U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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Chairman

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Ranking Member

April 29, 2011

James W. Coon II, Chief of Staff

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MEMORANDUM

TO: Members of the Subcommittee on Water Resources and Environment

FR: Bob Gibbs
Subcommittee Chairman

RE: Hearing on "EPA Mining Policies: Assault on Appalachian Jobs Parts I and II"

PURPOSE OF HEARING

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

BACKGROUND

Surface Mining

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

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

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

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

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

Selected Federal Laws Pertaining to Surface Mining

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

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

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

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

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

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

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

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

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

Arch Coal Permit Revocation

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

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

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

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

Guidance vs. Regulation

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

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

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

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

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

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

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

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

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

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

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

Enhanced Coordination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Use of Conductivity as a Measure of Water Quality

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

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

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

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

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

Witnesses

(In no particular order)

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

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

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

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