

EPA Rescinding Valid Clean Water Permits

By Mark S. Kuhar

A decision by the U.S. Environmental Protection Agency (EPA) to revoke a valid Clean Water Act (CWA) permit from a mining operation in West Virginia could have ripple effects on the ability of public agencies and private firms to deliver urgently-needed transportation-improvement projects for the nation, American Road & Transportation Builders Association (ARTBA) First Vice Chairman Nick Ivanoff, president and CEO of New York-based Ammann & Whitney, told members of Congress recently.

In testimony before the House Transportation & Infrastructure Committee's Subcommittee on Water Resources and Environment, Ivanoff told federal lawmakers that EPA's 2011 decision to revoke Arch Coal's valid, three-year-old CWA permit, even though the mine was operating in compliance with the permit, sets a dangerous precedent that threatens to remove certainty from the permitting process.

"Major transportation projects, can take years, if not decades, to complete. In order for these projects to move forward, planners need to be able to know permits received at the beginning of a multi-year construction process will be valid throughout the project's life span," Ivanoff said.

He argued that the prospect of validly issued permits being rescinded could increase the perceived risk of a project to potential investors, thereby making projects less appealing and more expensive.

"While the EPA's decision was directed at a single mining operation, its impacts have been felt throughout the regulated community in all sectors of the economy," explained Ivanoff. "As things stand currently, project sponsors now face the potential uncertainty of losing a valid wetlands permit, through no fault of their own, simply because the EPA changes its mind."

EPA's decision to revoke the permit, issued by the Army Corps of Engineers, is particularly troubling in light of the agency's recent attempts to expand its CWA jurisdiction, making this a "one-two" punch on transportation improvements, according to ARTBA. As the permitting burden increases, the validity of those documents will be in doubt.

Ivanoff also noted that uncertainty in regulatory process threatens to jeopardize bipartisan legislative achievements in MAP-21 aimed at streamlining and speeding the transportation project delivery process.

Congressional Action Needed for Proper Water Safeguards

Rep. Steve Southerland (R-Fla.) has introduced "Waters of the United States Regulatory Overreach Protection Act" (H.R. 5078). This bipartisan legislation establishes safeguards that preserve important federal-state partnerships in protecting our nation's waterways.

"I am pleased that Republicans and Democrats on the committee acted in a bipartisan fashion to recognize the role that states must play in regulating waters within their respective boundaries," said Southerland. "By turning back the administration's brazen power grab, we've stood in defense of a federal-state partnership that has worked for 40 years under the Clean Water Act. As a result, we've taken the first step in restoring certainty for the farmers, manufacturers, and construction and transportation industries that drive America's economic growth."

A proposed rule by the U.S. Environmental Protection Agency and the Army Corps of Engineers would redefine "waters of the United States" and expand the scope of federal jurisdiction. Cement plants in the United States currently comply with National Pollutant Discharge Elimination System (NPDES) permits that require strict adherence to water quality guidelines.

However, the proposed rule is confusing and ambiguous, and will likely add requirements to water permits. For example, an added provision in the proposed rule is that "waters of the United States" may be defined "on a case-specific basis," and consequently, infrastructure projects and construction site developments could be delayed due to increased hydrological and geological surveys to determine jurisdictional questions.

"As proposed, the rule could undermine cement manufacturing's long-term investment by preventing full access to limestone deposits," Cary Cohrs, chairman of the Portland Cement Association (PCA) Board of Directors said. "Cement is vital to maintaining and building our nation's infrastructure. The EPA and the Corps must fully consider the potential economic impacts that the proposed rule may place on the regulated community and on state and local governments as well as the construction and building sectors."

"The Waters of the United States Regulatory Overreach Protection Act" will provide the proper safeguards against regulatory overreach while allowing industry the certainty necessary to improve our nation's economy.