



**STATEMENT OF
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Before the
UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
Relating to
THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977:
POLICY ISSUES THIRTY YEARS LATER
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My name is Hal Quinn, senior vice president, legal and regulatory affairs, and general counsel for the National Mining Association (NMA). I am appearing on behalf of the NMA to testify about the coal mining industry's experience under the Surface Mining Control and Reclamation Act (SMCRA) of 1977.

NMA represents producers of over 80 percent of America's coal -- a reliable, affordable, domestic fuel that is the source of more than 50 percent of the electricity used in America. NMA's members also include the producers of metals and non-metal minerals, manufacturers of mining equipment and supplies, transporters of coal and mineral products, and other firms serving the mining industry.

General Introduction

In the 30 years since SMCRA's enactment, the coal industry has supplied over 29 billion tons of coal to fuel our nation's growth and prosperity. This is the equivalent of 115 billion barrels of oil and is five times our proven domestic oil reserve. Over 2.2 million acres of the lands supplying this coal resource have been restored to a wide variety of productive uses including farmlands, pastures, wildlife refuges, parks, recreational areas, wetlands, and commercial development. These achievements of the first order in energy production and environmental stewardship are the product of the collective efforts of the coal industry, and state and federal governments. They underscore the underlying strength of America's coal resource as the foundation of our nation's prosperity and energy security.

SMCRA Legislative History

SMCRA was the culmination of a sustained effort throughout the 1970's to enact a comprehensive federal regulatory policy for coal mining. Unlike environmental legislation directed at the impacts of many industries upon one natural resource -- e.g., Clean Water Act, Clean Air Act -- SMCRA focuses upon one industry and its effect upon various natural resources. As the legislation proceeded through successive congressional sessions, the product transformed from a 17-page version passed by the House of Representatives in 1972 to a 90-page bill reported by the conference committee and signed by President Carter on the morning of August 3, 1977.

Throughout the protracted legislative process, one theme emerged to become the central purpose of the law: strike a balance between our nation's need for coal as an essential energy source and protection of the environment. Recall that in the 1970's, this country was in the throes of economic turmoil related to its vulnerable dependence upon foreign sources of energy. The oil embargo in October of 1973 focused attention on domestic energy security and the ability of our domestic coal resources to meet increasing energy requirements. At the same time, concerns existed about the potential environmental consequences of increased coal mining.

The balance SMCRA intends to strike between meeting our energy needs and environmental protection rests upon several principles. First, coal is an indispensable and prominent part of our nation's energy requirements and prosperity. Second, coal mining should serve as a temporary use of the land. Third, coal mine development and resource management must be integrated to successfully restore mined lands to support future uses. And, fourth, given the diversity in terrain and other physical conditions among our coal mining regions, states are best positioned to develop and administer programs designed to meet those objectives.

Industry's SMCRA Experience

The protracted and contentious legislative history of SMCRA caused some lawmakers to predict that the law's implementation would meet with regulatory delays and endless litigation. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 193 (1977). The early SMCRA experience would not disappoint them. The first attempt to implement the entire range of permanent program requirements produced 150 pages of regulatory text to "flesh-out" an already prescriptive 90-page statute. An additional 400 pages were required to explain what the regulations meant. Several years later, a comprehensive review of the rules converted some of the unyielding design standards to more flexible performance standards and empowered states to tailor more suitable versions to accommodate regional differences.

Not surprisingly, SMCRA implementation has proven fertile ground for litigation. The battles waged over SMCRA implementation have extended

from the most fundamental questions about the jurisdictional reach of the law to the more arcane, such as the permissible conservation and husbandry practices to demonstrate successful reclamation. One court aptly characterized this early regulatory history with the following metaphor: "As night follows day, litigation follows rulemaking under this statute." *National Wildlife Federation v. Lujan*, 950 F.2d 765, 766 (D.C. Cir. 1991).

Apart from the turmoil accompanying efforts to establish the basic regulatory framework, the program experienced difficulty in its transition from the initial phase of shared federal and state responsibilities to the permanent phase that vested day-to-day regulatory authority with the states. In the field, the coal industry expected to see only one regulator, the state, for both permit and inspection tasks. The states shared a similar expectation since SMCRA declared that they would assume "exclusive" regulatory jurisdiction upon approval of their laws and regulations, and that the Federal Office of Surface Mining (OSM) would recede to a secondary role of overseeing state performance. In practice, the coal industry found itself positioned between conflicting state and federal applications of the law. States saw their exclusive role undermined with little deference or respect accorded to their applications of the law by OSM.

Serving two regulatory masters further compounded the difficulties coal companies confronted in complying with changing regulations. Uncertainty becomes especially frustrating to a regulated industry that operates under a statute that places a premium upon the principles of planning and sound resource management. The absence of a stable regulatory framework undermines the planning imperative. Changing standards and inconsistent application compromise the integrity of any planned strategy.

Changes in Industry Structure

In the midst of this regulatory transition, the coal industry experienced structural changes as a result of a combination of market forces and public policy choices. The number, size and location of coal mines have changed substantially.

Market forces combined with new and changing regulatory requirements caused a rapid consolidation within the industry. Between 1976 and 1986 the number of producing coal mines dropped by 32 percent (from 6,161 mines to 4,201 mines) while production increased by almost the same percent (from 685 million tons to 886 million tons). The trend in consolidation continues, and the coal industry today produces 40 percent more coal (1.2 billion tons) from 75 percent fewer mines than it did just before SMCRA's enactment.

Over the past 30 years there has occurred a significant geographical shift in coal production from the Eastern coalfields to the Western United States. Coal demand in the United States is driven by the electric power sector,

which consumes 90 percent of annual coal production. The policy choices arising over the last two decades under the Clean Air Act substantially influenced the fuel choices made by the electric power industry. The increasingly more stringent limits on emissions of sulfur dioxide at power plants made low-sulfur coal in the Western United States a cost-effective compliance strategy for many power plants. Favorable geologic conditions and economies of scale off-set the disadvantages some Western mines confront due to their distance from markets. As a result, coal produced from mines west of the Mississippi -- which accounted for only 25 percent of the annual production in 1977-- comprises almost 60 percent of production today.

SMCRA Successes

Both the industry and the SMCRA program have evolved over the past 30 years. Through persistence and innovation and aided in part by maturation in the administration of the regulatory programs, the industry has mastered the demands of the law. The investment to date has been substantial, and we can continue to report impressive returns:

- Restoration of 2.2 million acres of land to productive uses—three times the size of Rhode Island;
- Farmland with crop yields that exceed their pre-mining capabilities;
- Pasture lands that support grazing of more livestock per acre than pre-mining capabilities;
- Wildlife refuges providing new habitats for a diverse variety of species;
- Recreational areas to support fishing, hunting and other leisure activities;
- Forest lands;
- Sites in steep slope terrain that will support commercial, residential and economic development in areas where land suitable for such purposes is limited or unavailable;
- Payment of over \$8 billion in Abandoned Mine Land (AML) taxes to restore unreclaimed mined lands abandoned prior to SMCRA;
- Restoration through re-mining of more abandoned mined lands than the AML program—at no cost to the AML program; and
- Innovations in reclamation technology and practices including post mining landscape design and land use planning, water management and treatment technology, and ground control and subsidence mitigation measures.

These accomplishments have all occurred while the coal industry continues to supply our nation annually with the fuel that:

- Generates over half of all the electricity in America;
- Affordably furnishes the power to support over 151 million Americans in all activities of their daily life;

- Reliably provides the power to support employment of almost 127 million Americans; and
- Accounts for one-third of our primary energy production—the largest portion of any energy source.

Lingering Controversy

While we would like to report after thirty years that the program has emerged free of any controversy that is not the case entirely. Organizations opposed to coal mining in Central Appalachia coal region have brought a continuous series of legal attacks that have severely disrupted coal mining in this region.

The controversy surrounds what has been called mountaintop mining—but for all practical purposes this label includes almost all surface coal mining in the steep slope terrain of the West Virginia, Kentucky, Tennessee and Virginia. When coal is surface mined, the rock and dirt (overburden) that overlies the coal seams is excavated to access the coal. When rock is broken and moved, the material expands, or swells, perhaps as much as 15-40%. As a result, the volume of spoil is greater than the overburden excavated from its original geological location. Some mines generate more excess spoil than others because they are designed to leave more gently rolling or flatter land that can be used for development or other uses after mining is completed and the land reclaimed. This excess spoil must be stored somewhere permanently and in the steep slope terrain of Appalachia the only available and safest place to do so is in the narrow hollows and valleys adjacent to the mines.

Before SMCRA, conventional mining methods in Appalachia typically resulted in the placement of excess spoil on the outslopes of mountain ridges. This practice created unstable slopes of unconsolidated material prone to erosion, slides and prolonged sedimentation of streams. In the early 1970s, several emerging steep slope mining techniques—including the construction of hollow and valley fills—were hailed by various government agencies as preferred practices for avoiding these hazards. Because the construction of hollow and valley fills was found to afford significant environmental advantages, Congress incorporated them into SMCRA as an industry standard. In many respects, the location, design and construction techniques for these fill structures are similar to methods used in highway construction spoil disposal, rock-fill dam construction and highway embankment construction.

SMCRA also recognizes that land suitable for development is scarce in Appalachia and that surface coal mining provides a unique opportunity to leave land in a condition capable of supporting various economic or public uses. To address that need, the law provides that surface mines can be reclaimed without restoring the approximate original contour in order to accommodate use of the land later for industrial, commercial, agricultural, residential, recreational or public purposes. Appended to my testimony are

photographs that provide examples of how the coal industry has afforded these opportunities in the mountainous regions of Appalachia.

But these coal mines, the fuel they supply to generate our electricity, and the jobs and economic activity they provide all remain in jeopardy from a continual barrage of litigation questioning interpretations and policies that have been in place since 1977. For the fourth time since 1998, organizations have sought court orders to stop ongoing mining operations and to prevent new mines from opening. The first three times, they were momentarily successful, but their preferred interpretations of the law were ultimately found to lack merit. See *Bragg v. West Virginia Coal Association*, 248 F. 3d 275 (4th Cir. 2001); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F. 3d 425 (4th Cir. 2003); *Ohio Valley Environmental Coalition v. Bulen*, 429 F. 3d 493 (4th 2005). A Marshall University study found that if the views advocated in the first lawsuit prevailed, the state of West Virginia alone would lose over ten thousands jobs, hundreds of million dollars in wages and \$168 million in state and local revenues annually. Burton, Hicks and Kent, *The Fiscal Implications of Judicially Imposed Surface Mining Restrictions in West Virginia* (Feb. 2001).

This time they have obtained a court order that will close four mines and possibly a fifth one in West Virginia. Together these mines are projected to produce 50 million tons of coal, employ over 600 miners and other personnel, pay some of the highest wages in the region and provide over \$100 million in coal severance taxes to the state. And the collateral damage from this latest litigation may well exceed this direct hit. Since the court's initial order last March, less than a handful of permits have been issued in this jurisdiction. There are reportedly about 70 permits pending that have not been issued which are necessary to sustain existing mines or open new ones. As coal mines begin to reach their economic and operational limits, they will be forced to shut down if permits to expand their capacity are not issued in the next several months. The uncertainty and permitting delays are causing investments in new mines to be shelved or shifted to other states.

The interpretational disputes surrounding this litigation have become an epic in itself. While the focus has largely centered on West Virginia and surrounding parts of Central Appalachia, the reversal of longstanding policies advocated in the litigation have implications beyond that region and, perhaps, the coal industry as well.

Lessons Learned

Tomorrow's successes will depend largely upon whether we learn anything from our past. There are many lessons from the 30-years of SMCRA implementation, and we offer several here based upon our experience.

Design vs. Performance Standards: Some have observed that the excessive complexity and detail of the statute, compounded by the zeal of the federal

agency to outdo the legislators with even more detailed regulatory design standards, defied comprehension by the industry, states, and even by the legal minds that produced the regulatory product. Design standards are inherently inflexible and counterintuitive for national goals whose success will require the accommodation of diverse physical and geological conditions. A design standard approach to regulation stymies innovation. By contrast, a performance-based approach can accommodate new technology and advancements in mining and reclamation practices and is therefore more responsive to the diverse conditions found in the mining regions and an evolving industry. The switch to performance standards in the 1980's contributed greatly to the mined land reclamation successes we see today.

State Primacy: The regulation of land use, a historically local prerogative, on a national basis is difficult at best, and all but impossible if local, state and regional differences cannot be accounted for in the implementation of statutory goals. Each state and region has different needs and interests when it comes to land use. But SMCRA recognizes this: indeed, state primacy is the cornerstone of the law precisely because good ideas and practices in one state for achieving a national goal may not be good ones in another. State primacy needs to be supported institutionally and financially to assure continued success. For the most part, the earlier distrust of state capabilities has receded and has been replaced by respect and cooperation between the federal and state agencies. However, fiscal constraints in some states may jeopardize the continued retention of their programs. Consideration should be given to altering the law's federal funding formula, particularly as one considers that some of the increased costs have arisen from new federal mandates imposed by OSM regulatory initiatives. State programs are more cost-effective than federal programs as demonstrated by OSM's experience in administering a federal program in Tennessee after the state relinquished primacy.

Regulatory Duplication and Efficiency: SMCRA established a comprehensive program for regulating the effects of coal mining upon a wide array of natural resources. Nonetheless, it did not displace all existing laws that address specific resources, for example the Clean Air Act or Clean Water Act. In the past, this overlap has caused confusion and, at times, conflict for the industry in meeting overlapping program goals. The Clean Water Act is a prominent example of this overlap. SMCRA contains extensive requirements for hydrologic analysis, monitoring and protection requirements for coal mines. In some cases, federal and state agencies have strived to reconcile these programs and minimize duplication. Nonetheless, more can still be done to rely upon the regulatory benefits of SMCRA, avoid unnecessary duplication, achieve regulatory efficiencies and reap the attendant environmental benefits as envisioned by both the Clean Water Act and SMCRA.

Looking Ahead

As we reflect today upon SMCRA's 30th anniversary, there appears to be a remarkable similarity between our country's energy situation in 1977 and today. When President Carter signed SMCRA that summer morning in the Rose Garden thirty years ago, "energy independence" was a national imperative. It is no less so today, but it now goes by the name "energy security." Today, we import about 60 percent of our petroleum needs, a share that the Energy Information Agency (EIA) projects will grow to 75 percent by 2030. By that time, we will consume 28 percent more oil and 19 percent more natural gas. Yet the United States has only 3 percent of the world's oil reserves and not much more of its gas reserves. Since SMCRA's passage, our energy use has jumped 23 percent, but our energy production has increased by only 7 percent. Meanwhile, energy imports have climbed by 70 percent.

We sometimes forget that the United States is a growing country. Our population grew by almost 3 million people in 2005 and now exceeds 300 million. Our economic growth has eclipsed most mature economies. So, there is no question that our nation will require more energy in the future, just as it did 30 years ago, to sustain our economic growth. We will use energy more efficiently due to technological advances, conservation and increased efficiency. But, we will still use more energy. Not surprisingly, therefore, our need for coal is projected to increase from 22.9 quads in 2005 to over 34 quads in 2030, reflecting the 156 gigawatts of new coal-based generating capacity that are projected to be needed by the end of the EIA forecast period.

Meeting this demand with reliable, affordable and secure sources will be a challenge, but a challenge that can be met with the correct policies that enhance the role of all domestic energy sources, including policies that ensure that our coal resources can continue to play the critical role in our energy future.

Conclusion

Thank you for the opportunity to share with you the mining industry's experience under SMCRA and to express its views on the critical role of our domestic coal resources to our nation's energy security and prosperity.

FARMING



Pine Branch Cattle Farm
Perry County, Kentucky

FORESTY & WETLANDS



Reclamation creates new habitat for birds and animals in West Virginia.

RECREATION



Stonecrest Golf Course in
Floyd County, Kentucky.

HOUSING



Housing development in
Perry County, Kentucky

SCHOOLS



Mount View High School
Welch, West Virginia

AIRPORTS



**Big Sandy Regional Airport
Martin County, Kentucky**