



*Natural building blocks for quality of life*

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: Comments on EPA's After the Fact Revocation of the Corps 404 Permit at  
Spruce Mine No. 1 (EPA-R03-OW-2009-0985)

On behalf of the membership of the National Stone, Sand & Gravel Association (NSSGA), we submit the following comments and summary of NSSGA member survey 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 (Apr. 2, 2010) (hereinafter "proposed veto").

We appreciate the opportunity to express our views on these important issues. NSSGA concurs with and fully supports the National Mining Association's comments on this matter. We are submitting these comments on the legal, policy and practical implications of the proposed veto on our members. We also include key responses from a survey of our membership articulating their "real world" concerns over EPA's proposed veto.

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 badly needed additional flood storage capacity.

As described in detail in the comments of the National Mining Association, EPA's proposed "After the Fact" veto exceeds EPA's 404(c) authority. In addition, 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, the EPA proposed veto amounts to an "override" of state Clean Water Act actions in granting NPDES permits and 401 water quality certifications and conflicts with the scheme established under section 402(d) of the Act for EPA to object to state issued NPDES permits. EPA's proposed determination would also effectively invalidate the "permit shield" defense under sections 402(k) and 404(p) of the Act by essentially prohibiting all discharges at the site despite a company's good faith reliance on lawfully issued CWA permits and approvals.

As explained further below, NSSGA is deeply concerned about EPA's proposed use of its veto authority under 404(c). Our members are actively involved in aggregate mining and rely on the certainty of valid 404 permits. We believe that should EPA finalize its proposed veto, that action would set a precedent that would have significant adverse impacts on the aggregates industry. It would put private contracts at risk, make financing more expensive or unattainable, and cause future investments in mining and resource development to decline with the resulting increase in raw material prices. Such a precedent would also send a signal to aggregate operators that their long-term permits may be at risk because EPA could veto their 404 permits after the fact. The jeopardy of not having long term permits would be devastating to NSSGA member companies.

**I. EPA's Proposed 404(c) ATF Veto Amounts to an "End Run" Around the Careful Federal /State Scheme of Shared Responsibilities Under the Clean Water Act.**

Often an aggregate mining operation uses an integrated water quality management system to collect, control, recycle and discharge process and/or storm water. For example, sand and gravel mining routinely involves dredging material and then sorting sand and gravel that meets certain specifications necessary for certain contractual commitments. The process wastewater from these operations is then discharged through permitted outfalls in that meet state or federal NPDES effluent limitations covering such parameters as pH, temperature, dissolved oxygen, oil and grease, and total suspended solids<sup>1</sup>. Aggregate operators often devote considerable time and resources to negotiating and obtaining both Corps of Engineers section 404 permits and section 402 NPDES permits.

NSSGA members whose integrated water management systems require both 402 NPDES permits and a 404 fill permits must also obtain a state water quality certification under section 401 of the Clean Water Act that verifies their discharges will not violate water quality standards. Consequently, when EPA chooses to veto a previously issued 404 permit by the Corps at a mine, based in large measure on downstream water quality

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<sup>1</sup> For example, New York State DEP NPDES permits for aggregate mining discharges of process wastewater establish water quality based effluent limits for these parameters. See [www.dec.state.ny.us](http://www.dec.state.ny.us)

concerns, it is an end run around the Section 402 and Section 401 processes established under the CWA.

The clear linkage between section 404 and 402 regulated activities for mining was described by the U.S. Supreme Court in *See Coeur Alaska, Inc. v. Southeast Alaska Conserv. Council*, 129 S.Ct. 2458 (2009) (*Coer*) for gold mining where the Court addressed the two regulatory schemes under the Act. The Court described that mine's integrated water quality management system involving discharges from the mine into a slurry pond where sediment is collected and the water is reused or discharged into receiving streams. In the case of *Coer*, rather than build a tailings pond, Coeur Alaska proposed to use Lower Slate Lake, located some three miles from the mine in the Tongass National Forest, to discharge its fill. The mine required a 404 permit to discharge into Slate Lake, and a 402 NPDES permit to discharge treated water from Slate Lake into the receiving streams below. In that case Petitioners challenged whether the mine's discharges were regulated by section 404 at all. The Supreme Court held that the discharge of slurry material was regulated as "fill" under section 404 but noted that the subsequent discharge of treated waste water downstream was regulated under a 402 NPDES permit.

#### **A. 404(c) Veto Would Circumvent EPA's authority Under Section 402**

The proposed veto will set a very bad precedent regarding EPA's administration of the NPDES section 402 program because EPA never objected to the proposed issuance of the mine's NPDES permit in conformance with the Agency's 402 NPDES procedures. Under section 402(d), the NPDES delegated state (a) transmits a copy of each permit application to EPA with a notice of every action related to the permit application; (b) no permit may issue if the EPA Administrator within ninety days of his notification objects in writing to the permit as outside the guidelines and requirements of the Act; (c) whenever the Administrator so objects, the written objection must contain a statement of the reasons and the effluent limitations and conditions which the permit would include if issued by the EPA; and (d) EPA must then hold a public hearing on the objection and if the State does not resubmit the permit to meet the objections within 30 days after the hearing, EPA may issue the permit.; *see also Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1012-1013 (3rd Cir.1988), *NRDC v. EPA*, 859 F.2d. 156, 182-189 ( D.C. Cir. 1988).

The harmful precedent set by this proposed veto is especially significant here because EPA failed to object to the NPDES permit prior to issuance over three years ago, as required under this strict scheme.<sup>2</sup> Further, the proposed veto's suggestion that the mining would exceed West Virginia's water quality standards for several parameters now amounts to an "end run" around the statutory scheme. In fact, when EPA began to press the Corps of Engineers to suspend the permit, the WVDEP Director wrote the Corps on September 25, 2009 stating that NPDES permit for the Spruce No. 1 mine "...has been

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<sup>2</sup> The Proposed veto notes that the West Virginia Department of Environmental Protection (WVDEP) issued an NPDES permit for discharges of pollutants at 25 outfalls as well as authorizations under the State's Surface Mining program under SMCRA. EPA's "Notice of Proposed Determination" at p. 9, footnote #1.

open to scrutiny by USEPA on at least three occasions previously. Each time... USEPA allowed permit approval. [And] as the permit now stands the effluent limitations are in compliance with all applicable TMDLs and West Virginia's federally approved anti-degradation policy."<sup>3</sup> He further noted that "this is the most heavily studied and scrutinized surface mining coal operation in the history of a state which has a long history with the coal mining industry."<sup>4</sup> The Corps then declined EPA's request to suspend the permit on September 30, 2009. Yet, EPA bases its proposed "after the fact" veto, in part, on concerns regarding the discharges impacts on water quality. (Prop. Determination, pp. 30-38).

Additionally, it is worth noting that in EPA's 2005 Programmatic EIS on Appalachian Mountaintop Mining, EPA considered and rejected a regulatory scheme under which only 404 permitting would govern mountaintop mining.<sup>5</sup> In the EIS, one alternative considered, but ultimately rejected, granted the Corps and EPA the power to regulate mountaintop mining solely through CWA 404 regulatory program. EPA rejected this alternative in the EIS as not being efficient or environmentally beneficial. Yet, the example set by the proposed veto here amounts to using section 404 authority to "trump" the authority lawfully delegated to state environmental permitting agencies like WVDEP under the section 402 of the Clean Water Act.

In sum, EPA's proposed 404(c) veto will set a very harmful precedent for the entire NPDES 402 scheme and could undermine the careful federal-state balance established by Congress in enacting the Clean Water Act over 30 years ago.

**B. 404(c) Veto Would Essentially Invalidate the Permit Shield Defense Under the CWA.**

The Clean Water Act establishes a "permit shield" defense for discharges authorized under both section 404 and 402. In its comments, NMA discusses the permit shield defense under 404(p), and we support those comments. In effect, the 404(c) ATF veto invalidates the NPDES permit shield defense

The permit shield defense regarding NPDES permits is embodied in 33 U.S.C. § 1342(k), which bars suit under the CWA against a permit holder for the discharge of pollutants not expressly listed in the permit. The NPDES permit shields its holder from liability under the Clean Water Act as long as (1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2) the permit holder discharges pollutants not within the reasonable contemplation of the permitting authority at the time the permit was granted. Since the WVDEP continues to find that the Spruce Mine No. 1 is in compliance with its NPDES permit and has not made a (known) discharge of pollutants not within the reasonable contemplation of the permitting

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<sup>3</sup> Letter from Scott G. Mandirola, acting Director, WVDEP to Col. Robert Peterson District Engineer, Huntington District, Corps of Engineers, September 25, 2009 at p. 2

<sup>4</sup> Id. At p.3

<sup>5</sup> See Final Programmatic Environmental Impact Statement (PEIS) on Mountaintop Mining/Valley Fills in Appalachia - EPA 9-03-R-05002; [http://www.epa.gov/region3/mtntop/pdf/II\\_Alternatives.pdf](http://www.epa.gov/region3/mtntop/pdf/II_Alternatives.pdf) at p.15.

authority, it should be entitled to the permit shield. *See Piney Run Preservation Assoc. v. County Commis. Of Carroll County, Maryland*, 268 F.3d 255, 269-272 (4th Cir. 2001) (holding that the permit shield protects the holder from CWA liability for all discharges of pollutants not listed in the permit and all discharges of pollutants in compliance with the permit); *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (1994) (holding that polluters may discharge pollutants under CWA not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants).

Here, EPA's veto essentially invalidates the permit shield defense because the permittee can no longer rely on its lawfully issued permit, despite the express finding from WVDEP that the Spruce Mine permit is in full compliance with permit conditions. Therefore, it sets a very bad precedent for NSSGA members who fear the loss of this defense from liability should EPA propose to veto discharges at aggregate mining operations in the future.

**C. The Proposed 404(c) Veto Would Undermine the Deference Owed to State 401 Water Quality Certifications Found by State Water Quality Agencies to be in Compliance with State Water Quality Standards**

While the proposed veto would violate 402 NDPES revocation procedures and essentially invalidate the permit shield defense, it would also undermine the deference that must be given to the State's issuance of its 401 water quality certification. The certification ensures that the discharges will not violate state water quality standards approved by EPA. EPA's concerns about impacts to water quality are a major factor in its proposed determination. According to the Notice, the mine will cause "unacceptable adverse impacts to fish and wildlife" from water discharges. (*See e.g.*, Prop. Determination at 32).

However, water quality impacts were already addressed by the State under Section 401. That section conveys directly to States (and eligible Tribes) the authority to approve, condition, or deny all Federal permits or licenses authorizing a discharge to waters of the U.S., including Clean Water Act Section 404 permits, NPDES permits, and Federally issued permits under the Surface Mining Control and Reclamation Act. *See S. D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (upholding states' rights to certify water quality discharges for federal permit holders). Section 401 provides states with the authority to review and either deny or grant certification for any activities requiring a Federal permit or license, to ensure that they will not violate applicable state water quality standards. No permit will be granted until required certification has been obtained or has been waived.

Notably, under Corps regulations, a 401 state certification is entitled to substantial deference. In fact, such a determination is considered "conclusive" under Corps regulations unless the "EPA Regional Administrator advises of other water quality aspects to be taken into consideration." *See* 33 C.F.R. § 320.4(d). West Virginia certified the Spruce Mine No. 1 discharges as not violating state water quality standards –

which EPA approved. In fact, on September 25, 2009 WVDEP Director wrote the Corps stating that his agency "issued a water quality certification on December 19, 2005 and to my knowledge, USEPA has never provided this agency with any information that could lead us to conclude that the certification was deficient." Yet, EPA is now calling that certification into question by issuing its proposed veto addressing water quality issues while ignoring the deference owed to the State's determination. If EPA disagreed with this certification by West Virginia, it should have objected to that certification or established more stringent water quality standards prior to the issuance of the Corps 404 permit. It did neither of those.

In sum, by proposing to veto the 404 permit "after the fact", although WVDEP had already issued a 401 water quality certification, EPA is impinging upon the primary role that Congress carefully laid out for the states in determining whether a proposed discharge complies with state water quality standards. Therefore, EPA's proposed 404(c) permit veto based, in large part on water quality considerations, will set a bad precedent for NSSGA members who have routinely relied on State Water Quality Certifications in negotiating 404 and 402 permits.

## **II. EPA Veto of the Spruce Mine After the Fact (ATF) 404 Permit Would Set a Devastating Precedent for NSSGA Members Who depend on Clean Water Act Permits for their Business Operations**

Our members are deeply concerned with the potential precedent of EPA's Proposed Determination. As the comments below candidly reveal, should EPA rely on the precedent of EPA's Spruce Mine veto to threaten to veto discharges already authorized at an aggregate mine, such an action would be devastating for NSSGA members. It would undermine long-term planning decisions by aggregate companies and risk interrupting the supply of aggregate needed for construction, repair and rehabilitation of our nation's infrastructure. Aggregate mining companies must be able to rely upon 404 permits issued by the Corps without the threat of an "after the fact" veto of those permits in order to effectively plan their businesses.

The current costs of water quality permitting are already burdensome to regulated industries. EPA's proposed use of its veto authority will only drive those costs higher. For example, one NSSGA Member spent over 10 years and \$1 million dollars to obtain a 404 permit. Typically, the 404 permitting process takes our members between one to three years and costs anywhere from \$30k to over \$1 million, exhausting countless months of planning and requiring numerous revisions to their business plans in order to meet permitting standards.<sup>6</sup>

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<sup>6</sup> In *Rapanos*, Justice Scalia even observed that "the average applicant for an individual permit spends 788 days and \$271,596 in completing the process and the average applicant for a nationwide permit spends 313 days and \$28,915 days not counting costs of mitigation or design changes. [citing] Sunding & Zilberman, the Economics of Environmental Regulation by Licensing" An Assessment of Recent Changes to the Wetland Permitting Process, 42 *Natural Resources J.* 59, 74- 76 (2002) See *Rapanos v. United States*, 126 S. Ct. 2208, 2214 (2006).

To gauge industry's reaction, NSSGA surveyed its members to ask for comments on the effects of EPA's proposed veto. Below are summaries of key responses highlighting the potential impact to industry from EPA's Proposed Determination.

**A. Survey of Members Reflects Fear and Concern about Impact of an After-the-Fact 404(c) Veto.**

EPA's proposed veto puts in jeopardy future mining sites and will greatly increase costs of doing business. This is causing fear of further uncertainty in an industry already suffering from the economic downturn in construction and infrastructure investment. NSSGA members gave the following responses when asked about the impact of EPA's proposed veto:

"EPA's proposal to veto/revoke the previously issued Army Corps of Engineers Section 404 permit for the Spruce No. 1's West Virginia coal mining operation . . . would set a bad precedent and would have far reaching and long standing negative consequences."

"The potential to have our mining operations terminated because the EPA revoked a previously issued permit would not only cause substantial financial loss but also the potential damage of our company's reputation."

"Million dollar decisions are made when researching and finally deciding to construct, start-up and run a mining operation: engineering costs and construction cost, equipment cost, labor, permits, fees, etc., and a myriad of others costs. Revocation of an existing permit could shut a company's doors because of the catastrophic loss of revenue."

**B. The Mere Threat of 404(c) "After the Fact" Veto Would have Chilling Effect on Business Planning.**

Along with increased uncertainty, the potential for an after-the-fact veto by EPA will have a chilling effect on future investments, may substantially decrease available natural resources and production, and may put current operations in jeopardy. EPA's proposal also undermine decades of planning by companies that rely on these permits. With this uncertainty come higher costs of production, fewer jobs, and further federal mischief with the 404 and 402 permitting process. Member comments on the impacts to business include:

"The threat of an EPA veto would impact the company by having to rethink our permitting strategy. We may pass on permitting future reserves because of the possibility of a veto and the legal cost to defend our permits."

"[Our company] made a long, thought-out and researched business as well as a financial decision to begin mining operations in Louisiana. We spent several years researching and developing a plan that would not only be profitable to the Company but would also provide a valuable commodity to the local and surrounding markets. We worked long

hours with consultants and engineering firms to develop a plan and then committed a substantial financial investment in constructing our facility. None of this would have happened if we would not have received our Section 404 Permit from the U. S. Army Corps of Engineers.”

“A threat of [an after the fact veto] would create uncertainty with whether to move forward permitting new reserves.”

“[I]t takes years to obtain a 404 Permit and the cost is in the hundreds of thousands of dollars. In this part of the country with jurisdictional streams present on almost every parcel of adequate size and wetlands prominent in the eastern part of the state it would jeopardize the future of most sites. The bottom line is that it would reduce the life of existing operations, eliminate some future operations, increase production costs and shipping costs. We rely on these permits in order to invest in property, the purchase of mobile equipment and processing plants.”

In sum, EPA’s proposed veto will likely decrease future investments in mining, decrease market supplies, and strain businesses that rely on aggregates to supply the raw materials for projects like road building and other public works.

**C. A 404(c) After-the-Fact Veto would have Chilling Effect on Ability to Meet Contractual Commitments, Especially with Public Agencies such as Highway Departments that Depend on Reliable Source of Aggregate for Public Works Projects.**

Our members are concerned about long-term viability of projects given EPA’s possible 404 veto. That uncertainty will have a ripple effect through other industries that are dependant on an uninterrupted supply of aggregate for uses such as road building and home construction. Our survey respondents noted that:

“An after-the-fact veto by the EPA would put in jeopardy large or long term aggregate commitments and obligations that we have made to our customers. This could literally shut this operation down.”

“It means that projects could be stopped mid-stream after significant monies have been spent to permit and mine the site. It will add more unpredictability to an already unpredictable system. It will result in job losses and increased difficulty in today’s lending environment. The governments OWN HUD and FHA lending standards would not allow this unacceptable risk. HUD and FHA demand that all risks are mitigated and signed off prior to issuing loans. It could easily bankrupt most projects if the permit is revoked.”

“If a permit is issued and we go ahead with an expansion, we must have assurance that the agencies will not change their minds about the impacts. For example, in our recent permit, we will impact wetlands to move an existing road and double the size of our quarry. If we build the new road, build our new plant, and then the agencies decide to

revoke our wetlands permit, we will have wasted more money than a year's worth of sales at that one plant.”

“If EPA implements veto authority over 404 permits that have already been issued, they would be setting a precedent in their ability to terminate other active permits, not only Corps issued permits, but other regulatory agency permit as well. Business decisions are made regarding our capability to fill aggregate orders, which is also based on the ability to mine under the directives of these permits. This [veto] would very much put in jeopardy contractual obligation to our customers by putting at risk our ability to fulfill orders and meet customer’s demands.”

In sum, the precedent of an EPA ATF veto will create great uncertainty in the industry and jeopardize future contracts and supplies by chilling investments and raising unnecessary risks for NSSGA member companies.

### **III. Conclusion**

In conclusion, NSSGA submits that EPA's after-the-fact veto of the Corps 404 discharge permit sets a very bad precedent because the Agency's action violates the statutory requirements that must be followed by EPA under section 402 of the CWA. It will also essentially invalidate the "permit shield" defense under the Act. Further, EPA’s proposed veto fails to give proper deference to the states’ 401 certification and therefore, impinges on the careful federal state scheme of shared responsibilities established by Congress under the Act. From a practical standpoint, it would set a precedent that would put millions of dollars and thousands of jobs at risk if used by EPA to veto an aggregate mining operation. Such action would increase the cost of aggregate extraction, and it will interfere with private business contracts, business’ reputation, and much needed supplies for the building and public works industries. EPA's proposed "after-the-fact veto" is a clear violation of the Clean Water Act. NSSGA urges EPA to immediately withdraw its proposed veto of the Spruce No. 1 Surface Mine.

Thank you for the opportunity to comment on the Proposed Determination.

Sincerely,



John S. Hayden, PG, REM  
Vice President, Environment, Safety and Health