

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

Good morning, Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee. I am Shawn M. Garvin, Regional Administrator for the United States Environmental Protection Agency (EPA)'s Mid-Atlantic Region, Region III. I am here today to testify on behalf of EPA's Great Lakes and Mid-Atlantic Regions, and am joined by my colleague Deputy Regional Administrator Bharat Mathur of EPA's Great Lakes Region. As the Agency has indicated to your staff, I am responsible for the implementation of regulations in the Mid-Atlantic Region. Mr. Mathur focuses on the implementation of regulations in the Great Lakes Region. Our testimony will focus on our implementation of EPA's work. Additionally, as has been indicated to your staff, as leaders of Regional offices, we are able to address questions on implementation, whereas matters of national policy are more suited to national policymaking staff. We are happy to refer any such questions to them.

EPA has responsibilities under the Clean Water Act and other statutes that may impact coal production. The work implementing these statutes is essential to protecting the air we breathe, the water we drink and the land where we live. This testimony will focus on Clean Water Act water permitting, related to mining, but the Agency also works with State partners to implement other environmental statutes.

The EPA recognizes the significant contribution of coal mining to the Nation's economic and energy security. I want to assure you that we use our Clean Water Act authorities in a responsible and environmentally effective manner, and while carefully considering potential

environmental justice and economic implications. I am confident we can work with all of our partners and the public to provide the environmental and public health protections required under the law while supporting the Nation's energy and economic security.

A. EPA's Role in Working with States under the Clean Water Act

EPA and our State and Federal agency partners work diligently toward the goal of protecting human health and the physical, chemical and biological integrity of our Nation's waters. Communities depend on our Nation's waters for drinking, swimming, fishing, farming, manufacturing, energy development, tourism and other activities essential to the American economy and quality of life.

EPA has responsibilities under the permit programs established under Sections 402 and 404 of the Clean Water Act. While each of the States in the Great Lakes and Mid-Atlantic Regions have been authorized to issue National Pollutant Discharge Elimination System (NPDES) permits pursuant to Section 402,¹ the Clean Water Act provides EPA with critical coordination responsibilities regarding these authorized State programs to ensure the goals and requirements of the Act are being met. The Clean Water Act, its implementing regulations and Memoranda of Agreement (MOAs) that EPA and each State have signed, clarify the respective roles of EPA and the States.

The Clean Water Act and MOAs lay out categories of permits that EPA reviews to assure consistency with the requirements of the law. EPA Regions, in collaboration with our States, identify and review industrial and municipal NPDES permits using a variety of factors, including size and location of a facility's discharge. While we typically review most permits for large dischargers and many mining projects, we also review permits for discharge to waterbodies that serve as drinking water sources or have use impairments that impact recreation, subsistence fishing, or aquatic life. Examples of some of these impaired waterbodies include the Chesapeake Bay and the Mississippi River.

¹ The District of Columbia within the Mid-Atlantic Region has not been authorized to implement the NPDES program, and therefore the EPA administers the program directly within Washington, D.C.

Section 404 of the Clean Water Act designates the U.S. Army Corps of Engineers (Corps) as the permit issuing agency for discharges of dredged or fill material in addition to providing other specific authorities and responsibilities to EPA. For one, the Clean Water Act requires EPA, in conjunction with the Corps, to issue regulations (known as the 404(b)(1) Guidelines) establishing the environmental criteria that the Corps applies in the evaluation of permit applications. Additionally, EPA may provide comments to the Corps on specific permit applications and may request that the Assistant Secretary of the Army for Civil Works review certain permit decisions pursuant to coordination required by Section 404(q) of the Act. Also, Section 404(c) authorizes EPA to prohibit, deny, restrict, or withdraw specification of dredged or fill disposal sites in waters of the U.S.(commonly known as EPA’s “veto” authority), an authority that EPA has exercised only 13 times since 1972. Our Regional offices work 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 the nation’s waters is being proposed.

B. Impacts of Appalachian Surface Coal Mining

EPA’s role in reviewing Clean Water Act permits for Appalachian surface coal mining is informed by peer-reviewed science documenting the environmental and public health impacts of mining practices such as valley fills. Many waters of the Mid-Atlantic and Great Lakes regions carry the pollution legacy of past coal mining operations, particularly those operations that preceded the Clean Water Act and surface mining laws. Data compiled by the EPA and the Region III States pursuant to Section 303(d) of the Clean Water Act show that impacts from mining were among the many leading causes of stream impairment in the Mid-Atlantic Region.

Recent studies point to environmental impacts and challenges from surface coal mining that were largely unrecognized even ten years ago. Between 1992 and 2002, more than 1,200 miles of Appalachian headwater streams have been impacted by Appalachian surface coal mining

practices, at an estimated rate of 120 miles per year.² Such impacts have placed new stresses on the water quality and ecological viability of previously impacted Appalachian watersheds. Stream assessments by the States and efforts to develop total maximum daily loads for mining-impaired waters indicated that additional controls were needed to protect water quality beyond basic technology requirements.

EPA Regions and States are taking steps to help remediate past contamination from surface mining. In the past five years, EPA's Mid-Atlantic Region has provided over \$10 million in grant funding to implement 30 abandoned mine drainage projects to reduce legacy pollutants such as aluminum, iron, and manganese from past mining practices. Similarly, EPA's Great Lakes Region provided \$8.6 million for 24 projects to treat abandoned mine drainage. These efforts complement additional funding being provided by other Federal and State Agencies, such as the Department of Interior's Office of Surface Mining Reclamation and Enforcement.

C. EPA's Review of Mining Permits

Section 402 Reviews

One of EPA's responsibilities in reviewing draft Clean Water Act permits for Appalachian surface coal mining is to help ensure that discharges associated with current mining practices are fully consistent with the requirements of the Act. The Agency is guided in its permit reviews by Clean Water Act provisions and its implementing regulations, as well as relevant science. When EPA reviews a draft NPDES permit and identifies an inconsistency between the draft NPDES permit and the Clean Water Act or its implementing regulations, EPA has discretion to issue an objection, provide the State with comments and suggestions, or take no action. Of these possible responses, only an objection has the effect of preventing the State agency from issuing the permit while issues are being resolved. In deciding how to respond to a particular draft NPDES permit, EPA considers a variety of factors in exercising its discretion, including but not limited to, the

² Final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia. 2005. Available at <http://www.epa.gov/region03/mtntop/eis2005.htm>.

nature of the discharge (volume, potential constituents, etc.), the characteristics of the receiving water and compliance with Clean Water Act implementing regulations. Our reviews of draft NPDES permits have helped to assure that these permits protect applicable water quality standards, incorporate appropriate requirements for new discharges to impaired waters, and include appropriate compliance schedules.

Let me be clear – EPA has not established a “moratorium” on coal mining. EPA is not “blocking” or delaying 402 Clean Water Act permits from being issued. As the following data demonstrate, the Regional offices have worked cooperatively with the States, other Federal agencies, and permit applicants to reach resolution and allow protective permits to be issued. We can find ways to both mine and also protect our environment, and the bulk of this work is done with the States.

EPA has issued very few objections that would prevent NPDES permits for mining discharges from being issued. Of the 283 draft NPDES permits for mining discharges received by EPA from West Virginia between July 21, 2011 and June 25, 2012, EPA took an action that has the potential to ultimately prevent the State from issuing the permit in only five instances, or less than 2% of the time. In those cases, EPA is continuing to work with the State and other applicants to resolve issues that are the basis for EPA’s objection. Therefore, in the majority of its reviews, EPA took no action that would prevent the State agency from issuing a permit. In June 2012, the most recent full month for which we have data, the average time for EPA’s review for NPDES permits for mining discharges in EPA Region III was 11 days. The State of Ohio has chosen to cover surface coal mines under general permits where appropriate. The Great Lakes Region reviewed a total of 46 Notices of Intent for coverage under the Ohio General Permit between June 2009 and May 2011, and recommended that the State require individual permits for 7 of these were reviewed in order to provide data that would better assess potential impacts on water quality. However, while EPA’s comments on these Notices of Intent represent our recommendation on how to ensure that permits protect water quality, they do not prevent Ohio from covering these projects under the General Permit.

EPA strongly prefers to work with authorized State agencies to resolve concerns regarding NPDES permits without having to resort to the formal objection process. To that end, EPA uses the review periods provided by the regulations and the MOA to try to work with the authorized State agency to reach resolution. We work to find systemic solutions that will require less active involvement by EPA on a permit-by-permit basis and that enable State programs to issue permits efficiently and consistent with the Clean Water Act.

The following are just two examples of many that show how the regional offices have worked with States and mining companies to address NPDES permit concerns identified by EPA:

The Mid-Atlantic Region recently worked successfully with an applicant and the West Virginia Department of Environmental Protection (WVDEP) to resolve EPA's concerns with the Hampden Coal Company's Canebrake Surface Mine. EPA, WVDEP, and the applicant resolved EPA's water quality concerns within 30 days of EPA's receipt of a draft NPDES permit, resulting in issuance of an NPDES permit by WVDEP on June 5, 2012.

In Pennsylvania, EPA and the Pennsylvania Department of Environmental Protection (PADEP) worked cooperatively with the company to agree on a draft NPDES permit for a proposed treatment facility near the existing St. Michaels abandoned mine discharge that will allow the applicant to mine additional coal reserves. PADEP estimates that the proposed treatment plant will reduce the total acid mine drainage loading to the Little Conemaugh River by 44%. The permit is the first mining permit in Pennsylvania to include specific language requiring the permittee to document that it is offsetting pollutant loads.

Section 404 Reviews

Similarly, with respect to discharges of dredged and fill material pursuant to Section 404 of the Clean Water Act, EPA has worked cooperatively and successfully with the Corps, and with applicants, to promote permits that protect waters of the US and allow projects to move forward. When EPA receives a public notice from the Corps of an application to discharge dredged or fill material, EPA reviews the public notice and may provide comments to the Corps. Most of the

comments from EPA are intended to assist the Corps District as they make decisions to assure that permits issued for proposed discharges of dredged or fill material are consistent with the Section 404(b)(1) Guidelines, including ensuring adequate avoidance and minimization, preventing significant degradation and protecting water quality standards. EPA also offers its assistance to other agencies in identifying issues early in the permitting process so they can be resolved quickly and efficiently. For example, on a quarterly basis, Great Lakes regional staff attend Ohio Department of Natural Resources' Coal Workgroup meetings along with State and Federal regulators, the Ohio Coal Association, and industry representatives. Great Lakes regional staff participate in pre-application meetings held by the Corps to review project proposals with applicants and regulators, and are members of workgroups that discuss agency positions and hear industry suggestions to address re-mining and mitigation.

EPA and the Corps established procedures under Section 404(q) of the Clean Water Act for those instances when EPA determines that issuance of the permit will result in unacceptable adverse effects to Aquatic Resources of National Importance. This coordination process may be triggered if concerns are not resolved at the Regional and District level. The final permit decision under these procedures remains with the Assistant Secretary of the Army for Civil Works. Of the 40 public notices for Section 404 permits for discharges for coal-related activities received by the Mid-Atlantic Region since January of 2009, and of the 48 Section 404 public notices reviewed in Ohio, to date neither Region has formally requested higher level review of a Corps permit decision related to a coal mining project. The majority of proposed projects have received comments from EPA intended to ensure that permits are consistent with the Section 404(b)(1) Guidelines and in some cases EPA has reserved its ability to request higher level review of a Corps permit decision under the Section 404(q) MOA. EPA is committed to successfully resolving concerns to avoid elevation of any permit decision, and is working closely with the Corps and the applicants to achieve this. EPA also recognizes the importance of ensuring close coordination with State SMCRA agencies as it provides comments to the Corps, because EPA's comments on water quality issues and the Section 404(b)(1) Guidelines may result in changes to the project that should be reflected in the project's SMCRA permit.

As an example of our collaborative efforts, the Mid-Atlantic Region's work with one applicant and the Corps resulted in a permit for the Hobet 45 mine in West Virginia that allowed the applicant to extract 92% of the coal originally proposed for extraction and reduced the impacts to the streams. In 2010, EPA worked with the Corps on a Section 404 permit application for Coal Mac Inc.'s Pine Creek project. This collaboration resulted in development of additional best management practices that are now demonstrating positive water quality results. For Hampden Coal Company's Canebrake project, which I mentioned earlier, EPA worked closely with the applicant, the Corps, and the state SMCRA agency to review and provide encouraging comments on the project's innovative valley fill design that will reduce direct environmental impacts and minimize the potential for harmful downstream pollution. In the Great Lakes Region, after receiving input from EPA, the Corps and Ohio EPA, Oxford Mining revised its application for the Peabody 3 mine in Ohio to avoid mining through nearly a mile of the highest quality category of streams while enabling coal extraction to move forward.

D. Conclusion

We are committed to working together with our State and Federal partners, coal companies and the public to assure that decisions under the Clean Water Act are consistent with the law and best available science. We are confident that we can work with our partners and the public to protect public health and the environment while supporting the Nation's energy and economic security. Families should not have to choose between healthy watersheds and a healthy economy -- they deserve both.

Thank you for the opportunity to be here today. Bharat and I would be pleased to answer any questions you may have.