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- Industrial Minerals Association - North America ▪ National Association of Home Builders ▪
- National Association of Manufacturers ▪ National Association of REALTORS® ▪
- National Cattlemen's Beef Association ▪ National Council of Coal Lessors, Inc. ▪
- National Council of Farmer Cooperatives ▪ National Mining Association ▪
- National Stone, Sand & Gravel Association ▪

June 4, 2010

EPA-R03-OW-2009-0985, Spruce No. 1 Surface Mine
 U.S. Environmental Protection Agency
 EPA Docket Center Water Docket
 Mail Code 28221T
 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460

Re: Proposed Determination to Prohibit, Restrict or Deny the Specification, or the Use for Specification (Including Withdrawal of Specification), of an Area as a Disposal Site; Spruce No. 1 Surface Mine, Logan County, West Virginia

Dear Sir or Madam:

The undersigned submit these comments in response to the Environmental Protection Agency's ("EPA") Federal Register notice requesting comments "on its proposal to withdraw or restrict use of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and certain tributaries to those waters in Logan County, West Virginia to receive dredged and/or fill material in connection with construction of the Spruce No. 1 Surface Mine." 75 Fed. Reg. 16,788 (April 2, 2010) (hereinafter "Proposed Determination").

Description of Commenters

American Farm Bureau Federation ("AFBF")

AFBF is an independent, non-governmental, voluntary organization governed by and representing farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being of farmers and ranchers. AFBF is the nation's largest general farm organization, representing farm and ranch families in all 50 states and Puerto Rico. Farm Bureau members produce virtually every commodity grown or raised commercially in the United States. AFBF is an advocacy organization that regularly represents its members' interests before Congress, federal regulatory agencies and the Courts. Many of AFBF's members currently possess Clean Water Act ("CWA") permits, and these landowners will be directly affected by the uncertainty of EPA's actions in revoking lawfully issued permits.

American Road and Transportation Builders Association ("ARTBA")

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs. ARTBA members are directly involved with the federal wetlands

permitting program and undertake a variety of construction-related activities that require compliance with the CWA. As part of the highway construction process, ARTBA members are actively involved in the restoration and preservation of wetlands. In the 35 years since the CWA's passage, ARTBA has actively worked to achieve the complementary goals of improving our nation's transportation infrastructure and protecting essential water resources. In doing so, we are proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the natural environment. If the CWA processes ARTBA members have come to rely upon are disturbed by an unprecedented revocation of a Section 404 permit, it will be difficult, if not impossible, for ARTBA members to rely upon CWA permits to both build transportation improvements and accomplish environmental objectives through mitigation.

Industrial Minerals Association - North America (“IMA-NA”)

IMA-NA is the representative voice of companies that extract and process a vital and beneficial group of raw materials known as industrial minerals. Industrial minerals are the ingredients for many of the products used in everyday life, and our companies and the people they employ are proud of their industry and the socially responsible methods they use to deliver these beneficial resources. IMA-NA members extract and process ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, magnesia, mica, soda ash, talc, wollastonite and a variety of other industrial minerals.

The products made possible by industrial minerals are not only valuable, but often essential to our way of life. From modern medicine to structural integrity of bridges and buildings, industrial minerals save lives and extend our longevity. The advantages of modern society could not be possible without industrial minerals. Many of the luxuries we all value depend on this important class of natural resources. For example, industrial minerals are found in cosmetics, paper, ceramics, glass, insulation, paints, adhesives, fertilizers and food products, to name a few. The utilization of our industrial mineral resources is a smart way to capitalize on the natural geology of the earth. Industrial minerals extraction processes are clean and efficient, and the mining processes they employ avoid heavy chemical usage and environmental damage.

The industrial minerals industry does not take for granted its privilege to extract resources from lands in North America. We are committed to being good stewards of our world. The achievements of our member companies demonstrate this attitude. For example, the U.S. Chamber of Commerce's Business Civic Leadership Center in 2006 awarded member company Fairmount Minerals with its Corporate Citizenship Award in the category of Corporate Stewardship, Small/Midsize Business. Also in 2006, member company Badger Mining Corporation was named as the Best Small Company to Work for in America by the Society of Human Resources Management.

Our companies rely heavily on Section 404 permits. The ability to obtain these permits is vital to our industry. The location of our operations is dependent on geology; we cannot simply move to

another location. In order for our companies to develop business plans, invest in mine sites and equipment and attract investors, they need to have assurance from regulatory agencies that permits, once issued, will not be revoked without cause.

National Association of Home Builders (“NAHB”)

NAHB represents more than 175,000 individuals and firms involved in home building, remodeling, multi-family construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. As part of the regulated community, NAHB’s members must routinely assess and document the impacts their activities may have on both human and natural environments in order to obtain necessary federal, state and local approvals.

Due to the broad definition of “waters of the United States,” NAHB members must often obtain and operate pursuant to a CWA Section 404 permit. Like all other entitlements they are required to obtain, land developers and builders need certainty and predictability that their Section 404 permits, as issued, will be valid for the life of the project or at least for the permit term.

In 2009, all housing accounted for 15.5 percent of the nation’s annual Gross Domestic Product (“GDP”). Housing is an equally important contributor to state economies, as many states are reliant on housing as an engine of economic growth and significant source of state income. States typically derive 10 to 20 percent—and in some cases, as much as 30 percent—of their Gross State Product from housing. Based on Bureau of Labor Statistics data, about 2.1 million workers are currently employed in residential construction (as of April 2010). The conventional measure of how many dollars housing construction adds to the economy on a yearly basis is residential fixed investment (“RFI”) from the GDP statistics. In 2009, RFI was \$361 billion.

National Association of Manufacturers (“NAM”)

NAM is the nation’s leading voice for the manufacturing economy, representing small, medium and large manufacturers in all industrial sectors and in all 50 states. Employing nearly 12 million American workers, the manufacturing sector generates more than \$1.6 trillion in value to the U.S. economy, or 11 percent of the GDP. Manufacturers are impacted both directly and indirectly by federal policies governing issuance of Section 404 permits pursuant to the CWA. Not only do many manufacturers require such permits in order to expand operations and infrastructure that add much-needed jobs, but many facilities that provide energy to the manufacturing sector, including power plants, require Section 404 permits for their basic operations. Any proposed policies that add uncertainty to the operation of these facilities raise energy costs, which disproportionately impacts the industrial sector. Manufacturers use more than one-third of all energy consumed in the U.S.

National Association of REALTORS® (“NAR”)

NAR is the largest professional trade association in the country. Its 1.2 million members are involved in all aspects of the real estate industry, including buying and selling residential, commercial and land as well as managing real property, contributing millions of dollars annually to the nation’s economy. Although most NAR members are not directly involved in obtaining 404 permits, they are dependent upon a reliable supply of new housing and other developed property, as well as a robust environment for economic activity.

National Cattlemen’s Beef Association (“NCBA”)

Initiated in 1898, NCBA is the trade association and marketing organization for America’s cattle producers, with more than 28,000 individual members and 64 state affiliate, breed and industry organization members. Together, NCBA represents more than 140,000 cattle breeders, producers and feeders. With offices in Denver and Washington, D.C., NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation’s food and fiber industry. Our members are proud of our tradition as good neighbors to our communities and stewards and conservators of America’s open spaces. We support and conduct wide-ranging measures to protect our environment, which we carry out every day of every year to supply America and much of the rest of the world with the food they need.

The culturally unique ranchers of the U.S. own and manage approximately 666.4 million acres of the 1.938 billion acres of the contiguous U.S. land mass. They rely on considerably more land than any other segment of agriculture and any other industry. In addition to raising livestock, they and America’s farmers grow hay, feed grains, food grains, fiber, fruits and vegetables. Cattle ranchers often need to obtain Section 404 permits for any number of reasons, ranging from building a road over a dry wash in order to access different parts of their property to building a barn or other outbuilding for farm animals and machinery.

National Council of Coal Lessors, Inc. (“NCCL”)

The NCCL is a national trade association of companies, individuals and trusts that own and lease coal reserves and coal infrastructure assets to coal mining companies. The size of the membership companies range from large publicly traded companies to small family entities (partnerships, Sub S corporations or trusts). These companies provide the reserve base, an essential asset to mining companies, which the mining companies mine, process and sell. The members generally collect revenue based on a percentage of the sales price of the final salable product. The members of NCCL do not obtain CWA Section 404 permits or Surface Mining Control and Reclamation Act (“SMCRA”) permits but rather depend on their lessees to obtain those permits. However, without those permits, the assets purchased and owned by the members have no value. Additionally, in many instances, the members purchase and leaseback, at the request of the mining companies, the reserve base for a mine prospect in order to provide the mining company the necessary capital to build and equip the mine. As a critical part of the due

diligence leading to these transactions, our members require proof of the issuance of all permits to mine the coal prior to funding. If EPA is able to veto existing permits, this method of funding will cease to exist and many projects will have to look for other financing sources which may not be available in today's financial markets.

National Council of Farmer Cooperatives (“NCFC”)

Since 1929, NCFC has been the voice of America's farmer cooperatives. Our members are regional and national farmer cooperatives, which are in turn composed of more than 2,500 local farmer cooperatives across the country. NCFC members also include 26 state and regional councils of cooperatives. NCFC is unique in Washington as the only national organization devoted solely to promoting, protecting and advancing the interests of farmer cooperatives and their owner-members.

NCFC values farmer ownership and control in the production and distribution chain; the economic viability of farmers and the businesses they own; stewardship of natural resources; and vibrant rural communities. We have an extremely diverse membership, which we view as one of our sources of strength – our members span the country, supply nearly any agricultural input imaginable, provide credit and related financial services (including export financing) and market a wide range of commodities and value-added products. Earnings from these activities are returned to their farmer members on a patronage basis, helping to improve their income from the marketplace. These earnings are then recycled through rural communities as farmers and ranchers purchase goods and services from local businesses, thereby sustaining rural America.

Farmer cooperatives provide jobs for nearly 250,000 Americans, with a combined payroll of more than \$8 billion. Many of these jobs are in rural areas where employment opportunities are often limited.

Farmer cooperatives have been at the forefront of proactive work to improve the environment in the communities they serve. From pest management to nutrient management, from development of cutting-edge technologies to implementation of area-wide conservation practices, farmer cooperatives have the expertise and the trust of their farmer members to serve as the best place for information on production practices.

During a time of extreme regulatory uncertainty, we are troubled by EPA's proposed actions to alter and/or revoke the specifications of the aforementioned, valid CWA permit. With this action, EPA has set in motion a dangerous precedent that could impact other permits obtained through the CWA.

Without question, if farmer cooperatives are no longer able to rely on stable and certain obligations, responsibilities and rights under the terms of a formal or informal contractual relationship with the public sector – whether related to permits, rules of commerce or expected standards of performance – their own and their creditors' investments in their business would

diminish, the number of jobs they create and support would drop and the livelihoods and communities they sustain would decline. It is impossible to overestimate how fundamentally and overwhelmingly important the value of stable business relationships, expectations, standards and obligations is to the welfare of individuals and the collective. The permitting programs of the CWA fall squarely into this category now that the Act's obligations and penalties for failure to meet them have become so central to business operations. As a matter of general principle, EPA must recognize the value of certainty and stability in the obligations and rights that the Act's permits create and avoid—to the maximum extent possible—creating the expectation in the business and lending community that such obligations and rights cannot be relied upon for a sufficient planning and operations period.

National Mining Association (“NMA”)

NMA is a national trade association whose members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members own and operate mining facilities that involve discharges of fill material into waters of the United States subject to authorizations under CWA Section 404, administered by the U.S. Army Corps of Engineers (“Corps”). The ability to rely on a validly issued Section 404 permit is critical to the domestic mining industry's ability to compete globally and to provide coal and minerals necessary to our nation's economic and social well-being.

Last year, the coal mining industry provided 135,000 direct jobs at 2,064 mining operations in 25 states, producing approximately 1 billion tons of coal with about \$30 billion in coal sales, translating to nearly \$80 billion in direct and indirect output. With more than \$8 billion in direct payroll, coal mining jobs paid as much as double the statewide average in the states where we operate. Coal mining generated another \$16 billion in indirect payroll and directly paid \$8 billion in local, state and federal payroll and social security taxes.

The Section 404 permit is part and parcel to every mining project. Due to the scale and scope of the mining project and the fact that coal must be mined where the coal seam lies, coal mining operations simply cannot avoid all waters; therefore, the business of producing the nation's coal energy supply depends upon the ability to obtain Section 404 permits.

EPA's action will have a profound effect on the entire coal mining industry. A recent report by the Minority Staff of the Senate Committee on Environment and Public Works (“EPW”) found that freezing 190 permits will put at risk roughly 1 in every 4 coal mining jobs in the Appalachian region. Additionally, 81 small businesses will lose significant income and will be at risk of bankruptcy and more than two years of America's coal supply will be placed in jeopardy. U.S. Senate Committee on Environment and Public Works, “The Obama Administration's Obstruction of Coal Mining Permits in Appalachia,” May 21, 2010, available online at www.epw.senate.gov/inhofe.

The Senate report shows that 41 percent of the entire Appalachian region's annual coal production is already on hold due to EPA's action with respect to the issuance of 190 permits. EPA's proposed veto of an existing Section 404 permit will cast an even greater cloud of uncertainty over the future of all existing projects. EPA's proposed veto has the potential to render entire regions of the U.S. unable to attract the capital and investments necessary to maintain the sustained coal supply necessary to meet our energy and national security demands. EPA is putting electricity reliability for consumers at risk, and the administration has no plan for how that baseload electricity demand will be met. Many alternative energy sources such as wind and solar cannot provide baseload energy and do not make a reliable energy source. Without a realistic plan for how to replace the inevitable reduction in domestic coal production, EPA is placing America's national security at risk.

In 2007, the U.S. consumed 1.1 billion tons of coal. Most of this coal—or roughly 1 billion tons—was used to meet nearly one-half of the nation's electricity needs. The remaining amount of coal was used to produce, among other things, steel, plastics, synthetic fibers, medicines and coke. U.S. Energy Information Administration, available online at <http://www.eia.doe.gov>.

National Stone, Sand & Gravel Association (“NSSGA”)

NSSGA is the world's largest mining association by product volume. Its member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. and approximately 110,000 working men and women in the aggregates industry. During 2009, a total of about 1.95 billion metric tons of crushed stone, sand and gravel, valued at more than \$17 billion, were produced and sold in the United States. The vast majority of these materials are utilized in public infrastructure projects. These materials are also used in many environmental applications as well, such as landscaping and erosion control, water filtration and other pollution control devices, such as scrubbers for air quality enhancement. NSSGA members also regularly undertake land reclamation activities that often include wetland restoration, creation and enhancement, as well as wetland mitigation banking for internal and external use. Our land reclamation activities have long been known for the ability to create much-needed additional flood storage capacity. Because aggregate companies operating mines with integrated water management systems depend on both Section 404 and 402 permits and Section 401 state water quality certifications, EPA's proposed veto essentially halts all permitted discharges associated with these operations that are essential to NSSGA member companies operating such facilities.

The Comments

Under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Corps, issues permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. The Corps is authorized to specify these disposal sites through the application of guidelines – which are developed by EPA in conjunction with the Corps – and on the basis of economic considerations. EPA is empowered to prevent the Corps from

specifying a disposal site if it determines that discharges at the site 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). EPA’s authority under Section 404(c) is commonly known as the 404(c) “veto” authority. *See* 75 Fed. Reg. 16,788.

We are submitting these comments because EPA’s invocation of Section 404(c) in its Proposed Determination is unprecedented. For the first time in the nearly 40-year history of Section 404, EPA is seeking to “veto” the specification of a disposal site *after* the permit has been issued. The effect of this action is to revoke a permit that has been validly issued by the Corps. Far beyond this specific action, EPA’s assertion that it has the authority to revoke a valid 404 permit will have wide ranging and deleterious effects on all those individuals and entities that rely on 404 permits.

As designed by the drafters of the Clean Water Act, individuals and entities that need to discharge dredged or fill material rely on Section 404 permits to protect themselves from the outright prohibition on such discharges contained in Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a). Any undertaking that requires the discharge of dredged or fill material is utterly contingent on these permits. In turn, businesses incorporate the permit application and approval process into their strategic planning, assume the existence of these permits in their financial forecasting and orient their businesses around the sanctity of a permit. Businesses regularly invest millions of dollars on property, technology, personnel and machinery on the assumption that their activities can continue unabated so long as they dutifully comply with the terms of their 404 permit. This is true for thousands of applicants and tens to hundreds of thousands of permit holders throughout the country, including many public agencies engaged in the construction of important public infrastructure projects.

The content of applicable laws and regulations is less important to these parties than the implicit guarantees of consistency and permanence. This institutional reliance is essential to the structural foundation of the free market economy. Congress recognized this in 1977, when it passed Section 404(p), 33 U.S.C. § 1344(p). This section formally established that compliance with a valid 404 permit is a complete shield to liability for these discharges. Through this Proposed Determination, EPA is upsetting this foundational principle, and letting every permit holder know that at any time, for any reason, it may pull out a brick.

The destructive public policy and economic implications aside, EPA’s Proposed Determination is disconcerting because EPA does not appear to have the statutory authority to revoke permits. Section 404 grants all authority over permits to the Corps. Section 404(a) gives the Corps exclusive authority to issue permits. *See* 33 U.S.C. § 1344(a). Section 404(b) directs the Corps to apply the 404(b)(1) guidelines to specify a disposal site for each permit. *See* 33 U.S.C. § 1344(b). Section 404(c) gives EPA authority to veto the specification of a disposal site. Nothing in Section 404 gives EPA any authority over permits. What authority EPA does have in Section 404(c) is specifically limited to the specification of disposal sites, which is separate from, and

necessarily precedes, the issuance of a permit. Once a permit is issued, it is the Corps, not EPA, that has continuing jurisdiction over the permit.

EPA apparently recognized that it is within the Corps' discretionary authority provided by 33 C.F.R. Section 325.7 to make post-issuance determinations to suspend, revoke or modify permits. How else do you explain EPA's Sept. 3, 2009, letter to the Corps formally requesting that the Corps exercise its authority to suspend or revoke the Mingo Logan permit? But the Corps refused EPA's request in a letter on Sept. 30, 2009, stating that Mingo Logan was in compliance with its permit and that there had been no change in circumstances warranting suspension. Additionally, the Corps invited the West Virginia Department of Environmental Protection ("WVDEP") to also comment on EPA's letter requesting the Corps suspend the permit. The WVDEP responded confirming that Mingo Logan's permit meets all water quality standards and the permit is in compliance with all applicable Total Maximum Daily Loads ("TMDLs") and West Virginia's federally approved antidegradation policy.

Failing to convince the Corps or the state oversight authorities to interfere with Mingo Logan's use of its permit, EPA's only remaining avenue for revoking an active permit is limited to situations where the permit is being violated. EPA has the authority to enjoin violations of permits under Section 309, 33 U.S.C. § 1319, and to seek injunctions for imminent and substantial endangerments to the health or welfare of persons under Section 504, 33 U.S.C. § 1362, but once the permit has been issued, EPA has no authority under Section 404(c) to revoke it. But EPA has made no such allegations with respect to the Mingo Logan permit.

If this were not made clear enough in the statute, the legislative history demonstrates that Congress intended EPA to exercise its Section 404(c) authority during the application process and did not grant EPA any authority to disturb a validly issued permit. When Senator Edmund S. Muskie, chairman of the Subcommittee on Air and Water Pollution and chief sponsor of the 1972 Clean Water Act amendments, explained EPA's power under 404(c) as he was presenting the Report of the Conference Committee to the Senate, he said:

prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

Senate Consideration of the Report of the Conference Committee, Oct. 4, 1972, *reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972*, at 177 (1973) (emphasis added). The remainder of the legislative history is completely consistent with this understanding of EPA's powers under Section 404(c). EPA has the authority to veto specifications, and must necessarily do so before a permit is issued.

Finally, EPA's Proposed Determination exceeds the scope of EPA's authority under Section 404(c). That section authorizes EPA to consider the impacts that the dredged or fill material will have on "municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife [and] recreational areas" within waters of the United States. Yet, many of the objections presented by EPA deal with discharges authorized under a 402 permit, which is completely separate from the 404 permitting process and relates to discharges other than dredged or fill material. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009). Other aspects of the Proposed Determination seek to interpret state water quality standards and enforce EPA's interpretation of those state standards, even though under the Clean Water Act these standards are the province of the states.

Nothing in Section 404(c) gives EPA the authority to enforce these various provisions of the Clean Water Act. In addition, many of the issues raised by EPA relate to upland animals, social justice and other concerns that neither appear in Section 404(c)'s exclusive list nor are even impacts to waters of the United States caused by the disposal of dredged or fill material.

EPA's Proposed Determination appears to be an assertion of authority to enforce the entirety of the Clean Water Act as EPA sees fit, whether or not it has anything to do with the discharges authorized by the Corps under the terms of Mingo Logan's 404 permit. This action will have rippling effects for the thousands of individuals and entities that depend on Section 404 permits, as they are forced to adjust their planning and businesses to account for this added regulatory uncertainty.

Should EPA go forward and veto this permit, the deleterious impact upon our and many other industries will be profound, and the adverse consequence to our economy may be incalculable as entities may well choose to forgo investments knowing that a 404 permit cannot be relied upon in making investments.

Respectfully Submitted,

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