NATIONAL ASSOCIATION OF Manufacturers

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# Testimony

**of Ross Eisenberg**
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*before the* House Committee on Natural Resources, Subcommittee on Energy and Mineral Resources

*on* "Obama Administration's Actions Against the Spruce Coal Mine: Canceled Permits, Lawsuits and Lost Jobs"

June 1, 2012

**TESTIMONY OF ROSS EISENBERG**

**BEFORE THE**

**HOUSE COMMITTEE ON NATURAL RESOURCES**

**SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES**

Oversight hearing on: *"Obama Administration's Actions Against the Spruce Coal Mine: Canceled Permits, Lawsuits and Lost Jobs."*

**JUNE 1, 2012**

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

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its membership includes both large multinational corporations and small and medium-sized manufacturers. Manufacturers are major energy consumers, using one-third of the energy consumed in the United States. Manufacturers, therefore, strongly support an "all-of-the-above" energy strategy that embraces all forms of domestic energy production, including oil, gas, nuclear, energy efficiency, alternative fuels, renewable

energy sources and the natural resource at the center of the Spruce Mine controversy: coal.

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

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

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

## I. History of the Spruce Mine Section 404 Permit

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

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

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

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

Prior to issuance of the Section 404 permit, the EPA took no steps under CWA Section 404(c) to prohibit the specification of disposal sites in the proposed permit. The EPA wrote to the Corps: "We have no intention of taking our Spruce Mine concerns any further from a Section 404 standpoint." The mitigation plan required by the permit included comments by the EPA. The permit itself mentioned nothing about the EPA's ability to suspend, modify or revoke it.

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

It was at this point that the EPA did something highly unusual—something, in fact, it had never done before in the history of the CWA. The EPA retroactively vetoed

Spruce Mine's Section 404 permit. The EPA announced its notice of intent to veto the permit on March 26, 2010; on January 13, 2011, the EPA issued the final veto. Because the Corps is the only agency with statutory authority to revoke, suspend or modify a Section 404 permit, the EPA instead withdrew the *specification* of certain areas defined by the Corps as disposal sites under Section 404(c), something the EPA viewed as available to it by language contained in the statute. But the EPA admitted that by withdrawing the specification, it was in effect vetoing the Section 404 permit.

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

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

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

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

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

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

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

> It is further unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality. Indeed, this concern prompted a number of amici to take up their pens and submit briefs to the Court. They argued that eliminating finality from the permitting process would have a significant economic impact on the construction industry, the mining industry, and other "aggregate operators," because lenders and investors would be less willing to extend credit and capital if every construction project involving waterways could be subject to an open-ended risk of cancellation. *See* Brief of *Amicus Curiae* The National Stone, Sand and Gravel Association in Supp. of Pl. Mingo Logan Coal Co., Inc. at 5–13; Brief of *Amici Curiae* the Chamber of Commerce of the United States et al. in Support of Pl. at 7–14. EPA brushed these objections away by characterizing them as hyperbole, Tr. at 66, but even if the gloomy prophesies are somewhat overstated, the concerns the amici raise supply additional grounds for a finding EPA's interpretation to be unreasonable.

For the vast majority of these industries, there is no way to reconfigure a project to avoid the need for a Section 404 permit. The EPA's retroactive veto brought with it significant investment uncertainty with respect to currently held permits and permits to be acquired

in the future. Inevitably, that uncertainty would translate into higher risks in borrowing, less investment, lost jobs and slower growth throughout the U.S. economy.

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

> The EPA's precedential decision to revoke a valid discharge authorization alters the incentives to invest in projects requiring a permit under Section 404. Project development usually requires significant capital expenditure over a sustained period of time, after which the project generates some return. Actions like the EPA's that increase uncertainty, raise the threshold for any private or public entity to undertake the required early-stage investment. For this reason, the EPA's action has a chilling effect on investment in activities requiring a 404 authorization across a broad range of markets. Increasing the level of uncertainty can also reduce investment by making it more difficult to obtain project financing. Land development activities, infrastructure projects and the like often require a significant level of capital formation. Reducing the reliability of the Section 404 permit will make it harder for project proponents to find financing at attractive rates as lenders and bondholders will require higher interest rates to compensate for increased risk, and some credit rationing may also result.

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

EPA introduced a new risk that causes a distortion in the benefit-cost ratio for new investment projects.

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

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

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

### *A. Waters of the United States*

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

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

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

The EPA has sent final “waters of the United States” guidance to the White House Office of Management and Budget for review and approval. Manufacturers are

concerned that the guidance is legislative in nature and could reduce regulatory certainty by subjecting a wide range of traditionally *intrastate* waters to CWA jurisdiction and permitting. Moreover, by issuing this dramatic policy shift as guidance instead of a regulation, the EPA and the Corps are circumventing many safeguards built into the regulatory process to protect the regulated community, such as economic impact statements, job loss analyses and considerations of impacts to small businesses.

### *B. Preemptive 404 Veto Threats*

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

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

permits for the mine. Environmental groups have already begun calling for a similar assessment of mining activity in the Great Lakes region.

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

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

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