Testimony of
Hal Quinn
President and CEO
National Mining Association
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Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

"EPA's Expanded Interpretation of Its
Permit Veto Authority under the Clean Water Act"

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Good morning. I am Hal Quinn, president and chief executive officer of the National Mining Association (NMA). NMA is the national trade association representing 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.

I want to thank the chairman and the members of the subcommittee for holding this hearing on the significant implications of the U.S. Environmental Protection Agency's (EPA) expanded interpretation of its veto authority under Section 404 of the Clean Water Act (CWA). Recently, EPA has taken unprecedented actions under Section 404 to both retroactively veto a permit for an existing operation, and to preemptively veto a project before a company was afforded the opportunity to apply for a permit. Due to these actions, businesses and investors can no longer be sure that lawfully-issued permits will be honored or that permit applications will be fairly evaluated. EPA has dramatically altered the rules of the game with respect to its use of 404(c), and in doing so greatly harmed the U.S.' reputation for maintaining a stable rule of law that fosters the certainty needed to attract and maintain capital investments needed to sustain economic growth.

THE 404 PERMIT PROCESS

The scope of the CWA's regulatory reach has expanded substantially over the years and EPA has recently proposed to extend the law's reach in a manner that will touch many more landowners and businesses. At the same time, the process for obtaining permits to proceed with economic and land use activities has become longer and more complicated. To make matters worse, EPA's recent decisions on the reach and timing of its role under CWA Section 404 have removed the longstanding certitude businesses understood accompanied a permit if one successfully navigated the protracted process.

Many essential and valuable projects involve activities that require Section 404 CWA permits. Section 404(a) of the CWA authorizes the Army Corps of Engineers (Corps) to permit the "discharge of dredged or fill material into navigable waters at specified disposal sites." Under its Section 404 program, the Corps permits thousands of projects each year for activities ranging from construction and transportation to agriculture and

manufacturing, thereby facilitating economic activity worth hundreds of billions of dollars to the U.S. economy.

The regulatory process for obtaining a section 404 permit from the Corps is set forth in great detail in the Code of Federal Regulations and has a long history of well-established practice. The section 404 permitting process serves two important complimentary functions. On the one hand, the permitting process allows the government to evaluate and address unacceptable impacts on navigable waters. On the other hand, the process offers parties the assurance of regulatory certainty that if they obtain a permit they can proceed in accordance with its terms.

That regulatory certainty and assurance that a permit-compliant operation is a lawful operation afford investors the certitude they need to commit the capital required to develop projects, including the significant expense required to go through the permitting process itself. Such capital can be raised only if investors are assured that their investment will not be rendered worthless on a regulatory whim.

EPA's recent actions, however, have gravely undermined the certainty needed to attract investment, particularly with respect to large, capital intensive projects. By retroactively vetoing one project and initiating the veto process preemptively for another, EPA has embarked upon previously uncharted waters in terms of regulatory uncertainty that both chills the appetite for new investment and raises the cost of capital for businesses and landowners. Understandably businesses and investors are less likely to risk their capital if they will not be afforded due process by their government, or if they fear a permit carries a term measured by the next election cycle.

RETROACTIVE VETO

In 2007, after 10 years and millions of dollars spent on environmental reviews conducted by EPA, the Corps, and other state and federal agencies, the Corps – with EPA's concurrence - issued a 404 permit to a mining company. The company then began operations in full compliance with the terms of the permit. Three years later, EPA retroactively and unilaterally invalidated the company's permit. Never before had EPA used 404(c) to veto and revoke an existing permit issued under the law by the Corps. It deserves mention again—EPA had ample opportunity to

participate in the permit review process and did so, as evidenced by the substantial changes made to the project expressly designed to resolve all of EPA's concerns before the Corps issued the permit. EPA's belated and unprecedented action dramatically changed the calculus for anyone that currently holds, or needs to acquire, a Section 404 permit.

In defense of its actions, EPA now asserts that it will use Section 404(c) after a permit has been issued only in rare circumstances. Such assurances carry no value now that the harm is complete, and its implications reverberate throughout the business community. After all, the term "rare" as used by EPA has no discernable boundaries for exercising such breathtaking discretion.

Projects that require significant capital expenditures over a substantial period of time need to generate a certain level of return to justify the investment. Actions that introduce new and increased regulatory risk raise the threshold of the necessary return to undertake the required early-stage investment. Even assuming that EPA would exercise such unbridled discretion in so-called "rare circumstances," the chilling affect remains significant and substantial. Here is how University of California Berkeley Professor David Sunding assessed the costs associated with the risks raised by EPA's unprecedented actions:

- Greater difficulty in obtaining project financing
- Lenders and bondholders will require higher interest rates to compensate for increased risk
- Some credit rationing will occur

Professor Sunding also quantified the impact of a potential veto as follows: if a project proponent faces a one percent chance that EPA would act under Section 404(c) after the permit issues, it would decrease the expected cost-benefit ratio for the project by 17.5%. A two percent chance that EPA would take adverse action—not an unrealistic assumption for a large or controversial project—would decrease the project's cost-benefit ratio by ***30%***. These types of substantial changes in the profile of a project will undoubtedly dissuade numerous businesses from pursuing investments that require them to acquire a Section 404 permit.

Senator Edmund Muskie, who played the most significant role in the design and passage of the CWA, clearly articulated that there are "three essential

elements" to the Act – "uniformity, finality, and enforceability." EPA's retroactive revocation of a lawfully issued Section 404 permit has destroyed two of those essential elements – uniformity, since EPA has no discernable standard for exercising this remarkable authority it claims after the permit process has come to closure; and finality because a permit can never be final when a non-issuing agency remains free to reopen the matter anytime, anywhere and for any reason, including those already fully vetted and addressed when the permit was issued.

PREEMPTIVE VETO

In February 2014, EPA took yet another unprecedented step when it initiated a veto process of a mining project on state lands in Alaska before the company had even applied for their 404 permit. In doing so, EPA bypassed the established lawful procedures of the CWA and the National Environmental Policy Act (NEPA) specifically designed to fully and fairly evaluate potential projects and provide project proponents with the due process of law. EPA's actions trampled the authority of the state of Alaska, preempted the role of other federal and state agencies, and potentially stranded the mining company's $700 million in capital investment. Frankly, EPA's actions here suggest the agency can exercise power akin to local zoning powers—authority the Constitution does not confer upon the federal government.

EPA claims that it initiated the veto process only in response to petitions submitted in 2010, and only after it completed its science report that purportedly shows the project would have significant and irreversible negative impacts on the Bristol Bay watershed. However, internal EPA documents obtained by congressional committees and various media outlets reveal that, as early as 2008, regulators inside EPA were advocating a preemptive 404 veto of the project. In fact, it appears these same regulators secretly worked with tribal and environmental activists to generate the petitions asking EPA to stop the project well before any studies of the environmental impacts were even begun.

The efforts to get EPA to veto the project before the Corps had an opportunity to evaluate a permit application with the mine plan, engineering designs and environmental background data reached all the way to top agency officials in Washington. A presentation prepared in 2010 for then-EPA Administrator Lisa P. Jackson candidly admits that a preemptive veto

"had never been done before in the history" of the CWA, would bypass the processes designed to "generate considerable information informing the [404] decision," and would not "adhere strictly to the regulation." However, that same document observes that, if EPA were to utilize the "established legal framework" under Section 404, the agency would "have less control of the 'spin' and political debate," and could only hope to prohibit "that project" – as opposed to all potential future projects in the area.

Other federal agencies with roles in the permit review process were likewise saying as early as 2010 that an EPA veto was a fait accompli. According to the Fish and Wildlife Service, an EPA regulator indicated he had briefed top EPA officials in Washington and believed EPA leaders have decided to proceed and they are just deciding when. All this occurred before EPA even began the watershed assessment EPA claims is the basis for its decision to proceed in this unusual and unprecedented manner.

Importantly, EPA's decision to initiate a preemptive veto before the Corps, and other state and federal agencies even began their environmental reviews clearly shows that EPA's actions have been neither transparent nor based on the best information or science. The proper and best way to evaluate potential environmental impacts and decide whether a proposed project meets the requirements of CWA section 404 is to proceed with the well-established CWA and NEPA procedures designed to ensure informed agency decision-making and afford due process. Only then can the Corps and EPA have the project-specific information necessary to make lawful, reasoned decisions under the CWA.

PRECEDENTIAL NATURE OF EPA'S EXPANDED INTERPRETATION OF ITS VETO AUTHORITY

EPA has defended its use of its newly claimed 404 retroactive and preemptive veto authority as limited to very "unique" circumstances. However even a very small risk of EPA using its veto authority can have significant impacts on project investment. Furthermore, EPA's assurance that it intends to use its 404 authority sparingly in the future are unconvincing in light of recently publicized internal agency documents. For example, EPA stated in a headquarters briefing that the preemptive use of Section 404 "can serve as a model of proactive watershed planning."

EPA's actions have already emboldened opponents of projects to petition EPA to use this so-called "rare and unique" power in other states. Six Chippewa tribal bands have asked EPA to initiate CWA veto proceedings against a mining project in northern Wisconsin. Their request is similar to the 2010 request in Alaska's Bristol Bay region. Without any discernable or objective criteria governing EPA's claimed authority under section 404, a cloud of uncertainty and delay hangs over any plan to invest and create jobs

We believe legitimate concerns about proposed projects requiring a 404 permit should be addressed. However, the law provides the right place and the right time to do so through the current CWA permitting process that provides ample opportunity to take a hard look at an actual project proposal.

CONGRESS MUST ACT

Under EPA's expansive claim of authority, the very regulatory finality and certainty Congress intended for the CWA permitting process does not—and cannot—exist. The breadth and depth of concern is reflected in a recent communication to Congress by 184 organizations– representing agriculture, construction, housing, manufacturing, utilities, energy production, and transportation sectors –asking that clear limitations be restored to govern EPA's role and authority. In short, under Section 404 EPA's role should be as it has been historically - during the permit review process. EPA must not be permitted to displace a Corps' permit decision until after 404 review processes are completed, but before a permit is actually issued. Such limitations would maintain the longstanding environmental protections provided under the law while at the same time encouraging economic investment and growth by ensuring transparency and certainty landowners and businesses need to invest and grow our economy.

We commend the Chairman of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment Bob Gibbs (R-Ohio) and Ranking Member of the Transportation and Infrastructure Committee Nick Rahall (D-W.Va) and 17 co-sponsors for introducing H.R. 4854, the "Regulatory Certainty Act," which addresses these serious concerns and provides for the clarity so needed by U.S. businesses. Their legislation would put a limit on the EPA's gross overreach and give mining projects the

certainty they need to move forward – stimulating our nation's economic engine when America needs it the most.

CONCLUSION

Thank you again for the opportunity to testify today. In summary, EPA's authority under CWA Sec. 404(c) must be clarified and limited in a manner that provides the regulatory transparency and certainty landowners and businesses deserve. Only then can landowners and businesses have the faith in the federal permitting process necessary to invest in American development and jobs.