U.S. CHAMBER OF COMMERCE

October 26, 2015

VIA ELECTRONIC FILING

Office of Surface Mining Reclamation and Enforcement
Administrative Record, Room 252 SIB
1951 Constitution Avenue NW
Washington, DC 20240

Re: Comments on the Proposed Stream Protection Rule;
Docket ID No. OSM-2010-0018; Federal Register Vol. 80, No. 143 (July 27, 2015);
RIN 1029-AC63

The U.S. Chamber of Commerce and the National Association of Manufacturers (the Associations) submit the following comments on the Department of Interior, Office of Surface Mining Reclamation and Enforcement's (OSM) Proposed Stream Protection Rule (SPR) and the Draft Regulatory Impact Analysis (RIA) (OSM-2010-0018) and urge OSM to withdraw the proposed rule. While this proposed rule directly impacts coal mining in the United States, its repercussions will be felt throughout the economy. From the railroads that have significant investments in transporting coal, to utilities that provide coal-fired power, to manufacturers reliant on that affordable coal-fired power, the Associations have a substantial interest in this rulemaking. Finally, as highly regulated entities, the Associations have significant interest in ensuring federal rules and policies provide the regulatory certainty necessary to allow businesses to remain competitive and prosper.

Natural resources are the lifeblood of the economy and critical to the nation's ability to compete in the global marketplace. Coal is one of the nation's most abundant energy resources and a vital part of our efforts to meet our energy and transportation needs. Coal generates a significant percentage of our nation's electricity, amounting to 40 percent of domestic electricity production in 2014. Maintaining coal as part of a diverse "all of the above" national energy portfolio is in the best interest of national security and the economy. Indeed, since 2011 more than 40,000 coal miners have lost their jobs. OSM's own very modest and incomplete analysis suggests another 7,000 coal miners in 22 states will lose their jobs as a result of the SPR. A recent economic impact analysis conducted by Ramboll Environ suggests up to 77,520 coal mining jobs could be at risk and nearly 300,000 total jobs lost in mining and support industries as a result of the SPR.[1] All of this is at a time when working families are struggling to recover.

The costs for environmental protection compete in a society with finite resources to address diverse, worthy goals. Environmental laws and regulations are essential to the orderly running of society, the protection of health and the environment, and to the operation of a free

[1]Ramboll Environ, ECONOMIC ANALYSIS OF PROPOSED STREAM PROTECTION RULE, Final Report, Oct 2015.

market. However, regulations must be based on scientific criteria resulting in cost-effective measures that provide significant and demonstrated environmental or human health benefits. This process includes the application of risk-based hazard identification and prioritization; scientifically sound risk analysis; benefit-cost analysis; flexible, efficient and cost-effective risk management; and adequate opportunity for meaningful public participation. The SPR fails on all counts.

For the reasons explained below, the OSM should withdraw the SPR and propose a new rule that demonstrates constructive collaboration with the states and a thorough assessment of the economy-wide impacts of the rule.

Unnecessary Federal Overreach

Great advances in environmental protection have resulted from practical, cooperative programs between regulated entities and regulatory agencies. As environmental problems require more technically complicated solutions and the global business environment becomes more competitive, greater emphasis should be given to such cooperative approaches and to providing compliance assistance. State agencies, rather than the federal government, are often in the best position to consider, understand and effectively act upon local environmental needs.

The Surface Mining Reclamation and Enforcement Act (SMCRA) created a program based on a strong foundation of cooperative federalism whereby the federal agency establishes a set of minimum standards and states are able to develop and implement state-specific standards, so long as those standards meet the federal minimum requirements. In the case of mining regulations, this cooperative approach makes sense because different states have different mining industries and resources, as well as vastly different climates, ecosystems and resource sensitivities.

As proposed, the SPR would essentially eliminate those state-specific programs in favor of a prescriptive, one-size-fits-all federal program. Importantly, neither the proposed rule nor any of its supporting documents demonstrate or even suggest that existing state regulatory programs are ineffective or that implementation or compliance concerns necessitate the proposed significant overhaul. Unless and until the agency has identified failures or otherwise demonstrates that existing state regulatory programs are underperforming or obsolete, the existing programs should remain in place. The proposed SPR needlessly reforms a program that OSM itself has repeatedly evaluated and concluded is successful at the state level and protective of the environment.

Inconsistency with Environmental Regulations

The proposal veers well beyond the authorities provided in the SMCRA and into at least two other federal regulatory programs – the Clean Water Act (CWA) and the Endangered Species Act (ESA) – which are administered by the EPA, the Army Corps of Engineers, the U.S. Fish and Wildlife Service and authorized state and tribal regulatory agencies. Section 702 of SMCRA makes it clear that DOI's authority "shall not be construed as superseding, amending, modifying, or repealing" other environmental statutes.[2] Consequently, if the SPR is finalized as drafted, the provisions that overlap, and sometimes conflict with other federal programs, will be

[2] 30 USC § 1292 (a).

at best confusing and difficult for the regulated community to comply with, and at worst may violate section 702 of SMCRA.

The SPR addresses several issues which are authorized by the CWA, not the SMCRA, and which are outside of OSM's statutory authority, including stream use designation, water quality assessment, criteria development, and mitigation requirements. Indeed, the CWA authorizes the EPA, the Army Corps and authorized states and tribes to protect the nation's water quality. It is simply not reasonable for the SPR to duplicate existing regulatory programs that are properly and successfully implemented, particularly if they contain potentially conflicting standards and requirements.

Similarly, the SPR purports to "ensure compliance" with the ESA by incorporating a requirement to consider impacts to threatened or endangered species in the permit review process. The proposed SPR provisions concerning endangered/threatened species are unnecessary, duplicative, and potentially create confusion concerning when and to what standard threatened and endangered species must be evaluated. These provisions also arguably shift the final approval of a permit application to the U.S. Fish and Wildlife Service. The ESA is an independently enforceable federal statute and it should be respected as such.

Inadequate Economic Analysis

Executive Order 12866 states: "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[3] Without this important quality analysis, it is difficult to ensure that regulations are meeting health, safety and environmental objectives in a cost-effective manner. More recently, President Obama reaffirmed the principles of sound rulemaking when he issued Executive Order 13563, stating,

> Our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative… It must measure, and seek to improve, the actual results of regulatory requirements.[4]

We agree with these principles and believe that a rule can and should be constructed in a way that protects health and safety without creating new barriers to American competitiveness and economic growth.

However, the RIA accompanying the proposed rule is flawed by at least three significant omissions and errors affecting the cost side of the analysis. Consideration of these omissions and errors suggests that OSM's projection of annual compliance cost of $52 million per year for the proposed regulatory alternative may be significantly underestimated. The three cost analysis flaws identified are explained in detail below.

[3] EO 12,866, "Regulatory Planning and Review" 58 Fed. Reg. 190 (Oct. 4, 1993).
[4] EO 13,563, "Improving Regulation and Regulatory Review," 76 Fed. Reg. 3,821 (Jan. 18, 2011).

i. Failure to consider the effect of regulation on the time dimension of the permitting process

The effect of regulatory requirements, reviews and appeals by opposing interests to slow the permitting process for energy and infrastructure projects is a well-documented concern. For example, the Chamber's report ***Project-No-Project***,[5] highlights 351 proposed energy production and distribution projects that have been stalled in the permit process for inordinate lengths of time. The proposed SPR includes new requirements that will add to the processing and review time of permit applications, including the proposed expansion of pre-mining data collection requirements to establish the baseline for groundwater and surface water conditions and additional studies regarding delineation of hydrologic balance parameters adjacent to project areas. The inherent subjectivity of the review process and the potential for intervention by outside parties in opposition to permit applications create the likelihood for a continuing loop of requirements to refine and resubmit application materials.

While the RIA has attempted to calculate the direct costs added to the typical application package production process by these additional requirements, the analysis does not consider the economic effect of the time dimension. In other words, these new requirements will add significantly to the time from initiation of permit application (including data collection and analysis), to submission of a complete application, to the ultimate review time by the agency. The new data collection requirements also add to the likelihood that outside interested parties may not understand or may choose to challenge the data upon which an application is based.

In any investment, time is a critical economic parameter. Extending the time from initiation of an application to final decision to permit means that opportunity cost of capital invested in the collection and analysis of data and invested to secure land use rights pending project approval is accumulating while return on the investment is held in abeyance. Lengthening the review process lowers the eventual rate of return on the investment, and prolonged delays of the permit process may lead to abandonment of a project or discourage its initiation. The timing of the application and review processes may have an equal or greater effect on the economic conditions of the coal market as do the direct costs of the application elements. Yet these effects have not been acknowledged in the RIA, let alone analyzed and addressed. Proper analysis of time-cost impacts in the RIA is likely to significantly increase the total compliance cost of the proposed approach and may change the assessment of the most cost effective alternative.

ii. Failure to consider the effect of the regulation on the probability of increased permit denials

OSM also has failed to consider the fact that its proposed expansion of permit application requirements and review criteria is likely to result in fewer approved applications and less overall domestic coal production. Again, the RIA includes only the additional direct administrative costs of developing a permit application and collecting the requisite baseline data in relation to a typical approved mining project. In reality, only a fraction of permit applications are approved under existing rules, and the more extensive requirements and review criteria in the proposed rule will inevitably reduce the fraction of approved applications even further.

[5] Pociask, S. & Fuhr, J., PROJECT NO PROJECT, March 10, 2011. *Available at* www.projectnoproject.com.

Based on the economic impact analysis conducted by Environ, the proposed SPR could prevent up to 65% of existing domestic coal reserves from being extracted, the lost value of which is estimated between $14 - 29 billion. Such a significant limitation in domestic energy production will result in economic impacts throughout the supply chain, including cost increases for all electricity customers, industrial and residential.

OSM's failure to include these impacts in the RIA is another reason to expect that the actual regulatory cost and economic impact of the proposed SPR will be significantly greater than the value estimated in the published RIA.

iii. Failure to consider the compounding impacts of the SPR and other regulations

The RIA fails to consider or account for the compounding economic impacts from other significant rules affecting the domestic mining, energy, infrastructure and other related sectors. Executive Order 13563[6] calls on federal agencies to review and understand the cumulative impacts of regulatory programs. Section 1(b)(2) provides that each agency must, among other things, "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, *taking into account, among other things, and to the extent practicable, the costs of cumulative regulations*."[7] OSM should have conducted such an analysis to understand how the burdens of the proposed SPR may be compounded by the new regulatory requirements and constraints created by EPA's recent definition of Waters of the U.S. and its final Clean Power Plan rule, among others.

OSM failed to comply with mandatory impact analyses, including Executive Order 13563, and did not consider the realistic cost of cumulative regulations. Until a full analysis is undertaken, the proposal should be withdrawn.

Conclusion

Sound science and appropriate risk management processes must be utilized, in coordination with states and other affected stakeholders, to better focus our national effort and resources on environmental problems that pose a truly significant risk. OSM has not demonstrated that the proposed SPR is the result of such processes, evaluations or coordinated effort. Consequently, OSM should withdraw the SPR and undertake such processes before proposing a new rule.

A strong new proposal would employ rigorous economic analysis to better understand potential economic impacts and cost-benefit relationships. It is critical to identify sensible policy options and optimize the allocation of available resources to prevent requirements that create costly inefficiencies and waste precious economic and natural resources. Finally, before moving forward OSM should complete cumulative analyses of a regulation's impact on the regulated industry, manufacturers, energy consumers and the overall economy.

The high standard of living every American deserves depends upon a healthy environment, robust economic growth and an adequate and secure supply of energy at globally competitive prices. Measures to protect environmental quality should address an identified need and be based on facts and credible science. Because the SPR fails to adequately address or balance these important factors, the proposal should be withdrawn.

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[6] EO 13,563, "Improving Regulation and Regulatory Review," 76 Fed. Reg. 3,821 (Jan. 18, 2011).
[7] *Id*. at 3,821 (emphasis added).