Testimony of Hal Quinn
President and CEO
National Mining Association
before the
United States House of Representatives
Committee on Natural Resources
Subcommittee on Energy and Mineral Resources

Legislative Hearing on H.R. 1644, The STREAM Act

May 14, 2015

Testimony of Hal Quinn
President and CEO
National Mining Association
before the
United States House of Representatives
Committee on Natural Resources
Subcommittee on Energy and Mineral Resources

Legislative Hearing on H.R. 1644, The STREAM Act

May 14, 2015

Good morning, I am Hal Quinn, president and CEO 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 and manufacturers of mining and mineral processing machinery, equipment and supplies.

The Office of Surface Mining Reclamation and Enforcement's (OSM) so-called "Stream Protection" rulemaking odyssey can be characterized as long, expensive and opaque. We appreciate the Committee's attention to this textbook example of a regulation searching for a need and purpose. We thank Representatives Mooney, Johnson, and Lamborn for introducing legislation that would bring much needed transparency to the rulemaking process, along with providing greater clarity and focus to OSM's mission by avoiding costly and unnecessary duplication and conflict with other laws applicable to coal mining operations.

Introduction

Coal serves as the backbone of our nation's diverse, reliable and affordable electricity supply. Coal-based electricity has supplied 45 percent of the electricity generation over the past decade. The diversity of our electricity supply, anchored by coal, saves consumers more than $93 billion annually and reduces the volatility of their utility bills by half.[1] This is important for all Americans, but especially for those on fixed incomes and families with lower incomes who spend an outsized portion of their budgets on energy costs.

More than 30,000 coal miners have lost their jobs since 2011. This unprecedented loss of employment in the coal sector coincides with the issuance of the first of several rules by the Environmental Protection Agency (EPA) designed to make our electricity supply less diverse, less reliable and more expensive. Some suggest that the loss of coal jobs is largely attributable to market forces. While low natural gas prices present a cyclical challenge, policies that won't allow coal to compete present structural barriers that hurt all Americans who depend upon reliable and affordable electricity.

[1] IHS Energy, *The Value of U.S. Power Supply Diversity* (July 2014)

An analysis by Duke University's Nicholas School of Environment concluded that most of the retirements of coal-base load power plants are in direct response to EPA utility MATS rule, not fuel prices or other market forces.[2] The MATS rule, by EPA's accounting, will cost American consumers almost $10 *billion* each year, but bring, at most, only $4-$6 *million* in benefits. In other words, EPA requires consumers to pay $1,600 each year in exchange for $1 in benefits.

OSM's stream rule is another example of unbalanced and unnecessary regulatory policy. OSM's own internal analysis of an earlier version of the rule showed it would cause more than 7,000 coal miners to lose their jobs with widespread economic losses in 22 states.[3] An outside analysis concluded that the rule could cost 55,000-79,000 jobs throughout the United States.[4] Additional impacts shown by the analysis include:

- a decrease in recovery of coal reserves by 30-41 percent
- annual value of coal lost to production restrictions of $14-$20 billion, and
- $4-$5 billion in federal and state tax revenue reductions.[5]

While pursing another regulation designed to separate more coal miners from their jobs, OSM demonstrated a disturbing absence of concern about the consequences of its rulemaking. Recordings of agency meetings about the rule capture a surreal exchange between OSM and its contractor about changing assumptions to show lower job impacts from the rule. When the contractor objected that changes in those assumptions would not reflect "the real world," an OSM representative replied: "*It's not the real world, this is rulemaking*."[6]

Unfortunately, the real world today has been all about losing high-wage coal jobs as a consequence of unbalanced regulatory policy. I would observe that whenever a coal miner loses his or her job, every American loses something, including low cost, reliable electricity and, perhaps, eventually their job as well.

A Rule In Search of a Need or Purpose

For the past five years OSM has failed to articulate a clear purpose and need for undertaking this rulemaking. Initially, the agency expressed a desire to address what it called "ambiguities and inconsistencies" in the interpretation of the existing rule promulgated in 1983. However, whatever ambiguities existed in the interpretation of the

---

[2] Pratson et al, *Fuel Prices, Emission Standard and Generation Costs for Coal vs Natural Gas Plants*, Environ. Sci. Technol. (March 2013).
[3] Committee on Natural Resources, Majority Staff Report, 112th Cong. at 3. (http://naturalresources.house.gov/uploadedfiles/staffreport-112-osm_sbzr.pdf).
[4] Environ International Corporation, *Economic Analysis of Proposed Stream Protection Rule Stage I Report* (2012) at ES-1.
[5] *Id*. at 3-4.
[6] Committee on Natural Resources, Majority Staff Report, 112th Cong. at 4. (http://naturalresources.house.gov/uploadedfiles/staffreport-112-osm_sbzr.pdf).

1983 rule has long been resolved by the courts.[7] It also bears mentioning that the resolved "ambiguities" arose in the context of steep slope mining in central Appalachia, which begs the question whether a nationwide rule—as opposed to a more appropriate state based initiative— is needed to address any lack of clarity that may remain.

OSM has cited pending litigation over a 2008 rule revision as a reason for undertaking a wide-ranging regulatory initiative. However, that litigation has been resolved, leading to the reinstatement of the 1983 rule. Moreover, the outcome in that litigation turned upon a minor error conceded by OSM—the failure to conduct an acceptable consultation with the Fish and Wildlife Service (FWS) when it revised the rule in 2008. That error could be remedied easily by reengaging FWS without embarking on a five-year, $9.5 million regulatory extravaganza.

More recently, the agency has referred to "significant advancements in science and technology" since the 1983 rule was promulgated in justifying a new rule. This ignores the advances incorporated in the 2008 rule that OSM so readily abandoned once a new administration took office. Quite telling is the agency's admission when it embarked upon this regulatory odyssey. In its notice soliciting comments from the public about the need to undertake such a rulemaking, the agency simultaneously shut the door to any objective evaluation of the need or purpose when it candidly admitted "…*we had already decided to change the rule following change of Administrations on January 20, 2009*."[8]

Any purported inadequacies of the 1983 rule are belied by the performance of the industry and the states operating under the state versions of the rule. The record shows continuous improvement in performance with 90 percent of active operations free of any off-site impacts.[9] The annual reviews of state programs conducted by OSM further demonstrate exemplary performance under the existing rules, including:

- Significant improvements in Cumulative Hydrologic Impact Assessments (CHIAs) by the Kentucky program in 2014.[10]
- In Texas, 100 percent of inspected units were free of offsite impacts in 2012.[11]

[7] See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F. 3d 425, 442 (4th Cir. 2003); *Ohio Valley Environmental Coalition v. Aracoma Coal Co*., 556 F.3d 177, 190 (4th Cir. 2009).
[8] 75 Fed. Reg. 34,667 (June 18, 2010).
[9] United States Department of the Interior, Budget Justifications and Performance Information, Fiscal Year 2016: Office of Surface Mining Reclamation and Enforcement, pp 30.
[10] Annual Report for the Regulatory and Abandoned Mine Land Programs Administered by the Kentucky Department of Natural Resources, for Evaluation Year 2014, pp 4, 20.
[11] Annual Report for the Regulatory and Abandoned Mine Land Programs Administered by the Railroad Commission of Texas, for Evaluation Year 2013, p. 8.

- For FY 2014, "Wyoming continues to operate an effective program with no major regulatory problems or issues"[12] and 100 percent of inspected units were free of negative offsite impacts during the evaluation year.[13]

- "Alabama continues to ensure all lands are successfully reclaimed that are affected by surface coal mining operations… The reclamation success study determined the [state] is meeting all program requirements before bond releases are approved and any release of reclamation liability occurs. There were no required or recommended actions in this report."[14]

Perhaps only in a world that is" not the real world, but all about rulemaking," such success and continual performance improvement becomes difficult to embrace.

Lack of Consultation and Engagement with States

Permitting, inspection and enforcement is the exclusive domain of the states with approved programs under SMCRA. With states serving in this capacity for 97 percent of the coal operations nationwide, their experience and expertise should be welcomed by OSM. Despite some initial collaboration under a 2010 Memorandum of Understanding (MOU), we have witnessed OSM straight-arming states over the past five years in any deliberations about the need, purpose and scope of any rulemaking. While the committee will hear directly from several state representatives today, the correspondence between OSM and the states reveals the following:

- Shortly after states provided some initial input into the rulemaking process in 2010, OSM, for all practical purposes, terminated engagement with the states without explanation;

- Until recently, the states had not heard from OSM about the rule since January 2011—four years ago; and

- OSM never responded to a July 3, 2013, letter regarding the rule or further consultation opportunities under the MOU or the National Environmental Policy Act.

If you desired to produce a wise and informed policy, surely the experience and expertise of those administering a regulatory program for most of the coal mining operations in the country would add great value. OSM's approach here reveals that it places no value upon the state experience and, if anything, views it as a nuisance.

[12] Annual Evaluation Report for the Regulatory Program Administered by the Wyoming Department of Environmental Quality, Land Quality Division of Wyoming, Evaluation Year 2014, p. i.
[13] Id. at ii.
[14] Annual Report for the Regulatory and Abandoned Mine Land Programs Administered by the state of Alabama, for Evaluation Year 2014, pp. 2-3.

Duplication and Conflict

OSM's stream protection rulemaking also represents another troubling trend—mission creep by straying beyond the agency's jurisdiction and duplicating requirements already imposed under other laws applicable to coal mines. Section 702 of SMCRA draws boundaries that OSM must--but increasingly fails to—respect.[15]

The earlier version of this rulemaking, and the current framework we believe under consideration, would significantly overlap, duplicate and conflict with existing requirements under other federal and state laws. By way of example, various regulatory programs under the Clean Water Act, including the Section 402 (NPDES), 404 (dredge and fill) and 401 (state water quality certification), address discharges to streams from industrial activities including mining. Substantial revisions have been made at both the state and federal levels under these water quality programs over the past five years.

Balanced regulatory policy should strive to reduce and eliminate such duplication rather than add more of it. OSM is not free to disregard another statutory program that addresses an issue in a manner differently than it prefers and, in turn, impose its own regulatory preference under the guise of filling a regulatory gap. No gap exists. Rather, OSM is simply creating conflict and uncertainty.

H.R. 1644—The STREAM Act

NMA commends representatives Mooney, Johnson and Lamborn for introducing H.R. 1644, the STREAM Act, to bring transparency and accountability to the rulemaking process. The bill also serves another important purpose by curbing duplicative, conflicting and unnecessary regulations that will only produce grave uncertainty for the nation's coal industry.

This commonsense legislation would prevent OSM from duplicating existing laws and regulations already in place, or attempting to interpret and enforce laws and regulations outside of its jurisdiction. It simply reflects good governance. It also acknowledges that the states possess the capability to address emerging issues using their vast experience as the day-to-day regulators. NMA strongly supports this legislation, and we thank you for your commitment to balanced public policies.

[15] **30 U.S.C. § 1292(a)**