TESTIMONY OF

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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.[1] 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.[2] The full cumulative effects of surface coal mining operations at this scope and scale have not been fully calculated.[3] 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

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[1] *Final Programmatic Environmental impact Statement on Mountaintop Mining/Valley Fills in Appalachia.* 2005. Available at http://www.epa.gov/region03/mtntop/eis2005.htm.

[2] Ibid. These estimates do not reflect recent efforts to promote reforestation of previously mined sites.

[3] *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.[4] 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.[5] 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

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[4] 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.

[5] 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.

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

Biographical Summary of Nancy K. Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency

July 14, 2011 Hearing of the Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending
House Committee on Oversight and Government Reform

Nancy Stoner presently serves as Acting Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA). Since February 2010, Ms. Stoner was the Deputy Assistant Administrator for Water at EPA.

Ms. Stoner's extensive career in environmental policy and law began in 1987 as a trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice. Following her time at the Department of Justice, she served as Director of the Office of Policy Analysis in the Office of Enforcement and Compliance Assurance at the EPA where she contributed to the development of the EPA's environmental auditing and self-disclosure policies. Most recently Ms. Stoner served as the Co-Director of the Natural Resources Defense Council's (NRDC) Water Program. As the Director, she was responsible for supporting the development of sound environmental policies and practices to protect water resources under the Clean Water Act. Among her many responsibilities, Ms. Stoner spearheaded NRDC's work to clean up the Anacostia River in Washington, DC. These efforts included facilitating the use of green infrastructure and low-impact development measures that reduce stormwater flows and sewer overflows into the Anacostia. Ms. Stoner is a 1986 graduate of Yale Law School and a 1982 graduate of the University of Virginia.