Statement of John Stefanko, Deputy Secretary, Active and Abandoned Mine Operations, Pennsylvania Department of Environmental Protection, on behalf of the Commonwealth of Pennsylvania, The Interstate Mining Compact Commission, and the National Association of Abandoned Mine Land Programs re. Legislative Hearing on the Discussion Draft of *The Community Reclamation Partnerships Act* before the Energy and Mineral Resources Subcommittee of the House Natural Resources Committee – May 24, 2017

Introduction

Good Morning Mr. Chairman and Members of the Committee. My name is John Stefanko and I serve as the Deputy Secretary for Active and Abandoned Mining Operations within the Pennsylvania Department of Environmental Protection. I am appearing today on behalf of the Interstate Mining Compact Commission and the National Association of Abandoned Mine Land Programs, two multi-state governmental organizations that represent the natural resource and environmental protection interests of their 30 member states (and in the case of NAAMLP, three Indian Tribes).

We appreciate the opportunity to share our perspectives on the current status of abandoned mine drainage water treatment efforts and to express our support for this much-needed amendment to the Surface Mining Control and Reclamation Act (SMCRA).

In enacting the Abandoned Mine Lands (AML) Program under SMCRA, Congress sought to address a very difficult problem. Legacy coal mining sites have enduring impacts on public health and the environment; but because the mining occurred so long ago and the coal companies that conducted that mining are long since defunct, no known party exists with reclamation obligations for these sites under any State or Federal law. Put simply: abandoned mines are everyone's problem but no one's responsibility.

SMCRA provides AML-impacted States the resources and authority they need to counteract the massive and costly AML problems within their borders. The State AML programs have made significant progress since the Act's passage, but much remains to be done, in particular regarding waters impacted by abandoned mine drainage (AMD). In Pennsylvania alone, there are an estimated 5,600 miles of streams impaired by AMD[1].

Congress clearly intended the mission of the SMCRA AML program to encompass mine drainage-impacted water treatment work[2], but due to problematic overlap in Federal Environmental Law applicable to such water pollution, the AML programs are not being allowed to fully realize that mission. As a result of the significant, undeserved liability faced by States and their AML partners under Federal Law, even where an AMD project would improve water quality, many potential projects are left sitting on the shelf, and many of the states' potential partners are left sitting on the sideline. With the bill before the Committee today, this paralyzing ambiguity can be clarified and more effective overall implementation of Federal Environmental Law can be achieved.

[1] 2016 Pennsylvania Integrated Water Quality Monitoring and Assessment Report
[2] Surface Mining Control and Reclamation Act of 1977, Section 101(h)

In an era of increasing economic hardship for coalfield communities throughout the country, the State AML programs' work has become more important than ever. As the RECLAIM Act (H.R. 1731) before the Committee last month indicates, the AML programs are not only steadfast defenders of our coalfield communities' health, safety, and environment, but are also key contributors to economic revitalization efforts.

The water treatment work conducted by the State AML programs and their partners is particularly vital to economic revitalization. Clean, unpolluted water supplies and recreational waterways are foundational pieces of the new economic future for coal country that Congress seeks to build. Meanwhile, AML impacts like water pollution only worsen over time, and the resources available or that will become available to the State AML programs under SMCRA for their work, and in particular for water treatment, are significantly less than what is needed. Allowing the State AML programs to fulfill SMCRA's role in treating water impacted by abandoned mines and bringing the resources and passion available from the states' AML partners to bear on this massive and intractable problem is critical for the future of coal country. With the bill before the Committee today, Congress has the opportunity to achieve those ends and put an important piece of that future into place.

AMD Water Treatment and the Clean Water Act

The environmental decade of the 1970's brought sweeping changes to the way that water quality is regulated in the United States. Foundational environmental laws like SMCRA and the Federal Water Pollution Control Act (Clean Water Act) helped to clean up our waterways and safeguard the health of our citizens and environment, and the country is undoubtedly a better place as a result. It is therefore a great irony that these laws, which were meant to facilitate water quality, now stand in the way of water quality improvements at AMD sites.

The Clean Water Act, as a cornerstone of Federal Environmental Law, is intentionally very strict in the restrictions placed on and the penalties potentially assessed against those who impact our Nation's water resources. As an unintended consequence of that strict design, and in particular its purposefully stringent and inflexible standards for water treatment, Clean Water Act requirements do not comport well with the realities of AMD treatment.

With regard to this issue, John Whitaker, a White House staffer during the Nixon Administration who played an integral role in the passage of the Clean Water Act, recalls the following:

> *"When I and other White House staffers responsible for environmental initiatives during the Nixon Administration recommended to the President new water pollution control strategies for congressional consideration, our focus was primarily on sewage treatment and industrial effluent, not the acid mine drainage problems from abandoned mines. We should have had more foresight…We did not envision at the time that the day would come*

when the zero discharge provision would prevent Good Samaritans from cleaning up acid mine drainage…"[3]

This dilemma has been confirmed by the Environmental Protection Agency on many occasions, and is summarized well by the following quote from an EPA Administrator's testimony before Congress in 2006:

"Under the CWA, a party may be obligated to obtain a discharge permit which requires compliance with water quality standards in streams that are already in violation of these standards.... Yet, in many cases, the impacted water bodies may never fully meet water quality standards, regardless of how much cleanup or remediation is done. By holding Good Samaritans accountable to the same cleanup standards as polluters or requiring strict compliance with the highest water quality standards, we have created a strong disincentive to voluntary cleanups. Unfortunately, this has resulted in the perfect being the enemy of the good."[4]

The crux of the problem is that the federal statutory paradigm for treating AMD-impacted water is not well-suited to the unique characteristics of these sites. The fundamental issue with AMD treatment is that impacted waterways are by definition already impaired, and in the case of abandoned mines, the originators of the pollution have long since gone out of business. Even so, due to joint and several liability under the Clean Water Act, any party who re-affects an AMD-impacted site risks being held permanently responsible for fully eliminating the existing discharge, even where the pollution is the result of legacy mining, the project is significantly improving water quality, the party in question has no connection to the pollution, and no recklessness or negligence is exhibited.

The EPA has acknowledged and attempted to mediate the conflict between AMD treatment and the Clean Water Act in the past, but the Agency's efforts have not meaningfully facilitated progress. The EPA's guidance memoranda of 2007[5] and 2012[6] regarding "Good Samaritan" involvement in such projects, and the "comfort letters" issued by the Agency pursuant to that approach, have, for reasons which will be discussed further below, unfortunately led to very few additional projects being undertaken.

The obstacles posed by the Clean Water Act to the treatment of AMD-impacted water have significantly slowed progress with such projects throughout the country and efforts to rectify the issue have been underway for over 20 years. While the need for resolution of this issue has been widely agreed upon for some time, the specifics of the ideal solution have long

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[3] "Cleaning Up Abandoned Hardrock Mines In The West: Prospecting for a Better Future"- Limerick, Ryan, Brown, and Comp, Center for the American West

[4] Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, Testimony before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, March 30, 2006, pp. 2-3.

[5] "Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans," June 6, 2007

[6] Clean Water Act Sec. 402 National Pollutant Discharge Elimination System (NPDES) Permit requirements for " Good Samaritans" at Orphan Mine Sites," Dec 12, 2012

been debated - and it is clear that debate is stalling water treatment work that our coalfield communities desperately need.

While the issue is typically discussed in the context of hardrock AML (mainly due to the absence of a dedicated national hardrock AML program, which accentuates the need to facilitate those efforts) current circumstances also strongly disincentivize AMD treatment at coal AML sites, even where conducted under SMCRA. IMCC and NAAMLP strongly support efforts to facilitate much-needed hardrock AML work through Good Samaritan legislation, as well as the enactment of a national hardrock AML program akin to the coal AML Program under SMCRA, and we intend to continue our work with Congress and affected stakeholders to support the development of legislation to those ends. In the mean time, the bill before the Committee today presents a comparatively simple path to making meaningful progress with a significant portion of the country's AMD-impacted water resources through the existing coal AML Program.

Obstacles to AMD Water Treatment Under SMCRA Title IV

Under the SMCRA AML Program, Congress has already established a system to contend with water pollution resulting from AMD at abandoned coal mines, which was clearly intended to become the primary mechanism by which these sites are handled under Federal law.

As defined by SMCRA Title IV, lands and waters eligible for State AML projects are confined to those for which "no reclamation obligation exists under State or other Federal Laws", which is essentially to say that no party with responsibility for the pollution is known to exist. Essentially, if these sites were subject to existing Clean Water Act, CERCLA, or other federal liability, they would not be eligible under SMCRA Title IV in the first place, and thus it is generally understood that other federal laws potentially relevant to abandoned AMD pollution are not necessary for AML sites listed and treated under the auspices of SMCRA.[7]

SMCRA eligible AML sites can involve discharges of AMD, but in the absence of any liable party with respect to the site, there are generally not the means available to treat the site under other federal environmental programs. Accordingly, the status quo is that SMCRA Title IV has served as the primary mechanism to treat AMD resulting from eligible coal AML sites. With SMCRA being specifically aimed at this sub-group of uniquely-situated, abandoned discharges, and federal and State efforts under CERCLA and the Clean Water Act being generally targeted at, and often overwhelmed with, other clean up activities, this arrangement is reasonable and has worked well.

While the above generally holds true for coal AML work, the Clean Water Act's relationship with AML work has become a special case. Despite the fact that Title IV eligible sites are not subject to *existing* Clean Water Act liability and that the handling of Title IV eligible sites with AMD-impacted water are generally deferred to the SMCRA AML programs, the act of constructing, operating, or otherwise affecting a mine drainage treatment system or other point-source discharge carries the risk of exposure to liability with respect to the discharge

[7] House Report 101-24, to accompany the Abandoned Mine Reclamation Act of 1989, pg. 37

under the Clean Water Act, as well as responsibility to comply with Clean Water Act Sec. 402 and obtain an National Pollutant Discharge Elimination System (NPDES) permit. For the reasons explained above, this risk has proven very problematic.

SMCRA Title IV Section 405(l) is intended to allow States with approved AML programs to proceed with their efforts unimpeded by unnecessary liability under Federal Law – but this section only applies with respect to potential *liability* under such laws, as opposed to *compliance* with those laws[8]. While that distinction is generally immaterial to the States' AML work vis-à-vis other relevant Federal Law, since as explained above, there is generally no cause for such responsibility at Title IV eligible sites, Section 413(d) of SMCRA specifically requires that treatment systems constructed and operated by the States under SMCRA fully comply with the Clean Water Act. AMD is generally understood to be defined as a non-point source and would therefore not generally be subject to NPDES requirements even given the requirement in 413(d), but recent court decisions have created a different expectation.

Under current circumstances, an AMD treatment system may be considered to "convey" a polluted water source and therefore in fact to be a point-source discharge, even where the system is actually reducing pollution loading.[9] The courts have also created an expectation that States and volunteer groups affecting an existing source of water pollution may be held as "operators" under the Clean Water Act and compelled to comply with full requirements of and liability associated with an NPDES discharge[10] [11], even where those requirements are clearly unreasonable and the liability clearly undeserved with respect to the parties in question. These developments have exacerbated the concern surrounding the potential for untenable consequences for well-intentioned and well-performed clean up efforts at AMD sites.

At the center of this concern is the simple fact that, as noted above, NPDES permits are not well-suited for treating AMD-impacted water. In many instances, strict compliance with water quality standards imposed under Section 402 of the CWA is not logistically possible or technically practical. Even where achieving compliance is possible, the diminishing return on funding needed to achieve that standard renders the pursuit uneconomical and imprudent given limited resources and the prevalence of other critical AMD water treatment priorities. These realities of AMD treatment have led many State AML programs to adopt an approach that attempts to maximize the number of discharges that receive treatment to the highest standard practicable, in particular such that they support biological and other functions of the water resource. While these projects often do not strictly adhere to NPDES water quality based effluent requirements, they nevertheless significantly improve water quality in the receiving streams, the

[8] Abandoned Mine Land Reclamation Program; Limited Liability for Noncoal Reclamation by Certified States and Indian Tribes, 80 Fed. Re. 24 (February 5, 2015)

[9] Environmental Defense Fund, Inc. v. East Bay Municipal Utility District

[10] Pursuant to the Fourth Circuit Court of Appeals decision in *West Virginia Highlands Conservancy v. Huffman* to designate water treatment facilities as point-source discharges, West Virginia must now obtain CWA permits for bond forfeiture sites. There have been concerns that this ruling could be extended to AML projects being undertaken by the states and tribes under SMCRA.

[11] It is important to note that AML reclamation is handled separately and distinctly from bond forfeiture sites, and that these sites, and any companies experiencing bond forfeiture, would not be eligible for participation under the bill before the Committee today.

aggregate effect of which produces drastic improvements in overall health of the greater watershed at a comparatively low cost.

The network of pollution-reducing active and passive water treatment systems employed by many State AML programs under this approach has led to great strides in restoring AMD-impacted watersheds, as well the community health and livelihoods which depend on those watersheds; but as a result of these systems' inability to comply fully with the Clean Water Act as described above, the State AML programs risk exposure to daunting undeserved liability (and therefore risk to their past and future progress with other AMD priorities) whenever they undertake such projects. These circumstances continue to discourage if not totally preclude many States' (and even more so their potential AML partners') ability to treat water under their approved SMCRA AML programs; and even in States that have been able to proceed with some amount of water treatment work, these circumstances have been a severely complicating factor.

To summarize, Title IV-eligible coal AML sites are generally handled exclusively through the auspices of SMCRA, but in cases where the Clean Water Act does or seems potentially to apply based on certain relevant legal decisions, the States' responsibilities under Section 402 of the Clean Water Act are generally unclear, and where they are clear, are typically impracticable.

Facilitating AMD Treatment Work under the Community Reclamation Partnerships Act

As noted above, the EPA has attempted to resolve this issue administratively through Guidance memoranda, which essentially outline conditions under which the Agency will waive its enforcement authority under the Clean Water Act (i.e. forego applying undeserved penalties and unreasonable compliance responsibilities) for mine drainage treatment projects conducted under certain conditions. In similar fashion, many State AML programs have reached understandings[12] with the EPA and/or their State NPDES authority counterparts to outline practicable levels of compliance with NPDES for their respective AML programs based on the main goal: improving water quality.

The primary remaining obstacle is that, despite assurances and understandings described above, these projects are still potentially subject to citizen suit liability under the Clean Water Act. Due to the requirement in 413(d), and the developments in relevant legal precedence described above, the States' efforts may be deemed non-compliant by the courts where they do not fulfill NPDES requirements. This means that even where these projects are conducted under SMCRA, condoned by the EPA and/or State NPDES authority, and are improving water quality by reducing pollution loading, a State could still be assessed liability and compelled to take immediately required, expensive, tax-funded action to return a given site to an impracticable condition, which is ultimately what the States must avoid.

[12] For example, under such agreements, the States may not be expected to achieve full water quality compliance where infeasible, may not be required to sample for the full range of constituents generally applicable, and may have their responsibility otherwise proscribed based on conditions at a given site and the State's staffing and financial capability – but for reasons described below, these agreements provide limited assurance to the AML programs.

The key to resolving this issue is bringing clarity and practicality to any Clean Water Act compliance responsibilities borne by the States as they conduct AMD water treatment under SMCRA. This bill would accomplish that goal by setting an established, thorough process by which State AML programs can work with their NPDES authority counterparts (contingent on EPA approval) to outline a clear, achievable, statutorily-sanctioned strategy for their water treatment work. This approach will ensure that the purposes of the Clean Water Act are upheld while providing necessary assurance that such efforts will be considered compliant with the Clean Water Act in the future, and can be pursued free from concerns with liability stemming from the unreasonable, unhelpful aspects of the Clean Water Act's application to AMD treatment work.

The amendment proposed by the bill represents a genuine attempt to find the appropriate middle-ground between SMCRA and the Clean Water Act for AMD projects, and ensure that the purposes of the Clean Water Act are fulfilled through the State AML programs' efforts. These improvements will result in more prevalent and effective AMD water treatment work by the State AML programs, and more effective overall implementation of Federal Law with respect to these sites. Without such improvements, the ambiguity remaining in (and certain other prohibitive aspects of) the Law's application to abandoned AMD pollution will continue to constrain and delay the States' progress under SMCRA.

Removing Obstacles to Partnerships for AMD Treatment Work

The obstacles to AMD treatment work described above constrain and complicate the States' efforts significantly, but for the States' would-be partners in those efforts, the impediment is much worse. Now more than ever, the States and their AML–impacted communities could use the assistance of their passionate and capable Community Reclaimer partners, but current circumstances unfortunately heavily disincentivize that possibility.

Much like the State AML programs themselves, their partners face the potential for devastating undeserved liability in the due course of their AMD treatment work, even where the group in question has no connection to the site and the project is significantly improving water quality. What's more, the States' partners tend to have limited sources of funding, often in the form of discrete grants, and are therefore all the more vulnerable to the risks of undeserved liability and infeasible compliance responsibility. If these groups are not completely certain of their responsibilities and potential liability as a result of conducting, participating in, or funding a project, and that those responsibilities will be practicable, they will have little choice but to forego those activities or risk lethal impacts to the financial health of their organization.

Pennsylvania recognized long ago that with the availability of these volunteer efforts and advances made in our understanding of mine drainage, many of the State's abandoned coal mine AMD discharges could be eliminated or improved at little or no cost to the Pennsylvania tax-payer if only the potential for undeserved liability could be addressed. To that end, Pennsylvania enacted its Environmental Good Samaritan Act of 1999[13], under which 79 AMD treatment

[13] Title 27 Pennsylvania Consolidated Statutes Annotated Sections 8101 - 8114

projects have been undertaken in various partnerships between the Commonwealth, local governments and municipal authorities, individual community supporters, corporations, watershed associations, and conservancies. These projects are spread among 20 counties and 53 distinct groups, and the majority of these projects are active today. State-level liability protections have enabled these projects to occur without risk of undue liability under state law, but risks remain for the Commonwealth and their partners under federal law, and still more projects could have been pursued if not for the remaining specter of liability.

Much like the proposal in the bill before the Committee today, projects eligible under the EGSA must abate water pollution resulting from abandoned mine lands and eligible participants must meet certain conditions demonstrating that they and the project are worthy of liability protections offered by the program. A key component of the program's success is its reliance on the State AML program's long-standing expertise in their field. Under the EGSA, all activities related to a given project proceed under the guidance and approval of the Pennsylvania Department of Environmental Protection (PADEP), which utilizes its expertise and long resume of successful water treatment projects to appropriately adjust requirements to match the scale and complexity of the proposed project and to ensure that only well-conceived projects move forward. The program proposed by the bill before the Committee today reflects the structure of the EGSA, and should successfully integrate its advantages.

Pennsylvania's experience in the almost 20 years since the passage of the EGSA demonstrates that there are countless opportunities for Community Reclaimers to assist the AML programs, especially in the treatment of AMD-impacted water. The Commonwealth and its partners' work under the EGSA provides a proof of concept for the beneficial, responsible participation of such groups in the AML programs' work as well as for the bill before the Committee today.

Facilitating AMD Treatment Work under The Community Reclamation Partnerships Act

This bill would build on the proven program in SMCRA, take the lessons of the successful program in Pennsylvania, and responsibly confer with relevant authorities, to establish a distinct process for unnecessarily marginalized groups to work with the State AML programs as partners.

The critical components of this approach are the States' assumption of ultimate responsibility for the project under Federal law, the strong definition of Community Reclaimer, and the requirement that these projects be conducted pursuant to a State's approved Reclamation Plan, including where applicable the jointly-developed strategy for AMD treatment as developed under Section 405(m) of the proposed amendment.

The States' assumption of responsibility under Section (n)(1)(v) of the bill will ensure that ultimate care of affected sites will be accounted for in accordance with the State Reclamation Plan. It will also allow the States to provide the necessary assurances to prospective partners that they will not be assessed federal liability outside the terms and conditions of the State Reclamation Plan and the State's agreement with the partner as described in (n)(1)(v). It is

interesting to note that AML contractors utilized under the conventional AML program are similar to volunteer groups in that they could theoretically be subject to similar liability by affecting a polluted site, becoming considered "operators" under federal environmental law, and thus being exposed to joint and several liability. In some cases, States mitigate liability risk to prospective contractors by formally agreeing as a condition of the contract to assume potential liability as a result of remaining pollution or certain accidental releases (basically any instance in which the contractor would be exposed to undue liability, meaning other than liability that is a result of their own recklessness or negligence.) The program proposed by the bill before the Committee today would emulate this not-unprecedented solution represented by the assumption of ultimate liability by the State, thereby providing volunteer groups the assurance they need to securely proceed with their efforts, while also ensuring that, at the end of the day, the site will be taken care of appropriately.

The proper care of these sites will be further ensured by the fact that these projects will be conducted in compliance with the States Reclamation Plan and under the guidance of the State AML program, and, where applicable, will support the attainment of water improvements under the terms and conditions agreed to by the State AML program and other relevant agencies and approved by the EPA as required by Section 405(m) of the proposed amendment.

Through the definition of Community Reclaimer provided by the bill, eligible groups will be confined to those who have no connection to the pollution at the site, genuinely seek to improve the environment, have a strong history of environmental compliance, and are otherwise worthy of participation in this program. Between the fundamental requirement that no Title IV AML site may be subject to existing liability, the strict bar set for participation in the program by the Community Reclaimer definition, the appropriate exceptions for instances of reckless and gross negligence, and the fact that the Office of Surface Mining Reclamation and Enforcement will review and approve each project pursued under the program, this bill is clearly designed to ensure that only parties deserving of participation in the program are allowed to do so. For this reason and those described above, the Commonwealth of Pennsylvania, IMCC, and NAAMLP believe that this bill provides a responsible approach to achieving its much-needed ends.

Pennsylvania's citizen, watershed, and environmental groups have long been working to address the impacts of legacy mining under the state-level protections of the Commonwealth's model EGSA, but even this particularly well-established community of potential Community Reclaimers has the potential to make an even more impactful contribution given the chance through the bill before the Committee today. For States who, in the absence of a program similar to the EGSA, do not benefit from such fruitful partnerships with their potential Community Reclaimers, this bill will ease the inadvertent suppression of these groups' assistance and help those partnerships to grow.

The bottom-line is that if we are to eliminate the lingering effects of abandoned coal mines, and in particular the impairment of our communities' water resources, every available tool and every source of help is needed. The Commonwealth of Pennsylvania, IMCC, and NAAMLP believe this bill is a responsible solution to providing the long-awaited assurances potential Community Reclaimers need to enhance their work and give the State AML programs the assistance they need to fulfill the potential of the SMCRA AML Program

Conclusion

The SMCRA AML Program has made great progress with the reclamation of abandoned coal mines, but the cost remaining to complete reclamation in every State far outweighs what has been or will be available from the AML fee. SMCRA Title IV justifiably prioritizes immediate dangers from AML sites to public health and safety, but the investment of limited grant funding in this work makes it difficult for the States to maintain adequate, consistent funding for water treatment work. As coal production declines, AML grant funding declines in turn, and with expiration of the AML fee pending in 2021, the future of AML grant funding under SMCRA is seemingly limited, or at best unclear. Meanwhile, the current inventory of known AML problems sits at over $10 billion – which would be significantly higher were the full long-term costs of AMD water treatment accurately reflected in the inventory.

While the future of the AML program remains unclear, with each passing year in which the resolution of these obstacles to AMD treatment is delayed, this fact at least has become increasingly difficult to ignore: the remaining inventory of abandoned mine lands is so large and the existing governmental resources so comparatively limited, that without a clearer, more practical process for treating AMD under SMCRA, and without the robust assistance of the States' AML partners, it will be impossible to complete the SMCRA AML programs' mission of restoring our country's AML-impacted lands and waters.

The specter of undeserved liability under current circumstances constrains the States' efforts under SMCRA and deters motivated, well-intentioned volunteers from assisting in that work, which serves only to prolong the environmental, social, and economic harm these sites represent.

It is time for Congress to restore SMCRA's role in AMD water treatment and enable the State AML programs and their partners to make meaningful progress to that end.