STATEMENT OF
HAROLD P. QUINN, JR.
EXECUTIVE VICE PRESIDENT
THE NATIONAL MINING ASSOCIATION
Before the
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
Relating to
H.R. 2421
THE CLEAN WATER RESTORATION ACT OF 2007

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My name is Hal Quinn, executive vice president and general counsel, for the National Mining Association (NMA). NMA appreciates the invitation to testify about H.R. 2421, "The Clean Water Restoration Act of 2007."

NMA is the national trade association representing producers of most of America's coal, metals and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

Introduction

The development of the energy and mineral resources required by our Nation involves a unique set of technological, logistical and economic considerations. Given that coal and minerals are fixed in location, we could hardly go about the business of finding, producing and supplying them for our society without incurring water or land features where water may pass. So, our members have a vast amount of experience with questions about which waters fall within the purview of the Clean Water Act (CWA) as well as the myriad of permitting and performance standards that protect them.

Restoration or Revision

We respect that the sponsors of H.R. 2421 consider the legislation a clarification of congressional intent on the CWA's jurisdictional reach. However, we believe that the bill would alter the statutory intent as gleaned from its text and structure.

The CWA is a comprehensive and complex statute. To be sure, the question of where waters of the United States begin and end has proven to be a

difficult one. Nonetheless, the answer must at least start with "navigable waters" which provides the statutory context for the obligation to obtain a permit before discharging a pollutant. 33 U.S.C. § 1311(a), 1362(12)(A) (making it unlawful to discharge a pollutant into navigable waters without a permit). *See also id*. at § 1342(b), § 1344(a). In defining the term 'navigable waters' as waters of the United States, it has been recognized that Congress intended to regulate at least some waters that would not be meet the traditional understanding of navigable. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

The recognition that Congress intended to authorize the regulation of some waters that do not meet the classical understanding of navigability does not carry with it the notion that the term "navigable" has no effect at all on the meaning of waters of the United States. As the Supreme Court held, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA." *Solid Waste Agency of Northern Cook County v. U.S. Army of Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172 (2001). In that regard, it begins with waters navigable in fact or which could reasonably be so made, *id*. (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); and, at its outer bounds, could not extend further than allowed under the Commerce Clause such as discharges of pollutants into nonnavigable waters that substantially affect interstate commerce. *Cf., Riverside Bayview*, 474 U.S. at 133.

It is from this framework that the jurisdictional instruction is derived that the CWA reaches those waters with a "significant nexus" to traditionally navigable water. *SWANCC*, 531 U.S. at 167. *See also Rapanos v. United States*, 126 S. Ct. 2208, 2225 (2006) (Kennedy, J., concurring in judgment). Although this instruction admittedly does not carry the precision all would desire, when those bounds are reached it does not leave a gap in protection. Where waters of the United States end, waters of the state still remain and there is no reason to suppose that the states are inadequate to the task of protecting those resources. Indeed, the core policies informing the administration of the CWA include recognition of the states historic role in managing their water resources and their primary responsibility and rights to plan the development and use of land and water resources. 33 U.S.C. § 1251(b), (g).

H.R. 2421 alters fundamentally this framework. First, deletion of the term "navigable waters" removes the historic bounds of regulation. No longer would waters need any sort of nexus or connection—let alone a significant one—with navigable or even interstate waters for the federal government to assert jurisdiction over any water or land over which water may pass. Moreover, removing "navigable" as the reference point eliminates the Commerce Clause power as the outer bounds of the federal government's reach. This is further confirmed by the insertion of a reference to "the legislative power of Congress under the Constitution," which packs even

more weight behind calls for more expansive assertions of federal regulatory powers over land and water.

The legislation would also alter the historic context of CWA regulation. Under the current regulatory definition of waters of the United States, nonnavigable and non-interstate waters may be regulated if their use or degradation would affect interstate or foreign commerce. Under the legislation's definition, federal jurisdiction turns upon whether "activities affecting these waters" are subject to any legislative power of Congress. In short, waters become federalized not due to any discharge to waters that affects commerce, but simply because an "activity" that falls within the constitutional realm of Congress' legislative powers affects waters. Such changes could potentially unleash a significant and substantial federal usurpation of the traditional powers of state and localities in land use and water resource management. For businesses like mining, changing the jurisdictional reach of the law poses grave dangers of compromising their investments and compliance strategies for existing operations and facilities developed under a different understanding.

The Overburdened CWA Permitting System

Putting aside the question about Congress' original intent, undoubtedly H.R. 2421 would change the existing status quo. As a consequence, the proposed changes to the CWA would have a measurable effect on the existing regulatory burdens borne by businesses, landowners and governments.

The existing permitting system is already overwhelmed. The CWA § 402 National Pollutant Discharge Elimination System (NPDES) program has backlogs for renewals of expiring permits for existing facilities. The CWA § 404 dredge and fill program administered by the U.S. Army Corps of Engineers reportedly has a backlog of pending permit applications or notices involving more than 5,000 project proposals.

The time and costs incurred to navigate the permitting process is protracted and expensive. One study found the mean cost of preparing an individual permit application under CWA § 404 to exceed $270,000, excluding the expenses related to satisfying permit stipulations such as mitigation and design changes to the proposed project. David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation: A Post SWANCC Exploration of Conservation Alternatives* (Jan. 2003).

The expense in preparing a permit application is only part of the costs associated with an overburdened permitting system. The delays in receiving permits necessary to begin or continue an enterprise comprise an even more significant cost. According to the Sunding & Zilberman study, on average, CWA § 404 individual permits required a total of 788 days to prepare and obtain a decision, with 405 of those days involving the agency's

deliberations. *Id*. at 8. For capital intensive industries like mining, a delay of weeks or months can mean substantial losses in the net present value of a project. These risks unduly delay returns on investments and cause investors to look elsewhere in deploying their investment capital.

We believe it ill-advised to make such fundamental changes in the law when the existing permitting system appears ill-equipped to respond. The current state of affairs has eroded confidence in the process and frustrated the investments and plans of businesses and landowners. Forcing more permit traffic on to an already constrained regulatory infrastructure will only increase that frustration and makes the regulatory program less credible.

Upgrading the permitting system so that it can be responsive to the requirements of the regulated community will require a substantial investment. The expense and delays arise from a lack of sufficient resources as well as increasingly complex issues. However, there are opportunities to improve permitting efficiencies for some industries that are already subject to a myriad of state and federal environmental programs that overlap and duplicate the CWA in terms of their purpose and goals.

One of the goals of the CWA is to "prevent needless duplication and unnecessary delays" in the law's implementation, including encouraging a "drastic minimization of paperwork and interagency decision procedures." 33 U.S.C. § 1251(f). The domestic mining industry already operates under a robust and comprehensive set of state and federal laws that prescribe substantive goals and procedures to prevent or minimize adverse impacts to environmental resources. In many cases, these laws and programs require the assessment and protection of the same water resources that are targeted by the CWA. We have appended to this statement a brief overview of the permitting and performance standards for coal mines nationally under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. 1201 *et seq*., and the planning, permitting and operational requirements for mining minerals on public lands under the Federal Land Policy Management Act (FLPMA), 43 U.S.C. § 1732 (as implemented in 43 C.F.R. Subpart 3809).

Our suggestion here is not that these laws should supplant the CWA. Rather, given the overlap there is potential for greater efficiencies for the regulated and regulators in terms of permitting steps, timelines, public participation, collection of environmental resource information, analysis of impacts and development of mitigation measures.

Conclusion

NMA supports the goals of the CWA to restore and maintain the integrity of our Nation's waters, but we do not believe changing the federal reach of that law is necessary in order to achieve them. A greater threat to the CWA's goals may be a permitting system that is not capable of producing reasonable decisions in a reasonable timeframe.

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976:

- ***In General*** – Permitting Authority for Hardrock Mining on Federal Lands.
- ***Environmental Standard*** (43 U.S.C.A. § 1732(b)) – Requires the Secretary of Interior to "take any action necessary to **prevent unnecessary or undue degradation** of the lands" in managing the public lands.
- ***Surface Management Regulations*** (43 C.F.R. Subpart 3809) – Establishes procedures and standards to ensure that "anyone intending to develop mineral resources on the public lands [ ] **prevent unnecessary or undue degradation of the land and reclaim disturbed land**." 43 C.F.R. § 3809.1(a).

- **Plan of Operations** – Required, except for "casual use" operations or mining operations that will cause a cumulative surface disturbance of 5 acres or less. 43 C.F.R. §§ 3809.10, 3809.11, 3809.21, 3809.31. The plan of operations "must demonstrate that the proposed operations would **not result in unnecessary or undue degradation of public lands**."

  Plan of Operations Must Include (43 C.F.R. § 3809.401)**:**

  1. Water Management Plans
  2. Quality Assurance Plans
  3. Spill Contingency Plans
  4. Reclamation Plans

     Including Plans for:

     - Regrading and Reshaping
     - Mine Reclamation
     - Riparian Mitigation
     - Wildlife Habitat Rehabilitation
     - Topsoil Handling
     - Revegetation
     - Isolation and control of acid-forming, toxic, or deleterious materials
  5. Monitoring Plan

     Examples of Monitoring Programs:

     - Surface & Groundwater Quality & Quantity
     - Air Quality
     - Revegetation
     - Wildlife Mortality
  6. Interim Management Plan
  7. Reclamation Cost Estimate

Performance Standards Applicable to Plan of Operations (43 C.F.R. § 3809.420):

1. Land-use Plans
2. Mitigation Measures
3. Concurrent Reclamation
4. Compliance with all other laws
5. Specific Standards:
    - Air Quality
    - Water Quality
    - Disposal & Treatment of Solid Wastes
    - Fisheries, Wildlife, & Plant Habitat
    - Cultural Resources
    - Acid Forming, Toxic, or Other Deleterious Materials
    - Leaching Operations & Impoundments

- ***Public Notice & Comment & Judicial Review*** (43 C.F.R. §§ 3809.411(c) & 3809.800 – 3809.809) **–** BLM will publish a notice of the availability of the plan of operations in a local newspaper of local circulation and will accept public comment for at least 30 calendar days. A party adversely affected by a decision under these regulations may either (1) petition the State Director or appropriate BLM State Office to review the decision; or (2) directly appeal a BLM decision to the Office of Hearings and Appeals.

SURFACE MINING CONTROL AND RECLAMATION ACT:

- ***In General*** – Permitting authority for surface coal mining operations to **"assure that surface coal mining operations are so conducted as to protect the environment."** 30 U.S.C.A. § 1202(d).

- ***Surface Coal Mining & Reclamation Permit*** (30 U.S.C.A. §§ 1256 – 1259) – Prior to engaging in or carrying out any surface coal mining on federal lands, a valid surface coal mining and reclamation permit must be obtained from OSM. SMCRA Regulations establish permit requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations. 30 C.F.R. Part 772.

  Permit Application – Statutory Requirements (30 U.S.C.A.§ 1257(b), 1258, 1259, & 1260(c)):

  1. Information Requirements

     Including:

     - Various maps showing land to be affected, including topographical maps and cross-section maps.
     - Name of the watershed and location of stream or tributary into which surface and pit drainage will be discharged.
     - A determination of the probable hydrologic consequences of mining and reclamation operations both on and off the mine site, including sufficient data for an assessment of probable cumulative impacts on the hydrology of the area.

  2. Reclamation Plan
  3. Insurance Certificate
  4. Blasting Plan
  5. Schedule of all notices of violations of SMCRA and air or water environmental protection laws received in connection with any surface coal mining operations within the three-year period prior to the date of the application.
  6. Performance Bond

Permit Requirements for Exploration (30 C.F.R. Part 772) – Includes Description of:

1. Cultural or Historical Resources
2. Archaeological Resources
3. Endangered & Threatened Species
4. Measures to Comply with Performance Standards
5. Various Maps of Areas of Proposed Exploration and Reclamation

Permit Application – Minimum Requirements for Information on Environmental Resources (30 C.F.R. Part 779):

1. Cultural, Historic, & Archaeological Resources
2. Climatological Information
3. Vegetation Information
4. Soil Resources Information
5. Land Use Information
6. Various Maps

Permit Application – Minimum Requirements for Reclamation and Operation Plan (30 C.F.R. Part 780):

1. Information on Proposed Mining Operations & Existing Structures
2. Blasting Plan & Monitoring System
3. Air Pollution Control Plan
4. Fish & Wildlife Information
5. Reclamation Plan
   - Compliance with Environmental Performance Standards (*See* below)
   - Estimate of Reclamation Cost and Timetable
   - Plan for Backfilling, Soil Stabilization, Compacting, & Grading
   - Plan for Removal, Storage, & Redistribution of Topsoil, Subsoil, and Other Material
   - Plan for Revegetation
   - Description of Measures to Maximize the Use and Conservation of Coal Resources
   - Measures to Seal or Manage Mine Openings
   - Description of steps to comply with Clean Air Act, Clean Water Act, and other applicable air and water quality laws and regulations and health and safety standards
6. Hydrologic Information
7. Geologic Information
8. Land Use Information
9. Siltation Structures, Impoundments, Banks, Dams, & Embankments
10. Protection of Publicly Owned Parks & Historic Places
11. Disposal of Excess Spoil

- ***Environmental Performance Standards*** (30 U.S.C.A. §§ 1251 & 1265) **–** Any surface coal mining operations authorized on federal land must meet **all applicable environmental performance standards** provided in SMCRA and its implementing regulations. These standards are deemed necessary "to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." 30 U.S.C.A. § 1201(d).

Environmental Performance Standards (30 C.F.R. Subpart 816 & 817):

1. Casing and Sealing of Drilled Holes
2. Removal, Timing, Storage, & Redistribution of Topsoil & Subsoil
3. Ground-water & Surface-water Protection & Monitoring; Acid Drainage; Water Rights & Replacement
4. Water Quality Standards & Effluent Limitations
5. Diversions
6. Sediment Control Measures
7. Siltation Structures
8. Discharge Structures
9. Impoundments
10. Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities
11. Stream Buffer Zones
12. Coal Recovery
13. Use of Explosives
14. Disposal of Excess Spoil
15. Coal Mine Waste
16. Stabilization of Surface Areas
17. Protection of Fish, Wildlife and Related Environmental Values
18. Contemporaneous Reclamation
19. Backfilling and Grading
20. Revegetation
21. Cessation of Operations
22. Postmining Land Use

- ***Public Notice & Comment & Judicial Review*** – SMCRA provides citizens the opportunity to participate in rule making, permit approval, bond release, inspections, and enforcement.

  1. ***Rulemaking*** – Public notice and comment is provided prior to the promulgation of rules implementing SMCRA. 30 U.S.C.A. §§ 1202(i) & 1251.

  2. ***Permit Issuance*** – Applicants for a surface coal mining and reclamation permit must file a copy of his application for public inspection with the recorder at the courthouse of the county or an approved public authority where the mining is proposed to occur. 30 U.S.C.A. § 1257(e). In addition, the applicant must also place an advertisement in a newspaper of general circulation in the locality of the proposed site at least once a week for four successive weeks notifying the public on the filing of the mine permit application and reclamation plan. 30 U.S.C.A. §§ 1257(b)(6) & 1263(a). Any person with an interest that may be adversely affected by a proposed operation may file written objections to a proposed or revised permit application and request an informal conference. 30 U.S.C.A. § 1263(b). The regulating agency is required to issue within 60 days after the informal conference a written decision with supporting reasons for its grant or denial of a permit application. 30 U.S.C.A. § 1264. The applicant or any interested person may request a hearing to review the reasons for the decision. 30 U.S.C.A. § 1264(c); 30 C.F.R. § 775.11.