

**STATEMENT OF
HAROLD P. QUINN, JR.
SENIOR VICE PRESIDENT & GENERAL COUNSEL
THE NATIONAL MINING ASSOCIATION
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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
Relating to
THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977:
A 30TH ANNIVERSARY REVIEW
July 25, 2007**

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 and success under the Surface Mining Control and Reclamation Act (SMCRA) of 1977. I suspect that among those on hand when President Carter signed Public Law 95-87 on a summer morning 30 years ago, only a few would have ventured to predict the many successes of America's coal industry in responding to the nation's increasing demand for more energy and improved environmental performance.

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, environmental stewardship and reclamation 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 and size of coal mines and companies changed substantially. When SMCRA was debated, economic analysts predicted that coal prices would soon exceed \$50 a ton. These forecasts proved well off the mark. The average price of coal in real terms declined \$10 per ton in just 10 years (1975-1985), and by 1988 it fell to \$22 a ton.

These market conditions forced 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 remedy for the diminishing margin between increasing mining costs and decreasing coal prices was a powerful and sustained increase in productivity, i.e., more production from fewer and larger mines and companies. The trend in consolidation continued, 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.

Perhaps the most significant development related to coal markets over the past 30 years is the 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. We are hopeful the program has turned the corner where conflict has given way to cooperation, and litigation has been replaced by innovation. 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.

Lessons Learned

It would be imprudent to simply praise these collective achievements without drawing any lessons from the 30 years of experience in the implementation of SMCRA. Tomorrow's successes will depend largely upon whether we learn anything from our past.

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 -- let alone implementation—by the industry and 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. As our good friend, Ben Greene, the former president of the West Virginia Mining and Reclamation Association, once advised, "a perfectly good hunting dog in Wyoming may not hunt in West Virginia, and vice versa." 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 culturally 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 matching federal funding formula, which is capped at 50 percent of program costs, particularly as one considers that some of the increased costs have arisen from new federal mandates imposed by OSM regulatory initiatives. The OSM experience in Tennessee is ample proof that investing a greater share of federal dollars into state primacy will save the federal government substantially, since the state programs have been dollar-for-dollar more cost-effective than a federal program.

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 in light of today's energy picture, I cannot help but think of the film *Back to the Future*. When President Carter signed SMCRA that Wednesday morning in the Rose Garden, "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,

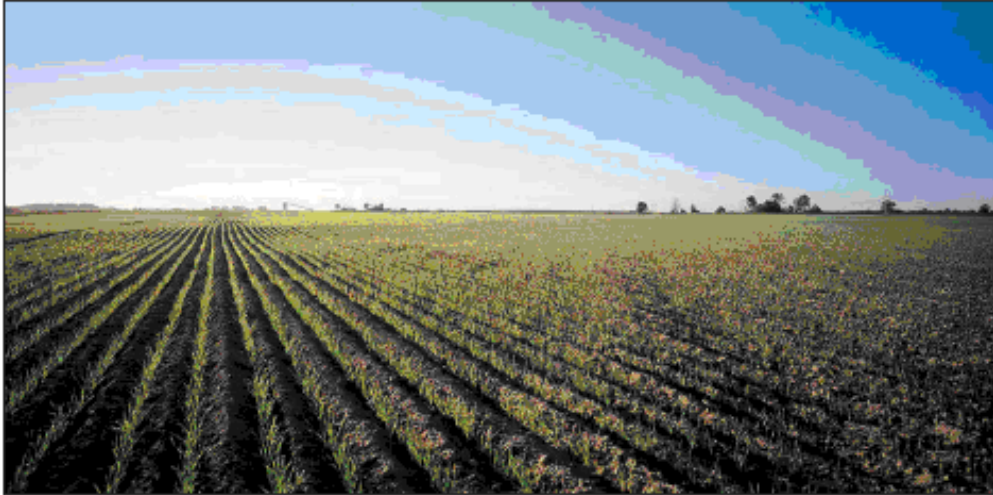
therefore, coal consumption is projected to increase from 22.9 quads in 2005 to over 34 quads in 2030, reflecting the 156 gigawatts of new coal-based generating capacity that are projected to be needed by the end of the EIA forecast period.

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



Crops growing on mined lands at Black Beauty's Farmersburg Mine in Indiana.

FORESTY & WETLANDS



Five wetland areas and 40 acres of hardwood at Tatum Mine in Texas.

RECREATION



Twisted Gun golf course
in West Virginia.

HOUSING



Single family housing
community in Montana.