Statement of the U.S. Chamber of Commerce

FOR: HEARING ON "EPA's EXPANDED INTERPRETATION OF ITS PERMIT VETO AUTHORITY UNDER THE CLEAN WATER ACT"

TO: HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

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political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON WATER RESPURCES AND THE ENVIRONMENT

Hearing on "EPA's Expanded Interpretation of Its Veto Authority Under the Clean Water Act."

Testimony of William L. Kovacs
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July 15, 2014

Good morning, Chairman Gibbs, Ranking Member Bishop and distinguished members of the Subcommittee. My name is William L. Kovacs and I am Senior Vice President for Environment, Technology & Regulatory Affairs at the U.S. Chamber of Commerce. You have asked me to come before the Subcommittee today to discuss "EPA's Expanded Interpretation of Its Veto Authority under the Clean Water Act." To address your request my testimony will focus on:

1. The impact of EPA's retroactive veto of an issued Clean Water Act permit on jobs, investment and infrastructure;
2. How EPA is interpreting the Clean Water Act and other statutes to expand its regulatory reach so far that it is literally becoming a National Zoning Authority that controls the location and operations of businesses nationwide; and
3. How EPA's new regulatory interpretations cause great uncertainty and will chill investment.

I. Background

Securing a permit to build or extract virtually anything in this nation is a multi-year, complex and costly task requiring lengthy studies, engineering reports, air and water sampling, modeling, environmental impact statements, compliance with over 30,000 pages of federal environmental regulations, and proving compliance with federal statutes regulating water, air, solid and hazardous waste, historic preservation and endangered species, to name only a few. And then there are the state and local requirements. The project sponsor must comply with every requirement or be denied a permit by the government. Even after getting a permit, the project sponsor often must stand by when environmental organizations sue the government for failing to thoroughly do its permitting job. Cape Wind is a good example of a permitting effort that took over a decade to secure a permit to build a wind farm. When a permit is issued, the public can be certain that the federal and state governments have analyzed every aspect of a project to ensure it complied with tens of thousands of pages of statutory and regulatory details. When a permit is obtained the company has proven to the government that it can and will comply with all of the conditions imposed on it.

Securing a permit for a large infrastructure or natural resource project can cost millions of dollars for the project sponsor. This investment is made with the expectation that the project will operate for a determined period of time as long as it meets permit conditions. It is during the permit review stage that an agency is expected to raise any objections to a proposed permit. Between 1981 and 2008, EPA has used section 404(c) of the Clean Water Act twelve times to deny or restrict permits for use of certain areas. EPA's exercise of this power was always within the permit review process. In 2009, EPA determined for the first time that it had the authority to retroactively revoke a permit several years after the permit had been issued. The permit in question had been issued by the Army Corps of Engineers to the Mingo Logan Coal Company for a discharge of material from its Spruce Mine No. 1. During the permit review process EPA expressed its concern to the Army Corps of Engineers that the mine could have significant environmental impacts. Nonetheless, EPA clearly stated "we have no intention of taking our Spruce Mines concerns any further from a Section 404 standpoint…"[1] The section 404 permit was subsequently issued to Mingo Logan on January 22, 2007, with a term that extended to December 31, 2031.

Subsequently, EPA developed a new standard to measure water quality, known as conductivity. After evaluating the Spruce Mine permit under the conductivity standard, on January 13, 2011, EPA published a Final Determination prohibiting the discharge of material from the Spruce Mine. Essentially, EPA changed the rules in the middle of the game and revoked an existing permit under section 404(c). It is important to note that there was **no** alleged environmental damage or harm that occurred as a result of operations at the Spruce Mine. EPA based its section 404(c) decision on exactly the same facts and figures that it relied upon when approving the permit four years earlier, only this time EPA applied its new standard to those facts and figures.

Nowhere in the legislative history of the Clean Water Act does it state that the congressional intent was to provide EPA with the unlimited authority to retroactively veto an already-issued permit whose terms and conditions were being fully complied with. Congress created specific roles for EPA and the Corps. EPA would have a clearly limited role and the Army Corps would be the lead.[2] As part of the permitting process, EPA has the authority to veto or require conditions in a permit before it is issued. As such, Congress clearly limited EPA's decision making to the permitting process itself and did not intend to give EPA "retroactive" authority. Nevertheless, the U.S. Court of Appeals for the District of Columbia Circuit concluded – improperly, in our view – that EPA's regulatory decision was entitled to deference. The court considered the language of section 404(c) of the Act:

> 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 deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he

[1] *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 610 (D.C. Cir. 2013) *cert. denied*, 134 S. Ct. 1540, 188 L. Ed. 2d 557 (U.S. 2014).
[2] See, e.g., *National Mining Ass'n v. Jackson*, 42 ELR 20,165 (July 31, 2012) ("The Corps has sole authority to issue Section 404 permits . . . but in doing so must apply guidelines that it develops in conjunction with EPA.").

> determines that, after notice and opportunity for public hearings, that the discharge of such materials into such, will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.[3]

The court focused on the word "whenever" in section 404(c), and found that the Act allows EPA to act at any time it determines that an "unacceptable adverse effect will result.[4] The court failed to consider section 404 in its entirety, however. The section must be considered as a whole, rather than focusing on a single word. The appropriate time for EPA to exercise its section 404(c) veto authority has always been during the initial permit review process, not after the permit has been issued. In the absence of any compelling new evidence of unacceptable adverse environmental impact, EPA should not have been allowed to retroactively veto a valid permit which the permit holder was fully complying with.

The retroactive application by EPA of its section 404(c) authority to revoke a validly issued permit establishes that even full compliance with agency-approved permit conditions no longer guarantees that a permit holder can continue operations. Under EPA's new interpretation, the agency can change its mind 'whenever he (the Administrator) determines the discharge will have an "unacceptable adverse effect' on the environment.' Certainly if Congress meant to give such extraordinary power to EPA, it would have done so very clearly in the statue and discussed it in its legislative history.

II. EPA's Retroactive Veto of a Properly-Issued Permit Was Unnecessary

By reinterpreting the time frame within which it can exercise its veto authority under Section 404(c) from within the permit review process to "whenever" it decides to exercise such authority, EPA has established wholly new agency policy; i.e. that approved permits can be revoked at "will" by the agency. Such a policy creates complete uncertainty for the business community. Seeking a permit becomes an expensive gamble with company and stockholder assets. Moreover, companies will be reluctant to make investments that create jobs since there is no longer any assurance that a project can be operated for the time period needed to make it profitable under normal business conditions.

Perhaps the most troublesome aspect of EPA's reinterpretation and expansion of its permit veto authority is the fact that Mingo Logan was in full compliance with all of its permit conditions. Had Mingo Logan violated any of the terms of the permit or took actions that caused imminent and substantial endangerment to health or the environment, EPA would have been able to use its emergency powers under Section 504 of the Clean Water Act or the environmental community could have filed citizen suits under Section 505; or EPA could have simply revoked the permit for violations of its terms. Moreover, under Section 309 of the Act (33 USC § 1319), EPA has the power to initiate administrative, civil and criminal actions against the permit holder. Finally, EPA could have withdrawn West Virginia's delegated authority to issue section 404

[3] 33 U.S.C. §1344(c).
[4] 714 F.3d at 612.

permits. In summary, Congress provided EPA with immense powers to protect the environment should violations occur.

Despite the agency's immense authority to respond to all legitimate threats to health or safety posed by an existing permit, EPA found it necessary to inflict significantly greater uncertainty by transforming a fully authorized permit into a temporary operating certificate, good only as long as it suits the whims of the agency.

III. EPA Is Expanding Its Authority to Become the National Zoning Authority

EPA's expansion of its regulatory powers using the retroactive veto provision under Section 404 (c) of the Clean Water Act is only one of many regulatory interpretations EPA has recently adopted to increase its regulatory powers over businesses, communities, local governments, and land uses in the United States. Another recent example is the Pebble Mine project in Alaska. In this situation, EPA has managed the Clean Water Act permitting process in a manner that allows it to preemptively veto Pebble's permit application before the application is even submitted. Pebble Mine is the largest known undeveloped copper ore body in the world. The project is currently in the study phase and the project sponsors haven't even finalized their mine plan, let alone applied for a permit. The Pebble Mine is expected to create over 15,000 jobs and produce over $18 billion in revenue for local, state, and federal taxes. The project would potentially increase U.S. copper production by 20%.

Before Pebble can start actual construction, it must first secure roughly 50 state and federal mining permits. Pebble has already invested more than $540 million into the project and has not even reached the point where it can file for a permit. Nevertheless, EPA was petitioned by activists who requested that EPA preemptively shut down the Pebble Project prior to submission of an application. EPA then took the extra-regulatory action of conducting a watershed assessment of the potential mine's area using an outdated and inaccurate model of the mine as the template for the study. Essentially, EPA modeled the characteristics of the mine by using very old assumptions of the workings of a mine that did not take into account technological advancements that have been made in the past few decades. EPA's preemptive veto of the Pebble Mine permit before it has even been formally submitted represents a substantial and dangerous expansion of the agency's regulatory reach.

Another example of EPA's assertion of dramatically expanded Clean Water Act authority is the agency's recently proposed revised definition of "Waters of the U.S." (WOTUS). The proposed revision would define many historically non-jurisdictional areas of the U.S. as jurisdictional waters. This expanded Clean Water Act coverage is expected to result in **at least a twofold to fourfold** increase in the areas of the U.S. that will become subject to new permitting requirements. Businesses, communities, and local governments will be forced to apply for section 404 permits for the first time, along with permits and approvals under sections 402, 303, and 311. This dramatically increased permitting requirement will subject routine activities such as maintaining ditches, roads, and parking lots (and conceivably, soil-disturbing activities on residential properties) to permitting requirements. Regulated entities that fail to secure required permits will be at risk of an enforcement action carrying penalties of up to $32,500 per day per

violation. The expanded WOTUS definition is potentially one of the most significant expansions in an agency's regulatory power in history.

A final illustration of how EPA is expanding its regulatory authority under the Clean Water Act is found in what is called "Sue and Settle" agreements with environmental groups. Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created.

Examples of EPA expanding its regulatory authority under the Clean Water Act are *Fowler v. EPA,*[5] in which EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay by changing its stormwater program. Another example is *Ohio Valley Environmental Coalition v. Army Corps of Engineers*,[6] in which environmental groups challenged the water permitting for surface mining, claiming EPA did not account for the impact on stream function. Rather than defend its position, EPA chose to issue the guidance requested by the environmental group, which effectively settled the case in the environmentalists favor.[7]

While these are only two examples of EPA using the sue and settle process under the Clean Water Act to expand its jurisdiction, EPA has acquiesced to the use of this process by outside groups to implement over one hundred new rules.[8]

The Mingo Logan mine's ***retroactive*** veto, along with the Pebble Mine's likely ***preemptive*** veto, together with the vastly expanded proposed interpretation of "Waters of the U.S." and abusive sue and settle agreements intended to establish sweeping new water rules are clear examples of EPA's quest to enlarge its regulatory power under the Clean Water Act. Likewise, the agency is interpreting its authority under other environmental statutes to rapidly expand its regulatory powers over land uses and commercial activities within the United States. Using the Clean Air Act, the agency is shaping the nation's energy policy by mandating what types of energy can be used and where it can be used. By setting increasingly stringent air quality requirements, more and more areas of the nation fall into non-attainment which restricts economic development in those areas. Couple EPA's activities with those of the Fish and

[5] Case No. 1:09-00005-CKK, Complaint (Jan. 5, 2009); Settlement Agreement (May 19, 2010).
[6] Civil Action No. 3:05-0784 (Nov. 2, 2005).
[7] U.S. EPA/U.S. Army Corps of Engineers, "Assessment of Stream Ecosystem Structure and Function under Clean Water Act Section 404 Associated with Review of Permits for Appalachian Surface Coal Mining" (July 30, 2010).
[8] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* 43-45 (2013), *available at* www.sueandsettle.com.

Wildlife Service's unprecedented number of new species being added to the endangered species list—together with the massive "critical habitat" areas that must be set aside for those species—and the two federal agencies are imposing such significant new restrictions across the United States that the future economic growth becomes uncertain.

IV. EPA's New Regulatory Interpretations Cause Great Uncertainty and Will Discourage New Investment

Businesses drive our economy. To make the investments that turn into growth and jobs, businesses need greater certainty in the permitting process. Yet EPA's recent regulatory actions have specifically created a lack of certainty in the permitting process. This lack of certainty can best be summed up by asking "is a permit really a permit?" Historically, a permit would provide the permit applicant with some assurance that they could continue to work and make future plans for growth as long as they followed the terms of the permit during the explicit life span of the permit. Now EPA believes it can change its mind on the approval of the permit at any point during the lifespan of the permit. The agency's belief that it can kill a permit "whenever" it choose to undeniably turns the permitting process on its head and creates a tremendous amount of uncertainty for the regulated community. This lack of certainty has a chilling effect on investment, impacting jobs, local and state tax revenues, the health of communities, and further growth.

If the EPA is allowed to continue its use of the "retroactive veto" the results will be disastrous if the agency and the Corps finalizes the revised "Waters of the U.S." definition. That revised definition will vastly expand the areas that will be required to obtain Clean Water Act permits, including section 404 permits. This will lead to more permit applications, since there will be a substantial increase in the areas that are newly covered by federal clean water permitting requirements. EPA will have the opportunity to use its newfound authority to retroactively veto any of these new permits it subsequently decides it dislikes. Thus, EPA's proposed "Waters of the U.S." rule will compound the already existing uncertainty by having a chilling effect on future projects. This will likely wreak havoc on routine but large-scale projects such as dredging and maintaining rivers and ports.

Chamber members are constantly looking to modernize and grow their businesses. This often entails developing new or existing properties. In order to start this development they spend years on advance planning and determining which areas offer the best location. They spend significant financial resources on studies and preparations for the permitting process. They do this knowing full well that they have to comply with our nation's vast and comprehensive set of environmental laws and knowing that there is no guarantee that they will even get a permit. They are willing to take this risk because they have historically had some assurance of continuity if they received a permit. A permit typically grants a relatively short window in which to undertake their project (usually not more than five years). If time runs out they must reapply. So EPA's retroactive veto action has basically made permit certainty illusory. There is no longer any certainty in the permitting process, because EPA now believes it can change the rules of any given section 404 permit "whenever" it wishes.

Our nation's infrastructure is extremely dependent on section 404 permits. Waterways, ports, pipelines, and highways are just a few of the infrastructure examples that at the very least must have a 404 permit in order to begin development. Infrastructure is extremely important to the member companies of the U.S. Chamber of Commerce because it is essential to moving and selling their goods as well as connecting with their customers. This committee has recently passed the Water Resources Development Act and is working on an important revision to the highway bill. The Chamber strongly supports these significant pieces of legislation and appreciates all of this Committee's efforts. A large number of the projects affected by those two bills will be dependent on obtaining Section 404 permits and will face major new uncertainties in the permitting process. When people think of the Clean Water Act retroactive veto they tend to think of it only in terms of the mining industry. However, all industries involved in moving earth will be impacted, especially infrastructure. This uncertainty permeates the entire permit applicant pool regardless of industry. Translated, this means our country will lose potential jobs and investments across the nation.

EPA has a specific role in the section 404 process, and has the authority to support or veto permits being applied for. If a permit is granted and violations subsequently occur, EPA has massive enforcement authority to address the problem – which it uses frequently. Considering the Clean Water Act permitting structure as a whole, the Army Corps of Engineers clearly runs the program with EPA having a prominent role in site selection during the permit process.

V. EPA's Has Failed to Evaluate the Employment Impact of its Water Programs

Troublingly, while EPA expends great effort to expand its regulatory authorities, it completely ignores a longstanding Congressional mandate to continuously evaluate the impact of its regulatory actions on employment and the creation of jobs. Under Section 507(e) of the Clean Water Act, the Administrator:

> [S]hall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order.[9]

After extensive research the Chamber cannot identify even one instance under the Clean Water Act in which the Administrator made any effort to conduct an evaluation of its actions on the potential loss or shifts in employment as a result of its actions. Congress imposed this mandate on the Administrator of EPA on October 18, 1972. Evaluating compliance with a similar provision is of the Clean Air Act,[10] the Chamber filed a Freedom of Information Act request with EPA to determine if the agency ever undertook such an investigation into job loss and shifts in employment. On June 14, 2013 EPA informed the Chamber that it "was unable to find any

[9] 33 U.S.C. §1367(e).
[10] 42 U.S.C. §7621(a).

documents pertaining to your (the Chamber's) request."[11] Congress inserted this mandate in most of its environmental statutes but EPA has refused to conduct any evaluations of the impact of its regulations on jobs or shifts in employment.[12]

Finally, while we could not identify any economic impact studies of the Mingo Logan mine as a result of the EPA veto, the Chamber did undertake a study to estimate the amount of money not invested in new facilities as a result of the unreasonably delayed permits. In 2011, the Chamber unveiled *Project ~~No Project~~*, an initiative that catalogued the broad range of energy projects that were delayed or halted because of the inability to obtain permits and endless legal challenges by opponents of development. Results of the assessment are compiled onto the *Project ~~No Project~~* website (www.projectnoproject.com). The purpose of the *Project ~~No Project~~* initiative was to understand the impacts of serious project impediments on our nation. It remains the only attempt to catalogue the wide array of energy projects being challenged nationwide.

Through *Project ~~No Project~~*, the Chamber identified usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Given that some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to forty-nine states.

The results of the inventory were startling. One of the most surprising findings is that it has been just as difficult to build a wind farm in the U.S. as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified in our study were renewable energy projects. Often, many of the same groups urging us to think globally about renewable energy are acting locally to stop the very same renewable energy projects that could create jobs and reduce greenhouse gas emissions. Activists have blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other delay mechanisms, thereby effectively bleeding projects dry of their financing.

It quickly became clear from our research that the nation's complex, disorganized process for permitting new facilities and its frequent manipulation by opponents constitutes a major impediment to economic development and job creation. Which prompted the next question: what are the economic effects of this problem on the economy and job growth?

According to an economic study that we commissioned, the successful construction of the 351 projects identified in the *Project ~~No Project~~* inventory could have produced a $1.1 trillion short-term boost to the economy and created 1.9 million jobs annually during the

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[11] Letter from Jim DeMocker, Acting Director, *EPA Office of Policy Analysis and Review*, to William Kovacs, Senior Vice President, *U.S. Chamber Environment, Technology & Regulatory Affairs Division* (June 14, 2013) (EPA-HQ-2012-001352).

[12] Clean Air Act, 42 U.S.C. §7621(a); Clean Water Act, 33 U.S.C. §1367(e); Toxic Substances Control Act, 15 U.S.C. §2623(a); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610(e); Solid Waste Disposal Act, 42 U.S.C. §6971(e).

projected seven years of construction. Moreover, after these facilities are constructed, they would continue to generate jobs because they operate for years or even decades. According to the study, in aggregate, each year of operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs.

VI. Conclusion

EPA's retroactive veto of a validly-issued section 404 permit, in the absence of an unacceptable adverse environmental impact, is a prime example of the agency's regulatory overreach. This action, together with EPA's likely preemptive veto of the Pebble Mine in Alaska, the proposed unprecedented expansion of the scope of the agency's Clean Water Act jurisdiction under the revised "Waters of the U.S." definition, and its acquiescence to the abuse of the sue and settle process to spawn expansive new rulemakings, has the effect of eroding trust in the agency's judgment, leaving permit holders in doubt about the value of their permits, making planning for new projects and investments extremely difficult, and casting a chilling effect on development.

Congress has two bills that address this issue that the Chamber supports. The first is Rep. David McKinley's (R-WV) bill, H.R. 524, which specifically addresses EPA's power to retroactively veto a permit. This bill has already passed out of this committee. The second is Rep. Bob Gibbs (R-OH) and Rep. Nick Rahall's (D-WV) bill, H.R. 4854 the "Regulatory Certainty Act of 2014." The Chamber urges this committee to pass this bill. The Chamber also supports any efforts through the Appropriation process to restrict or limit the ability of EPA and the U.S. Army Corps of Engineers to implement or administer any change to the definition of "waters of the U.S."

Thank you for giving me the opportunity to testify before this Subcommittee.