

**Subcommittee on Energy & Minerals Resources
Natural Resources Committee United States House of Representatives**

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

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Thank you, Chairman Lamborn, Ranking Member Holt, and members of the Committee. I am Karen Harbert, President and CEO of the Institute for 21st Century Energy (Institute), an affiliate of the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region.

The mission of the Institute is to unify policymakers, regulators, business leaders, and the American public behind common sense energy strategy to help keep America secure, prosperous, and clean. In that regard we hope to be of service to this Committee, this Congress as a whole, and the administration.

I appreciate this opportunity to discuss the Spruce No. 1 mine (Spruce Mine) permit revocation and the potential impact to capital investment and jobs. First, I would like to clarify that this is not about mining, and specifically whether strip mining should be permitted under federal law. This is not about whether coal which supplies 40 percent of our electricity should or shouldn't be part of our energy mix. This case is about the rule of law and regulatory certainty and the type of regulatory regime that the law allows for and that we wish to have in the United States. Even more fundamentally, the outcome of this case will signal whether America is open for business and safe for long term investment.

One of our great strengths as a country is how we hold the rule of law sacrosanct coupled with a regulatory system with appropriate checks and balances to protect the regulated. If we were to move to a system embodied by the Environmental Protection Agency's (EPA) action in the Spruce Mine case, hundreds of projects and businesses in America today could question whether they too might retroactively have their lawful permits revoked or recaptured. New projects will have to determine how to calculate risks associated with changing viewpoints at a future point from a regulatory agency. This will reduce and delay a broad range of projects, increase the cost of doing business, and reduce the number of jobs at a time when job creation is most critical. The Chamber supports environmental safeguards and clear standards that are applied consistently to all businesses. But just as businesses must be accountable for the decisions they

make, government must honor the decisions that it makes and operate within the laws established by Congress.

Furthermore, a clear, transparent, and predictable regulatory system is not only valuable to business, but furthers the protection of the environment. When business is provided with the certainty to know what is necessary for compliance, it can be a valuable partner in environmental stewardship.

Background and Timeline

The Spruce Creek mine was granted a surface mining permit in 1998 by the State of West Virginia under the Surface Mining Control and Reclamation Act (SMCRA). At the same time permits were pursued under section 402 of the Clean Water Act (NPDES) and under section 404 of the Clean Water Act (dredge and fill). The initial section 404 permit was withdrawn by the Army Corps of Engineers (Corps) because a Federal Court found that an Environmental Impact Statement (EIS) was required. EPA commented on a preliminary draft EIS in August 2001 and the draft EIS in August 2002. In both cases EPA expressed concerns, but committed to work with the Corps to develop an environmentally acceptable project. In 2006, the Corps published the draft EIS and final EIS, and EPA submitted comments in both processes. After further consultation with EPA, the Corps issued the section 404 permit for the Spruce Mine in January 2007.

Please note that the section 404 permit, which is required to begin operations at the Spruce Mine, was issued *eight years* after the initial mining permit. Before the initial mining permit was issued, the owner made significant investments to acquire the rights to develop the mine and the necessary engineering work to determine the feasibility of the project. Significant investment was also required to complete the permitting process which ultimately took 10 years to complete. Much of this investment remains stranded today as the company battles in court to defend its right to use the very permit one agency of this government issued and another agency of the same government subsequently revoked.

Almost two years after the Corps granted the section 404 permit, EPA requested the Corps suspend, revoke, or modify the permit in such a way that would prevent the discharge of dredge or fill as allowed by the permit. The Corps declined EPA's request. In March 2010, EPA took the unprecedented action of withdrawing or restricting specifications in the section 404 permit which would have the impact of revoking, or retroactively vetoing, the lawful permit issued by the Corps.

This is a very short summary of a long and complex regulatory record. The key point is that even with the current regulatory process, there is significant investment risk because of the complexity, long permit processing times, and potential challenges and litigation. Adding an arbitrary and capricious and completely unpredictable risk of a permit being revoked or withdrawn after it is issued, greatly increases the challenge of securing capital for any project subject to this process.

Economic Impact of Greater Regulatory Uncertainty

When the risks of a project increase, investors expect a higher return. Therefore, fewer projects meet the return on investment criteria to support funding. These risks can be in the form of many different project impacts, but regulatory risk is clearly one of those criteria. An economic analysis of the Spruce Mine and the broader economic impact of EPA's action was prepared by Professor David Sunding of UC Berkley and The Brattle Group to support a multi-industry amicus curiae brief filed in support of the lawsuit challenging EPA's action. The analysis is attached as an appendix. The conclusion of that analysis provides a good summary of the economic impact:

Conclusions

The EPA's precedential decision to revoke a valid discharge permit will have a chilling effect on investment across a broad swath of the American economy. Activities ranging from residential and commercial development, roads, renewable energy, and other projects rely on discharge authorization under Section 404 of the Clean Water Act. These activities provide needed infrastructure, housing, and other services, and are a significant part of the annual value of economic activity in the country. They also generate hundreds of thousands of jobs nationwide, and stimulate economic activities in support sectors.

The types of projects that require discharge permits are usually capital intensive and involve irreversible investments, meaning that the project proponent cannot recoup costs if the necessary authorization is revoked by the EPA. Revoking discharge permits introduces two essential market distortions: (i) revoking permits raises hurdle rates among private investors; and (ii) revoking permits reduces the expected benefit-cost ratio of new projects. These effects are likely to dampen investment rates in industries relying on discharge permits, both by delaying and by deterring new projects from being built. Importantly, I show that even small changes in the probability of ex post revocation can have a large effect on project investment.

To give a sense of the scale and magnitude of industries that are put at risk by this EPA action, the Army Corps of Engineers issues approximately 60,000 discharge permits annually under section 404 of the CWA, and estimates that over \$220 billion of investment annually is conditioned on the issuance of these permits. If the investment is conditioned on the permit and the permit is subjected to potential future arbitrary and capricious treatment, it is clear that the result will be significantly reduced capital investment. It is because of actions like EPA's that regulatory uncertainty has risen to a level that many economists estimate some \$2 trillion dollars have been "sidelined" instead of being invested and catalyzing economic growth and job creation.

While it is never a good time to unnecessarily restrict investment, it is doubly so during a time when the economy is struggling. We need productive, effective, and environmentally sound investments to create jobs. In almost ten years of review, EPA did not identify a need to withhold approval of the Spruce No. 1 mine when it had the opportunity and legal ability to do so. Attempting to withdraw their approval and retroactively veto the permit almost two years after issuance not only causes immediate economic loss to the mine owner and workers employed to support the mine, but also creates a substantial negative economic and chilling impact on the economy by setting a precedent that section 404 permits can be revoked post hoc

or changed at will. This uncertainty has a direct and lasting impact of increasing the risk for all projects that require a section 404 permit.

This is not just a matter for mining or energy projects, but impacts industry broadly including both public infrastructure projects and private industry. As noted by Dr. Sunding, these impacts touch a significant component of the economy; including, residential and commercial development, roads, renewable energy and other projects. A reduction or constriction on investment has a direct impact in limiting job growth. With an unemployment rate of 8.1 percent, we must ensure that government is not restricting job growth.

Will the U.S. remain a low risk investment destination?

According to the World Economic Forum's Global Competitiveness Report 2011-12, the U.S., which long held the top global position as an attractive investment destination, has continued its three year decline and now holds fifth place. Two of the factors cited as reasons for this decline were a reduction in the transparency of government policymaking and the increase in burdensome regulation.

Some of the risks and uncertainties evaluated as part of an investment decision process include risks regarding the business opportunity, commodity prices, and cost management risks. These are just a few of the considerations. Components of risk analysis also include legal, regulatory and government related risks. Historically, the U.S. has had low government or sovereign risk because of the strong rule of law and consistent regulatory systems. This is in contrast to many countries around the world in which the regulatory processes and contract terms are subject to change when the government changes or when one government or bureaucrat changes its mind. The United States is still an attractive market for investment, but to the extent that government increases risk, the United States becomes less attractive than other potential investment markets.

It is not just the regulatory risk but the accumulation of risks for a given project, including other issues such as tax policy, which can increase the perception of sovereign risk. When a U.S. government agency takes unprecedented action to revoke a lawful permit issued by another government agency, this action sends a message to all businesses that government approvals may not be honored.

Businesses of all sizes are not asking for no regulation, they are asking for transparent and enduring regulations upon which they can make decisions and investments against a backdrop of certainty. Simply put, a process that makes sense. A process that has clear time frames. A process where once a decision is made a business and its investors can trust the decision will be honored. Without such confidence, capital will go elsewhere and that undermines not only our competitiveness but the ability to get Americans back to work and the economy on its feet. This is not a one-off problem but a long term challenge to our economic system that we must face head on.

Spruce Mine Case – United States District Court

Fortunately the legal system has provided review and emphatically stopped EPA's unprecedented attempt to retroactively veto a legally issued section 404 permit. On March 23, 2012, Judge Amy Berman Jackson of the United States District Court for the District of Columbia issued a holding that EPA exceeded its authority by issuing its Final Determination on January 13, 2010, purporting to modify Mingo Logan's section 404 permit for the Spruce Mine.

Judge Jackson specifically states: "First and foremost, EPA's interpretation fails because it is illogical and impractical.... EPA resorts to magical thinking....Not only is this non-revocation revocation logically 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 Clean Water Act compliance: the permit."

Judge Jackson also states: "It is further unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality.... the concerns the amici raise supply additional grounds for finding EPA's interpretation to be unreasonable."

Judge Jackson also makes specific reference to the importance of the broad implications of the EPA action. This reference acknowledges the concerns and impacts presented by the broad based coalition of business groups presented in our amicus brief.

The Administration went so far to avoid having these broader implications considered that they petitioned the court to preclude this information from consideration by objecting to the filing of the brief. Judge Jackson rightfully denied EPA's attempt to squelch the voice of the broader business community.

Judge Jackson's opinion is unlikely to be the final word on this issue. The EPA has already notified the court that it intends to appeal the decision. It is troubling that the EPA intends to devote even more resources further defending an indefensible policy that is so transparently bad for the economy and so inconsistent with the principles of rule of law and regulatory consistency. And defending that policy after such a strong rebuke from Judge Jackson.

Summary

Again, I would like to highlight that this issue is not about whether one is for or against mountain top mining. This is about an Agency abusing its authority. This action has sent signals to the broadest set of industries that build the things in this country that keep our economy moving. The issue is regulatory certainty – ensuring that the United States maintains a clear, transparent, and predictable regulatory system for a permitting process that is essential for almost every significant project and a large part of the economy. This is a system that Congress envisioned would provide finality to the regulatory process so business can move forward to make investments and grow the economy.

In conclusion, I cannot over estimate the potential impact if EPA's unlawful action remains. As stated earlier, the Corps estimates that approximately \$220 billion in annual investment is contingent on section 404 permits. The Brattle Group in their economic analysis estimates that every billion dollars of construction spending generates 16,000 to 18,000 jobs. The process that resulted in the permit of the Spruce Mine adhered to the law even if it took eight long years. If

that lawful process can be upended, the reverberations through the economy will be real: restricting, postponing or eliminating investment and jobs. Making infrastructure projects riskier in the U.S. makes them less likely to happen and more costly to the consumer and taxpayer. That is not the foundation for a competitive 21st century economy.

Business can and should adhere to laws and regulations governing its industry. Business needs to know the rules of the road and regulators need to provide a clear, transparent, timely, and fair regulatory process to follow. America's private sector needs the type of clarity to make investment decisions that EPA's retroactive veto of the Spruce Mine just undercut.

Effective and consistent environmentally regulatory management is good for business and good for the environment. In the case of section 404 permits, Congress provided clear direction to EPA. EPA must follow that direction and Congress and our judicial system must ensure they do.