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SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

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Good morning Chairman Gibbs, Ranking Member Bishop, and Members of the Committee. I am Nancy Stoner, Acting Assistant Administrator for the Office of Water at the U.S. Environmental Protection Agency. I am pleased to have the opportunity to discuss EPA's use of its authority under Section 404(c) of the Clean Water Act to protect water quality. I appreciate your interest in EPA's Clean Water Act role in assuring effective protection of human health and the environment.

EPA's Clean Water Act Role

EPA and our state agency partners work every day toward the goal of protecting human health and the environment. EPA's role in reviewing surface coal mining projects is conducted pursuant to the Clean Water Act, which Congress passed in order to ensure that our nation's waters are protected. Appalachian communities and all Americans depend upon these waters for drinking, swimming, fishing, farming, manufacturing, tourism, and other activities essential to the American economy and quality of life. Our work to review permit applications for Appalachian surface coal mining operations that affect streams is one way in which 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 ensures that we provide clean water to future generations.

Background on Clean Water Act Section 404(c)

Passage of the Federal Water Pollution Control Act Amendments of 1972 (also known as the Clean Water Act) established a comprehensive program to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Clean Water Act provided overall responsibility to EPA, in partnership with the states, to reduce pollution entering waters of the United States in order to protect their uses as sources of drinking water; habitat for aquatic wildlife; places for swimming, fishing, and recreation; and for other purposes. As part of the 1972 amendments, Section 404 gave specific roles to both the U.S. Army Corps of Engineers ("the Corps") and 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 provides the Secretary of the Army acting through the Chief of Engineers the authority for implementing the administration of the Section 404 regulatory program, including deciding whether to issue or deny permits. The Act authorizes EPA, in conjunction with the Corps, to develop the substantive environmental criteria applied in Section 404 permit reviews. The Section 404(b)(1) Guidelines, are regulations promulgated by EPA, in consultation with the Corps, and are set forth at 40 C.F.R. Part 230.

Under Section 404(c), the Act authorizes EPA 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. EPA does not view this authority as an opportunity to second guess the Corps's decisionmaking, but rather as an important responsibility to conduct an independent review of projects that have the potential to significantly impact public health,

water quality, or the environment, and which EPA has rarely used to prohibit or withdraw the use of an area. Specifically, the Act states:

“The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to restrict or deny the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” 33 U.S.C. § 1344(c).

The procedures for implementation of Section 404(c) are set forth in EPA regulations at 40 C.F.R. Part 231. These procedures provide for a science based and transparent review of projects, with opportunity for meaningful dialogue among EPA, the Corps, the permit applicant or project proponent), the state, and the public. Key aspects of the 404(c) review process include an opportunity for discussion between EPA and the project proponent and opportunities for public involvement.

Use of Clean Water Act Section 404(c)

EPA works constructively with the Corps, the states, and other partners to assist applicants in developing environmentally sound projects in cases where a discharge of dredged or fill material into waters of the U.S. is proposed. EPA takes very seriously our responsibilities under the Clean Water Act, and believes that prudent and careful use of this authority is an effective provision for encouraging innovation to protect public health and preserving valuable environmental resources and our Nation’s economic security.

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 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.

Examples where EPA used its Section 404(c) authority demonstrate the significance of potential project impacts and the important role that Section 404(c) plays in protecting human health and the environment. Prior veto actions by EPA include:

- The Yazoo Pumps Project¹ in 2008 to avoid significantly degrading the critical ecological functions provided by up to 67,000 acres of wetlands, including bottomland hardwood forests, in the Yazoo Backwater Area, Mississippi. These wetlands provide important habitat for an extensive variety of wetland dependent animal and plant species, including the federally protected Louisiana black bear, and serve as an integral part of the economic and social life of local residents and sportsmen from around the Nation;
- An action in 1990 on the Two Forks Dam, Colorado, to protect approximately 30 miles of the South Platte River corridor that have extraordinary aquatic resource values, including supporting an outstanding recreational fishery that the State of Colorado has designated a "gold medal" trout stream;
- An action in 1985 on the proposed Bayou aux Carpes flood control project¹ in Louisiana to protect a diverse, 3,000-acre coastal wetland complex consisting of forested wetland, shrub wetland, cypress-tupelo swamp, marsh, and open water; and
- An action in 1985 on Jehossee Island, South Carolina, to protect 900 acres of productive coastal marsh habitat.

¹ Discharges associated with these two projects were evaluated under the Corps' Civil Works program and not under the Corps' Section 404 permitting program.

As the numbers above demonstrate, 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. EPA's Section 404(c) procedures provide an effective, meaningful opportunity for EPA, the Corps, and the project proponent to discuss opportunities for reducing environmental impacts and preventing unacceptable adverse effects. These procedures also allow for significant public involvement in EPA's Clean Water Act review process to ensure that the agency's decisions are scientifically sound and transparent.

Spruce No. 1 Surface Mine

EPA's 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 project was originally authorized under a Clean Water Act Section 404 general permit (also known as a "nationwide" permit). Litigation commenced immediately upon issuance of this permit authorization by environmental and community groups and the project was halted by a Federal District Court. The Corps subsequently agreed to withdraw the permit authorization as part of a settlement agreement. Under this agreement, the Corps agreed to review the proposed Spruce No. 1 Mine under an individual permit application and to prepare an Environmental Impact Statement. EPA was a cooperating agency on the Corps lead EIS.

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. For example, in 1998 and 2002, EPA expressed significant concerns about the project's potential water quality effects in connection with EPA's review of draft state Clean Water Act NPDES permits for the Spruce No. 1 Mine. EPA noted

that preliminary scientific studies were beginning to demonstrate the potential for significant negative impacts to water quality and wildlife from mining operations similar to the Spruce No. 1 Mine. In 2006, EPA expressed concern and provided technical comments and recommendations for revision of the project in connection with our review under the National Environmental Policy Act.

A second permit for a modified Spruce No. 1 project was issued in January 2007 and was quickly challenged through litigation. Under an agreement with plaintiffs in the litigation, the company agreed to proceed with mining on only a portion of the project site. The permit would have authorized filling approximately 7.5 miles of pristine mountain streams. The project would have impacted three streams: Seng Camp Creek; Pigeonroost Branch; and Oldhouse Branch in addition to their tributaries. The latter two streams and their tributaries (6.6 miles total) represent some of the last remaining, least disturbed, high quality stream and riparian resources within the Coal River watershed and contain important wildlife resources and habitat. These streams are located within the Coal River watershed, one of the most impacted in all of Appalachia. More than 257 past and present surface mining permits have been issued in the Coal River subbasin, and the corresponding mines collectively occupy more than 13 percent of the land area. Within the smaller Spruce Fork subwatershed in which the Spruce No. 1 project is located, more than 34 past and present surface mining permits have been issued, and the corresponding mines collectively occupy more than 33 percent of the land area. The Spruce No. 1 Mine would have occupied a surface area of 2,200 acres, or more than three square miles.

As limited mining operations proceeded on the Spruce No. 1 site, EPA's concerns regarding the Spruce No. 1 Mine increased as a growing volume of scientific studies detailed the adverse water quality impacts associated with surface coal mining projects in central Appalachia and confirmed EPA's earlier articulated concerns.

EPA's Section 404(c) Review of the Spruce No. 1 Mine

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, in addition to the jobs that coal mining provides. This scientific information has been published in peer reviewed scientific literature and supplemented by research by scientists at EPA, FWS and USGS. Peer reviewed science reflects a growing consensus regarding the importance of Appalachian headwater streams and the significant impacts to these streams from surface coal mining – impacts that cannot be readily mitigated by methods such as stream creation or restoration. These advances in scientific knowledge heightened EPA's long standing concerns that the Spruce No. 1 Mine would result in unacceptable adverse effects on wildlife, adverse water quality impacts, and significant cumulative effects.

EPA's Section 404(c) review began in September 2009 with an attempt to work with the Corps and 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. 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 EPA offered various alternatives, EPA and the company were unable to reach agreement on changes to the project that EPA viewed as necessary to reflect best available science and prevent significant adverse effects to the aquatic environment. As a result, EPA Region 3 published a Proposed Determination under Section 404(c) in March 2010. EPA took public comment on its Proposed Determination, gathering more than 50,000 comments, and held a public hearing in Charleston, West Virginia. The majority of these comments supported EPA's Section 404(c) action to prohibit the burial of high-quality streams on the project site. After evaluating these comments, EPA Region 3 issued a Recommended Determination in September 2010 that recommended to EPA Headquarters that the filling of two high quality streams be prohibited.

Following the EPA Region 3 Recommended Determination, EPA Headquarters invited Arch Coal Company, state representatives, land and mineral rights owners, and the Corps to meet regarding the Recommended Determination and to discuss mining alternatives at the Spruce No.1 Mine that could reduce environmental and water quality impacts. Following an in-person meeting on November 16, 2010, EPA again reached out to Arch Coal on November 22 to reiterate its interest in finding alternative mine designs that might reduce anticipated environmental and water quality impacts. Again, while EPA offered various alternatives, EPA and the company could not reach agreement on options for redesigning the mine in ways that would meaningfully reduce anticipated unacceptable adverse environmental and water quality effects. After reviewing EPA Region 3's recommendations and comments provided by the public, the West Virginia Department of Environmental Protection, and Arch Coal Company, EPA Headquarters 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.

Conclusions of EPA's Section 404(c) Review

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. 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.

In their final determination, EPA concluded impacts from the Spruce No. 1 Mine would be unacceptable in several ways. The project would have eliminated more than 35,000 feet – or 6.6 miles – of high quality streams, which would have buried and killed fish, small invertebrates, salamanders, and other wildlife that live in them. The project would have also resulted in indirect impacts to stream life below the valley fills. In addition, in EPA’s judgment, the proposed mitigation, which included in part reliance on sediment ditches at the mine, would not have offset the mine’s significant environmental impacts to miles of high quality streams that would be buried and polluted by mining at the Spruce No. 1 Mine.

Uniqueness of the Spruce No. 1 Mine

Significant attention has been focused on the fact that EPA took action under Section 404(c) after issuance of the Spruce No. 1 Mine’s Clean Water Act permit by the Corps. EPA’s action on the Spruce No. 1 Mine represents only the second time that 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. EPA recognizes that such action should only be taken in exceptional circumstances. The Spruce No. 1 Mine represents such an exceptional set of circumstances.

Adverse environmental and water quality impacts associated with the Spruce No. 1 Mine are among the most extensive and significant of any surface coal mining project ever proposed in the Appalachian coalfields. In the case of the Spruce No. 1 Mine, as the result of a voluntary agreement between environmental and community groups and the mining company, discharges had only occurred on a portion of the project site at the time EPA initiated and completed its Section 404(c) action. EPA’s action prohibits only the discharges that had not yet occurred – into Pigeonroost Branch, Oldhouse Branch, and their tributaries – and did not affect ongoing mining activities elsewhere on the project site.

EPA's Section 404(c) decision explicitly states the Agency's willingness to work with the Corps and the company to evaluate a future mining configuration at the Spruce site that avoids the unacceptable adverse effects on wildlife that would have been caused by the Spruce No. 1 Mine. EPA is also committed to working with others, including the mining industry and the states, under the Clean Water Act to encourage mining practices that protect Appalachian communities and the mining jobs on which these communities depend. EPA's repeated attempts to reach out to the company were guided by our recent experience with other mining projects, where it has been 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. As 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.

Conclusion

We are committed to work together with our federal and state 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 also recognize the significant contribution of coal mining to the Nation's economic and energy security. I want to assure you that we will use our Clean Water Act Section 404(c) authority in a responsible and environmentally effective manner, and in careful consideration of potential environmental justice and economic implications. I am confident we can 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. I am pleased to answer any questions you might have.