia's annual coal production. Our membership also includes mine maintenance and specialty contractors, mine reclamation companies, equipment manufacturers, land companies and general service companies.

The state of West Virginia is the nation's leading underground coal producing state, averaging 155 million tons of annual coal production over the past decade, of which 100 million tons comes from underground mining operations. West Virginia's mining industry includes 305 underground mines and 232 surface mines employing over 27,000 miners. Arguably, the state of West Virginia and our

member companies are impacted more directly by the actions of EPA than any other state.

West Virginia is also part of a group of eastern coal states that produce coal east of the Mississippi River which account for approximately forty percent (40%) of the nation's production of coal and nearly 80 percent of the nation's coal workforce. This region of the country has seen its share of national production fall from a high of 623 million tons in 1990 to an estimated 339 million tons in 2011, a 46 percent reduction.

In addition to representing the 300 plus members of the West Virginia Coal Association at this hearing, I am also appearing on behalf of the West Virginia Business and Industry Council which represents almost 400,000 employees across 26 separate industry categories in the state of West Virginia from small business owners to farmers to chemical manufacturers to mining companies.

The Members of the Business and Industry Council are just as concerned about the federal Environmental Protection Agency's (EPA) activities with respect to mining in Appalachia as is the coal industry because its behavior sets a dangerous precedent that allows EPA to bypass the process established by Congress for regulating activities under the federal Clean Water Act (CWA). While EPA's focus at the moment is on coal mining, its actions, if left unchecked, could extend to any activity anywhere. If EPA can revoke a validly issued permit with a

remarkable record of compliance three years after it was issued as they have done in West Virginia, then what hope can there be for further investment to build new economic activity if EPA may show up some day and take that permit away?

Before I address EPA's action specifically, I would like to provide some additional background on West Virginia's coal industry. West Virginia's coal is the most valuable coal in the world. For electrical generation, West Virginia's coal offers a fuel source that is both high-btu and low in sulfur emissions.

For domestic and international steel makers, our coal is irreplaceable as a feedstock for the production of iron and steel. West Virginia coal is also used in variety of manufacturing processes that produce everything from plastics to medication to cosmetics. In short, West Virginia coal does everything from charging your iphone to forging the steel for our nation's infrastructure to making the plastic bottle for your soda. Our coal is shipped to 33 states and 23 countries and West Virginia energy fuels 40 percent of all electricity needs on the east coast.

The coal industry is also the broad shouldered atlas of West Virginia's economy supporting thousands of supporting jobs and businesses. The coal industry accounts for more than 12 percent of West Virginia's gross state product and represents \$3.2 billion in direct wages annually.

Finally, coal is the backbone of West Virginia's government structure... the taxes collected on coal production provide the majority of the funding for vital state and county social programs, funding everything from ambulance and fire service to public water infrastructure to financial assistance for the needy. In fact, together with the electrical utility industry, coal provides upwards of 60 percent of all business taxes collected in West Virginia.

All of the direct benefits provided by the coal industry and all that results from having a domestic source of energy that is so versatile in the economy has been placed in serious jeopardy by the actions of the current administration and it's EPA.

EPA has gone to great lengths to target coal mining across the nation but seems to have focused specifically on West Virginia and the Appalachian states of Kentucky, Virginia, Ohio and Pennsylvania. The agency's assault begins with the mine permitting process and continues up to the point where the coal is consumed. As we will explain in greater detail, EPA has virtually halted the orderly processing of mining related environmental permits and at the same time has cast a long, doubtful shadow on the continued use of coal by proposing sweeping revisions to Clean Air Act standards and entirely new regulatory programs for coal combustion residuals. Simply put, the federal government is

coming by land, air and sea to cripple the production and use of West Virginia coal.

The federal government's battering of the coal industry literally began the moment the current administration assumed office. On January 20, 2009 the Army Corps of Engineers received its first comment letter from EPA objecting to the issuance of a coal mining related permit. From that point on, EPA has never slowed down. In June of that year EPA joined other federal agencies and the White House Council on Environmental Quality in a MOU that announced sweeping revisions to the regulatory consideration of mining permits. In April 2010 EPA issued water quality guidance to usurp the powers of the state and impose limits for which no promulgated standards exist. All the while EPA's comment and objection letters continue to be delivered.

EPA has abused its role under the CWA to essentially bypass and nullify the authority and responsibilities of individual states to regulate activities within their borders. They have done so by way of "guidance" and "policy", disregarding the federal rulemaking process so carefully crafted by the Congress decades ago in the CWA. Providing perhaps the best evidence that its actions are designed to satisfy a political agenda, this guidance targets only a specific activity, coal mining, in a specific region, Appalachia. The CWA applies nationwide. To otherwise narrow its scope to political boundaries compromises its very integrity.

EPA has hijacked state water quality standards by interpreting them to mean something they never have. In our current situation, EPA has focused on certain parameters for which there are NO legally promulgated national or state water quality criteria, yet in almost every case, EPA pressures the states to insert these illegal standards in coal mining permits... an action that would cause the states to violate their own laws and regulations. EPA has also seized control of the Corps' permitting program, forcing that agency to adopt permit specific standards for EPA's pet parameters... this is a role that Congress never intended for the Corps... it was reserved to the individual states. In EPA's warped application of the CWA, it can bully one federal agency, the Corps, to implement a standard advocated by another federal agency, EPA, and all the while ignore the legally promulgated programs of the states.

EPA's interference knows no bounds. EPA will tell the Congress and the public that its actions target only large scale mountaintop mining operations... nothing is further from the truth. The federal agency is actively obstructing the issuance of permits for surface mines with no valley fills, underground mining operations and even road construction associated with coal mines.



Reduced to its essence, what you have is EPA avoiding the rulemaking process and the lawful boundaries of its authority under the CWA to impose the most stringent, impractical, if not impossible to meet standards against a selected industry in a handful of states.

This history and pattern of behavior is well established. The State of West Virginia, by official act of the West Virginia Legislature and through official correspondence between the Governor and our environmental regulatory agency, has notified EPA that its interpretation and application of state standards is incorrect. EPA remains unbridled in its actions, showing zero respect for the balance of power between states and the federal government that Congress carefully crafted in the CWA years ago. So egregious is EPA's behavior that state regulatory authorities, including West Virginia have sued their federal counterpart over its abuses of power in federal court.

Resolution of this issue cannot wait for judicial adjudication. Every day the permitting backlog at the Corps and EPA grows. Every day that EPA remains free to ignore the rule of law places other activities in other regions at risk. Every day that EPA interferes with the permitting process, the closer individual states come to surrendering and handing those duties back to the federal government.

So compromised is the mine permitting process under the CWA that it is near collapse.

The very few permits that have been “cleared” by EPA for issuance include the illegal limits we talked about earlier. Mining companies, approaching the point where closure of an operation was the only option available without a permit, were extorted by EPA to agree to the imposition of these thresholds. Here again, EPA has abused its power to bypass the legal process and nullify state programs to get what it wants.

The Congress needs to move quickly to reign in EPA, not only to preserve the viability of the coal industry, but to prevent this bureaucratic-driven, policy implemented power grab from infecting and afflicting other activities in other regions. Passage by this body of H.R. 2018 yesterday is a positive step towards restoring the balance of authority envisioned in the CWA. Quite frankly, it is the first glimmer of hope the besieged coal industry has seen since EPA began its anti-coal offensive in West Virginia.

The mining of coal is so significant to this country. Not only in economic terms, but it has brought the United States through two world wars, powered us through the industrial and information ages. Perhaps more significant today, given recent tragic events around the globe and the political unrest in areas from

which we import our oil, coal holds the key for our country to become energy independent, to secure our borders and to bolster our national defense.

In closing, thousands of men and women show up at a mine every day to provide our state, region and world with low cost, dependable industrial and household power. These dedicated coal miners are true masters of their profession, extracting a vital resource with great pride and sophistication, exercising great attention and detail to safety and environmental accomplishment. Clearly we have the most dedicated workforce found anywhere in the world. These men and women look to this Committee and the Congress not for a handout or subsidy, but for the ability to continue to work, live and raise their families in their native West Virginia.

Thank you very much for the opportunity to speak before this Committee.

Mr. JORDAN. Mr. Hamilton, we'll get to the rest of that during the questions. Thank you very much for I think your very compelling testimony.

Mr. Lovett.

#### STATEMENT OF JOE LOVETT

Mr. LOVETT. Good afternoon, and thank you for the opportunity to testify here today.

My name is Joe Lovett, and I'm executive director of the Appalachian Center for the Economy and the Environment. We're a non-profit policy center located in Lewisburg, WVA.

I'm also a lawyer who has been attempting for too many years now to enforce surface mining, coal mining, and other environmental laws that Federal and State regulators refuse to enforce in Appalachia.

I learned a word here today, permitorium, I think, which really I don't think is a word at all except maybe in George Orwell's world. But, in any event, it's certainly not an accurate description of what is occurring on the ground in Appalachia.

For years now, every permitting agency has issued any permit to the coal industry that it wants at any time. This is the first time the coal industry has met any resistance to its permitting, and it doesn't like it.

I would note that no operator has the right to a permit. It has to comply with the law. And none of the permits for mountaintop removal comply with the law. That's why EPA is doing what it's doing now.

EPA's actions to regulate surface mining in the region during the past 2½ years have been necessary not only to enforce the Clean Water Act against mining operators but also to ensure that regulatory agencies comply with the law. Too often, State and Federal agencies in our region see their jobs not as enforcing the law and protecting the environment and the communities in the region but as protecting coal operators from having to comply with the law. Rather than forcing mountaintop removal operators to conform their actions to the law, Federal and State agencies bend or change the law to accommodate destructive mining practices.

Make no mistake. This is not about mining in general. It's about mountaintop removal. EPA's actions go to mountaintop removal. Mountaintop removal can't be conflated with all mining. So mountaintop removal should be stopped. It can't comply with the law. It's hurting the people of our region and stealing its jobs.

The U.S. Army Corps of Engineers continues to disregard its duties under the Clean Water Act by issuing permits to mountaintop removal operators. The Corps is literally overseeing the illegal destruction of our mountains and streams. For years, the Corps has issued permits for huge mountaintop removal mines with little more than a wink and a nod. And the unlawful issuance of the permit to Arch's Spruce Mine is a paradigmatic example of the Corps' refusal to enforce the law.

In the past 2½ years, EPA has taken three significant steps to enforce the Clean Water Act relating to mountaintop removal mining. It entered into an enhanced coordination process with the Corps for the issuance of 404 permits, it vetoed Arch's Spruce 404

Mine, and it issued a guidance document on conductivity levels in Appalachian streams.

None of these actions should be controversial. Taken together, they merely accomplish the minimum required by the Clean Water Act. Indeed, EPA should take much more vigorous actions to enforce the laws in our region.

For instance, Arch's Spruce Mine, which the Corps vetoed, would devastate one of West Virginia's most beautiful hollows. Although the industry has tried to foment controversy around EPA's veto of the Spruce Mine, that veto was necessary to protect the Nation's water and was, therefore, required by the Clean Water Act. The discharges at that Spruce Mine alone would bury 6.6 miles of high-quality Appalachian headwater streams. That 6.6 miles is over 5.6 percent of the total streams in the headwaters of the Spruce Fork watershed. The mining would remove 400 to 450 vertical feet from the mountains and would place approximately 501 million cubic yards of overburdened material in those streams.

This is not an issue about procedure. This is issue about enforcing an act that, on its face, has to protect water. The mining industry is destroying water at a clip in Appalachia that no other industry enjoys anywhere in the United States. To allow this to continue without regulation would be the mistake.

Economically, mountaintop removal is devastating the economy in the coal mining region as much as it is the mountain. Mountaintop removal is capital intensive. It uses machines and explosives to replace miners. We've seen a slight drop-off in mountaintop removal lately. As that's happened, coal production has remained relatively constant, and employment has actually increased.

And, of course, the public health impact may be the most troubling of all. You see that research is showing now that there are birth defects associated with people living near mountaintop removal mines.

So, all in all, mountaintop removal is an ecological, economic public health disaster that does not comply with the Clean Water Act. EPA is merely enforcing the act and, if anything, we think should more stringently enforce the act; and I hope that Congress will not do anything to limit its ability to do that.

Thank you.

[The prepared statement of Mr. Lovett follows:]

**Statement of Joe Lovett, Appalachian Center for the Economy and Environment,  
to the House Committee on Government and Regulatory Reform, Subcommittee on  
Regulatory Affairs**

**July 14, 2011**

**Introduction**

Good afternoon. Thank you for the opportunity to testify today. My name is Joe Lovett and I am the Executive Director of the Appalachian Center for the Economy and the Environment, a law and policy center located in Lewisburg, West Virginia. I am also a lawyer who has been attempting to enforce surface coal mining and other environmental laws that federal and state regulators refuse to enforce in Appalachia.

From its inception in 2001, the Appalachian Center has been at the forefront of the battle to end the abuses associated with the devastating method of coal mining known as mountaintop removal. The Center serves low-income citizens, generations-old communities, and local and grassroots groups of central Appalachia.

For the last fourteen years I have been fighting to enforce the Clean Water Act and other environmental laws in central Appalachia with the goal of stopping mountaintop removal. During that time, regulatory agencies have time and again looked the other way while coal operators ignore the law and tear down our mountains.

Given this climate of lawlessness, EPA's actions to regulate surface mining in the region during the past two and a half years have been necessary not only to enforce the Act against mining operators, but also to ensure that other regulatory agencies comply with the law. Too often state and federal agencies see their jobs not as enforcing the law and protecting the environment and the communities in the region, but as protecting coal operators from having to comply with the law. Rather than forcing mountaintop removal operators to conform their actions to the law, too many federal and state agencies bend or change the law to accommodate destructive mining practices.

Thomas Paine famously wrote in Common Sense that "in America, *the law is king*. For as in absolute governments the King is law, so in free countries the law *ought* to be king; and there ought to be no other." In contrast, in central Appalachia, "King Coal" governs us. When a law must be changed or misinterpreted to satisfy coal operators, our politicians and regulators know where their allegiance lies. The rule of law has been replaced by the rule of "coal." John Adams' maxim that we should seek to establish "a government of laws and not of men" is not well understood by our politicians and regulators.

For example, the cabinet secretary of West Virginia's Department of Environmental Protection, Randy Huffman, recently sued the United States Environmental Protection Agency for trying to raise the level of protection given to streams in the region. This

action was taken to protect the coal industry from EPA and citizen enforcement of the Clean Water Act. Secretary Huffman does what he can to assure that the coal operators, rather than the environment and local citizens are protected. Secretary Huffman is charged with enforcing the Clean Water Act. Instead his agency regularly bends the Act to accommodate mining operators. Kentucky environmental regulators have followed West Virginia's example and have also refuse to require mountaintop removal operations to comply with the Clean Water Act. Both states have been recruited by the industry to fight against the Clean Water Act's provisions that were enacted to protect the states' streams.

Similarly, the United States Army Corps of Engineers continues to disregard its duties under the Clean Water Act by issuing permits to mountaintop removal operators. The Corps has changed a longstanding regulation (the definition of "fill material") in its attempt to legalize mountaintop removal and is the federal agency that is literally overseeing the illegal destruction of our mountains and streams. For years, the Corps has issued permits for huge mountaintop removal mines with little more than a wink and a nod. The unlawful issuance of a permit to Arch Coal's Spruce Mine is a paradigmatic example of the Corps' refusal to follow the law.

Additionally, until 2008, the buffer zone rule, 30 C.F.R. 816.57, (overseen by the federal Office of Surface Mining (OSM)) stated that no land within 100 feet of a perennial stream or an intermittent stream may be disturbed by surface mining unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority was authorized to allow such activities only upon finding that surface mining activities would not cause or contribute to the violation of applicable State or Federal water quality standards, and would not adversely affect the water quantity and quality or other environmental resources of the stream. On its face, this rule prohibited valley fills in intermittent and perennial streams and, in 1999, a federal judge in West Virginia agreed that this is what the rule means. Although, that decision was reversed on appeal for purely procedural reasons, the Court of Appeals did not reach the merits.

To protect the coal industry, OSM failed to enforce this law: instead as a last minute give away to the coal industry, the previous administration changed the stream buffer zone rule to remove the "buffer" and expressly allowed coal companies to dump their wastes right into our mountain streams. It is absurd to allow, as OSM, the Corps and State regulators have, mountaintop removal operators to permanently bury more than 2000 miles of mountain streams beneath billions of tons of mining waste and still claim to be enforcing the Clean Water Act and Surface Mining Act.

The stated goal of the Clean Water Act is to protect the physical, chemical and biological integrity of the waters of the United States. Nothing could be more antithetical to this goal than mountaintop removal. Although all of the peer-reviewed science demonstrates that mountaintop removal is devastating our region's ecosystem, it does not take a PhD in biology to see that blowing up mountains and forests is bad for the environment. The science developed by EPA and University researchers detailing the harm associated with

the destruction of whole watersheds is unassailable, but it is not necessary to rely on scientists to tell us that burying streams beneath tens of millions of tons mining waste is bad for streams.

The mining industry naturally takes advantage of federal regulators' failure to enforce the law. The coal-rich mountains of central Appalachia are home to generations-old communities and contain beautiful hollows through which thousands of pristine and ecologically rich mountain streams flow. Mountaintop removal mining carelessly lays waste to our mountain environment and communities. The deforestation is not only an ecological loss, but also a permanent blow to a sustainable forest economy in a region in desperate need of long-term economic development. Mountaintop removal has already transformed huge expanses of one of the oldest mountain ranges in the world into a moonscape of barren plateaus and rubble.

#### **HB2018**

The power of coal to undermine the Clean Water Act extends beyond the borders of coal producing states. When the Clean Water Act was passed in 1972, the need was apparent. Rivers were catching on fire. Pollution choked waterways. Most rivers and streams weren't safe to swim in. Now, to help mountaintop removal operators evade regulation, some members of the House of Representatives from my State and region are supporting an effort by the coal industry and other major polluters to turn the page back to those days.

A bill working its way through Congress, H.B. 2018, the "Clean Water Cooperative Federalism Act of 2011," would undo decades of progress and render the Clean Water Act all but useless. I believe that if voters understood the implications of the bill, they would turn from office any legislator that supports it.

The bill – supported by my Representative (Mr. Rahall) and Representative Capito, also from West Virginia – strikes at vital provisions of the Clean Water Act. It would strip the U.S. Environmental Protection Agency of the ability to make states improve deficient water quality standards. The EPA could no longer withdraw approval of state programs, limit financial assistance or object to specific permits because of inadequate water quality standards enforced by the state.

As an analysis of the legislation by the EPA shows, the bill would prohibit the agency from revising water quality standards without agreement from the state "even in the face of significant scientific information demonstrating threats to human health or aquatic life." The bill allows a state to overrule a determination by EPA scientists that a dredge and fill permit could harm municipal water supplies, fishing, wildlife or recreation areas.

Essentially, the bill would turn the Clean Water Act on its head, giving states the right to allow less stringent protection of the nation's waterways. These changes to the Clean Water Act would lead to a race to the bottom in places like West Virginia where industry holds substantial sway over state regulatory agencies. The entire point of the Clean Water



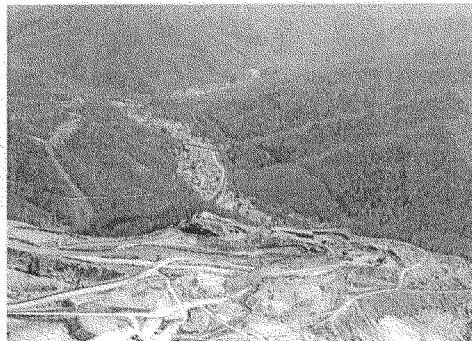
Act is to ensure a nationwide clean water standard because the waters of this nation are a shared resource.

The bill seems aimed at curbing EPA's regulation of mountaintop removal mining, but its effects would be felt far beyond Appalachia. I hope that Congress will not eviscerate the Clean Water Act for all parts of the Nation to satisfy Appalachian mining operators. Although the bill may have been written to accommodate mountaintop removal, it would result in the most substantial weakening of the Clean Water Act since its passage. It is impossible to support both H.B. 2018 and a clean environment.

### **Mountaintop Removal Coal Mining**

Disregarding human and environmental costs, mountaintop removal coal mining as currently practiced in Appalachia eradicates forests, razes mountains, fills streams and valleys, poisons air and water, and destroys local residents' lives. Toxic mine pollution contaminates streams and groundwater; hunting and fishing grounds are destroyed. Because the large-scale deforestation integral to mountaintop removal takes away natural flood protections, formerly manageable storms frequently inundate and demolish downstream homes.

According to the Environmental Impact Statement, from 1985 to 2005 over 7000 valley fills were authorized in central Appalachia for mountaintop removal and other strip mining operations. This has led to the destruction of over 1700 miles of Appalachian streams. Past, present, and future mining in Appalachia may cumulatively impact 1.4 million acres. The destruction of these nearly 1.5 million acres of forest is profound and permanent. Mountaintop mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions.





Valley fills are strongly associated with violations of water quality standards and loss of stream uses. EPA in its 404(c) veto of the Spruce No. 1 permit in West Virginia stated that increasing levels of conductivity have “significant adverse effects” on biological communities in streams. EPA’s April 1, 2010 guidance on water pollution downstream from mountaintop removal sites further outlines significant water quality impacts from surface mining operation. A recent EPA study found that nine out of every 10 streams downstream from surface mining operations were impaired based on a genus-level assessment of aquatic life. Another federal study found elevated levels of highly toxic and bioaccumulative selenium in streams downstream from valley fills. These impairments are linked to contamination of surface water supplies and resulting health concerns, as well as widespread impacts to stream life in downstream rivers and streams. Further, the estimated scale of deforestation from existing Appalachian surface mining operations is equivalent in size to the state of Delaware. Appalachian deforestation has been linked to significant changes in aquatic communities as well as to modified storm runoff regimes, accelerated sediment and nutrient transport, reduced organic matter inputs, shifts in the stream’s energy base, and altered thermal regimes. Such impacts have placed further stresses on water quality and the ecological viability of watersheds. A 2008 seminal EPA study found that mountaintop removal mining is strongly related to elevated conductivity in streams and causes downstream biological impairment.

#### **Environmental Impact Statement on Mountaintop Removal**

Because of litigation that I brought in 1998, EPA, the Army Corps of Engineers and OSM performed a programmatic Environmental Impact Statement on mountaintop removal. The EIS concluded that mining could impact 244 terrestrial species, including, for example, 1.2 billion individual salamanders, and that the loss of the genetic diversity of these affected species “would have a disproportionately large impact on the total aquatic genetic diversity of the nation.” The EIS also observed that valley fills are strongly associated with violations of water quality standards for selenium, a toxic metal

that bioaccumulates in aquatic life. All 66 selenium violations identified in the EIS were downstream from valley fills, and no other tested sites had selenium violations.

The Corps response to these devastating conclusions was to further weaken its enforcement of the Clean Water Act in Appalachia.

In 2001 and 2002, the federal agencies responsible for regulating mountaintop removal weakened the EIS and did not proceed with necessary scientific studies when they realized that the science that mountaintop removal could not be practiced without devastating the environment and economy of our region. The agencies simply halted the economic study that was crucial to the EIS when it became apparent that the results were not what OSM wanted them to be.

In sum, the EIS was supposed to demonstrate the environmental and economic impacts of large scale strip mining on Appalachia and propose ways to protect the environment and mitigate the impacts of mining on the region. In spite of the fact that the environmental studies that were performed all showed significant harm to the environment, the Corps changed a regulation to make permits easier for mining operators to receive. The Corps ignored the science and turned the EIS on its head.

In June 11, 2009, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the U.S. Department of Interior issued a joint Memorandum of Understanding to address the environmental impacts of surface mining in the Appalachian states. In this Agreement, OSM and the other agencies recognized that:

“The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities . . . . [Surface mining] often stresses the natural environment and impacts the health and welfare of surrounding human communities. Streams once used for swimming, fishing, and drinking water have been adversely impacted, and groundwater resources used for drinking water have been contaminated. Some forest lands that sustain water quality and habitat and contribute to the Appalachian way of life have been fragmented or lost.” June 2009 MOU at 1.

The agencies jointly announced an interagency plan that said it was “designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law.” *Id.* Unfortunately the Corps appears to be failing again in its duty to enforce the law or protect streams. Indeed, only the U.S. EPA, of the three federal agencies responsible for regulating mining in the region, has taken meaningful action to protect our streams or help local communities avoid the environmental impacts of mountaintop removal mining.

Meanwhile, mountaintop removal continues to devastate Appalachia. The Appalachian region is historically one of the poorest in the nation, particularly because the mining industry has cut jobs in order to increase its profit at the expense of the environment and

the law. The law requires protection of waters, and policymakers need valid economic data to assist communities' transition from an economy based on mountaintop removal to less harmful forms of mining and a sustainable economy. As a presidential candidate, Mr. Obama expressed "serious concerns about the environmental implications" of mountaintop mining," saying: "We have to find more environmentally sound ways of mining coal than simply blowing the tops off mountains." It is time for the federal agencies that regulate mountaintop removal to help make the President's commitment a reality.

### **EPA's Actions**

In the past two and a half years, EPA has taken three significant steps to enforce the Clean Water Act relating to mountaintop removal. It entered into an Enhanced Coordination Process (ECP) with the Corps for the issuance of Section 404 permits. It vetoed the Spruce Mine 404 permit. It issued a guidance document on conductivity levels in Appalachian streams. None of these actions should be controversial. Taken together, they accomplish only the minimum required by the Clean Water Act. Indeed, EPA should take much more vigorous action to enforce the Act in the region.

EPA should do much more than it has done so far. It should promulgate a definition of "fill material" that excludes mining waste, mirroring the Corps' definition before the Bush administration changed it to legalize mountaintop removal. Adopting such a regulation would accomplish the goals of the Clean Water Act by assuring our streams may not be used as giant garbage cans for the mining industry's waste. EPA should also promulgate a regulation that follows the science by preventing cumulative impacts. To that end, it should prohibit future surface mining in watersheds where significant disturbance has already occurred. Finally, EPA should adopt a numeric water quality criterion for conductivity and associated ions and require states to place effluent limitations in Section 402 permits regulating discharges of conductivity and associated ions for mountaintop removal mines. Until EPA takes these actions, mountaintop removal operators will continue to violate the Clean Water Act by killing aquatic life in the region's streams, blowing up mountains and filling streams with mining waste.

Arch Coal's Spruce Mine would devastate one of southern West Virginia's most beautiful hollows. Although the industry has tried to foment controversy around EPA's veto of the Spruce mine, that veto was necessary to protect the Nation's waters and was, therefore, required by the Clean Water Act. EPA, as the primary agency responsible for protecting the environment, has ultimate oversight authority under § 404. EPA may prohibit, withdraw, deny or restrict the use or specification of any U.S. waters as a disposal site for fill "whenever" EPA makes the required determination pursuant to § 404(c). 33 U.S.C. § 1344(c).

The construction of the Spruce Mine as authorized by the Corps would bury virtually all of Oldhouse Branch and its tributaries and much of Pigeonroost Branch and its tributaries under excess spoil generated by surface coal mining operations. These discharges would

result in the burial of approximately 6.6 miles of high quality Appalachian headwater streams in a watershed that has already experienced substantial impairment. The loss of the 6.6 miles of high quality Appalachian headwater streams in this watershed would result in a significant loss (over 5.6% of the total stream miles in Headwaters Spruce Fork subwatershed) of valuable wildlife habitat for many species in this watershed. The loss of the 6.6 miles Appalachian streams in this watershed would result in a significant loss (over 5.6% of the total stream miles in Headwaters Spruce Fork subwatershed) of valuable wildlife habitat for many species in this watershed. The mining process would remove 400 to 450 vertical feet from the height of the mountain, or approximately 501 million cubic yards of overburden material. Nearly 391 million cubic yards of spoil would be placed within the mined area and the remaining 110 million cubic yards of excess spoil would be placed in six valley fills.

EPA's veto of the Spruce Mine is well supported and substantively unassailable. EPA exercised its 404(c) authority to veto the permit for discharges into Oldhouse Branch and Pigeonroost Branch and their tributaries because EPA determined these discharges would have unacceptable adverse effects on wildlife both within and downstream from the permit area. For example, EPA found that

Pigeonroost Branch and Oldhouse Branch and their tributaries are some of the last remaining streams within the Headwaters Spruce Fork sub-watershed and the larger Coal River sub-basin that represent —least-disturbed# conditions. As such, they perform important hydrologic and biological functions, support diverse and productive biological communities, contribute to prevention of further degradation of downstream waters, and play an important role within the context of the overall Headwaters Spruce Fork sub-watershed and Coal River sub-basin.

On the site of the Spruce No. 1 Mine, EPA determined that the dumping of mining waste would bury “virtually all of Oldhouse Branch and its tributaries and much of Pigeonroost Branch and its tributaries,” resulting in a significant loss of valuable habitat to many species in the watershed. Examining the science and potential effects downstream from the site, EPA found that the mine as authorized would lead to “increased pollutant loadings in Spruce Fork and the Little Coal River,” “loss of macroinvertebrate communities and population shifts to more pollution-tolerant taxa,” and “the extirpation of ecologically important macroinvertebrates.” Additionally,

loss of macroinvertebrate prey populations, combined with increased potential for harmful golden algal blooms and additional exposure to selenium will have an unacceptable adverse effect on the 26 fish species found in Spruce Fork as well as amphibians, reptiles, crayfish, and bird species that depend on aquatic organisms and downstream waters for food or habitat.

As EPA explained, “[b]urial of Pigeonroost Branch and Oldhouse Branch would also result in unacceptable adverse effects on wildlife downstream caused by the removal of

functions performed by the buried resources and by transformation of the buried areas into sources that contribute contaminants to downstream waters.” EPA’s withdrawal of specification for Oldhouse Branch and Pigeonroost Branch and their tributaries was also informed by the fact that the Corps’ permit did not comply with the § 404(b)(1) guidelines. For example, EPA concluded that the dumping of mining waste into those streams would significantly degrade the Nation’s waters because it would “eliminate the entire suite of important physical, chemical and biological functions provided by the streams of Pigeonroost Branch and Oldhouse Branch including maintenance of biologically diverse wildlife habitat and will critically degrade the chemical and biological integrity of downstream waters.” See 40 C.F.R. § 230.10(c). EPA recognized that degradation would be particularly significant because it would occur in the context of the long-term, cumulative degradation of streams in the Spruce Fork and Coal River watersheds. Moreover, EPA found that the mine’s proposed mitigation plan would not replace the high quality aquatic resources that would be destroyed by the Spruce No. 1 Mine, in part because the company’s plan failed to “adequately account for the quality and function of the impacted resources.”

EPA has also released an interim guidance document on conductivity. Construction of valley fills causes an increase in conductivity and total dissolved solids (TDS) in receiving waters downstream of such discharges. Elevated conductivity can have a toxic effect because the ions, regardless of type, can overwhelm the respiratory system and other physiological processes leading to impaired breathing, dehydration, and decreased survival or reproduction. Thus, native Appalachian taxa adapted to naturally dilute streams can be harmed by elevated conductivity for these physiological reasons. The burial of our streams leads to discharges of TDS and selenium, which results in unacceptable adverse effects on wildlife in downstream waters. Increased salinity levels lead to loss of macroinvertebrate communities and population shifts to more pollution-tolerant taxa, specifically the extirpation of ecologically important macroinvertebrates. Through the loss of stream macroinvertebrate and salamander communities, there will be, in turn, substantial effects to both aquatic and terrestrial vertebrate populations that rely on these communities as a food source.

It is well recognized that the loss of a certain number of individuals of a species in a local ecological community can be tolerated, provided that the species continues to reproduce to replace lost individuals. However, when species are impacted by both acute stressors (e.g., food web changes, algal blooms) and exposure to reproductive toxicants, there is an increased risk of the loss of an entire species within an area. The loss of macroinvertebrate prey populations, increased risk of harmful golden algal blooms, and additional exposure to selenium has an unacceptable adverse effect on Appalachian streams.

All of the peer reviewed scientific literature reflects a growing consensus of the importance of headwater streams; a growing concern about the adverse ecological effects of mountaintop removal mining; and concern that impacted streams cannot easily be recreated or replaced. Scores of recent articles and studies point to the role headwater streams play in the transport of water, sediments, organic matter, nutrients, and organisms

to downstream environments: their use by organisms for spawning or refugia; and their contribution to regional biodiversity. There are no contrary peer reviewed studies. Additionally, destruction or modification of headwater streams has been shown to affect the integrity of downstream waters, in part through changes in hydrology, chemistry and stream biota. The literature specifically documenting the effects of mountaintop removal mining has also grown, and additional studies have increased EPA's understanding of the effects of elevated levels of total dissolved solids (TDS) discharged through mining operations on downstream aquatic ecosystems (Pond et al. 2008, Simmons et al. 2008, Palmer et al. 2010, Fritz et al. 2010).

The science is impressive and undisputed. Any politician or regulator that supports mountaintop removal must confront this voluminous and growing peer-reviewed body of scientific literature from University professors and agency scientists. None have done so -- except to ignore or dismiss the science without providing meaningful reasons.

### **Cumulative Impacts**

Section 404 of the Clean Water Act requires that the Corps and EPA determine that neither individual nor cumulative impacts from an activity will significantly degrade streams. Again, the Corps utterly fails to discharge its duty to assure that cumulative impacts are insignificant. For example, more than 1.5 percent of the land area in the region encompassing eastern Kentucky, southern West Virginia, western Virginia, and areas of eastern Tennessee is being impacted by mountaintop removal. As a result of this destruction of headwater streams, mountaintop removal mines cumulatively devastate aquatic ecosystem. The Corps has not attempted to analyze and minimize the environmental harm of past, present, and reasonably foreseeable future surface mining operations in Appalachia. These impacts include total elimination of all aquatic life in buried streams, negative impacts on the proper functioning of aquatic ecosystems, including fisheries located downstream of mountaintop removal mining operations, and impairment of the nutrient cycling function of headwater streams.

For example, in the Coal River watershed in West Virginia, existing and pending surface mining permits cover 12.8 % of the watershed. In the Laurel Creek watershed Coal River, existing and pending surface mining permits cover 28.6 % of the watershed. Surface mining permits, including valley fills, cover 14.5% of first order streams and 12 % of all streams in Coal River and surface mining permits including valley fills cover 37.3% of first order streams in Laurel Creek and 27.9% of all streams.

The United States Fish and Wildlife Service recognize that mountaintop removal mining results in forest loss and fragmentation that is significant not only within the project area, but also regionally and nationally. In particular, the mines cause a fundamental change in the environment from forestland to grassland habitat, cause significant adverse impacts to the affected species, cause loss and/or reduced quality of biodiversity, and cause loss of bird, invertebrate, amphibian, and mammalian habitat.

When Congress passed the Clean Water Act, it intended to protect the environment and citizens of the Nation. In Central Appalachia, however, the Corps has used the Act as a perverse tool to justify the very harm that the Congress sought to prevent. The members of Congress who voted to pass the Clean Water Act could not have imagined the cumulative destruction that would be visited on our region by the complete failure of the regulators to enforce the Act.

### **Economics**

Mountaintop removal is also devastating the economy of the coal bearing regions of Appalachia. In 1948, there were 125,669 coal-mining jobs in West Virginia and 168,589,033 tons of coal mined. In 1978, there were still 62,982 coal mining jobs in West Virginia with only 84,696,048 tons mined. By 2010, however, only 20,452 of these jobs remained despite the fact that coal production had again risen to 144,017,758 tons mined.

So, although coal production today is roughly the same as it was sixty years ago, coal-mining jobs have decreased by approximately 80%. This job loss has been driven not by environmental production or decreased production, but by coal operators themselves who have replaced workers with machines and explosives. McDowell County, which has produced more coal than any other county in the Nation, is now one of the poorest counties in the United States. Far from being an economic asset to communities, mountaintop removal devastates economies wherever it occurs.

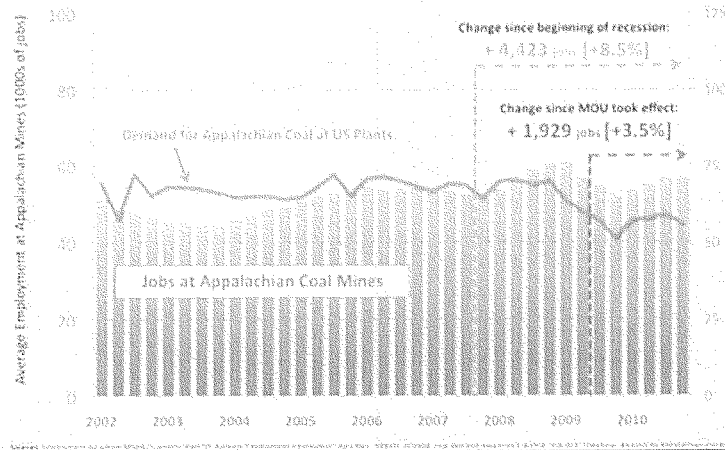
Mountaintop removal destroys coal mining jobs – as well as mountains. Underground mines, on the other hand, create 52% more job-hours than mountaintop removal mines for every ton they produce and employ nearly two thirds of the miners in Central Appalachia while producing just over half of the coal. Although the overall production from mountaintop removal mines declined by 25% between 2007 and 2010, employment at Central Appalachian coal mines increased. Claims by coal companies that more stringent permitting of mountaintop removal is causing an economic crisis in Central Appalachia are wrong. Since 2007, as production in Central Appalachia has shifted away from mountaintop removal and back toward underground mining, the increase in employment at underground mines has more than offset declines at other types of mines. Although mountaintop removal may benefit the bottom lines of big coal operators, it does not increase the number of coal mining jobs.

Because mountaintop removal mining replaces miners with explosives and giant machines, its demise would actually benefit workers in our region. We will mine the coal in central and northern Appalachia because our power plants require it. Importing western coal is not really an option in our region because of transportation bottlenecks, cost of transportation and the fact that many of our plants are built to burn high BTU eastern coal. When mountaintop removal is stopped, the production will be replaced with less destructive forms of mining that will actually employ more miners or with natural gas produced in the region.

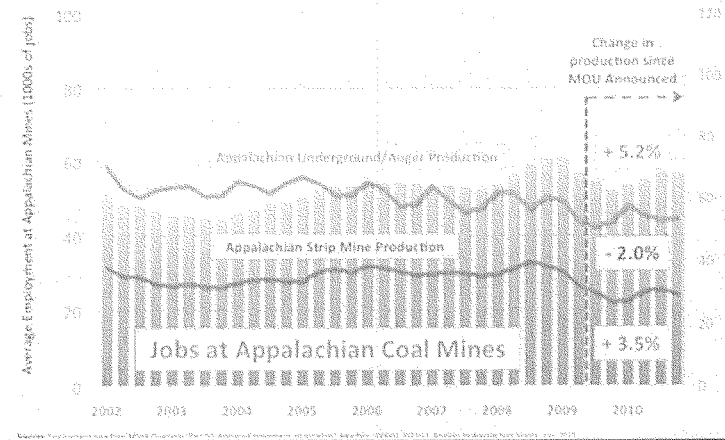


The data available support those conclusions. Since mountaintop removal permits have been slowed by litigation and EPA regulation, mining jobs have actually increased in the region.

**Jobs at Appalachian coal mines are up since start of recession -- and since EPA began stricter review of mountaintop removal permits -- despite falling demand**

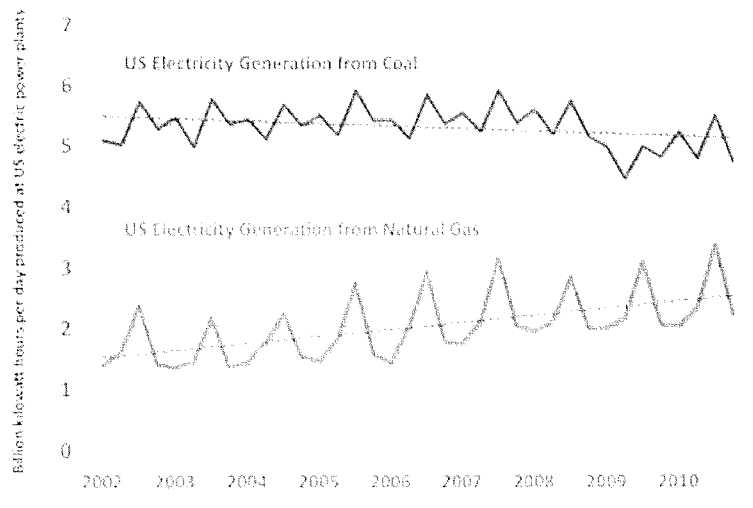


**A shift from strip to underground mining is partly responsible for the 3.5% increase in jobs at Appalachian mines since the EPA began more stringent permit reviews**



Data also show that newly available natural gas, not environmental regulation, is reducing the demand for coal.

**Declining Appalachian coal production is driven by greater reliance on natural gas for electricity generation**



Mountaintop removal permanently destroys the forest ecosystem of the region. Central Appalachia holds the most productive and diverse temperate hardwood forest in the world. Properly managed, the forests could provide good timber jobs for generations. Mountaintop removal lays to waste those jobs. Similarly, once a mountain is torn down, it can no longer support windmills that could be built on the ridges.

Mountaintop removal coal mining costs state budgets more than it generates. Recent studies concluded that coal mining costs Kentucky and West Virginia taxpayers more than it brings into the state -- a net loss of more than \$100 million annually in Kentucky. The costs include: increased road expenditures, operating mining-specific health and safety systems, supporting training and research and development for the industry, and various tax-breaks and subsidies. This estimate does not include healthcare costs, loss of home values, and the need for water treatment.

One of the most common arguments in favor of mountaintop removal mining is that it creates much-needed jobs in economically depressed areas. However, a recently published paper by Woods and Gordon, *Mountaintop removal and Job Creation: Exploring the Relationship Using Spatial Regression*, found no evidence supporting the suggestion that mountaintop removal contributes positively to nearby communities' employment. In fact, the authors concluded that neither a rise nor decline in employment

was found near mountaintop removal mines. The lack of a statistically significant relationship between mountaintop removal and mining employment shows that reliance on mountaintop removal coal mining for job growth is unsupported. Furthermore, the absence of any statistical relationship between mountaintop removal and job creation does not support the industry's claim that coal mining plays a positive role in developing local economies.

### Public Health

In addition to the economic toll mountaintop removal takes on the region, there are significant public health impacts. Recent scientific research shows that human cost to people living near mountaintop removal mines is extremely high.

For example, research shows that residents of coal-mining counties are much more likely than their counterparts to be unemployed, receive fewer years of education, and live shorter lives. Indeed, the imprint of coal mining on people's lives can be traced to before birth. A paper by Ahern *et al.*, *The association between mountaintop mining and birth defects among live births in central Appalachia, 1996–2003*, released in May of this year investigated the correlation between a mother's place of residence during pregnancy and the incidence of congenital birth defects. The study investigated the incidence of birth defects in counties in Kentucky, Tennessee, Virginia, and West Virginia with mountaintop removal mining, other types of mining, and no mining activity. The authors concluded that even after controlling for a multitude of covariates such as the mother's age, race, education level, access to prenatal care, smoking and drinking habits, there was a statistically significantly higher rate of birth defects in mountaintop mining areas versus other mining and non-mining areas. That is consistent with previous research showing greater surface, air, and water disturbance specific to surface mining areas where mountaintop mining occurs. Given the previous research on the toxic chemical agents used or created in the extraction, processing, and transportation of coal, researchers find it likely that these chemicals are also agents in the etiology of birth defects.

Infant birth weight is another indicator of overall health concerns in regions of Appalachia where mountaintop removal mining is prevalent. A study entitled *Residence in Coal-Mining Areas and Low-Birth-Weight Outcomes* published in January of this year finds a significant relationship between low birth weight and mother's residence in coal mining areas in West Virginia. Authors Ahern *et al.*'s research revealed that living in areas with high levels of coal mining elevated the odds of a low-birth-weight infant by 16%, and by 14% in areas with lower mining levels, relative to counties with no coal mining. Even after adjusting for covariates, the persistence of a mining effect on low-birth-weight outcomes suggests an environmental effect resulting from pollution and mining activities. Of the various forms of mining, the study finds that mountaintop removal causes the greatest amount of harm because of its significant air particulate exposure. Other similar studies have found support for the idea that adverse pregnancy outcomes may result from maternal exposure to airborne pollutants.

In addition to elevated rates of infant health problems, there is also substantial evidence of elevated mortality in adult individuals living in coal-mining areas. In April of 2010, Hitt and Hendryx publish a paper, *Ecological Integrity of Streams Related to Human Cancer Mortality Rates*, which examines the significant relationships between increasing coal mining, decreasing ecological integrity, and increasing cancer mortality. Although smoking, poverty, and urbanization were significantly related to total cancer mortality, they did not fully explain the observed relationship between ecological integrity and cancer. These results suggest a causal link between coal mining and cancer mortality. This contention is supported by prior research demonstrating that coal mining and processing may increase carcinogenic contamination of air and water in nearby area.

Another study published in 2009 entitled *Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost*, translated this elevated mortality into economic terms. Authors Hedryx and Ahern calculated the statistical value of life lost due to elevated mortality rates in Appalachian coal mining areas and compared it to the economic benefits of the coal mining industry. The paper concludes that the coal industry costs states billions of dollars more than it brings in as revenue. While the economic benefit of the coal industry was estimated at \$8.088 billion, discounting the value of statistical life costs into the future (accounting for estimate future earnings etc.) resulted in excess costs relative to benefits with an estimate of nearly forty two billion dollars. The human cost of Appalachian coal mining, therefore, vastly outweighs its perceived economic benefits.

One important trend during their research showed that the highest mortality rates were detected in areas with the highest levels of mining. Also worth noting was the fact that elevated adjusted mortality occurred in both males *and* females, suggesting that the effects were not due to occupational exposure, as nearly all coal miners are men. Rather, the illnesses were consistent with exposure to water and air pollution from mining activities. Previous research that examined specific forms of mortality in coal mining areas has found that chronic forms of heart, respiratory, and kidney disease, as well as lung cancer, remained elevated after adjusting for socioeconomic and behavioral factors.

### Conclusion

Finally, I would like to take this opportunity to invite members of this Subcommittee and the full Committee and its staff to travel to West Virginia to witness the devastation caused by mountaintop removal to help you appreciate the incalculable harm that OSM's failure to enforce the Act has done to our region. We would be pleased to provide flyovers of mountaintop removal area and to arrange meetings with community members whose lives and property are severely impacted by the illegal mountaintop removal mines that the Corps refuses to regulate.

Mr. JORDAN. Thank you, Mr. Lovett.  
Mr. Horton.

# **STATEMENT OF ROGER HORTON**

Mr. HORTON. Good afternoon, and thank you for the opportunity to truthfully testify today on this very important subject.

My name is Roger Horton. I am the founder of Citizens for Coal and co-founder of the Mountaintop Mining Coalition and a member of Local Union 5958 of the United Mine Workers of Amerikca.

I've spent over 30 years in the West Virginia mining industry, beginning in 1974 as an underground coal miner. During my career, I have also been active in my union, serving in various official capacities for my union local.

I am proud to say that I'm still a coal miner and a local union officer at a surface coal mine in West Virginia. A native West Virginian, I have lived virtually all my life in the coalfields of the mountain State, spending most of that time in Logan county where I live today in the community of Holden. I built a home, raised two children, participated and enriched my community all because of my employment in the coal industry.

It is because of my rewarding experiences in and around the coal industry and its communities that in 2008 I founded Citizens for Coal, a group open to everyone, no matter their employment or other affiliation, dedicated only to preserving the future of coal mining jobs and to actively participate in the debate surrounding coal mining in West Virginia and Appalachia. It is in this capacity that I appear before you today.

I am deeply concerned and troubled by the actions of the Federal Environmental Protection Agency with respect to mining permits in West Virginia and Appalachia and its whole attitude concerning the place that coal occupies in our Nation's energy supply mix.

The EPA has openly attacked coal. This assault begins with the permit application process, which you are discussing today, and continues to throughout the process and finally to the end use of coal, where EPA has recently announced sweeping regulatory changes. These regulatory initiatives, coupled with the Agency's obstruction of mining permits, threatens to cripple the viability of Appalachia and West Virginia as a source of domestic energy and destroy West Virginia's coal reputation as the world's fuel of choice, be it for electrical generation or steel making or manufacturing.

In its attacks on the mine-permitting process, the EPA has trampled the interests of our individual States to control and regulate activities that occur within their own borders. In West Virginia, the EPA has arrogantly disregarded the will of the people and the actions of the West Virginia legislature with respect to water quality standards, streams uses, and environmental improvement. The Federal agency has focused on insects and tiny, almost undetectable shifts in insect populations, while ignoring the overall health of our mountain streams and the aquatic life and fish that call them home. Further, EPA has taken such positions without regards to jobs or communities that depend on these occupations for their very survival.

If left unchecked, EPA threatens to strip our citizens, our communities, and the very social fabric of West Virginia of the most important source of existence, and that is coal.

These are not just idle observations. I have personally witnessed the social and economic disruptions that occur when unelected bureaucrats in an EPA office somewhere in downtown Philadelphia make arbitrary decisions about what is best for my fellow coal miners, my friends, and my community.

About 11 years ago, through a combination of government interference and numerous legal challenges, a large surface mine in Logan County, WVA, was forced to close because it could not obtain the permits necessary to continue mining the coal. The results were devastating. Some 400 members of Local Union 2935 were out of a job, not because there was no demand for the coal or because the coal reserve had been exhausted but because of pure legal and regulatory interference.

The work force and this local union was obviously devastated, but the county was severely damaged as well. The school system and social welfare programs lost revenue that was vital to their existence and operation. Entire communities were devastated. With nowhere to work and no prospect of the mine reopening anytime soon, some residents packed up and moved to other States to find lower-paying jobs. Businesses that relied on the mine for their income—gas stations, restaurants, repair shops, and equipment vendors—vanished. Families suffered and disintegrated. Substance abuse and divorces skyrocketed, and these folks struggled to come to terms with the loss of the good-paying jobs that were forecast to last decades.

In fact, it is fair to say that our communities and certain families have never recovered from the loss of these jobs.

That experience and those troubling, painful memories motivated me to start the Citizens for Coal organization, of our community and I hope the committee and the entire Congress is mindful that the EPA's assault on the coal industry has real, often dramatic effects on our work force and our people.

I have been fortunate to be able to spend the majority of my life living and working in my native West Virginia. Every day I enjoy the benefits of a rural way of life. I hope that my children can live and work in West Virginia and enjoy the same lifestyle and experience, but every day the EPA goes unchecked those chances decline.

Finally, as a lifelong citizen of the coalfields of Logan County, WVA, I would like the committee to carefully weigh the testimony of others that do not live, work, or recreate in our communities. They will come before you as false prophets claiming to represent the people of the coalfields and/or environment and offering to help us survive or transition to other forms of employment when they destroy our coal industry. Whether they be from the EPA or the Corps in Washington or lawyers that claim they sue the government on our behalf, we don't need their assistance or help. We can do just fine on our own.

[The prepared statement of Mr. Horton follows:]

**Statement of Roger D. Horton**

**House Committee on Oversight and Government Reform:**

**Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending-**

***EPA's Appalachian Energy Permittorium: Job Killer Or Job Creator?'***

July 14, 2011

Good afternoon and thank you for the opportunity to testify today on this very important subject. My name is Roger Horton. I am the founder of Citizens for Coal, a co-founder of the Mountaintop Mining Coalition and a member of Local 5958 of the United Mine Workers of America (UMWA). I have spent over 30 years in the West Virginia mining industry, beginning in 1974 as an underground coal miner. During my career I have also been active in my union, serving in various official capacities for my UMWA local. I am proud to say that I am still a coal miner and a local union officer at a surface coal mine in West Virginia. A native West Virginian, I have lived virtually all my life in the coalfields of the Mountain State, spending most of that time in Logan County, West Virginia, where I live today in the community of Holden. I built a home, raised two children, participated and enriched my community all because of my employment in the coal industry.

It is Because of my rewarding experiences in and around the coal industry and its communities that in 2008 I founded Citizens for Coal, a group open to everyone no matter their employment or other affiliation, dedicated only to preserving the future of coal mining jobs and to actively participate in the debate surrounding coal mining in West Virginia and Appalachia. It is in this capacity that I appear before you today. I am deeply concerned and troubled by the actions of the federal Environmental Protection Agency (EPA) with respect to mining permits in West Virginia and Appalachia, and its whole attitude concerning the place that coal occupies in our nation's energy supply mix.

EPA has openly attacked coal. This assault begins with the permit application process, which you are discussing today, and continues throughout the mining process and finally to the end use of coal, where EPA has recently announced sweeping regulatory changes. These regulatory initiatives, coupled with the agency's obstruction of mining permits, threatens to cripple the viability of Appalachia and West Virginia as a source of domestic energy and destroy West Virginia coal's reputation as the world's fuel of choice be it for electrical generation or steel making or other manufacturing.

In its attacks on the mine permitting process, EPA has trampled the interests of individual states to control and regulate activities that occur within their own borders. In West Virginia, EPA has arrogantly disregarded the will of the people



and the actions of the West Virginia Legislature with respect to water quality standards, stream uses and environmental improvement. The federal agency has focused on insects, and tiny, almost undetectable shifts in insect populations while ignoring the overall health of our mountain streams and the aquatic life and fish that call them home. Further, EPA has taken such positions without regard to jobs and communities that depend on those occupations for their very survival. If left unchecked, EPA threatens to strip our citizens, our communities and the very social fabric of West Virginia of their most important source of existence- coal.

These are not just idle observations. I have personally witnessed the social and economic disruptions that occur when unelected bureaucrats in an EPA office somewhere in downtown Philadelphia make arbitrary decisions about what is best for my fellow coal miners, my friends and community.

About 11 years ago, through a combination of government interference and numerous legal challenges, a large surface mine in Logan County, West Virginia was forced to close because it could not obtain the permits necessary to continue the mining operation. The results were devastating. Some 400 members of Local

Union 2935 were out of a job... not because there was no demand for the coal or because the coal reserve had been exhausted but because of pure legal and regulatory interference. The workforce and local union were obviously devastated but the county was severely damaged. The school system and social welfare programs lost revenue that was vital to their existence and operation.

Entire communities were devastated. With nowhere to work and no prospect of the mine reopening any time soon, residents packed up and moved to other states to find lower paying jobs.

1,000 people were left with no jobs.

Businesses that relied on the mine for their income- gas stations, restaurants, repair shops and equipment vendors vanished.

Families suffered and disintegrated... substance abuse and divorces skyrocketed as these folks struggled to come to terms with the loss of good-paying jobs that were forecast to last decades. In fact, it is fair to say that our communities and certain families have never recovered from the loss of those jobs. That experience and those troubling, painful memories motivated me to start the

Citizens for Coal organization, and I hope this Committee and the entire Congress is mindful that EPA's assault on the coal industry has real, often dramatic effects on our workforce, our people, our schools, our churches and our communities. EPA conveniently ignores these effects, hiding behind the excuse that it cannot consider economic results of its decisions. That must be changed and, given their behavior in Appalachia and West Virginia, needs to be changed quickly.

EPA's virtual moratorium on mining permits casts a long shadow of uncertainty over our coal miners and communities. Not knowing if another permit can be obtained or if you get one the company will be allowed to keep it and operate has me and my fellow miners gripped in economic fear. People are not buying cars or homes or vacationing... we are not spending money... we are not contributing to the economy.

I have been fortunate to be able to spend the majority of my life living and working in my native West Virginia. Every day I enjoy the benefits of our rural way of life... I hope that my children can live and work in West Virginia and enjoy that same lifestyle and experience but everyday that EPA goes unchecked those chances decline.

Finally, as I life-long citizen of the coalfields of Logan County, West Virginia, I would like the Committee to carefully weigh the testimony of others that do not live or work or recreate in our communities. They will come before you as false prophets, claiming to represent the people of the coalfields and our environment and offering to "help" us survive or transition to other forms of employment when they destroy our coal industry. Whether they be from EPA or the Corps in Washington or lawyers that claim they sue the government on our behalf, we don't need their help or assistance. We can do just fine on our own.

Thank you. \_\_\_\_\_

Mr. JORDAN. Thank you, Mr. Horton.  
Mr. Stilley.

#### STATEMENT OF JOHN STILLEY

Mr. STILLEY. Good afternoon. Chairman Jordan, members of the Regulatory Affairs, Stimulus Oversight and Government Spending Subcommittee, my name is John Stilley. I am president of Amerikohl Mining, Inc., which is headquartered in Butler, PA. I'm also president of Patriot Exploration Corp. and Amerikohl Aggregates, Inc.

Amerikohl mines coal by the surface mining method in 10 Pennsylvania counties. Last year, we produced 1 million tons of coal and employed 110 workers. Since 1978, we have completed mining on 324 separate mining sites and have successfully reclaimed the land to productive post-mining uses, including parks, residential communities, working farms, and forest land. Approximately one-third of these sites consisted of areas which had been mined in the 1940's and 1950's where no reclamation was required to be done. Amerikohl's remaining efforts on these sites provide for hundreds of acres of abandoned mine reclamation and miles of streams rehabilitated, all at no cost to the taxpayer or public. Amerikohl's has won over 70 awards for excellence in reclamation over the past 30 years.

We are also in the stone and natural gas business. Last year, we produced 750,000 tons of stone and aggregates used to build and rehabilitate Pennsylvania's infrastructure and currently operate 160 oil and gas wells from the Upper Devonian formation, all in Pennsylvania.

I'm here today also on behalf of the Pennsylvania Coal Association. Pennsylvania is the Nation's fourth leading coal-producing State, mining about 67 million tons in 2009. In addition, the coal industry is a major contributor to Pennsylvania's economy. Its annual economic benefit to the Commonwealth exceeds \$7 billion and it is responsible for the creation of 41,500 direct and indirect jobs, with a payroll totaling over \$2.2 billion. Taxes on these wages alone netted more than \$700 million to the coffers of Federal, State, and local governments. Most of the coal produced in Pennsylvania is used to generate affordable and reliable electricity.

I appreciate being asked to testify today on EPA's overreach into the States permitting programs and how this abuse of power is costing production and jobs in the Appalachian coal fields.

Frankly, EPA's heightened scrutiny and overzealous regulation of coal mining in the past 2 years threaten the future economic viability of our industry. These policies attack both the mineral extraction process through protracted Federal review of mining permits heretofore reserved to the States and the end use process through establishing unreasonable and unjustifiable emission reduction standards for greenhouse gases, mercury, coal waste, and a plethora of other alleged pollutants. The cumulative effect of this assault provide for and will be an economic train wreck in the next few years to come.

To illustrate how EPA's actions are jeopardizing economic resurgence and the continued use of coal as an energy source, my testimony will focus on EPA's repeated intervention in an

approved State-delegated permitting program, the National Pollution Discharge Elimination System, and the chaos it's created.

Under section 402 of the Clean Water Act, NPDES permits for discharges of non-dredged and non-fill material are issued by the States once EPA approves the permitting programs. Pennsylvania's permitting program was approved by EPA through a 1991 Memorandum of Agreement executed between the Commonwealth and the EPA. The Pennsylvania DEP was identified as the lead agency with exclusive authority for administering and granting NPDES permits for mining-related activities in Pennsylvania. As part of this agreement, EPA waived its authority to conduct permit reviews of pending NPDES permit applications.

Pennsylvania's NPDES permitting process, which worked well for nearly two decades and was even recognized on many occasions for its excellence by EPA, was dramatically and unilaterally altered by EPA in September 2010. At that time, EPA, without any accompanying Federal statutory or regulatory changes, informed DEP that it was limiting the permit review waiver specified in the Memorandum of Agreement and would be conducting its own independent permit reviews for mining programs with discharges to the Monongahela River, the Kiskiminitas River, and the Conemaugh River or, for that matter, to any impaired watershed with designated total maximum daily load limit.

The Federal agency directed DEP to forward all such permit applications to its regional office. To date, EPA's Region III field office in Philadelphia has received 104 NPDES permit applications from DEP for review and comment. In addition, DEP continues to forward additional draft permit applications to EPA each month for review.

Since EPA's Region III office is not sufficiently staffed or, in many cases, qualified to perform the NPDES permit reviews in a timely manner, the change has led to indefinite delays in mining permit processes. Obtaining an NPDES permit for any discharge is a prerequisite to mining, so these delays and permit backlogs are tantamount to de facto prohibition of mining.

Also, while the EPA's comments and objections resulting from its permit reviews vary, a number of the objections to the permits are based on what the Federal agency perceives are inconsistencies between the application and an interim final guidance that it developed to provide a framework for regional reviews of surface mining projects based on conductivity levels—

Mr. JORDAN. If you could just finish up here.

Mr. STILLEY [continuing]. It associated with adverse impact on water quality.

[The prepared statement of Mr. Stilley follows:]

Good afternoon.

Mr. Chairman, members of the Regulatory Affairs, Stimulus Oversight and Government Spending Subcommittee, my name is John Stilley and I am President of Amerikohl Mining, Inc. which is headquartered in Butler, Pennsylvania. I am also President of Patriot Exploration Corp. and Amerikohl Aggregates, Inc.

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We are also in the stone and gas businesses. Last year we produced 750,000 tons of stone and aggregates used to build and rehabilitate PA infrastructure and operate 212 gas wells in the Upper Devonian formation all in Pennsylvania.

I am also here today on behalf of the Pennsylvania Coal Association.

Pennsylvania is the nation's fourth leading coal producing state, mining about 67 million tons in 2009.

In addition, the coal industry is a major contributor to Pennsylvania's economy. Its annual economic benefit to the Commonwealth exceeds \$7 billion and it is responsible for the creation of 41,500 direct and indirect jobs with a payroll totaling over \$2.2 billion. Taxes on these wages alone netted more than \$700 million to the coffers of federal, state and local governments.

Most of the coal produced in Pennsylvania is used to generate affordable and reliable electricity.

I appreciate being asked to testify today on EPA's overreach into the states' permitting programs and how this abuse of power is costing production and jobs in the Appalachian coal fields.

Frankly, EPA's heightened scrutiny and overzealous regulation of coal mining in the past two years threaten the future economic viability of our industry. These policies attack both the mineral extraction process through protracted federal review of mining permits heretofore reserved to the states, and the end use process through establishing unreasonable and unjustifiable emission reduction standards for greenhouse gases, mercury, coal waste and a plethora of other alleged pollutants.

The cumulative effect of this assault is an economic train wreck.

To illustrate how EPA's actions are jeopardizing economic resurgence and the continued use of coal as an energy source, my testimony will focus on EPA's repeated intervention in an approved state delegated permitting program – National Pollutant Discharge Elimination System (NPDES) – and the chaos it has created.

#### **NPDES Issue**

Under Section 402 of the federal Clean Water Act, NPDES permits for discharges of non-dredged and non-fill material are issued by the states once EPA approves their permitting programs.

Pennsylvania's permitting program was approved by EPA and, through a 1991 Memorandum of Agreement executed between the Commonwealth and EPA, the Pennsylvania DEP was identified as the lead agency with exclusive authority for administering and granting NPDES permits for mining related activities in Pennsylvania. As part of this agreement, EPA waived its authority to conduct permit reviews of pending NPDES permit applications.

Pennsylvania's NPDES permitting process, which worked well for nearly two decades and was even recognized on many occasions for its excellence by EPA, was dramatically and unilaterally altered by EPA in September of 2010.

At that time EPA, without any accompanying federal statutory or regulatory changes, informed DEP that it was limiting the permit review waiver specified in the Memorandum of Agreement and would be conducting its own independent permit reviews for mining permits with discharges to the Monongahela River or to any impaired watershed with a designated Total Maximum Daily Load. The federal agency directed DEP to forward all such permit applications to its regional field office.

To date, EPA's Region III field office in Philadelphia has received 104 NPDES permit applications from DEP for review and comment. In addition, DEP continues to forward additional draft permit applications to EPA each month for review.

#### **Negative Impact on Permits**

Since EPA's Region III field office is not sufficiently staffed to perform NPDES permit reviews in a timely manner, this change has lead to indefinite delays in the permitting process.

Obtaining an NPDES permit for any discharge is a prerequisite to mining, so these delays and permit backlogs are tantamount to a de facto prohibition of mining.

Also, while EPA's comments and objections resulting from its permit reviews vary, a number of its objections to the permits are based on what the federal agency perceives are inconsistencies between the applications and an "interim final" guidance that it developed to provide a framework for regional reviews of "surface mining projects" based on conductivity levels it associated with adverse impacts to water quality.



The guidance is based on flawed studies that cannot be used to develop a predictive cause and effect relationship between EPA's established benchmark threshold for conductivity levels (i.e. 500 microsiemens/cm) and healthy streams in Pennsylvania.

Indeed EPA's own Science Advisory Board, after reviewing the interim guidance, recommended that the benchmark values not be applied outside the geographic bounds of data, i.e., West Virginia and Kentucky, without further validating the similarity of the ionic mixture, background conductivity levels, and macro invertebrate assemblages within and outside the study.

Finally, by using this guidance to screen and review permit applications and treating its provisions as binding, EPA has implemented a substantive change in the permitting process. As such, EPA is circumventing the clear federal requirements of the Administrative Procedure Act for public notice and comment by substituting the issuance of agency guidance for formal rulemaking.

It should be noted that Pennsylvania DEP Secretary Michael Krancer sent a letter to EPA on May 27, expressing the Department's "dismay" over EPA's policy shift in this area and maintaining that EPA's involvement, "...has resulted in unnecessary increases in permit review timeframes with no environmental benefit."

In addition, the Pennsylvania House of Representatives, in a bipartisan vote, approved and sent to EPA House Resolution 87 which condemns the federal agency's behavior in this regard.

Since surface mine projects in Pennsylvania are significantly smaller in terms of reserves and production than underground mine operations and are completed in shorter time frames, permits for surface mining are required on a more frequent basis. As such, indeterminate permit delays acutely affect this type of mining method more than other types of mining.

For example, Amerikohl on average operates about eight to ten mining sites on an ongoing basis in a given year. On average, it takes us anywhere from six months to two years to complete a job. Consequently, we are continually applying for permits to mine. Delays on permit issuance challenge the company's ability to maintain continuity of operations, meet our contractual supply requirements and keep our men and women working full time.

In addition, most of Pennsylvania's easily accessible surface coal reserves have already been mined and a high percentage of our remaining reserves are off-limit because of unilateral and unjustifiable regulatory actions like stream redesignations, unsuitable for mining petitions, endangered species protections that more often are precipitated at the federal level.

When all factors are considered, surface operators have very little viable options left on where to mine. EPA's permitting actions further reduce these options and unless we get a more certain and predictable process, our remaining reserves will be sterilized, mining derived income and jobs will be lost and we will all lose the benefits of cheap and reliable coal based electricity.

To survive, we need to see a return to reason and common sense in federal environmental policies. One way to accomplish this is through enactment of HB2018, which is pending before the U.S. House. HR2018 amends the Clean Water Act (CWA) to restore the long-standing balance between federal and state governments in regulating waterways and preserves the system of cooperative federalism established under the CWA in which the states are designated with primary responsibilities to regulate discharges.

This concludes my testimony. I would be happy to try and answer any questions.

Mr. JORDAN. I know it's tough to get through everything. Thank you.

We'll start our questioning now.

Mr. Hamilton, how many permits does a mining company need to actually do their business? Just give me a rough estimate. How many permits do you need to operate?

Mr. HAMILTON. I don't have that answer. I apologize.

Mr. JORDAN. Is it five? Is it dozens? Is it hundreds?

Mr. HAMILTON. I would say on the order of magnitude upward of 50, probably closer to 100.

Mr. JORDAN. Between 50 and 100 permits.

And that has not changed since the Obama administration has come into office, correct? Still the same number of permits.

Mr. HAMILTON. That is absolutely correct.

Mr. JORDAN. What has changed is the way those permits are granted, what—the scrutiny or just the enhanced review process, that's what's changed.

Mr. HAMILTON. Yes.

Mr. JORDAN. And you've seen a marked increase in the ability for you to get the 50 to 100 permits you need to operate.

Mr. HAMILTON. Those are all not permits issued by under the Clean Water Act or EPA. But yes.

Mr. JORDAN. But total permits you've got to go to government to operate.

Mr. HAMILTON. Yes.

Mr. JORDAN. And a marked increase.

And Mr. Stilley, you said the same thing. I think I heard that pretty clear in your testimony.

Mr. STILLEY. We go through possibly 10 permits every year as a small coal company in Pennsylvania.

Mr. JORDAN. Okay.

Mr. STILLEY. It's taking us anywhere from probably 2 to 3½ years now to secure a permit. All the while, our coal mines, from start to finish, only last anywhere from 6 months to a year and a half. That alone speaks volumes to the dilemma that this is creating for us alone.

Mr. JORDAN. I understand. Understand.

Mr. Mackall—I'm saying that wrong again. I apologize.

Same thing? You would say the same thing? Marked increase?

Mr. MACKALL. I'm an underground miner, so I don't have to get as many permits—

Mr. JORDAN. How many do you have to get?

Mr. MACKALL [continuing]. As a surface mine operator, but they have a significant effect on us. And they force us to do things in unusual ways. Like, for example, we have an underground coal mine that finished. We couldn't get the Army Corps permits and the EPA permits we needed for the next mine, so we actually just used the same footprint that we had for the end mine and went down 180 feet to a lower coal seam and sloped down to hit that instead. And it cost us \$1 million more to develop that mine because we couldn't get the permits that we needed in a timely manner.

Mr. JORDAN. And all these permits—Mr. Lovett, in his testimony, said that permits are denied if you're not in compliance with the law. Mr. Hamilton, all the companies you represent in your asso-

ciation, were they in compliance with the law when you were getting permits in a much more efficient manner?

Mr. HAMILTON. Yes, absolutely.

Mr. JORDAN. You weren't breaking the law, right?

Mr. HAMILTON. No, sir.

And perhaps the most egregious illustration that we could all use is the Spruce Mine where this mine, the permitting process was under way. It's probably undergone the most scrutiny of any industrial permit in the country. It underwent about a 6-year plus approval process with all the environmental and technical and engineering, with EPA participating throughout that period of time. The permit was issued back in 2007.

Mr. JORDAN. And this mine you're referring to, if I could interrupt Mr. Hamilton, this is the one that was challenged in a court case. And what was the decision of the Fourth Circuit in that case?

Mr. HAMILTON. The Fourth Circuit completely cleared the company.

Mr. JORDAN. And the challenge came on this enhanced review concept that's before us today; is that correct, Mr. Hamilton?

Mr. HAMILTON. That's correct.

Mr. JORDAN. And who was the individual who argued the case and brought the case? Who was responsible? Who argued the case? What agency—who argued that case on behalf of I think it's the Ohio Valley Environmental Coalition?

Mr. HAMILTON. Yes.

Mr. JORDAN. Who was the individual that argued that case? Do you know, that brought that case?

Mr. HAMILTON. I believe it was Mr. Joe Lovett and his colleague sitting right here.

Mr. JORDAN. And, again, what was the decision of the Fourth Circuit?

Mr. HAMILTON. The Fourth Circuit completely overturned every single ruling of the court.

Mr. JORDAN. So they said the way it was operating before, prior to this administration—

Mr. HAMILTON. There was no violations with the Clean Water Act, yes.

Mr. JORDAN [continuing]. Was fine. And that was the Aracoma decision of the Fourth Circuit; is that correct?

Mr. HAMILTON. That's correct.

Mr. JORDAN. Okay. I just want—a question to the business owners, real quick.

We had this happen, probably it was the hearing in front of the full committee 5, 6, maybe 4 months ago, I guess. We had a group of business owners in here. And at the end of the long hearing on regulation, the impact it's having on business, what I thought was one of the most compelling questions and part of the entire hearing, a colleague of ours, Mr. Guinta from New Hampshire, asked the witnesses, all business owners, many small business owners—one was actually from our district—he asked them a simple question.

He said, guys, if you knew then what you know now, would you have started your business? If you knew all the things government was going to require you to do, would you have started? Would you

have created those jobs? Would you have taken the risks? Would you have provided those opportunities for all the employees that work for you?

The answer from every single one was they wouldn't do it.

And I just wanted to ask the same question to you, Mr. Stilley, and then you, Mr. Mackall, and Mr. Hamilton for the business you represent. If you had it to do all over again, would you do it?

Mr. STILLEY. I started my business in 1978. In no way, shape, or form could I have ever anticipated all the impediments—regulatory impediments that have been thrown up by the Feds, principally the Feds. State government's fine. The answer to your question is probably no.

Mr. JORDAN. How many people work for you, Mr. Stilley?

Mr. STILLEY. I have 120 men and women working for us right now.

Mr. JORDAN. Mr. Mackall.

Mr. MACKALL. We have 160 employees, and that's my big quandary. And I also have a quandary within our family. As a family business, my son could have chosen a lot of things. He has his MBA. He could have chosen a lot of things for a career; and, you know, he chose to come and work for our company. And I don't know if that's the best thing for him.

But it all comes down to we have a responsibility to these employees that have worked for us for many years, and it's hard to walk away from it. But I would love the freedom of not having to deal with all those issues; and I really wonder if I'd ever, you know, would have started over again if I had to.

Mr. JORDAN. Thank you.

I yield to the gentleman from Ohio, Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Mr. Mackall, is it?

Mr. MACKALL. Mackall.

Mr. KUCINICH. Mackall.

Mr. Mackall, in the notice of the hearing, it has you as president of Sterling Mining, and I'm told that you're the officer of East Fairfield Coal Co. Could you help this subcommittee or this committee with this—

Mr. MACKALL. They are both companies that are in my—a part of my family business. One's an underground mining company of coal, and one's a—

Mr. KUCINICH. Which is which?

Mr. MACKALL. East Fairfield Coal Co. is now a limestone coal company, and Sterling Mining is an underground coal mining company.

Mr. KUCINICH. So have you been an officer of both, then?

Mr. MACKALL. Correct.

Mr. KUCINICH. Okay. And how long have you been an officer of both?

Mr. MACKALL. Thirty-plus years.

Mr. KUCINICH. Okay. I have here a news report that said that Sterling Mining to pay a \$50,000 fine for Clean Water Act violations at the Sunshine Mine and Mill, according to an EPA agency release. This was from 2009. Are you familiar with that story?

Mr. MACKALL. No, I'm not. It's not the same company.

Mr. KUCINICH. It is not? Okay. Then I withdraw then. Is it your—I want to go to Mr. Hamilton.

Your comments on litigation over the Spruce Mine permit revocation, can you tell us a little bit about that?

Mr. HAMILTON. First of all, I—I was asked a question in haste whether that was the Aracoma decision. I believe that was known as the Bragg decision, but this permit underwent about a 6-year, plus year scrutiny. EPA, Corps of Engineers, the State DEP, everyone had very, very intense involvement with that permit. The permit was issued in 2007, only to have EPA come back a year and a half ago, 2010, and actually initiate revocation proceedings for that permit, and that's been the only mining permit in the country that has underwent the—that type of scrutiny and action on behalf of the EPA.

Mr. KUCINICH. Now, Mr. Lovett, could you clarify the legal issues that Mr. Hamilton referenced?

Mr. LOVETT. Certainly.

Mr. KUCINICH. And use the mic, please.

Mr. LOVETT. Yes. Let me state first, the Court of Appeals did not overturn the Clean Water Act injunction in the Spruce Mine case. That's incorrect. The Army Corps of Engineers was forced to change a longstanding regulation, the definition of fill material, which basically legalized mountaintop removal, and it did that in, I think it was 2008. As a result of that ruling, other issues went to the Court of Appeals, not the issue of the court's injunction related to Clean Water Act issues in the Spruce case.

The most important thing about the Spruce Mine, from my perspective, isn't all the procedural wrangling that we're doing here. It will destroy, forever, nearly 5 square miles of Appalachian forest and streams. It will fill with mining waste over 6 miles of stream, forever. If that kind of activity doesn't deserve environmental scrutiny, I don't know what does.

Mr. KUCINICH. Well, let me go—just hold on there. Now I want to go back to Mr. Hamilton.

Mr. Lovett just outlined some environmental consequences. We hear about those all the time, but we rarely get a person from the industry to be able to respond directly when challenged on environmental consequences. What do you say to people who are concerned about water quality or concerned about the adverse health effects when these toxic substances get into the environment that come as a result of mining? What's your response to them?

Mr. HAMILTON. I say come personally and visit the operation. Come personally and see the biological diversity and the clean drinking water standards coming off that active mine site. Come personally and talk to the men and women who live above, who live below, who work on those operations and have for some time. We are—

Mr. KUCINICH. I appreciate that response and that invitation. You know, we have representatives of the industry who are mining underground and do mountaintop mining. Now, on the mountaintop mining side, people did come personally and did a documentary that, of course, you're familiar with, called "The Last Mountain," where they point out, this mountaintop moving removal in its wake, the process leaves toxic sludge piles, containing arsenic, lead,

and mercury, contaminated rivers and streams, fine particulate airborne matter that creates an epidemiological health nightmare and unlivable communities. Mountaintop removal has already destroyed 500 Appalachian mountains, decimated a million acres of forest, buried 2,000 miles of streams.

There are some people who are coming and taking a look at it, but they are coming—they are coming up with conclusions that might be at variance to what the industry is saying.

I thank the gentleman, and I yield back.

Mr. JORDAN. Thank the gentleman.

I now recognize the chairman of the full committee, the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you for holding this important hearing. There's nothing more important to this committee or to America than the kinds of jobs that every day we continue to hear we lack in this country.

For all of you who came here from West Virginia, where the unemployment rate is so high, hopefully this hearing will be a start toward getting West Virginians working again.

Mr. Stilley.

Mr. STILLEY. Stilley.

Mr. ISSA. Stilley, I apologize, I wasn't here for the introductions.

Mr. STILLEY. That's quite all right, sir.

Mr. ISSA. I would like to understand a little bit more about what it's like in West Virginia. You've been mining there for generations. I am a native of Ohio, so we enjoy in the southern part some of the same activities, but you've been mining for a long time. Would you say it's fair to say that we've learned a lot, that we mine better than we used to?

Mr. STILLEY. There's no question but that is the case. We have mined in West Virginia, but this is for clarification, we are principally Pennsylvania coal miners today, all surface mining.

Mr. ISSA. Right.

Mr. STILLEY. But the technology that we subscribe to has progressed immeasurably. You don't have enough yardsticks in the room to measure how much progression has taken place since the mid 1970's, when surface mining was largely unregulated.

Mr. ISSA. All right. And I would like to delve into that for a second because this hearing is not about a history of mining, and yet if we don't know the history, we don't know where you are here today when people say streams and water and so on.

My partner in business years ago was from Pennsylvania, Enon Valley, PA, near the Ohio border. And they did what was then called strip mining, and quite frankly, he got a nice lake, but he had some real problems with the rest of the activities related to the stream in and out, and ended up with quite a bit of bulldozer work for a period of time to get things right. But it was the 1970's.

Today what is the before and after in what is being called mountaintop? What is the standard? Because Mr. Lovett has said, you know, we're going to destroy 6 square miles, and it's going to be ruined forever. Now, I've been to Mount St. Helens, so I understand one thing, you can blow off the top of a mountain, and it's not necessarily forever because it grows back.

But I don't want to—I don't want to wait, I don't want to wait the way they have at Mount St. Helens for growth to begin where the ashes are and so on. How long between the end of mining operations and a return of substantial forest in a typical example that you would be involved in?

Mr. STILLEY. Where we're involved, in each and every case, within no more than 60 days or by the next planting season, we have our sites totally reclaimed where I doubt any person in this room could—could or would know that any mining had taken place on that site.

We go through 10 mine sites every 2 years. Our average site lasts anywhere from 6 months to 3 years, and I can assure you that's one of the things we take great pride in is the concurrent reclamation where, again, within a month or two or by the next planting season, those farms, those timberlands are returned to a use that's as good as what had existed before our involvement at the site.

Mr. ISSA. Mr. Hamilton, going to West Virginia now—

Mr. HAMILTON. Yes.

Mr. ISSA. Is it substantially the same? Is there any ability for an actor to basically do it the way they did it in the 1970's—

Mr. HAMILTON. No.

Mr. ISSA [continuing]. And sort of leave you with a pond? Is it the same that basically within 5 or 6 years after the secession of mining, you not only have primary growth, but you've got a considerable amount of growth in the area, including maintenance of historic water activity?

Mr. HAMILTON. Absolutely. And we, we go back a period of 12, 15 years, and you cannot find certain—certain structures that were there during active mining. In fact, a lot of the, the mountaintop mining operations or surface mine operations in West Virginia will actually reclaim during the active mining process today, will reclaim miles and miles and miles of the old rigid high walls that were left by mining operations in the pre-mining period. And we also have example after example throughout the State where you have recreational, commercial, and industrial facilities that are developed on these mountain sites today.

Mr. ISSA. Let me ask just two quick questions, then let anyone that thinks they can help with it. First of all, isn't it true that in some cases, failed past mining operations of 30 years ago, if they have additional coal resources, are often the best sites to go in, mine additionally, and get them right? And second of all, isn't it true during the entire Clinton administration, the rules that governed those success stories you talked about were in place and that ultimately over that 8 years of the Clinton administration, mining activities increased while, in fact, the restoration process probably reached what is today what we call the gold standard?

Mr. HAMILTON. Absolutely. That's absolutely correct.

Mr. ISSA. Mr. Stilley, do you pretty much concur with that?

Mr. STILLEY. I totally agree with it and can only even emphasize it further. As I mentioned earlier, about one-third of the mine sites that we activate or participate in had been mined previously, where there are existing high walls left, streams in somewhat bad repair, and in the past 30 years, we've reclaimed over 200 acres of



abandoned mine lands as part and parcel to our re-mining process and literally have cleaned up miles upon miles of streams by correcting the deficiencies that had existed in pre-law situations.

Mr. ISSA. Thank you.

Mr. Chairman, my time has expired. What I will say on behalf of the committee is that if you would like to take up the offer of actually visiting some of these reclaimed sites, particularly those that are left better than they were found, I certainly believe that the committee should make that investment, and I would be glad to help you with that.

Mr. JORDAN. Thank you.

Mr. KUCINICH. Will the gentleman yield?

Mr. ISSA. My time has expired. I yield back.

Mr. JORDAN. Let me say one thing before I yield to the gentleman. The audience, remember this is a committee hearing, and let's make sure we remember that as we proceed.

The gentleman from Cleveland is recognized.

Mr. KUCINICH. I would just like to say to my friend from California that I think that's a good idea, and I think it would be a good idea for us to look at both sides of the equation. That is where people say they left it better and where maybe some people in the community say, well, you know, maybe it wasn't better.

Mr. ISSA. If the gentleman would yield?

Mr. JORDAN. Of course.

Mr. ISSA. I certainly believe that if we do a field observation, and it's not very far to West Virginia or Pennsylvania from here, or even Ohio, that we should look at the sites that are presented to us, review them pictorially, and then visit them, and I think that would be helpful because I think the invitation we had here is come see the effect of mining or not mining in these towns, so I thank the gentleman.

Mr. JORDAN. In that vein, if I could, just real quick, Mr. Stilley, you live in Pennsylvania?

Mr. STILLEY. I live in Butler, PA.

Mr. JORDAN. And your mines are in that area?

Mr. STILLEY. We operate in 10 counties in Pennsylvania, all central and western Pennsylvania.

Mr. JORDAN. Your employees live there?

Mr. STILLEY. All my employees live local to where the mines exist.

Mr. JORDAN. You care about your employees, right? They are the reason you're in business; you make a—you make a profit, your company?

Mr. STILLEY. The only reason I am successful is because of my employees.

Mr. JORDAN. And you all drink the water in that area?

Mr. STILLEY. We all drink that water.

Mr. JORDAN. We would be happy to come visit at some point.

We will turn now to the gentlelady from California.

Ms. SPEIER. Mr. Chairman, thank you.

And thank you all for your participation here today.

I'm a little mystified by the discussion that's gone on because from my reading of some of these documents, it would suggest that this mining has been going on for a long time. It predates the

Clean Water Act. But the sections that people are all tied up in a knot about, Sections 402 and 404, are not new. They've been on the books. They just weren't enforced for the last 8 years. A new administration comes in and is enforcing an existing law, and you're all going crazy.

Now, Mr. Lovett, explain to me how large the amount of land that's been destroyed by mountaintop removal mining is.

Mr. LOVETT. Well, remarkably, I don't think anyone has an accurate number. I've been surprised that the government doesn't publish the number, but it's certainly over a million acres by most estimates. And the mining has been going on since before the passage of the Clean Water Act. However, the size of mountaintop removal mines has grown dramatically in the last 10 or 12 years and created problems for complying with the Clean Water Act that didn't exist with smaller mines.

Ms. SPEIER. Well, actually, this chart, unfortunately, we can't put it up on the screen, suggests that this little blue area is where the surface mine production is going on; it's about 98 million tons. The other U.S. coal production is 977 million tons, and the unused U.S. mine capacity is 360 million tons. How many employees in this industry?

Mr. LOVETT. I don't know about the surface mining industry in general, but it's approximately 6,000 employees in West Virginia on all surface mines. It changes from year to year, but that's the approximate number.

Ms. SPEIER. You know, there was a lot of discussion about loss of jobs, and if we could put up the slide that I believe we do have with jobs at Appalachian coal mines, can we do that? Well, if we can't do that, this is a chart that suggests actually—there it is up on the screen—that jobs have actually increased. Here we are in the middle of a recession, and jobs in coal mining have increased. Even though that green line denotes that the demand for Appalachian coal at U.S. plants has decreased, the number of jobs have actually increased.

So my big concern is talking about something that I don't think has been addressed yet. There was a West Virginia University study, scientific study by two doctors, Doctors Ahern and Hendryx, that found that there was an increased risk of babies being born with defects of the circulatory or respiratory system by 181 percent living around mountaintop mining areas.

The coal industry's response to the study was outrageous. Now, I'm not attributing it to anyone who is at this table, but the response was, to this study, a scientific study, that it's probably not due to the mountaintop coal mining but probably more likely due to consanguinity, which is another way of saying inbreeding. Now, that became quite volatile, and I think the representative who made the statement retracted it, but either it's a serious problem relative to birth defects or it's not. It doesn't have anything to do with inbreeding.

So, Mr. Lovett, do you have any comments that you would like to make?

Mr. LOVETT. Well, remarkably, that statement was made by a lawyer. I mean, it's a terrible statement.

Clearly, the coal industry does what it can do to shift emphasis elsewhere. There's no doubt that living near one of these mines is very difficult. There's blasting all the time, dust; water is contaminated. EPA has determined that 9 out of 10 streams downstream from a mountaintop removal mine are impaired. It's living in an industrial landscape and very difficult for people to live in. They breathe dust with particles in it that are bad for them, and the water is bad because of these mines. Now, I just want to be clear; this is not about all mining. I'm only talking about large-scale mountaintop removal mines. Those mines are very destructive to the environment and to the communities near them.

Ms. SPEIER. I think my time has almost expired. I'll yield back.

Mr. JORDAN. Thank the gentlelady.

Mr. Lovett, just let me ask you one quick question before I turn to Mr. Kelly. Do you think all mountaintop removal mining should be stopped?

Mr. LOVETT. Yes.

Mr. JORDAN. Let me ask you this: But isn't that—if that, in fact—if you believe that that's fine, I guess, but shouldn't that be decided by the elected Members of the U.S. Congress? It should be a decision made by the legislative branch of government, correct?

Mr. LOVETT. It should be, and I believe it has.

Mr. JORDAN. Not a decision made by going to court and doing it that way?

Mr. LOVETT. No, I don't agree with that. I think that going to court is a way to make sure that what Congress has passed is actually enforced.

Mr. JORDAN. Just for the record, you believe that should be a legislative question whether there should be mountaintop mining?

Mr. LOVETT. Without question.

Mr. JORDAN. Okay. Thank you.

Mr. Kelly is recognized.

Mr. KELLY. Thank you, Mr. Chairman.

Mr. Hamilton, you, in your testimony, you mentioned nearly 700 permits in West Virginia are up for renewal in the next couple years. Could you tell us more about the effects that will be if these permits are not renewed in a timely manner?

Mr. HAMILTON. Well, we think the effects would clearly be devastating. At the current time, again, there is a universe, as I mentioned in my earlier comments, of near a thousand permits of some, some type that are pending or must be acted on here currently, and over the next 24 months there's an additional 700 to 800 permits which must be renewed, and those permits come primarily from two watersheds in the State of West Virginia that represents about half of our production. And they are not limited to the one or two true mountaintop removal operations we have currently in the State of West Virginia, but they—again, we have one or two approved mountaintop mining operations in the State of West Virginia. We have a number and a variety of surface mining operations, which often get lumped into the category of mountaintop removal mines, but—but the 700 permits, 800 permits pending represent about half of our State's production from basically two, two watersheds, and those come from underground

mines, surface mines, small augur mines, again, just the whole gamut.

Mr. KELLY. Yeah, and I've got to tell you, I think the purpose of today's hearing is about this permitting or lack of permitting or the inability to get permits done in a timely manner. And then we start talking about water, and I understand water and the importance of clean water to everybody.

A couple months ago we had people from the gas company, the gas industry come in, and they started talking about the Marcellus Shale and fracking, and just from my past background, I know that fracking isn't new; it is 60 or 70 years old. But the question always becomes then about water, and what's going to happen to the water and how it's going to contaminate the water.

If you could, and maybe, John, you can weigh in on this, too, because you're doing some of the drilling right now, but I think there's a misconception out there about how much water is being affected by this, and if you could, just a little bit about the people's perception of what coal mining is doing to the water and also the Marcellus. It cleared up a lot of problems for us as far as fracking and the fact that it can be done very safely and can be done effectively. I think some of the problems are wastewater. It's not so much the actual fracking process but the treatment of the wastewater. So if you could just a little bit weigh in on that, and it could be anybody.

Mr. STILLEY. I can speak to that. You know, again, we've been through over 350 permitted mines over the past 30 years. Each and every one of those mine sites requires a full permit application. Within that permit application, most important to our regulators, which is the Pennsylvania DEP or at least had been, is that we can mine the coal with no impact on the water resources of the Commonwealth, whether it be discharges, private or public water supplies. If we can't demonstrate that in the permit application, we, we will not secure a permit from the Pennsylvania DEP period.

Mr. KELLY. And I think this is important because you have a chance now to explain some of these things. We talk about conductivity in the water, and my understanding that is a bottle of water, a sports drink has actually—doesn't a bottle of water or sports drink have more conductivity than the EPA will allow in a particular source of water that we emit? So, I mean, I think it's important when you understand the overreach and how far this gets and it goes way beyond what the average person would understand. If you could just explain a little bit about this conductivity, John.

Mr. STILLEY. If one would look at the label on a bottle of San Pellegrino drinking water, and I believe the number of total dissolved solids in that bottle of San Pellegrino is 780. In the impaired streams, such as the Monongahela River basin, we are going to be imposed due to the new EPA regulations for impaired streams a maximum of 250 parts per million sulfates. So a bottle of San Pellegrino is three times that of what we can put out of the end of our pipe of any coal mine. That's pretty tough.

Mr. KELLY. Yeah, I would—I would think so. But again, the general public doesn't understand these things, and, you know, we have the bad habit here of letting the perfect stand in the way of

the very good, and we just tend to keep pushing the stuff down the road.

To all of you in the coal business, I want to thank you for being here, but the effect of these permits not being issued, tell me on your businesses, because I also run a small business, where does this leave you?

Mr. HAMILTON. In West Virginia, I'll offer that we think it's leading to a real crisis in waiting. You know, we've been in a national recession here, and we've been attempting to weather that, that storm, as everyone else is, and, you know, we, we see markets come and go within the coal business. Again, we ship to some 33 different—33 different States, some 23 foreign, foreign destinations, and, you know, the margins out there and the competitiveness is about as fierce as it's, as it's ever been, and currently this recession's picking up, and we think we're going—we stand to lose a lot of these markets because we don't have the next block of coal or the next reserve base permitted, and so and at the current time, you know, we're into areas that are very, very inefficient, just trying to keep the people employed, trying to keep the operation in a state of activeness as we're waiting for the next sequence of permits to be issued so that we can—so that we can begin to administer the next 5-year operational plan.

Mr. KELLY. My time has expired. I was going to—Mr. Mackall, did you want to say anything about your company, where it puts you as far as the permitting, the inability to get the permits?

Mr. MACKALL. Are you talking to me? Yeah, we have the same situations. Our mining plans have to be adjusted all the time because we can't do what we want to do. We have to do—we don't have it permitted yet. We're always waiting for permits, so it's a big factor. And, you know, I would also like to say, in Ohio, that the greatest thing that I've seen in my lifetime in mining, almost all my lifetime, we've done a lot of reclamation in the State, and we've improved the water resources in the State and the streams so much in that time by reclaiming the old properties that weren't reclaimed before. So we've continued to make the streams better and better and yet we have a more and more difficult time in getting the permits.

Mr. KELLY. Very good.

Mr. Stilley.

Mr. STILLEY. I echo Mr. Mackall's sentiments totally. I think it's demonstrated by all the stream redesignations that have taken place in Pennsylvania over the past 20 years where all those designations are to better and better streams than what they had been 20 years ago. A large portion of that upgrade is a result of the re-mining that's taken place both in Ohio and Pennsylvania, and I'm certain as well in West Virginia. Just by the very nature of how that re-mining takes place, we're required to add lots of alkalinity into the overburden through importation of limestone dust and other calcareous materials which neutralize any potential for acidity emanating from those sites that existed before or after our mining and reclamation takes place.

Mr. KELLY. And I appreciate it.

And I've got to tell you in a country that right now has over 14 million Americans that wake up today with no place to go to work,

and we're talking about creating jobs, we're talking about improving our economy, it's hard for those of us in small business to sit back and watch all that's going on and the burdens that are being placed in front of you to create jobs, and then still hear we're going to go after this market; we're going to be energy producers. A third of the world's coal is below our surface. It just doesn't make sense to the average person as to what's going on right now, and I appreciate you taking time out of your days to come here. I know how tough it is to run these businesses. Thank you so much. Appreciate your testimony.

Ms. BUERKLE [presiding]. Thank you, Mr. Kelly.

I will now yield myself 5 minutes for questions. First of all, I want to say thank you to all of our panelists for being here today and, as Mr. Kelly said, for taking time out of your schedules to come here and testify.

I want to start with the comment Mr. Lovett made with regards to the fact that you would like to see all mountaintop mining ended. So my question is for the other four panelists. Do you think that the EPA's actions will end or will work toward the end of ending mountaintop mining as well as any other type of mining?

Mr. Mackall, I'll start with you.

Mr. MACKALL. To end mountaintop mining? Could you repeat the question?

Ms. BUERKLE. Will EPA's actions and what we're seeing and hearing today, will that—is that really what's going to happen with what they're doing?

Mr. MACKALL. I don't know anything about mountaintop mining, but I know that it's, it's very difficult for us now with all the different permits and all the issues that we're faced with, to, you know, go through all the agencies and do all the studies and get the permits in a timely manner to keep our employees working. We so often end up being inefficient because we don't have it—when we need to build the ponds to begin a mine, we don't have the permit in the summer season. We get the permit maybe in the winter when it's harder to do a good job and putting the ponds in. And so it seems to me that the EPA and the government is deliberately working against us to stop us from mining and stop us from employing people.

Ms. BUERKLE. Thank you.

Mr. MACKALL. It's very difficult.

Ms. BUERKLE. Mr. Hamilton.

Thank you, Mr. Mackall.

Mr. HAMILTON. I would concur with those remarks. I clearly think that the Appalachian states represented here today represent an area that's targeted by this administration and being carried out by the U.S. Environmental Protection Agency to do everything within their power to restrict and curtail productivity, coal productivity from these regions. There has been absolutely no degradation whatsoever of the water systems. We have a State that is primarily within a mountainous and hilly terrain, and so every impact, every earth moving operation of any kind, whether it's putting a highway through our State or a shopping center mall or a mining operation, has some impact on ravines or hillside troughs that only carry or pass water during a precipitation event. We have the most strin-

gent water quality standards enforced anywhere in the world in the State of West Virginia. And we have a booming tourism industry where people come from all over the Nation to participate in our outdoor recreational fishing, hunting, canoeing, white water, so we're real proud of what we do.

But we think that's all in jeopardy right now. Again, we think that this area's targeted for whatever reason, and, and we do have a crisis in waiting.

Ms. BUERKLE. Thank you, Mr. Hamilton.

Mr. Horton.

Mr. HORTON. Yes, ma'am, I do believe that their activities will end, not only mountaintop mining but very much of the underground mining in our State, not only our State but the State of Virginia and Kentucky as well. We have to have a permit to store our over-burden in order to begin mining, whether it's underground, high wall mine or surface mine, and for them to continue down the path that they're on, the operators and the people with the money are not going to invest in a operation where they can't have a reasonable guarantee of some type of economic benefit from their investment. They're just not going to do it, and that's the absolute truth.

Ms. BUERKLE. Thank you, Mr. Horton.

Mr. Stilley.

Mr. STILLEY. I would have to say the answer to the question is a definite yes, and not only will it eliminate mountaintop removal mining, but all surface mining as we understand it today. Very simply, by the nature of the delays, the inconsistencies, and the uncertainty that it creates about trying to secure a permit, and if you don't have a permit, you can't go to work, you can't comply with contractual obligations, you can't keep your men and women working on a full-time basis.

Ms. BUERKLE. Thank you. You know, we hear so often the word balance and how important it is, whether it's in law or whether it's in regulations or whether it's with government oversight. There is a balance, and that balance—and I look at this side of the ledger and I see we're talking about thousands of jobs, millions of dollars of tax revenues, community benefits, schools, hospitals, health care for communities, businesses, small businesses, you know. Mr. Hamilton, you talked about a recreation industry in West Virginia. All of these things hang in the balance, and it concerns me greatly that this regulatory agency is reaching, far-reaching to the point where it will hurt these States and these industries to the point where it just doesn't impact the coal industry. It impacts communities and towns and millions of people. So I want to thank all of you for being here today. I see my time has expired. Does anyone else on the committee have any other questions?

Mr. KUCINICH. I just want to say, apropos of what Chairman Issa said in terms of a field hearing, I hope we have a chance to go to the Coal River Valley in West Virginia, because notwithstanding what the gentlemen here say from the industry, there's been pretty serious complaints and documented reports about poison water, massive sludge dumps, floods, tumor clusters, and I think it's important to get that side of the story as well, and I appreciate the indulgence here, Madam Chair.

Ms. BUERKLE. Again, thank you to all of our panelists for being here this afternoon, and we will look forward to coming down and seeing these reclaimed areas and seeing what you do. Thank you very much.

We are now going to call the third panel. That's right. Sorry.

We will now welcome our third panel. As witnesses in our third panel, we have Ms. Nancy Stoner, the acting assistant administrator for water in the EPA; and Ms. Meg Gaffney-Smith, chief of the Regulatory Program at the Army Corps of Engineers. Pursuant to committee rules, all witnesses will be sworn in before they testify.

If I could ask you to stand. Please raise your right hands.

[Witnesses sworn.]

Mr. BUERKLE. Let the record reflect that both witnesses answered in the affirmative. Thank you.

We'll begin this panel by asking each one of you to give your opening statements, and just to allow time for further discussion, if you could limit your comments to 5 minutes, we would appreciate it. Ms. Stoner, you may begin.

**STATEMENTS OF NANCY STONER, ACTING ASSISTANT ADMINISTRATOR FOR WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY; AND MARGARET E. GAFFNEY-SMITH, CHIEF, REGULATORY COMMUNITY OF PRACTICE, ARMY CORPS OF ENGINEERS**

**STATEMENT OF NANCY STONER**

Ms. STONER. Thank you, and good afternoon. I'm Nancy Stoner, acting assistant administrator of the Office of Water at the U.S. EPA. I appreciate the opportunity to testify before you on EPA's work to protect America's waters, including those in Appalachia.

Let me start by repeating something that EPA Administrator Lisa Jackson has said many times. Americans do not need to choose between having clean water and a healthy economy. They deserve both. EPA is committed to work together with coal companies, States, the Army Corps of Engineers, and other Federal agencies to reduce coal mining pollution and protect the health and environment of coal field communities and protect the Nation's economic and energy security.

We at EPA have a responsibility under the Clean Water Act to ensure that surface coal mining projects do not impair water quality or endanger human health or environmental health. We're committed to fulfilling that responsibility because we believe that every community deserves our full protection under the law. In the last 2½ years, we've worked with our Federal and State colleagues and with mining companies to design projects so that they do not adversely affect water quality so that they can move ahead.

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



In 2010 an independent peer-reviewed study by two university professors found that communities near degraded streams have higher rates of respiratory, digestive, urinary, and breast cancer. That study was not conducted in a far-off country. It was conducted in Appalachian communities only a few hundred miles from where we sit today.

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

And a peer-reviewed study released days ago concluded that babies born to mothers who live in mountaintop mining areas of Appalachia have significantly higher rates of birth defects than babies born in other areas.

In addition to health studies, peer-reviewed science has increasingly documented the effects of surface coal mining operations on downstream water quality and aquatic life. Peer reviewed studies have found elevated levels of highly toxic and bioaccumulative selenium, sulfates, and total dissolved solids in streams downstream of valley fills.

Studies by the West Virginia Department of Environmental Protection and independent scientists have emphasized the role of high selenium levels in causing developmental effects in fish. Peer reviewed studies by EPA scientists have concluded that the environmental effects of surface coal mining include resource loss, water quality impairment, and degradation of aquatic ecosystems.

It's been a high priority of this administration to reduce the substantial human health and environmental consequences of surface coal mining in Appalachia and to minimize further impairment of already compromised watersheds. In carrying out this goal, we've demonstrated a constructive approach in our work together with the Army Corps, with the States, and with mining companies, and do you know what we found? When people of goodwill work together, we're able to find approaches that allow mining companies to move forward without degrading water quality. And that's what we're working to accomplish every day at EPA, protecting lives and livelihoods.

Let me make two specific points. First, EPA has not placed a moratorium on coal mining permits. More than a hundred Clean Water Act permits have been approved for Appalachian coal mining operations in the past 2½ years. EPA's regional offices work every day to review these and other permits, and they work with companies, the Army Corps, and other Federal and State agencies to discuss and resolve issues that emerge.

At the end of the day, the permits that are being issued provide improved environmental and health protection for Appalachian communities as well as jobs and economic and energy benefits to citizens of Appalachia.

Second, initial monitoring data show that mines that use modern practices to protect the environment can achieve downstream water quality well below levels of concern. These mining operations are designed to protect water quality and human health while also mining coal and providing jobs. It's being done at mines in Appalachia today.

In conclusion, Madam Chairwoman, science has told us that when we don't protect our waters from coal pollution, our communities and future generations will suffer. The costs of pollution are borne by the citizens of Appalachia who drink the water, breathe the air, and sweep the coal dust from their homes. As leaders, we should be taking every possible step to help keep them healthy and working together to provide a clear path for the future of coal, a path that ensures the health and prosperity of Americans living in Appalachia and the energy future for our Nation.

Senator Robert Byrd stated eloquently that, "The greatest threats to the future of coal do not come from possible constraints on mountaintop removal mining or other environmental regulations but, rather, from rigid mindsets, depleting coal reserves, and the declining demand for coal." The future of coal and indeed our total energy picture lies in change and innovation.

I sincerely respect Senator Byrd's challenge to all of us to embrace the future. EPA is doing so every day in its work to review permits and ensure they provide a path for mining coal while preserving the health and welfare of Appalachian communities. We'll continue to work with our Federal partners, State agencies, the mining industry, and the public to fulfill our common goal of reducing adverse impacts to water quality, aquatic ecosystems, and human health. Thank you.

[The prepared statement of Ms. Stoner follows:]

**TESTIMONY OF**  
**NANCY K. STONER**  
**ACTING ASSISTANT ADMINISTRATOR**  
**OFFICE OF WATER**  
**U.S. ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE**  
**SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT &**  
**GOVERNMENT SPENDING**  
**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**  
**UNITED STATES HOUSE OF REPRESENTATIVES**

**JULY 14, 2011**

Good morning Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee. I am Nancy Stoner, Acting Assistant Administrator for the Office of Water at the U.S. Environmental Protection Agency (EPA). I am pleased to have the opportunity to discuss the EPA's work with states, other federal agencies, mining companies, and the public to ensure that Clean Water Act permits for Appalachian surface coal mining operations protect water quality and human health. The EPA understands the critical contribution of coal mining to the Appalachian economy and its importance to the nation's energy security.

The EPA works every day to protect human health and the environment under the Clean Water Act. Congress established a leadership responsibility for the EPA in reviewing permits under the Act in order to ensure clean and safe water for all Americans. The EPA takes this role very seriously. Appalachian communities and all Americans depend upon clean and safe water for drinking, swimming, fishing, farming, manufacturing, tourism, and other activities essential to the American economy and quality of life. Our work to review and comment on permit applications for Appalachian surface coal mining operations that affect water quality is one way

in which the EPA carries out the mission Congress provided to us. We work hard to achieve our clean water goals in a way that protects public health, sustains our economy, and assures that we provide clean water to future generations.

### **Impacts of Appalachian Surface Coal Mining on Public Health and the Environment**

The EPA's role in reviewing permits for Appalachian surface coal mining are informed by significant peer-reviewed science documenting the far-reaching environmental and public health impacts of the unsustainable mining practices of the past. Recent studies, as well as the experiences of Appalachian coalfield communities, point to new environmental and health challenges that were largely unknown even ten years ago. The U.S. Army Corps of Engineers and EPA work together to avoid and minimize adverse environmental impacts under the agencies' regulations. Corps of Engineers permits also require mitigation to compensate for unavoidable impacts of authorized projects. Since 1992, however, more than 1,200 miles of Appalachian headwater streams have been filled by Appalachian surface coal mining practices, at an estimated ongoing rate of 120 miles per year.<sup>1</sup> Further, while precise estimates are limited, the estimated scale of deforestation from existing Appalachian surface mining operations is greater in size than the state of Delaware, or 5,700 square kilometers predicted to be affected by 2012.<sup>2</sup> The full cumulative effects of surface coal mining operations at this scope and scale have not been fully calculated.<sup>3</sup> Appalachian deforestation, which is not directly regulated under the Clean Water Act, has been linked to significant changes in aquatic communities as well as to modified storm runoff regimes (which can lead to increased flooding), accelerated sediment and nutrient transport, reduced organic matter inputs, increased algal production, and altered stream

<sup>1</sup> *Final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia*. 2005. Available at <http://www.epa.gov/region03/mtntop/eis2005.htm>.

<sup>2</sup> *Ibid.* These estimates do not reflect recent efforts to promote reforestation of previously mined sites.

<sup>3</sup> *The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields* (Final Report), EPA-600-R-09-138A. This report and the SAB's final review report are available at <http://www.epa.gov/owow/wetlands/guidance/mining.html>.

thermal regimes.<sup>4</sup> Such impacts have placed further stresses on water quality and the ecological viability of already impacted Appalachian watersheds. Potential associations between negative human health effects and coal mining activities have also been documented, including peer-reviewed public health literature that has preliminarily identified associations between increases in surface coal mining activities and increasing rates of cancer, birth defects, and other serious health consequences in Appalachian communities.<sup>5</sup> It is within this context that the EPA and other federal agencies have been working to reduce the harmful consequences of Appalachian surface coal mining operations.

#### **EPA's Clean Water Act Roles**

The EPA has a responsibility under the Clean Water Act to take steps to ensure that permits protect water quality and aquatic environments. We exercise this responsibility most directly through our coordination with Appalachian states under Sections 401 and 402 of the Clean Water Act and our work with the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act.

#### Clean Water Act Section 402

As provided in Section 402 of the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) permit program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. States can obtain authorization from the EPA to administer the NPDES program for discharges to waters within their

<sup>4</sup> Webster, J.R., S.W. Golladay, E.F. Benfield, J.L. Meyer, W.T. Swank, and J.B. Wallace. 1992. *Catchment disturbance and stream response: an overview of stream research at Coweeta Hydrologic Laboratory*. In P.J. Boon, P. Calow, and G.E. Petts (eds.), *River Conservation and Management*. John Wiley and Sons, New York, N.Y.

<sup>5</sup> See, e.g., Hitt, N.P. and M. Hendryx. 2010. *Ecological Integrity of Streams Related to Human Cancer Mortality Rates*. *EcoHealth* 7, 91–104; Hendryx, M. and M.M. Ahern. 2008. *Relations Between Health Indicators and Residential Proximity to Coal Mining in West Virginia*. *Am. Jnl. of Public Health* 10.2105; and Ahern, M.M., M. Hendryx, J. Conley, E. Fedorko, A. Ducatman, and K.J. Zullig. 2011. *The association between mountaintop mining and birth defects among live births in central Appalachia, 1996-2003*. *Environ. Res.*, doi:10.1016/j.envres.2011.05.019.

jurisdiction, and all Appalachian states have been authorized to administer the NPDES permitting program. Pursuant to the Clean Water Act, EPA oversees authorized state programs to ensure that permits are consistent with the provisions of the Clean Water Act. The EPA and states share responsibility for assuring compliance with environmental laws and regulations and for protecting human health and the environment. Congress envisioned cooperative implementation of the Act by the EPA and authorized states, with states serving as the primary day-to-day implementers of water quality programs and the EPA serving in an oversight role to ensure consistent and effective protection for all our nation's waters. The EPA and states work together every day under this cooperative federal-state partnership established under the Clean Water Act.

A critical element of the EPA's Clean Water Act oversight role is to review state-drafted permits for consistency with the law. The EPA conducted a comprehensive Permit Quality Review (PQR) of state NPDES permitting practices for Appalachian surface coal mining operations in fall 2009 to determine whether states were effectively implementing provisions of the Clean Water Act. The resulting report, *"Review of Clean Water Act §402 Permitting for Surface Coal Mines by Appalachian States: Findings & Recommendations,"* was issued in July 2010 and concluded that Appalachian states could be more effective in gathering water quality data and documenting their permit decision-making. Most significantly, the EPA's review concluded that states had not implemented their narrative water quality criteria consistent with the Clean Water Act and that state permits did not include limits intended to meet this critical requirement. Since this report was issued, the EPA has been working with authorized states to ensure that concerns identified through the PQR are being addressed to ensure effective protection of downstream water quality.

EPA's primary role in overseeing State NPDES permitting programs involves EPA's review of individual draft or proposed permits submitted to EPA Regions by states. Under the Act, the EPA reviews major draft NPDES permits and provides comments. The EPA's Regional offices work with Appalachian states on a regular basis to discuss areas of concern and ensure that permits protect water quality, reflect best-available science, and comply with the law. The EPA has a variety of tools for resolving permit concerns that may arise. For example, the EPA frequently provides written comments to states on proposed or draft permits. In those circumstances, the EPA expects that the state will review and address the EPA's comments before issuing the permit, but an EPA comment letter does not preclude state permit issuance. A tool that the EPA uses more rarely is its authority to object to the issuance of a permit, which would prevent a state from issuing a permit until the state resolves the issues contained in the EPA's objection, or until EPA withdraws the objection. As an action of last resort, if the state does not satisfy the EPA's objection, then the EPA can issue the permit itself. In the vast majority of cases, the EPA and the state work together to resolve outstanding issues to avoid permit objections and ensure that permits can be quickly issued by the state.

The EPA's recent work with Appalachian states on Section 402 permits has resulted in numerous improvements to the quality of state-issued permits for surface coal mining operations. While more work remains, EPA appreciates the states' dedicated efforts toward ensuring that permits comply with the Clean Water Act. Over the past year, hundreds of projects have been authorized under Clean Water Act Section 402 for discharges from Appalachian surface coal mining operations, and the EPA has not taken over a single state permit for surface coal mining activities in Appalachia. Just this month, EPA worked with Mid-Vol Coal Sales, Inc. and the West Virginia Department of Environmental Protection to develop a permit that includes a numeric limit on ionic pollution for the Dry Branch Surface Mine, thereby preserving 150 jobs. We are

committed to continuing our work with states to ensure that permits protect water quality, comply with the Clean Water Act, reflect best-available science, and enable the permitting process to move forward.

#### Clean Water Act Section 404

The EPA also has an important role in providing comments and information that Corps Commanders can consider when evaluating permit applications under Section 404 of the Clean Water Act to help safeguard the health of Appalachian communities and their environment. Section 404 of the Clean Water Act provides specific roles to both the Corps and the EPA in implementing a federal permitting program for activities proposing to discharge dredged or fill material in waters of the U.S. Section 404 of the Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to implement the Section 404 regulatory program, including deciding whether to issue or deny permits. The Act authorizes the EPA, in conjunction with the Corps, to develop the substantive environmental criteria applied in Section 404 permit reviews, which are known as the Section 404(b)(1) Guidelines.

The EPA works constructively with the Corps, states, and other partners to provide input that may assist applicants in developing environmentally sound projects in cases where a discharge of dredged or fill material into waters of the U.S. is being proposed. The EPA reviews Section 404 permit applications in light of applicable regulations and the Clean Water Act. Where the EPA has environmental concerns about a proposed project, our staff communicate these concerns to Corps staff and work toward resolution.

In June 2009, concerned about potential adverse impacts of surface coal mining discharges on



the aquatic environment, the EPA and the Department of the Army developed Enhanced Coordination Procedures (ECP) to ensure effective, timely, and transparent review of 79 pending permit applications. The EPA and the Corps continue to review projects under the ECP process and consistent with the Corps' permitting procedures outlined in the agencies' regulations. The agencies' work under these procedures has led to the permitting of environmentally responsible surface coal mining projects that have reduced overall project impacts to Appalachian streams and have better protected water quality and Appalachian communities. For example, the EPA and the Corps worked together with Hobet Mining, Inc. in early 2010 to authorize a project that reduced stream impacts by 50%, enabled continued coal production, and protected the jobs of more than 350 miners. The EPA worked with the Corps and Arch Coal Inc. in 2010 on the Pine Creek surface coal mining project to incorporate specific water quality-based triggers and limit the potential for significant downstream water quality effects. We continue to coordinate with the Corps on several additional permit applications that we expect will lead to final permit decisions soon. So far this year, we understand that the Corps has authorized 18 Appalachian surface coal mining projects under Section 404, with EPA review, and the EPA looks forward to working with the Corps to ensure that pending and future projects continue to receive effective, timely, transparent, adequate, and science-based review. EPA notes that there is pending litigation on the ECP and, therefore, the Agency is limited in its ability to discuss issues regarding the procedures at this time.

#### **Clean Water Act Section 404(c)**

Congress provided the EPA with authority under Clean Water Act Section 404(c) to review activities in waters of the U.S. to determine whether such activities would result in significant and unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas, and to prohibit, restrict

or deny, including withdrawal, of the use of any defined area as a disposal site. The EPA takes very seriously this responsibility provided to us, and we believe that prudent and careful use of this authority is an effective provision for encouraging innovation to protect public health and preserve valuable environmental resources and our Nation's economic security.

The EPA has used its veto authority sparingly, completing only 13 final decisions, known as Final Determinations, since 1972. To put this in perspective, over the past 39 years, the Corps is estimated to have authorized more than two million activities in waters of the U.S. under the Clean Water Act Section 404 regulatory program. To emphasize the significance of the few projects reviewed by the EPA under Section 404(c), these 13 completed Final Determinations have protected tens of thousands of acres of wetlands and other aquatic resources, as well as more than 35 miles of rivers and streams. As these numbers demonstrate, the EPA is able to work with the Corps and permit applicants to resolve issues without exercising its Section 404(c) authority in all but a miniscule fraction of cases.

#### **Spruce No. 1 Surface Mine and Section 404(c)**

The EPA's most recent decision under Clean Water Act Section 404(c) involved the Spruce No. 1 Surface Mine in Logan County, West Virginia, one of the largest surface coal mining projects ever proposed in the Appalachian coalfields. First proposed in 1997, the project's unprecedented environmental impacts raised significant concerns for federal agencies, local communities, and the public from the beginning. The EPA expressed its concerns about the environmental and water quality impacts of the Spruce No. 1 Mine consistently as scientific studies began to suggest that the associated impacts would be far more significant than initially understood. The EPA began its Section 404(c) review of the Spruce No. 1 Mine in response to significant new scientific information that emerged regarding the impacts of surface coal mining

operations on Appalachian watersheds and on the coalfield communities that depend on clean water for their way of life.

The EPA's Section 404(c) review of the Spruce No. 1 Mine included significant discussions with the Corps and Arch Coal Company to try to resolve the EPA's environmental concerns. The EPA repeatedly attempted to work with the company to modify the Spruce No. 1 Mine permit in a way that would reduce environmental impacts, prevent the significant environmental effects that science shows would occur, and allow mining to proceed. The EPA was eager to discuss alternative project designs that would reduce environmental impacts, assure a cost-effective mining operation, and preserve coal mining jobs on the project site. Unfortunately, while the EPA offered various alternatives, the EPA and the company were unable to reach agreement on changes to the project that the EPA viewed as necessary to reflect best-available science and prevent significant adverse effects to the aquatic environment.

During its Section 404(c) review, the EPA also received more than 50,000 public comments on its proposed Section 404(c) action, and held a public hearing in Charleston, West Virginia. The majority of these comments supported the EPA's action to prohibit the burial of high-quality streams on the project site. After reviewing the recommendation of the EPA Region 3's Regional Administrator and comments provided by the public, the West Virginia Department of Environmental Protection, and Arch Coal Company, the EPA issued a Final Determination on the Spruce No. 1 Mine in January 2011, prohibiting new impacts to streams at the site but allowing significant ongoing mining activities to proceed. The EPA's Final Determination concluded that by filling 6.6 miles of streams on the project site – Pigeonroost Branch, Oldhouse Branch, and their tributaries – the Spruce No. 1 Mine would have resulted in unacceptable adverse environmental effects on wildlife. The EPA's scientific review revealed

that the wildlife communities in these streams are of high quality in comparison to other streams throughout the central Appalachian region and the state of West Virginia. Pigeonroost Branch, Oldhouse Branch, and their tributaries perform critical hydrologic and biological functions, support diverse and productive biological communities, contribute to prevention of further degradation of downstream waters, and play an important role within the broader watershed.

Significant attention has been focused on the fact that the EPA took action under Section 404(c) after issuance of the Spruce No. 1 Mine's Clean Water Act permit by the Corps. The EPA's action on the Spruce No. 1 Mine represents only the second time that the EPA has used its authority under Section 404(c) to withdraw authorization to discharge under a previously issued permit in the 39 years since the Clean Water Act was passed. The EPA recognizes that such action should only be taken in exceptional circumstances. This action was justified for the Spruce No. 1 Mine for several reasons, including the significance of its environmental effects and the existence of ongoing litigation that had delayed harmful discharges to streams on the project site. As the EPA has repeatedly stated, its action on the Spruce No. 1 Mine represents an exceptional circumstance, and the Agency is not contemplating the use of Section 404(c) on any other previously permitted surface coal mining projects in Appalachia. EPA notes that there is pending litigation from this decision and, therefore, the Agency is limited in its ability to discuss the issues raised in this case.

### **Conclusion**

The EPA is committed to work together with our federal and state partners, coal companies, and the public to assure that permit decisions under the Clean Water Act are consistent with the law and best-available science and enable the continued permitting of such projects. The EPA is committed to working with its partners to encourage mining practices that protect Appalachian

communities and the mining jobs on which these communities depend. Over the past several years, we have demonstrated that we can work together to develop innovative, cost effective, and balanced approaches to mining practices that not only protect water quality, but also create jobs. I am confident we can and will work with our federal and state partners, the public, and the Congress to promote the Nation's energy and economic security and provide the environmental and public health protections required under the law. Appalachian families should not have to choose between healthy watersheds and a healthy economy -- they deserve both. We look forward to working with you to achieve these important goals.

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I appreciate the opportunity to be here today, and I am pleased to answer any questions you might have.

Ms. BUERKLE. Thank you, Ms. Stoner.  
Ms. Gaffney-Smith.

**STATEMENT OF MARGARET E. GAFFNEY-SMITH**

Ms. GAFFNEY-SMITH. Good afternoon, Vice Chairwoman Buerkle, Ranking Member Kucinich, and members of the subcommittee.

Ms. BUERKLE. If I could interrupt, is your microphone on?

Ms. GAFFNEY-SMITH. Yes. I am Meg Gaffney-Smith, chief of the regulatory program for the U.S. Army Corps of Engineers. Thank you for the opportunity to discuss our regulatory authority under Section 404 of the Clean Water Act and our involvement in surface coal mining activities.

The Clean Water Act requires the Corps to regulate the discharge of dredged or fill materials into waters of the United States, which would include streams and wetlands in Appalachia. It's important to note that when I use the term streams, I'm referring to a very large category of water bodies, ranging from major rivers like the Potomac to smaller headwater, intermittent, and ephemeral streams. Activities that are similar in nature and that are expected to cause no more than minimal effects individually and cumulatively may be authorized by a general permit.

Activities that do not meet the criteria for a general permit are processed under standard individual permit procedures which have an opportunity for public notice and comment, project-specific environmental review, and a public interest determination. The Corps can only authorize those activities that are not contrary to the public interest and may authorize the least environmentally damaging practicable alternative so long as that alternative does not have other significant adverse environmental consequences.

The Corps is neither an opponent nor a proponent for any project. Our 38 district commanders are responsible for making fair, objective, and timely permit decisions. Various components of surface coal mines, such as valley fills, sediment control ponds, stream mine throughs and road crossings typically involve the discharge of fill material into waters of the United States. In the Appalachian region, these activities usually occur in small ephemeral and intermittent streams in the upper reaches of these watersheds. When considered in a surface area context, the stream and riparian areas within the Corps' scope of analysis usually represent a very small percentage of the total acreage involved in a large surface coal mining project.

A key point is that compared to OSM, EPA and the States, the Corps 404 regulatory authority for surface coal mining is much more limited and focuses on impacts to aquatic resources.

In the early 2000's, we recognized that Federal and State agency regulatory programs dealing with surface coal mining projects were poorly integrated. This was not good for the economy or environmental protection. As a result, in 2005, 4 agencies signed an inter-agency MOA to improve the integration of regulatory processes, minimize redundancy, and improve coordination and information sharing with the ultimate goal of improving environmental protection. Unfortunately, for a variety of reasons, implementation of the MOU was somewhat inconsistent.

At the beginning of this administration in 2009, the agencies reinvigorated their efforts to strengthen interagency collaboration, signing a new MOU to implement an interagency action plan intended to improve permit reviews. In June 2009, EPA and the Corps established a review framework called the Enhanced Coordination Procedures [ECP]. The ECP applies only to permit applications that the Corps had previously public noticed or coordinated with EPA as of March 31, 2009. The purpose of the ECP was to provide the agencies with an opportunity to more closely coordinate on these projects.

Of the 79 applications that were on the final ECP list, 8 permits have been issued and 50 applications have been withdrawn for a variety of reasons; 21 applications are still pending. Since the MOU—since the 2009 MOU, we try to discuss proposed projects with applicants early in the design process and attempt to address agency concerns. For example, thus far in 2011, our collaborative review with EPA and other agencies has resulted in the issuance of 18 permits for mining-related activities in the Appalachian districts. We work with applicants to improve the ecological success of stream mitigation, applying lessons learned from successful projects and by conducting joint agency permittee site visits.

In November 2010, the Corps implemented an impact mitigation assessment tool to more effectively and efficiently evaluate impacts and proposed mitigation measures. The Corps understands and appreciates the economic importance of mining to our economy and our national energy security. We are also aware of the environmental concerns associated with surface coal mining. We work with agencies and applicants to avoid or reduce these impacts.

The heart of the Corps' regulatory program is the public interest review process which is designed to produce fair and balanced permit decisions which includes protection of the aquatic environment. I appreciate the opportunity to be here today, and I will be happy to answer any questions you may have. Thank you.

[The prepared statement of Ms. Gaffney-Smith follows:]

Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee, I am Margaret (Meg) Gaffney-Smith, Chief of the Regulatory Program for the U.S. Army Corps of Engineers (Corps). Thank you for the opportunity to discuss the Corps regulatory authority under Section 404 of the Clean Water Act (CWA) and to specifically discuss our regulatory involvement in surface coal mining activities. As Chief, I oversee national program implementation, which involves over 65,000 authorizations and 100,000 jurisdictional determinations, annually, all accomplished in the Corps Districts. As a career civil servant, I am fully prepared to address Section 404 program implementation.

#### **Background on Clean Water Action Section 404**

Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into "waters of the United States". Since the late 1970s, the Corps has regulated discharges of dredged or fill material into streams and wetlands related to activities such as highway construction; residential, commercial, and industrial developments; energy projects; and other projects. It is important to note that when I use the term "streams" I am referring to a very large category of waterbodies ranging from major rivers, like the Potomac, to much smaller perennial, intermittent, and ephemeral streams. Many of the surface coal mining activities in Appalachia authorized by the Corps involve very small but potentially ecologically significant ephemeral streams.

Discharges of dredged or fill material into streams and wetlands that are waters of the United States will require authorization from the Corps of Engineers. Activities that are similar in nature and that are expected to cause no more than minimal effects, individually and cumulatively, as described in Section 404(e) of the CWA, may be authorized by a "general permit". General permits protect the aquatic environment, but provide applicants with a quicker authorization process because impacts are anticipated to be minor. The CWA stipulates that general permits expire after five years, at which point the Corps must evaluate them, update them if necessary, and reissue them through a public notice and comment process. All Federal and state agencies have an opportunity to comment on general permits as part of the reissue process and the Corps uses input received to improve the general permits and environmental protection requirements.

Activities that do not meet the criteria for a general permit are typically processed under the "standard individual permit" procedures. These procedures include issuance of a public notice, preparation of an environmental document in accordance with requirements of the National Environmental Policy Act, and application of the Section 404(b)(1) Guidelines developed by the U.S. Environmental Protection Agency (EPA) in conjunction with the Corps. Regulatory program personnel in Corps districts work with applicants to avoid and minimize impacts to waters of the United States and to develop satisfactory compensatory mitigation plans for unavoidable impacts to aquatic resources. For these individual permit applications, the Corps conducts a full public interest review balancing the anticipated benefits against the anticipated impacts. The Corps can only authorize those activities that are not contrary to the public interest, and must authorize the least environmentally damaging practicable alternative, so long as the alternative does not have other significant adverse environmental consequences.



When implementing the Corps regulatory program, the Corps is neither an opponent nor a proponent for any specific project: the Corps' responsibility is to make fair, objective, and timely permit decisions. The Secretary of the Army, through the Chief of Engineers, has delegated responsibility for making final decisions on permit applications to the Corps of Engineers District Commanders. The regulatory program is implemented day-by-day at the district level by staff that know their regions, resources, and the public they serve.

Longstanding regulations state that a Corps District Commander may issue a permit only where he determines that a particular proposal complies with the Section 404(b)(1) Guidelines and is not contrary to the public interest.

#### **Section 404 Permits for Activities Related to Surface Coal Mining**

Various components of surface coal mines such as valley fills, sediment control ponds, stream "mine throughs", road crossings, and surface features associated with deep mines typically involve the discharge of fill material into "waters of the United States". Because of this, a Section 404 permit application must be submitted to the Corps for evaluation, and an authorization obtained from the Corps prior to beginning work in these jurisdictional waters. In the Appalachian region, these activities usually occur in small, but ecologically significant, ephemeral and intermittent streams in the upper reaches of the watersheds. Due to the large size of surface mines (typically at least several hundred acres) in the region, these proposed activities often have the potential to impact thousands of linear feet of these small streams.

Impacts to wetlands are usually minimal, because wetland resources are typically not found on the steep slope terrain of Appalachia. Under the Corps regulatory authority, it is responsible for evaluating impacts to aquatic resources resulting from the placement of fill into the streams, immediately adjacent riparian corridors, and very occasionally, wetlands. When considered in a surface area context, the stream and riparian areas within the Corps' scope of analysis normally comprises a small percentage of the total acreage involved for a surface coal mining project in Appalachia. It is not uncommon for entities commenting on project proposals to express concerns about impacts that are not within the regulatory purview of the Corps, such as upland impacts.

#### **Surface Mining Regulatory Framework**

Several key agencies have the legal authority to regulate or comment on various aspects of surface coal mining projects. The Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior administers and enforces the Surface Mining Control and Reclamation Act of 1977 (SMCRA). SMCRA establishes a program of cooperative federalism that allows the States to enact and administer their own regulatory program within limits established by Federal minimum standards and with backup authority exercised by OSM. All but one of the Appalachian States (Tennessee), have assumed jurisdiction over surface coal mining operations within their borders by developing a regulatory program that meets the

standards of SMCRA and that has been approved by OSM. In general, SMCRA authorizes regulation of the environmental effects of surface coal mining.

In addition to their SMCRA responsibility, the states also have authority under Section 401 and Section 402 of the Clean Water Act for ensuring that discharges do not violate state water quality standards. As EPA's testimony today describes, EPA has an oversight role with respect to the states' 402 programs. All Corps permits, general or individual, stipulate that the authorizations cannot be used until the applicant has a valid CWA Section 401 certification and a valid Section 402 permit provided by the appropriate regulatory entity. State water quality agencies, along with EPA, have authority to evaluate and regulate broad surface water quality issues such as selenium concentrations and concerns about groundwater contamination. The Corps must consider adverse effects of any proposed project on water quality, and generally defers to the State's conclusions.

#### **Earlier Regulation of Surface Coal Mining**

In the early 2000s, poor integration of federal and state agency regulatory programs dealing with surface coal mining projects coupled with each regulatory entity's propensity to focus on its niche of responsibility caused inefficient regulatory and environmental effects evaluations.

In 2005, four federal agencies developed and signed an interagency Memorandum of Agreement (MOU) to improve the integration of regulatory processes, minimize redundancy, and improve coordination and information sharing, with the ultimate goal of improving environmental protection, but implementation of the MOU was somewhat inconsistent. Thus, at the beginning of this Administration in 2009, the regulatory environment was still somewhat disjointed. Agency requirements were not communicated to the industry and the general public in as clear, consistent and transparent a manner as we would have liked. For example, applicants could work with one agency to design its mine to satisfy that agency's requirements only to find out later that some design features might be contrary to what another regulatory agency required.

#### **June 2009 Interagency MOU**

In June 2009, continued concerns resulted in the Department of Interior, EPA, and the Department of the Army entering into a new MOU to implement an Interagency Action Plan (IAP) intended to further reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law. The IAP contained a number of agency commitments to implement short and long term actions to minimize environmental harm while allowing continued permitting of environmentally responsible surface coal mining projects. Progress has been made on several of these short-term initiatives as I will describe in more detail later in my testimony.

Longer term initiatives included consideration of:

- Revisions to key provisions of current SMCRA regulations;
- Eliminating the use of Nationwide Permit #21 in Appalachia to authorize mining proposals – The Corps suspended its use in 2010; and,
- Revisions to how surface mining activities are evaluated, authorized, and regulated under the Clean Water Act.

### **Enhanced Coordination Procedures**

In conjunction with the June 2009 MOU, the Corps and EPA established a review framework called the *Enhanced Coordination Procedures* or ECP. The ECP applied only to permit applications that the Corps had previously public noticed as of March 31, 2009. The purpose of the ECP was to provide the agencies with an opportunity to more closely coordinate on these projects. The ECP specified time frames and procedures that the Corps and EPA would follow as they worked through this list of applications. Through today, of the 79 applications that were on the final ECP list, eight permits have been issued, 50 applications have been withdrawn for a variety of reasons, and 21 applications are still pending (see attached chart). The Corps staff continues to work with the applicants, EPA and other state and federal agencies to review the remaining 21 applications and move toward permit decisions.

### **Current Application Processing**

One of the major improvements stimulated by the 2009 MOU is the increased collaboration that is occurring among the regulatory agencies. We are meeting to discuss mine projects earlier in the design process and attempting to address all agency concerns closer to the beginning of the process instead of many months into the process. Regularly scheduled meetings in the Appalachian states allow applicants to meet with the regulatory agencies and discuss their upcoming mine proposals. In Tennessee, the agencies developed and signed a *Local Interagency Working Agreement* which includes *Standard Operating Procedures* that the agencies have agreed to follow during the review of mining applications. Similar procedures are being developed in other states and discussions about developing formal local agreements are ongoing.

One important consideration for the Corps in these agreements is that it will now identify jurisdictional waters at the beginning of the process. Making jurisdictional determination at the beginning of the coordinated review will help us work with applicants to identify and avoid or minimize impacts to waters of the U.S. These agreements have only recently been put into place – we anticipate that the benefits of these coordinated reviews will become evident as we start to process new applications submitted in accordance with these procedures.

Another major initiative is to improve the ecological success of stream mitigation performed in association with these mining projects. Personnel from my staff along with personnel from other agencies have been carefully reviewing lessons learned from previous mitigation efforts, performing site visits to mitigation projects, considering potential ways to collaborate with other programs, and writing a technical guidance document that will serve as a guide for our project

managers, consultants, and other agency personnel. The Corps must have confidence that the proposed mitigation is practicable and will adequately compensate for the aquatic resources that are lost as a result of the discharge of fill material. Other improvements that the Corps has implemented include publishing a stream impact assessment tool in 2010 which will enable us to better evaluate impacts and proposed mitigation plans. In summary, we feel like these improvements will allow us to make progress in performing more timely and sound reviews of permit applications.

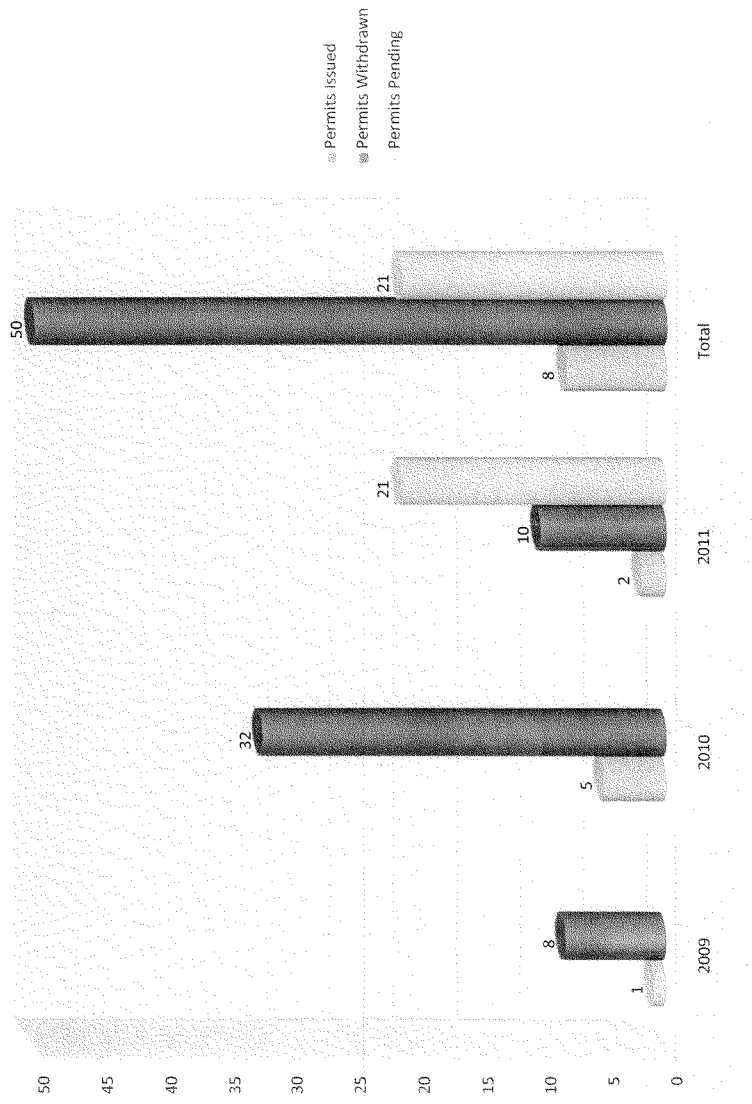
### **Upcoming Challenges**

As we move forward with our review of Section 404 permit applications associated with mining projects, we will continue to face substantial challenges. These applications are very large and complex, involve substantial impacts to aquatic resources, have very technical and complex compensatory mitigation plans. Performing and/or reviewing jurisdictional determinations are very time consuming activities but are essential to our process. We have numerous personnel throughout Appalachia devoted to reviewing permit applications associated with mining projects and districts have assigned additional staff to their "mining" sections to handle the workload.

The Corps understands the economic impact of the mining industry and the importance of the jobs that are associated with the industry. It is also aware of the many concerns that have been expressed about potential impacts to aquatic resources and is working together with other federal and state agencies to take positive steps toward reducing such impacts. The Corps will continue to work with applicants, other agencies, and the general public as it reviews the Section 404 permit applications, and follow the regulations to produce sound, objective, and fair final permit decisions.

I appreciate the opportunity to be here today and I will be happy to answer any questions you may have.

## ECP Projects



DATA OF JULY 2012

Ms. BUERKLE. Thank you both very much for your opening statements. I now yield the gentleman from Pennsylvania 5 minutes for questions.

Mr. KELLY. Thank you, Madam Chairman.

Miss Stoner, I have a question on this, and this is something I had written Ms. Jackson about a concern that we have, not just myself, but eight members of the Pennsylvania delegation, and it has to do with the fact that the Pennsylvania DEP for 19 years had primacy over permitting, and all of a sudden, EPA comes in and says, you know what, we need to step in now and do that, and the concern is, why? What possibly could have happened?

And the response that I got from Miss Jackson, and I'm going to ask to submit these to the record, not only our original letter but also letters back from the EPA and also Mr. Krancer, who is the secretary for the Department of Environmental Protection Pennsylvania, he also has questioned why the EPA has stepped in and is there something that I'm—

Mr. BUERKLE. Without objection.

Mr. KELLY [continuing]. Not understanding or something that happened. You have to do that without objection, I'm sure. So without objection.

Ms. BUERKLE. Without objection.

Mr. KELLY. Okay, thank you. If you could.

Ms. STONER. Yes, thank you for that question. Pennsylvania has primacy over the Clean Water Act 402, the Pollution Control Program, that has not changed, and EPA continues to work on a regular basis with the State of Pennsylvania in its role, which is a role of oversight, so we look at particular problems. So some of the correspondence that I've seen has to do with discharges of pollution into already impaired waters. Those are waters that are polluted already, and the permit, for example, doesn't have a limit for the kind of pollutant that's being discharged. That's the kind of issue that EPA raises in comments that it submits to the State. The State is the permit-issuing authority in Pennsylvania.

Mr. KELLY. Okay. Because in the letter I received back, this says EPA is unaware of any specific violations in terms of the memorandum of agreement, and so it causes one to wonder, because the meeting today is actually or the hearing today is about permitting, and the ability to get permitting done quickly because these folks that run these businesses don't have the ability, as government does, to stall and hold up and not really worry about doing things in a timely fashion. Their businesses are at risk and the people they employ are at risk all the time, so I wonder about it. Right now there are—if my numbers are right, there's 25 NPDES permits that have been sent to the EPA for further review. Can we get a commitment from the EPA on when these permits will be reviewed?

Ms. STONER. Are you speaking of 402 or 404 permits? I'm just not sure what number you're looking at?

Mr. KELLY. Here's what—402.

Ms. STONER. 402 permits? We do take our responsibility very seriously to provide that review promptly and try to resolve issues as soon as we can. And as soon as the permit meets the requirements of the Clean Water Act, we try to get back to the State as rapidly

as possible to let them know that. And I spoke with Region III about the correspondence, and they are working very hard to get those permits cleared by ensuring that they comply with the law. But what we've been filing is comments on those permits, to a large extent, which does not stop the permit from being issued. It identifies issues of concern for the State.

Mr. KELLY. Okay, because when I look at this, we have six permits have been waiting for 30 days; four have been waiting for 60 days; eight have been waiting for 90 days; two have been waiting for 120 days; one has been waiting over 6 months; and four have been waiting for over a year from the EPA. So in a world where time is of the essence and the ability to get these permits done, this has nothing to do with clean water—I would agree with you entirely that we all want the same thing, but when we hold businesses up because we can't process permits quickly, which is the whole purpose, again, of today's hearing, I just wonder, can the EPA actually do this in a timely fashion and in a way that will allow these companies to stay in business?

Ms. STONER. I completely agree with you about the importance of doing our job promptly, absolutely.

Mr. KELLY. Okay, so the commitment then from the EPA would be—

Ms. STONER. I'll talk with the region, and I'll make sure that we move forward as rapidly as we can on those permits.

Mr. KELLY. Okay, because some of these people, I mean, we have one waiting for 6 months and four have been waiting for over a year, so I would ask you to, please—and I know that your schedule's full and I know everything that's going on, but we have to move really quickly on this. So I appreciate you being here today and thank you for the job you're doing, but we do have to get this stuff to move forward.

Ms. STONER. We'll look into it. I don't know the details of those, but I will look into those, you have my commitment to do so.

Mr. KELLY. And I appreciate that. And we put the letters into the record, so you can take a look at those also because not only myself but my other friends in the Pennsylvania delegation and Secretary Krancer from the Pennsylvania DEP would also like an answer on some of those things, so I appreciate it. Thank you.

Ms. STONER. Very good.

Mr. KELLY. And I yield back, Madam Chair.

Ms. BUERKLE. I now yield 5 minutes to the ranking member, Mr. Kucinich from Ohio.

Mr. KUCINICH. Thank you very much.

I want to acknowledge my friend from Pennsylvania, who is a very strong advocate of business, and, you know, we've sat in many hearings where I've heard you, from your own experience, talk about the frustrations that businesses have.

I was looking at the testimony of Ms. Stoner. She just had a chance to read some of it. And she talks about how just this month, the EPA worked with the Mid-Vol Coal Sales and West Virginia Department of Environmental Protection to develop a permit that includes a numeric limit on iconic pollution for the Dry Branch Surface Mine, preserving 150 jobs. And then, later on, she talked about how the EPA and the Corps worked together with Hobet

Mining, Inc., in early 2010 to authorize a project that reduced stream impacts by 50 percent, enabled continued coal production, protected jobs of more than 350 miners.

The thing about your testimony that I found striking in view of the previous panel was when you cited peer-reviewed public health literature in speaking of potential association between negative human health effects and the documentation of coal mining activities. Peer-reviewed public health literature has primarily identified associations between increases in surface coal mining activities and increasing rates of cancer, birth defects, and other serious health consequences in Appalachian communities. That's a direct quote from your testimony.

You know, what I think we're really talking about here is trying to strike a balance where those who are trying to do the right thing and comply with the law are assisted in the permitting process. And on the other hand, those who are the bad actors—and they're in every line of endeavor—that the EPA will weigh in on the side of public health. Is that a correct way of describing how you see your mission?

Ms. STONER. Yes, it is.

Mr. KUCINICH. And I think the—I think the American public really is interested in that kind of a direction because we had a recent poll by the Natural Resources Defense Council that found that Americans want EPA to do more to protect them, not less, that two-thirds of Americans polled—well, actually 63 percent said the EPA needs to do more to hold polluters accountable in protecting air and water.

I think, again, the point that's made in this hearing is that we want to create a balance between protecting jobs and protecting the environment, and actually protecting the air and water quality does have a positive economic impact as well. So—but those who say, I don't want any regulation, those that say there's no legitimate role for the EPA, I think we have to look at them with suspicion, look at them very carefully.

And I have to say to my friends on this committee, you know, I saw this documentary about, you know, what's happening in West Virginia and, granted, it came from a particular point of view, but, you know, there are people who are suffering adverse health effects. And these studies that are done, they don't seem to include any other possibilities other than the fact that it was, you know, the effects of the mining. There was no other—all the other variables were ruled out. So, you know, as we continue as a committee and as the House to get into these issues, you know, I think that it may be that the EPA is on the right track in terms of being much more careful about the permitting process, but at the same time, you're showing a record where people are doing the right thing, that you are trying to assure that they are able to continue.

So I just wanted to make those observations and thank Ms. Stoner for her testimony.

And I saw in your presentation, you're very passionate about this. I could tell. You really do care about it. And that speaks well.

And I appreciate Ms. Gaffney-Smith's service as well. Thank you very much.

Ms. STONER. Thank you.



Ms. BUERKLE. Thank you very much.

I'll now yield myself 5 minutes for questions. I just want to clarify, Ms. Stoner, with regards to permits. In your testimony, in your opening statement, you mentioned that there is no moratorium on permits and that in the last 2½ years, 100 permits have been granted. Now, those are just permits in general, permits for what?

Ms. STONER. I was referring to both 402 and 404 permits. And those are for mining operations in Appalachia, I believe.

Ms. BUERKLE. So what about the enhanced review because there's 79 permits?

Ms. STONER. Not all of the permits that are issued by the Army Corps of Engineers, which is the 404 permits, or the 402 permits, which are actually issued by the States in Appalachia, not all of them are part of that ECP process. So we did provide that enhanced coordination procedure process information to you. I believe it's attached to Ms. Gaffney-Smith's testimony—that's hard to say—Ms. Gaffney-Smith's testimony this evening.

Ms. BUERKLE. So the 100 in your opening statement were the 402s and the 404s, not the enhanced permits.

Ms. STONER. There's a subset of them. There were particular permits that were identified for additional review. And those are in the Enhanced Coordination Procedures. And there were 79 that were identified there in the chart that was attached to the testimony identifies what the status is of all of those.

My understanding of two of those are currently in review. One has been proffered, I believe one of those two, and there are eight that have been issued. But there are lots of other permits that are also being issued at the same time, through both general and individual permitting mechanisms. And that's what I was referring to.

Ms. BUERKLE. Okay. Ms. Gaffney-Smith, could you just speak to the 22 that were—the 49, I'm sorry, the 49 that have been withdrawn.

Ms. GAFFNEY-SMITH. Okay. Actually, the correct number for the number of applications that have been withdrawn is 50. We have 50 applications that were withdrawn, and they've been withdrawn for a number of reasons. In some circumstances, the districts reached out to the companies to talk to them about whether or not they were ready to provide the additional information that was requested and whether or not they could provide that information within a timely manner. In other instances, the companies asked for us to withdraw their application, and therefore, we did that. And so those 50 applications reflect those 50 of 79 that were withdrawn.

Ms. BUERKLE. Okay. Thank you.

I want to speak to the issue that my colleague from Ohio, Mr. Kucinich, brought up with regards to, and this question is for Ms. Stoner, with regards to the new information in this increased cases of cancer. With a health care background, this is of interest to me and certainly of concern to me. In your written testimony, you claim that the EPA uncovered new information under scientific review. However, the Army Corps of Engineers said that no such review was discoverable and that—so I'm trying to understand, you're saying there was new evidence. Army Corps of Engineers said there was not any new evidence.

We have a slide up on the screen. And this was from a letter the Army Corps sent to the EPA. It says, a review of the bibliography attached to the EPA's letter does not reveal any research conducted by them in 2008. The study contains no new circumstances or information that the Army Corps of Engineers has not previously considered. So could you comment on that?

Ms. STONER. Yes. My understanding is that we have five boxes of scientific studies that my staff have copied that are articles about the environmental and public health impacts of mountaintop mining from 2007 to the present, which was the time of the issuance of that. And we would be happy to submit those for the record if you would like us to do so.

We felt like there was new information that was very important there. I think there's already been discussion about the kinds of environmental impacts and the more than 6 miles of stream impacts from that particular proposed mine.

Ms. BUERKLE. Thank you.

Let me just ask Ms. Smith. Was the Court made aware of this, or was this submitted for—

Ms. GAFFNEY-SMITH. What I can state about this activity, this Spruce veto is—I have to be careful because it's an active litigation. But I will say that when the district commander reviewed the information that was provided by the EPA in the letter that you're referencing, the district commander, in accordance with our regulations, made a determination that there wasn't any new information which would be required in order to suspend or revoke that issued permit.

Ms. BUERKLE. Thank you very much. I see my time has expired. We can go have another round of questions.

Mr. Kelly. Oh, I'm sorry.

Mr. KELLY. Thank you, Madam Chair.

I just want to make a quick comment, because I know the day is running late, and I want to thank you for coming down today. I know it's hard. Our schedule doesn't always allow things to run on time.

But I did want to make a really clear comment that this really, the hearing today, we all want clean water, and we want clean air. And I agree with Mr. Kucinich. That is our major concern. I would be the last one in the world to say that that's not what we want because yeah, the truth of this is these people that are doing this mining, they live in the same community. They raise their children in that community. They're going to live there for a long time, and they want everything safe for their kids and their grandchildren.

I think one of the things we fail to realize sometimes is that this is a business that requires, again, as I said earlier, a time is of the essence on this permitting. And in a country that relies on over 50 percent of its electricity generated through coal and the opportunities this country has, the natural resources, to be totally energy independent of anybody else in the world, we don't need to rely on people who don't like us particularly for our energy. But when we look at this, and we look at how some of these companies are being held back, that's my concern. I think that was the concern of the hearing today.

So I wanted you to understand I do appreciate what you're doing. Clean water is important to me also. I'm a father and a grandfather. I take kids out, and I watch them play outside. I take them to get drinking water and everything else, so I understand. So I think sometimes, we come across as people who are making too much sense and are not sensitive enough. But I do think that all of us have the same goals, and that's to make sure that we maintain the quality of the water we have, make sure we get the best out of everything, but also, let's make sure that we are not holding back job creators from doing what they can do and that is to turn this economy around and get us back to work. So thank you so much for being here today. I appreciate it. Thank you, madam chair.

Ms. BUERKLE. Thank you.

I now yield 5 minutes to the ranking member, Mr. Kucinich.

Mr. KUCINICH. I think it's important what Mr. Kelly just said because you know, it's very easy to paint everything here in black and white.

But we want clean water. We want clean air. And I would just say to my friend, that when you see—I understand you have to go—but when we see that there are egregious violations, we have to follow them.

And Madam Chair, I had a chance to see a documentary on Coal River Valley, WVA, it was called, "The Last Mountain Top." And again, you know, I'll submit, there was a certain point of view that was guiding it. At the same time, they raised some compelling issues about the environment and about the effects of people, about the effects the practice of dynamiting mountain tops and about the air and the water pollution, about the health effects to people.

And again, going back to what our chairman said, Mr. Issa, when he talked about the field hearing; I'm going to ask Mr. Issa if one of the places we go would be to go to Coal River Valley to hear what the people have to say because we need to see the people that are living with this and maybe learn a little bit about the direction we should be take.

So I thank the gentlelady for her indulgence.

Ms. BUERKLE. Thank you, Mr. Kucinich.

I have one last question, if you would both indulge me. This also was in the letter, and I'm going to enter it into the record, if there is no objection, a letter from the Army Corps of Engineers to the EPA dated September 30, 2009. Submit that for the record.

And we have the slide up on the screen. I'll read it. It says that, this is from the Army Corps of Engineers, further, the West Virginia Environmental Protection Agency has advised that the district's Spruce No. 1 mine is currently in compliance with their existing authorizations for the mine. Therefore, I have determined that no additional evaluation of the project's effects on the environment are warranted. The permit will not be suspended, modified or revoked, and a supplemental EIS will not be prepared.

So I'm trying to understand why then the EPA went ahead and revoked that license. I'll ask you that question, but first, I want to ask Ms. Smith if she has a comment on that.

Ms. GAFFNEY-SMITH. I don't have any comment on that. That was the district commander's position on that request from EPA.

Ms. BUERKLE. Ms. Stoner.

Ms. STONER. So there's mining at Spruce that has been going on and has continued throughout. And that is mining goes into a creek called Seng Camp, and that has never been stopped. It was—but mining never proceeded in the other two creeks, and that was the activity that EPA found, if that mining was to proceed into those other two creeks, then there would be an unacceptable adverse impact on the wildlife there.

And that was the determination we made based on all of the information, the years of study that had been done there. And I mentioned earlier, the 6.6 miles, the impacts on the wildlife, the diverse, very high quality streams that were affected there. That was a decision that we made under 404(c).

Ms. BUERKLE. But I'm confused because the Army Corps does address that issue, that Spruce No. 1 mine, they were talking specifically about that, was in compliance. And this was 3 years, now, later, and their permit was revoked. It goes back to that balance issue. How do you expect these businesses to get started to invest what they have invested and then 3 years into the project their permit is revoked for what seems to be, according to the Army Corps of Engineers, they're in compliance, they can't find any new scientific evidence, and—

Ms. STONER. I feel like I'm not explaining this clearly. What I was trying to explain is that it wasn't because of violations for the mining activity that was occurring at Seng Camp. That wasn't the reason that EPA moved forward with the 404(c). It was the prospective harm to the streams that would have been filled, the 6.6 miles of streams that would have been filled and the downstream impacts to the entire watershed, which was already downstream waters which were already impaired due to mining discharges. That was the basis of EPA's decision.

Ms. BUERKLE. Thank you.

Ms. Smith, let me ask you this. Are you aware that the EPA incorrectly identified the location of the Seng Camp in its concerns to the Army Corps and their request to revoke the permit?

Ms. GAFFNEY-SMITH. I am not aware of that.

Ms. BUERKLE. It's in the letter that the Army Corps sent to.

Ms. GAFFNEY-SMITH. It's in the 2009 letter and I just can't speak to that because that's a district commander letter, and I don't have the facts at my, off the tip of my tongue.

Ms. BUERKLE. Thank you. Is there a way that you could provide us with whether or not the Army Corps, you could provide that answer to the committee, whether or not the Army Corps was aware that the EPA used the, they incorrectly identified the location of the Seng Camp?

Ms. GAFFNEY-SMITH. Yes, ma'am.

Ms. BUERKLE. Okay. If there are no further comments or questions, we will conclude our questions.

And again, we thank you for being here for your commitment. I want to just again reiterate what the ranking member said, as well as Mr. Kelly. This is about a balance, and this is about keeping our air and our water clean so that the communities can enjoy it. But it is also a concern that the EPA stands squarely in the middle of jobs and getting this economy back on track and creating obstacles

for these industries. So, hopefully, we can strike that balance and do what's right for this country.

With that, this hearing is adjourned. Thank you.

[Whereupon, at 5:35 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

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## Congress of the United States House of Representatives

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Jim Jordan

Chairman

Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Committee on Oversight and Government Reform

1524 Longworth House Office Bldg

Washington, D.C. 20515

Dear Chairman Jordan:

In connection with the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending of the Committee on Oversight and Government Reform hearing entitled "EPA's Appalachian Energy Permittorium: Job Killer or Job Creator?" held on July 18, 2011, I would like to submit the following Questions for the Record to the United States Environmental Protection Agency (EPA):

- 1) At the hearing on July 18, the majority introduced a September 30, 2009 letter from Robert D. Peterson, District Engineer for the United States Army Corps of Engineers (the Corps) to the Acting Regional Administrator of EPA regarding EPA's request to review the Mingo Logan Coal Company's Section 404 Clean Water Act permit for discharges of mine waste into surrounding waters from Spruce No. 1 Mine. In the letter, the Army Corps stated that they did not believe there was new information that merited reviewing its decision on the Spruce No. 1 Mine permit. What new information did EPA have that compelled the Agency to pursue its 404(c) action?
- 2) The same letter also stated that the West Virginia Department of Environmental Protection "advised the District that Spruce No. 1 Mine is currently in compliance with their existing authorizations for the mine." Please clarify the basis of the EPA's Final Determination in light of the lack of violations identified in the Corps' letter. Please explain whether the subject of the Final Determination was future mining planned for a new location, and whether the basis for the Final Determination concerned environmental consequences of that future mining, rather than operations already in existence. Please also explain if the Final Determination under 404(c) actually stopped any currently on-going mining activity.

The Honorable Jim Jordan  
Page 2

- 3) The letter also stated that EPA incorrectly identified the location of Seng Camp as an impaired water. Please provide a written explanation clarifying this statement and explain what effect, if any, this had on EPA's 404(c) action.

Sincerely,

A handwritten signature in black ink, reading "Dennis J. Kucinich". The signature is written in a cursive, flowing style with a large initial "D".

Dennis J. Kucinich  
Ranking Member  
Subcommittee on Regulatory Affairs, Stimulus  
Oversight and Government Spending



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

APR 13 2011

The Honorable Mike Kelly  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Representative Kelly:

Thank you for your March 9, 2011 letter to the U.S. Environmental Protection Agency (EPA) concerning oversight of the Pennsylvania Department of Environmental Protection's (PADEP) implementation of the National Pollutant Discharge Elimination System (NPDES) Program.

EPA and PADEP have enjoyed a cooperative and productive relationship protecting public health and the environment through implementation of the NPDES Program. Enclosed, please find the answers to the questions contained in your letter.

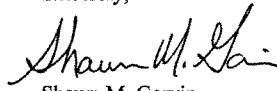
In order to provide context to our answers, I would like to take this opportunity to clarify EPA's role in the NPDES permitting process. Under the Clean Water Act (CWA), Section 402(d), EPA has the authority to review state NPDES permits. EPA reviews permits submitted by PADEP pursuant to the CWA Section 402, 40 CFR § 123.44, and *The National Pollutant Discharge Elimination System – Memorandum of Agreement Between the Commonwealth of Pennsylvania and the United States Environmental Protection Agency Region III (1991)* (the MOA), and letters modifying the permit review provisions of the MOA.

The MOA outlines the manner in which Pennsylvania will implement the NPDES Program under EPA oversight. The 1991 MOA modifies the MOA signed on June 30, 1979. Section 402(d) of the CWA requires that states submit all permit applications and proposed permits to EPA unless EPA waives the right to review those permits. EPA implements the Pretreatment Program portion of the NPDES Program directly in Pennsylvania as the state has not sought authorization for that portion of the program. Categories for which review cannot be waived are identified in 40 CFR §123.24(d) and 40 CFR § 403.



If you have any questions, please do not hesitate to contact me or have your staff contact Mrs. Jessica Greathouse, EPA's Western Pennsylvania Liaison, at 304-224-3181.

Sincerely,

A handwritten signature in black ink, appearing to read "Shawn M. Garvin". The signature is fluid and cursive, with the first name "Shawn" being more prominent.

Shawn M. Garvin  
Regional Administrator

Enclosures

**U.S. Environmental Protection Agency  
Response to Questions  
March 9, 2011 Letter from U.S. Representative Mike Kelly and Colleagues**

**1. Has the PADEP's review of NPDES permits since 1991 been in violation of the 1991 MOA? (If yes, please cite any specific violations.)**

EPA is unaware of any specific violations of the terms of the MOA. In an October 1, 1998 letter, EPA requested that all Total Maximum Daily Load (TMDL) related permits be submitted to EPA for review. PADEP had not been doing so for mining permits. This request was reiterated to PADEP on January 29, 2010, as EPA established the TMDL for the Kiskiminetas-Connemaugh River Watershed in Southwestern Pennsylvania, and TMDL related mining permits are now being submitted. In addition, EPA has been involved in activities involving the impacts of mine pool dewatering and brine waste disposal in the Monongahela and Dunkard Creek watersheds. On September 15, 2010, EPA requested that PADEP provide this category of draft permit to EPA for review. Copies of the referenced letters are enclosed.

**2. Why did the EPA partially withdraw its waiver of NPDES permit reviews after 19 years? Please provide the rationale of events that led to this policy change?**

Consistent with the MOA, PADEP currently submits the following categories of draft permits to EPA for review:

- major permits, including new permits;
- reissuances, and major amendments as established by the MOA;
- general permits as established by the MOA; and
- any other individual permits or categories of permits for which EPA has revoked its waiver of review.

Permits for which EPA Region III has revoked its waiver of review include:

- permits that implement TMDLs, pursuant to EPA's letter of October 1, 1998;
- permits related to concentrated animal feeding operations (CAFOs) pursuant to EPA's letter of March 26, 1999; and
- significant permits for discharges into the Chesapeake Bay watershed, pursuant to EPA's letter dated June 9, 2005.

Copies of the referenced letters are enclosed.

EPA does identify additional categories of permits for review, based on EPA priorities and other factors. EPA revises the categories of permits it reviews as new environmental impacts are recognized. Examples include the 1998 request for permits implementing TMDLs and the 2005 request for significant permits discharging into the Chesapeake Bay. All states in Region III have been requested to submit these additional categories of permits.

EPA's recent involvement in review of coal mining permits was in response to several needs. In 2007, EPA commenced its Healthy Waters Initiative to better promote watershed protection. The Healthy Waters Initiative focused on four industry sectors as areas of interest. These industry sectors included agriculture, mining, land, and transportation. As part of its overall



strategy for implementing the Healthy Waters Initiative, EPA initiated a Permit Quality Review (PQR) of the mining permits in Appalachian states which had significant mining activity, similar to the PQR that was conducted for the base program in each Region III state in 2007. The PQR process is a nationwide program that is used to periodically assess whether permits and supporting documents correctly incorporate and apply requirements of the NPDES regulations. PQRs have been conducted in a majority of EPA Regions and are used to encourage consistency and equity across EPA regions and states. Field visits have been completed for Pennsylvania mining permits and a report is in preparation.

**3. For which other industries has EPA revised its NPDES permitting agreements?**

Categories of industrial permits for which EPA has specifically requested review include: coal mining permits; significant discharges to the Chesapeake Bay watershed; those which are covered by a TMDL; and CAFOs. Periodically, EPA will request to review a specific permit, as defined by the MOA.

**4. What assurances can you provide that NPDES permit applications being relayed to Region III by PADEP will be timely reviewed and processed and the permit backlog eliminated?**

The timing and terms of EPA's review are outlined in the MOA. Once EPA receives a complete draft permit and application, EPA has 30 days to review the permit and provide comments, or issue a general objection/time extension to request the full 90 days allowed by law. General permits are automatically afforded 90 days for review. In reviewing PADEP's mining permits, EPA is working with the Pennsylvania's Central Office and the District Mining Offices to reach agreement on elements necessary for a complete application and permit. EPA traditionally responds within 30 days of receipt of a draft permit to provide comments to PADEP and/or request information necessary for a complete application and draft permit. Once PADEP submits the required documentation, EPA resumes its review.

Through this process, EPA and PADEP have been working together to improve the permitting process and facilitate exchange of information through electronic tools in order to expedite permit review. EPA and PADEP have also initiated monthly conferences to discuss any issues that may arise. EPA is in frequent communication with PADEP on individual permits to ensure that the requirements of the CWA can be met.

**5. Does the agency have a timeline for restoring Pennsylvania's NPDES administrative and permit process as it was originally outlined in the 1991 Memorandum of Agreement?**

The process defined in the MOA does envision that EPA will from time-to-time request that additional permits be submitted for review. EPA is supportive of approaches which utilize procedural agreements or quality checklists that PADEP can use to ensure permit quality and CWA compliance. EPA may revise the scope of our review of mining permits as we have assurance that issues identified in the PQR and in EPA's permit-by-permit review experience will be addressed on a consistent basis, as required by the CWA. EPA's review of Chesapeake Bay watershed permits is related to litigation and will stay in place.



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