To: Dravis, Samantha[dravis.samantha@epa.gov]
From: Nolan, Rich
Sent: Tue 5/16/2017 5:46:09 PM
Subject: NMA's Comments -- Hope you are well. Rich
NMA Regulatory Review Submission.pdf

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BRUCE WATZMAN
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May 15, 2017

Ms. Samantha K. Davis
Regulatory Reform Officer and
Associate Administrator, Office of Policy
U.S. Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: National Mining Association Response to Request for Comments on Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777, 82 Fed. Reg. 17,793 (Apr. 13, 2017); Docket ID No. EPA-HQ-OAR-2017-0190

Dear Ms. Davis:

The National Mining Association (NMA) appreciates the opportunity to submit this letter in response to the U.S. Environmental Protection Agency's (EPA) April 13, 2017 *Federal Register* notice "seeking input on regulations that may be appropriate for repeal, replacement, or modification." 82 Fed. Reg. 17,793. Consistent with the directive contained in E.O. 13777, 82 Fed. Reg. 12,285 (Mar. 1, 2017), our review has focused on regulations that: (1) eliminate jobs, or inhibit job creation; (2) are outdated, unnecessary; or ineffective; (3) impose costs that exceed benefits; (4) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (5) use secret science; and (6) derive from or implement other Presidential directives that have been rescinded or modified.

NMA is a national trade association that includes: the producers of most of the nation's coal, metals, 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. Our members supply energy, metals, minerals and materials used by every sector of our economy that are indispensable for the development of technology and products that improve and sustain our way of life. Their interests span the array of regulations EPA has promulgated that impact the production, movement and use of mined products. As

such, our comments address regulations falling under the purview of numerous EPA offices whose actions weigh heavily on the upstream and downstream production and use of mined materials.

At the onset, we want to thank the administration for providing this opportunity for the regulated community to submit recommendations to reform, repeal or modify regulations that impede economic growth and job creation, place unnecessary and unrealistic burdens on our nation's employers, burden domestic energy production and reduce our ability to compete in the global marketplace.

Following are regulations that impose costs which greatly exceed tangible benefits, duplicate other federal or state regulations, lack a sound scientific basis or lack any compelling purpose or need and are inconsistent with the goals of E.O. 13783, Promoting Energy Independence and Economic Growth. We appreciate the opportunity to provide input on this matter and look forward to working with EPA to revise or eliminate these unnecessary regulatory burdens.

Sincerely,

Bruce Watzman.

National Mining Association Response to Request for Comments on Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777, 82 Fed. Reg. 17,793 (Apr. 13, 2017)

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NMA Regulatory Review Submission

AIR

Regional Haze

I) Regulation

On January 10, 2017 EPA published a final rule, 82 *Fed. Reg.* 3078, implementing the second long-term strategy to achieve "reasonable progress" toward a national of preventing future, and remedying existing, impairment of visibility in certain nation parks and wilderness areas. The new rule establishes "reasonable progress goals" that states must implement to achieve visibility improvements during the second planning period from 2018-2028.

II) Problems with the Regulation

Despite the Clean Air Act's federalism mandate, the final rule imposes unrealistic reasonable progress goals that limit the discretion afforded states as to how to implement the program. This has resulted in EPA disapproving required State Implementation Plans and alternatively imposing Federal Implementation Plans (FIPs) with more stringent and costly federal emission control requirements. These requirements will, if left unchecked, result in the retirement of several coal-fired electric generating units.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) imposes excessive costs with dubious benefit, and (2) has inhibited job creation and economic growth. EPA's preexisting regional haze program resulted in the loss of a significant number of coal-fired electric generating units and the new, revised rule, contains several changes to how EPA will approach regional haze in the future. The agencies decision to impose FIP's in Texas and Arkansas (stayed and remanded to EPA) threatened a large number of coal facilities and the attendant jobs at mines supplying coal to these units. In Texas, EPA Region VI would have required 7 additional FGD retrofits. In the West, EPA Region VII has elected to require SCR retrofits. The seven units threatened under the Texas FIP are responsible for hundreds of jobs at the mines supplying coal to the generating units. The concern centers on the use of the economic test to require additional retrofit control measures at non-BART carl-fired stations even when the current emission levels are below the glide-path required by the regulation.

New Source Review

I) Regulation

NSR is a regulatory permitting program established under Title I of the Clean Air Act and its implementing regulation in 40 CFR Parts 51 & 52. The regulations require major new sources of regulated emission and "major modifications" at existing major sources to obtain preconstruction permits and to comply with stringent case-by-case new source emission limits. For coal-fired generating units NSR review is triggered when (a) the unit undergoes a non-exempt physical or operational change and (b) the change is projected to cause a "significant" increase in annual emissions.

II) Problems with the Regulation

The NSR regulations serve as a deterrent to undertaking improvements at existing sources to restore efficiency that was lost over time through wear and tear. Under the regulation, if a major modification is projected to result in a significant increase in emissions as measured by the total annual emissions (tons/yr.) then it can trigger pre-construction permitting, including the case-by-case new source standards based on the Best Available Control Technology, a process that typically takes two years and frequently even longer for controversial projects. In the Clean Power Plan, EPA took the position that efficiency upgrades that result in lower emissions per unit of electricity produced (lbs/mmBTU) may trigger the NSR requirements because the plant may operate more hours per year after the project resulting in an increase in total tons of emissions from that unit over the course of the year. Any permit for upgrades to existing coal units would almost certainly be controversial and subject to extended permit and legal challenges which would in turn delay and increase the cost of the efficiency improvement projects.

III) E.O. 13771 and 13777 Criteria

NSR is a candidate for revision under (i) Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). The NSR Rules (1) place undue burden on the development and use of domestic energy resources; (2) have the potential to eliminate jobs; (2) are outdated and ineffective; (3) create a serious inconsistency that serves as a deterrent to improved environmental performance; and (4) offers opportunities for reduction in regulatory costs.

Key to maintaining operation of the current fleet of coal-fired electric generating units is efficiency improvements. As utilities assess future generation needs an important consideration is to ensure that all assets are performing optimally – operating as

efficiently as possible. For electric generating unit's, unaddressed inefficiency results in less unit of electricity per input unit of heat. In short, inefficiency and the inability to implement efficiency upgrades without triggering controls for all regulated air pollutants threatens coal-fired units and coal miner jobs.

Additionally, and importantly, the hurdles presented by the NSR regulations prevent the continued reduction of emissions from coal-fired units. A one percentage improvement in the efficiency of a conventional pulverized coal plants results in a 2-3 percent reduction on CO2 emissions, depending on the level of efficiency prior to the change.

To remedy this, EPA should revise several longstanding NSR issues that impose undue regulatory burdens, limit operational flexibility, and result in regulatory uncertainty and enforcement exposure for all regulated sources. For some of these issues, EPA previously developed rulemaking proposals (but never finalized them) including the following:

i. EPA "Aggregation" policy: Through a series of guidance memoranda and applicability determinations, EPA developed a case-by-case, multi-factor approach for determining whether changes over time at a source should be "aggregated" and treated as a single project for purposes of determining NSR permitting requirements. EPA's current approach is cumbersome, prone to inconsistencies, and subject to aggressive/adverse agency interpretations. While EPA developed rule revisions intended to clarify when multiple projects should be aggregated for NSR permit applicability purposes, they were never finalized.

ii. EPA "Debottlenecking" policy: Through a series of guidance memoranda and applicability determinations, EPA developed a case-by-case approach for determining whether a proposed change would "debottleneck" upstream and downstream operations and whether the associated increase in emissions at those units should be included in determining NSR permitting requirements. EPA's case-by-case approach is cumbersome, unnecessarily complicated, prone to inconsistencies, and subject to aggressive/adverse agency interpretations. While EPA developed rule revisions intended to clarify that there must be a causal link between the change and the emissions increase from upstream or downstream units, it never finalized them.

iii. EPA "Project netting" policy: EPA has inconsistently taken the position that "project netting" (considering both emission increases and decreases attributable to project) may not be considered in determining whether the project would result in a significant emissions increase subject to NSR permitting requirements. While EPA developed rule revisions intended to allow project netting, EPA published a notice indicating that it was taking no action in 2009. Subsequent EPA determinations expressly state that project netting is not currently allowed by rule

or policy, which increases the scope of projects that potentially could be subject to NSR permitting requirements thereby subjecting the regulated community to additional regulatory burdens, delay, and costs.

Ozone National Ambient Air Quality Standards

I) Regulation

On Oct. 26, 2015, the agency published a final rule that reduced the ozone NAAQS from 75 to 70 ppb, 80 *Fed. Reg*. 65,292. Under the regulation states are required to designate non-attainment areas which, once designated, require the imposition of permitting restrictions for expansion of existing facilities or construction of new facilities that will contribute to overall ozone emissions.

II) Problems with the Regulation

Adoption of the 2015 NAAQS triggered a series of ongoing implementation dates for which States and sources must plan. In addition, northeastern states and environmental groups have submitted section 126 petitions claiming coal plants in upwind states will impede attainment of the NAAQS limits. Despite extensive comments submitted during the rulemaking, the final rule largely ignored the impact of natural sources of ozone, international transport of ozone and the use of modeling versus air quality monitoring to make determinations for areas as attainment, nonattainment or unclassifiable.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) imposes excessive costs with dubious benefit, and (2) will result in job losses. While EPA estimated net benefits of the final rule of $1.5 to $4.5 billion in 2011$ an independent study conducted by National Economic Research Associates concluded that the rule would reduce GDP by $140 billion per year; result on 1.4 million few jobs at factories, mines, agricultural facilities.

1-Hour PM 2.5 National Ambient Air Quality Standards

I) Regulation

$PM_{2.5}$ primary and secondary standards were last reviewed and finalized on January 15, 2013, 75 *Fed. Reg.* 3085. The rule establishes 35 **m**g/m^3 as a 24-hour standard for $PM_{2.5}$ with a form of the standard: 98^{th} percentile, averaged over 3 years. It also establishes an annual primary standard for $PM_{2.5}$ of 12.0 **m**g/m^3 and an annual secondary standard of 15.0 **m**g/m^3 based on an annual arithmetic mean, averaged over 3 years.

II) Problems with the Regulation

$PM_{2.5}$ standards are being used for modeling compliance that include crustal emissions such as fugitive dust, while the health-based concerns upon which the standards rely are derived from combustion emissions from fossil fuels. The supporting health studies were conducted in dominantly urban areas, where $PM_{2.5}$ emissions are predominantly derived from combustion sources. However, particulate matter emissions in more rural and remote areas are more significantly impacted by crustal material sourced from activities such as agriculture and mining. The health concerns for particulate matter derived from fugitive dust and crustal materials are appropriately addressed by the PM_{10} standards and should not be considered under compliance with $PM_{2.5}$ standards. Modelling compliance with the latest $PM_{2.5}$ standards using EPA's currently approved methodology often shows exceedances when considering crustal-derived particulate emissions from mining activities. This results in either restriction or reduction of existing mining activities that were previously permissible. Capital costs required to overcome this can also render new projects or expansions uneconomic.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) will eliminate jobs or inhibit job creation, (2) is unnecessary, and (3) imposes costs that exceed benefits. EPA should consider redefining $PM_{2.5}$ emissions as only applying to particulate matter from combustion emissions, or excluding (earth material) crustal derived particulate matter from the regulation.

Cross State Air Pollution Rule Update

I) Regulation

The Cross State Air Pollution Rule Update was finalized on Oct. 28, 2016, 81 *Fed. Reg.* 7404. The rule establishes new NOx ozone-season (May through September) budgets for fossil fuel-fired electric generating units in 23 eastern states.

II) Problems with the Regulation

While the final rule was less stringent than the proposed rule, it still poses undue burdens for a number of utilities and could affect coal production and eliminate jobs.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) imposes excessive costs exceeding any reasonable measure of projected benefits, and (3) will result in job losses. The negative impacts of the rule stem from EPA's use of a number of unreasonable analytic assumptions that bias the analysis toward finding that upwind sources are creating downwind nonattainment problems. These assumptions include, among others, the use of outdated data on emissions in upwind states and ambient pollution concentrations in downwind states and the use of a 1 percent threshold to determine whether upwind sources are meaningfully contributing to downwind impacts. EPA should grant pending reconsideration petitions and use the reconsideration process to redo the CSAPR-Update rule modeling based on more reasonable assumptions. The new modeling would likely significantly reduce the number of states that are subject to the rule and, for those states that remain subject to the rule, significantly increase their NOx budgets.

Mercury Air Toxic Standards (MATS)

I) Regulation

On Feb. 16, 2012 (effective April 16, 2012) the agency published a final rule under CAA Section 112 for new and existing coal- and oil-fired electric generating units establishing National Emission Standards for Hazardous Air Pollutants (NESHAPs) for major and areas source of HAPS (mercury, trace metals and acid gases). The rule required EGU's, within 3-years of finalization, to install pollution control equipment at many fossil-fueled power plants or retire a large number of units that cannot now be brought back on line. The rule was challenged and on June 29, 2015 the Supreme Court issued a 5-4 decision granting petitioner's request to strike down the final rule and remand the case back to the D.C. Circuit for further proceedings. Following publication of a supplemental finding EPA, on April 14, 2016, issued a final finding that it is appropriate and necessary to set standards for air toxics from coal- and oil-fired power plants. The finding has been challenged in *Murray Energy v. EPA*, Case No. 16-1127 (D.C. Cir. Apr. 25, 2016)

II) Problems with the Regulation

Despite EPA's claim that the final rule would result in the closure of 5GW of fossil-fueled electric generation coal unit retirements, based on utility reporting, by the 2015/2016 compliance deadline exceeded 50GW.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) is ineffective; and (2) imposes excessive costs with dubious benefit, and (3) will has resulted in job losses. In promulgating the final rule the agency estimated the cost of the rule to be $9.8b per year, but bring, at most, only $4-$6 million in benefits. Additionally, more than half of the cists are attributable to imposing standards for emissions the agency found pose no danger to public health. The direct jobs impacts of the rule have proven devastating for coal miners, power plant workers and other Americans formerly employed in the coal supply chain. More than 65,000 coal miners have lost their high-wage jobs since 2011 with the vast majority attributable to coal-fired power plants clotures as a result of the final rule.

The appropriate and necessary finding on which the rule is based is completely contrived and serves as a negative precedent for future action. Reconsideration would provide value by removing the reliance on a faulty "co-benefits" concept as a precedent for cost-benefit analysis and subject the science underpinning the rule to scrutiny.

Primary NO2 National Ambient Air Quality Standard

I) Regulation

Primary NO_2 standard was reviewed and finalized for the first time to include a 1 hour standard on February 9, 2010, 75 *Fed. Reg.* 6474. The rule establishes 100 ppb as a 1 hour standard for NO_2 with a form of the standard: 98^{th} percentile, 1-hour daily maximum, averaged over 3 years.

II) Problems with the Regulation

A 1-hour low level NO_2 standard is not warranted or necessary. For example, OSHA Permissible Exposure Level for 8 hours is 5 ppm for NO_2 while even California OSHA allows an 8 hour exposure of 1 ppm NO_2. There are no specific tests to diagnose for NO_2 poisoning. So the health-based analyses that EPA relied on are based on probable symptoms and causation statistics. Furthermore, EPA proposed as part of the same rule establishing a more extensive roadside NO_2 monitoring network, indicating that they did not have enough information to really assess NO_2 effects on the populace at large. Modelling compliance with the 1 hour NO_2 standard using EPA's currently approved methodology often shows exceedances due to either conservative model assumptions and/or variations in the meteorological parameters. This results in either restriction or reduction of existing mining activities that were previously permissible. Capital costs required to overcome this can also render new projects or expansions uneconomic.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) will eliminate jobs or inhibit job creation, (2) is unnecessary, and (3) imposes costs that exceed benefits. EPA should consider removing the 1-hr NO_2 standard during the NAAQS review process that is court-ordered for a proposed rule by July 2017. If deemed necessary for health protection, alternatively EPA might consider replacing it with a 24-hour or an 8-hour standard.

National Ambient Air Quality Standards (NAAQS) in Elevated Background Environments

I) Regulation(s)

The most recent example is the Ozone Primary and Secondary standards that were last reviewed and finalized on October 26, 2015, 80 *Fed. Reg.* 65292. The rule establishes 0.070 ppm as an 8-hour standard for Ozone with a form of the standard: annual fourth highest daily maximum 8-hour average concentration, averaged over 3 years.

Another example are particulate matter standards such as $PM_{2.5}$ and PM_{10} which were last reviewed and finalized on January 15, 2013, 75 *Fed. Reg.* 3085. The rule establishes 35 **m**g/m^3 as a 24-hour standard for $PM_{2.5}$ with a form of the standard: 98th percentile, averaged over 3 years. It also establishes an annual primary standard for $PM_{2.5}$ of 12.0 **m**g/m^3 and an annual secondary standard of 15.0 **m**g/m^3 based on an annual arithmetic mean, averaged over 3 years. Furthermore, it confirms the standard for PM10 as 150 **m**g/m^3 as a 24-hour standard not to be exceeded more than once per year on average over a 3-year period.

II) Problems with the Regulation(s)

The ozone standard for example is approaching background concentrations in the Mountain West terrain that is optimal for mining activities. The elevated background concentrations are primarily driven by elevation and geography but are also further exacerbated by stratospheric intrusions, wildfires and international transport. Areas of measured elevated background concentration are in locations where no industrial or urban activities exist within the airshed.

Particulate matter standard can be exceeded periodically in many remote areas due to wind-blown dust in arid desert environments where precipitation is low and vegetation is naturally sparse.

Supporting health studies are typically conducted where there is a significant difference between background concentrations and the standard and not where the background concentration already approaches the standard due to natural conditions.

Demonstrating compliance with the latest Ozone, $PM_{2.5}$, and PM_{10} standards can show exceedances when elevated background concentrations are additive to mining activities. This results in either restriction or reduction of existing mining activities that were previously permissible. Capital costs required to overcome this can also render new projects or expansions uneconomic.

III) E.O. 13777 Criteria

These regulation(s) are candidate(s) for revision under E.O. 13771 as they: (1) will eliminate jobs or inhibit job creation, 2) are unnecessary, and (3) impose costs that exceed benefits. EPA should consider proposing alternative standards for these pollutants that allow for an increment + the background concentration or perhaps allowance for more exceedances. For example, the Ozone standard of 0.070 ppm could be allowed to have an alternative standard in an area with a background concentration of 0.065 ppm in addition to an allowable increment of 0.025 ppm which would be 0.090 ppm in that location. Another possibility: for the PM_{10} standard the alternative to the 150 mg/m^3 might be approached by allowing ten exceedances per year if the background concentration is above 100 mg/m^3.

Grant of Petition for Reconsideration and Stay of 2008 Fugitive Emissions Rule

I) Regulation

In 2008, EPA issued a rule clarifying when fugitive emissions should be considered when assessing emission thresholds for major source construction, as well as major modifications. 73 Fed. Reg. 77882 (Dec. 19, 2008) (The Fugitive Emissions Rule). The rule clarified that fugitive emissions are not to be considered when assessing thresholds for either major modifications or new construction unless the source belongs to one of the 28 listed source categories. In doing so, the rule introduced consistency and certainty into making such determinations. However, in April 2009, EPA granted a Natural Resources Defense Council petition for reconsideration and stayed indefinitely the 2008 rulemaking. *See* 74 Fed. Reg. 50115 (Sept. 30, 2009); 74 Fed. Reg. 65692 (Dec. 31, 2009); 75 Fed. Reg. 6823 (Feb. 11, 2010). EPA has not taken final action consistent with its granting the petition for reconsideration, creating substantial regulatory uncertainty regarding the treatment of fugitive emissions in major modification determinations.

II) Problems with the Regulation

Under the Clean Air Act (CAA), a source must make a threshold calculation of its potential to emit air pollutants to determine whether it is a "major stationary source" or has undertaken a "major modification" for purposes of NSR permitting requirements. EPA historically has not required sources to include fugitive emissions in the threshold calculation for new sources unless the source belongs to one of 28 source categories listed by EPA through rulemaking. (Mining operations are not included in these listed source categories.) EPA's 2009 grant of the Natural Resources Defense Council's petition for reconsideration challenging the 2008 rule raises an inconsistency with EPA's past practice that results in regulatory uncertainty for mining and other industry sectors.

III) E.O. 13777 Criteria

EPA's grant of the Natural Resources Defense Council's petition for reconsideration and the stay of the 2008 rulemaking is a candidate for revision under Executive Order 13777. EPA's approach as articulated in its decision to grant the petition for reconsideration is inconsistent with past practice, and is unnecessary and ineffective.

NSPS and NESHAP Requirements and Restrictions for Stationary Engines

I) Regulation(s)

Applicable National Emission Standards for Hazardous Air Pollutants (NESHAP) for Stationary Reciprocating Internal Combustion Engines (RICE) are found in 40 CFR Part 63 Subpart ZZZZ. Applicable New Source Performance Standards (NSPS) for Stationary Compression Ignition (CI) Internal Combustion Engines (ICE) are found in 40 CFR Part 60 Subpart IIII. Applicable NSPS for Station Spark Ignition (SI) ICE are found in 40 CFR Part 60 Subpart JJJJ.

II) Problems with the Regulation(s)

Given the remote locations of typical mining operations within sparsely populated airsheds, there are minimal health benefits to be gained by restricting owner/operators from using certain stationary engines for applicable uses depending on when the engine is placed in service. Most of these engines are only utilized in an emergency backup capacity with few actual hours of operation on an annual basis. Non-emergency generators are used occasionally in more remote locations where grid power is not readily available. These requirements can mandate substantial capital expenditures to upgrade stationary engines that are fully usable and functional in areas where health impacts are negligible given their location and application.

III) E.O. 13777 Criteria

These regulations are candidates for revision under E.O. 13771 as they: (1) impose costs that exceed benefits. EPA should consider granting an exemption from or eliminating these owner operator requirements and restrictions for Stationary Engines (especially emergency generators) that are located in sparsely populated airsheds (typical for many mining operations).

Greenhouse Gas Mandatory Reporting Rule – Subpart FF

I) Regulation

On Dec. 9, 2016 EPA published a final rule, 81 *Fed. Reg*. 89188 to amend the reporting requirements for 29 subparts, including underground coal mines, to expand monitoring or reporting requirements necessary to improve verification and the accuracy of data submitted.

II) Problems with the Regulation

The reporting requirements for underground coal mines in subpart FF are not warranted or necessary. Coal mine emissions are negligible when compared to overall emissions yet the costs to be borne by the industry are grossly disproportional to any perceived benefit. The rule requires, in many instances, mine operators to utilize continuous emission monitoring systems that have not been designed for use in the underground environment.

III) E.O. 13777 Criteria

The regulation is a candidate for revision under E.O. 13771 as it: (1) imposes excessive costs with dubious benefit. According to EPA "the incremental increase in costs for subpart FF reporters from the revised monitoring requirements are $28,440 per facility in the first year (RY2018) and $14,609 in subsequent years ($2011). The proposed revisions are estimated to affect 65 respondents and would have an industry incremental cost of $1,848,571 in the first year (RY2018) and $949,582 in subsequent years. The annual hourly burden associated with these monitoring costs are 320 hours per reporter in the first year and 165 hours in subsequent years." The incremental cost increase represented a cost increase of over 3 times what underground coal mines operators incurred prior to issuance of the final rule and one member has incurred a cost increase of more than 500 percent to comply with the regulation.

Source Determination for Certain Emission Units in the Oil and Natural Gas Sector

I) Regulation

The Source Determination for Certain Emission Units in the Oil and Natural Gas Sector rule was finalized on June 3, 2016, 81 Fed. Reg. 35622 (Source Determination Rule). The rule clarifies the meaning of the term ''adjacent'' that is used to determine the scope of a ''stationary source'' for purposes of the Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NNSR) preconstruction permitting programs and the scope of a ''major source'' in the title V operating permit program in the onshore oil and natural gas sector.

II) Problems with the Regulation

Historically, the determination of the scope of a stationary source has been difficult in view of the ambiguity surrounding the interpretation of the term "adjacent." The Source Determination Rule establishes definitive criteria for determining the scope of a stationary source and thereby resolving, to a significant degree, the ambiguity surrounding such determinations; however, the rule's applicability is limited to the onshore oil and natural gas industry. The rule's applicability should be broadened to cover other industry sectors and, in particular, the mining sector in view of the commonalities – operations covering large areas and ownership issues – that the mining sector shares with the oil and gas industry.

III) E.O. 13777 Criteria

The Source Determination rule is a candidate for revision under Executive Order 13777. The lack of definition or clarity for the term "adjacent" under the PSD, NNSR and tile V programs (outside of the oil and natural gas industry) is outdated, unnecessary and ineffective, and creates a serious inconsistency.

NSPS provisions as applied to a Nonroad Engine that temporarily replaces a Stationary Engine

I) Regulation(s)

Applicable New Source Performance Standards (NSPS) for Stationary Compression Ignition (CI) Internal Combustion Engines (ICE) are found in 40 CFR Part 60 Subpart IIII. Applicable NSPS for Stationary Spark Ignition (SI) ICE are found in 40 CFR Part 60 Subpart JJJJ.

II) Problems with the Regulation(s)

As part of the rulemaking for NSPS Subparts IIII and JJJJ, EPA took the position that nonroad engines (i.e., portable engines that are not used in the same location for 12 consecutive months or more) that temporarily replace a stationary engine would be considered stationary engines. EPA regulates nonroad engines and stationary engines under different regulatory programs that include prohibitions on changing status (from nonroad to stationary and vice versa) unless the engine complies with all requirements under the relevant program. As a result, sources using nonroad engines to temporarily replace an existing stationary engine (e.g., while repairs are conducted) are unnecessarily subject to stationary source permitting requirements, compliance issues, and enforcement exposure.

III) E.O. 13777 Criteria

These regulations are candidates for revision under E.O. 13771 as they: (1) impose costs that exceed benefits and (2) create a serious inconsistency. EPA should consider revising these Subparts as part of required periodic review and include necessary clarifications and corrections to address the use of nonroad engines to temporarily replace stationary engines in accordance with the respective regulatory programs.

Once in, always in policy under NESHAP program

I) Regulation(s)

The National Emission Standards for Hazardous Air Pollutants (NESHAP) are found in 40 CFR Part 63.

II) Problems with the Regulation(s)

Under the NESHAP program, EPA established a "Once In, Always In" policy that requires a source that is a major source of hazardous air pollutant (HAP) emissions on the first compliance date of a particular NESHAP standard to comply permanently with that standard even if the source subsequently lowers HAP emissions below major source applicability thresholds. Accordingly, the policy eliminates any incentive for sources to reduce HAP emissions below major source thresholds to avoid regulatory burdens and costs. While EPA developed rule amendments that would eliminate the "Once In, Always In" policy, EPA took no further action on the amendments after opponents in Congress included a rider in a 2007 appropriations bill prohibiting funding of the amendments.

III) E.O. 13777 Criteria

The "Once In, Always In" policy is a candidate for revision under E.O. 13777 as it: (1) is outdated, unnecessary, or ineffective and (2) imposes costs that exceed benefits. EPA should consider rescinding the prior policy through rulemaking establishing a new policy under the NESHAP program based on the prior proposal.

Interpretation of NSPS requirements for Primary Copper Smelters

I) Regulation(s)

Applicable New Source Performance Standards (NSPS) for Primary Copper Smelters are found in 40 CFR Part 60 Subpart P.

II) Problems with the Regulation(s)

Some EPA representatives have taken the position that the NSPS Subpart P emission standard applies to any emissions from an affected facility rather than those emissions exiting the control device as the achievable standard was developed (i.e., through performance testing) during the initial rulemaking. In light of this interpretation, sources subject to Subpart P are unnecessarily subject to compliance issues, regulatory uncertainty, and enforcement exposure because some smaller levels of emissions (i.e., fugitive emissions that are unable to be collected and controlled) are not amenable to compliance demonstrations through performance testing.

III) E.O. 13777 Criteria

The Subpart P regulations are candidates for revision under E.O. 13771 because as interpreted they: (1) impose costs that exceed benefits and (2) create a serious inconsistency. EPA should consider revising the Subpart P regulations as part of required periodic review and include necessary clarifications and corrections to address the appropriate compliance demonstration.

NESHAP requirements for Primary Copper Smelters

I) Regulation(s)

Applicable National Emission Standards for Hazardous Air Pollutants (NESHAP) for Primary Copper Smelters are found in 40 CFR Part 63 Subpart QQQ.

II) Problems with the Regulation(s)

The Subpart QQQ regulations contain several errors and ambiguities in the provisions for establishing operating parameter limits for control devices and capture systems as well as associated monitoring. Due to the errors and ambiguities, sources regulated by Subpart QQQ are subject to unnecessary regulatory burdens and costs; regulatory uncertainty; and enforcement exposure.

III) E.O. 13777 Criteria

The Subpart QQQ regulations are a candidate for revision under E.O. 13777 as they: (1) impose costs that exceed benefits and (2) create a serious inconsistency. During a required periodic review of the regulation, EPA should consider including necessary clarifications and corrections to provisions for establishing operating parameter limits for control devices and capture systems as well as associated monitoring.

"Common Control" interpretation for stationary source determinations under NSR and Title V operating permitting programs

I) Regulation(s)

The NSR permitting program requirements are found at 40 C.F.R §§ 51.165, 51.166, and 52.21. The Title V operating permit program requirements are found at 40 C.F.R. Part 70.

II) Problems with the Regulation(s)

EPA's evolving interpretations have taken the position that a contract for hire between two otherwise separate companies can establish "common control" (i.e., one of the elements for determining whether two or more operations should be considered a single source or separate sources for permitting purposes). Based on this interpretation, permitting could be required to allow the operation of temporary contractor-operated equipment and activities within an existing permitted source owned and operated by a separate company—even if the contractor's equipment and activities are already separately permitted.

III) E.O. 13777 Criteria

The "common control" interpretation for stationary source determinations is a candidate for revision under E.O. 13777 as it: (1) is outdated, unnecessary, or ineffective and (2) imposes costs that exceed benefits. EPA should consider rescinding its prior guidance through formal rulemaking establishing a definition of "common control" for purposes of stationary source determinations under the NSR and Title V operating permit programs. EPA should also consider issuing contemporaneous guidance on portable and temporary source permitting.

"Contiguous or Adjacent" interpretation for stationary source determinations under NSR and Title V operating permitting programs

I) Regulation(s)

The NSR permitting program requirements are found at 40 C.F.R §§51.165, 51.166, and 52.21. The Title V operating permit program requirements are found at 40 C.F.R. Part 70.

II) Problems with the Regulation(s)

EPA's evolving interpretations have taken the position that the functional relationship between two operations (rather than the physical proximity) can establish whether the operations are located on "contiguous or adjacent" properties (one of the elements for determining whether two or more operations should be considered a single source or separate sources for permitting purposes). Based on this interpretation, otherwise separate sources located miles apart could be considered part of the same source and potentially subject to more stringent permitting requirement as a single source. Although EPA's interpretation was rejected by the Sixth Circuit Court of Appeals, EPA, in guidance, indicated it planned to retain its interpretation in all areas except those within the Sixth Circuit's jurisdiction. The courts also vacated this guidance as a violation of EPA's Regional Consistency rule. Rather than accept the court's decision, EPA initiated a revision to its Regional Consistency rule. Eliminating EPA's underlying "functional relationship" test would render the litigation moot.

III) E.O. 13777 Criteria

The "contiguous or adjacent" interpretation for stationary source determinations is a candidate for revision under E.O. 13777 as it: (1) is outdated, unnecessary, or ineffective and (2) imposes costs that exceed benefits. EPA should consider rescinding its prior guidance through formal rulemaking establishing a definition of "contiguous or adjacent" consistent with the Sixth Circuit's decision for purposes of stationary source determinations under the NSR and Title V operating permit programs.

Reactivation Policy under NSR and Title V operating permitting programs

I) Regulation(s)

The NSR permitting program requirements are found at 40 C.F.R §§51.165, 51.166, and 52.21. The Title V operating permit program requirements are found at 40 C.F.R. Part 70.

II) Problems with the Regulation(s)

Under EPA's "reactivation" policy, sources that shut down temporarily may be considered "new" upon reactivation (i.e., restart) and subject to regulatory requirements that apply to new sources. While EPA's policy historically focused on whether the shutdown was intended to be permanent (presumed if the source was shut down for two years or more), EPA's more recent positions (e.g., that taken in EPA, *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.*) require a continuous demonstration of concrete plans to restart for purposes of rebutting the presumption of permanent shutdown. EPA has also imposed additional tests that could effectively require all reactivations to require permitting as a physical change or change in the method of operation (i.e., from a lengthy period of inactivity to fully operational status).

III) E.O. 13777 Criteria

The reactivation policy is a candidate for revision under E.O. 13777 as it: (1) is outdated, unnecessary, or ineffective and (2) imposes costs that exceed benefits. EPA should consider rescinding its prior guidance and positions through formal rulemaking that codifies a revised reactivation policy.

WATER

Steam Electric Power Generating Effluent Limitations Guidelines and Standards

I) Regulation

The Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category ("ELG Rule"), which was promulgated pursuant to a settlement agreement with environmental organizations and finalized in Nov. 2015, sets novel, stringent limits on wastewater discharges from power plants under the Clean Water Act. Specifically, the rule imposes new design criteria and numeric limits directly applicable to hundreds of existing coal-fired power generating facilities, as well as even more burdensome standards for new sources.

II) Problems with the Regulation

The ELG Rule imposes excessive compliance costs and regulatory burdens on utilities, which will have serious ramifications on both the utility and coal industries and the large and small businesses that rely on them. In promulgating the ELG Rule, the Environmental Protection Agency (EPA) relied on limited and obsolete data, and withheld much of the fundamental information upon which it relied. As a result, the ELG Rule imposes requirements under a "best available technology economically achievable" standard that are not, in fact, available, feasible or economically achievable. Furthermore, many of the assumptions made in the ELG Rule were based on EPA's Clean Power Plan (CPP) and Coal Combustion Residuals (CCR) Rule, both of which are likely to undergo significant changes which will undoubtedly impact many of the premises upon which the ELG Rule was based.

According to the utility industry, the ELG Rule will force plant closures and lead in many instances to compliance costs in the hundreds of millions of dollars *per effected company*. For example, Dynegy has estimated costs associated with the ELG Rule at $308 million, MRG anticipates costs of approximately $200 million, and AEP has projected costs ranging from $400-550 million through 2023. When combined with the CPP and CCR Rule, the cumulative impacts to coal-fired electric generation are staggering.

III) E.O. 13771 and E.O. 13777 Criteria

The ELG Rule is a strong candidate for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the ELG Rule (1) eliminates jobs and inhibits job creation; (2)

imposes costs that exceed its benefits; (3) relies in part on data, information, and methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; (4) places undue burden on the development and use of domestic energy resources; and (5) offers opportunities for reduction in regulatory costs. Furthermore, review under the relevant E.O.s would allow the Administration the opportunity to comprehensively address the cumulative impacts of the ELG Rule, CPP, and CCR Rule to the coal mining and utility industries. The ELG Rule was based on unsound and, in many cases, undisclosed data, imposes overly stringent limitations not supported by scientific or economic realities, and will lead to excessive compliance costs and the closure of coal-fired power plants.

Draft Conductivity Methodology

I) Regulation

In late Dec. 2016, the U.S. Environmental Protection Agency (EPA) released its draft document, *Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity*. The document is intended to provide guidance to states on developing numeric field-based conductivity criteria for flowing waters, and is based in large part on EPA's controversial work, *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams*, which was the subject of a lawsuit brought against EPA by the National Mining Association and the states of Kentucky and West Virginia. Importantly, if finalized, states will have to consider the document in their triennial reviews of their water quality standards packages, and may be forced via EPA or outside lawsuits to adopt numeric criteria for conductivity that they do not believe are based on sound science. Additionally, environmental organizations have already pointed to the document upon which the methodology is based to force post-hoc, court-developed numeric conductivity limits which the state had specifically rejected into coal mining discharge permits.

II) Problems with the Regulation

EPA's draft conductivity methodology suffers from multiple fatal technical and scientific flaws which render the numeric limits it produces not scientifically valid. These flaws include issues associated with data collection and analysis, inappropriate application of extirpation methods and regression models, and the failure to consider multiple factors that could lead to the presence or absence of benthic invertebrates from sample streams. Additionally, the Clean Water Act (CWA) expressly provides for narrative water quality criteria, and it is up to the states to determine how to interpret such criteria – states should not be forced to develop numeric criteria that they do not feel is supported by science.

Importantly, while most coal and hardrock mining operations will have significant difficulty complying with the proposed numeric limits, those limits are so overly stringent that multiple other sectors of the economy – including, among others, agriculture, POTWs, and oil and gas operations – will have difficulty meeting them as well. Furthermore, where treatment is available to meet the proposed limits, significant costs are likely associated. Extremely low conductivity limits can often only be met through the installation of reverse osmosis (RO) technology, if at all. While the costs of RO treatment vary, an example of two municipal wastewater treatment facilities in the Indianapolis area shows that the capital costs for installation of RO technology was $700 million, and annual costs for implementation were projected at $40 million – resulting in overall annualized treatment costs of $116.9 million, assuming that capital

costs would be financed over 20 years. It should also be noted that in some instances treatment technologies might not be available to meet the proposed limits, resulting in lost job opportunities, decreased economic growth, and a failure to develop the U.S.'s vast mineral potential with no corresponding environmental benefit.

Finally, the Obama Administration announced its intention to revise the 1985 *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses*. Those guidelines provide the basis for deriving EPA's national water quality criteria, and EPA has in the past noted that field-based criteria – like the conductivity methodology – will likely be a focal point of its revisions. It is therefore incredibly important for EPA to review the conductivity methodology to ensure that any field-based methods supported by the agency are technically and scientifically sound.

III) E.O. 13771 and E.O. 13777 Criteria

EPA's draft conductivity methodology is a strong candidate for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the methodology (1) eliminates jobs and inhibits job creation; (2) imposes costs that exceed its benefits; (3) places undue burden on the development and use of domestic energy resources; (4) offers opportunities for reduction in regulatory costs; and (5) intrudes upon the rights of states. The draft methodology will force state regulators to utilize disputed, unsound science and will impose significant, and at times infeasible, treatment requirements upon regulated entities without a corresponding environmental benefit. This will deter the development of U.S. mineral resources, impose substantial costs on existing operations, and infringe upon state primacy under the CWA.

Selenium Water Quality Criterion and Implementation Guidance

I) Regulation

In July 2016, the U.S. Environmental Protection Agency (EPA) updated its chronic selenium freshwater criterion to include, for the first time, fish tissue-based limits that better reflect the fact that selenium toxicity in aquatic life is driven by consumption of selenium-contaminated food rather than direct exposure to selenium dissolved in water. However, while NMA supports the fish tissue-based approach, at the urging of the U.S. Fish and Wildlife Service and environmental organizations, EPA also included overly stringent water column-based limits and, while acknowledging that the fish tissue limits are more scientifically accurate, nevertheless required the water column limits to be applied in a number of permitting situations. Importantly, these default national water column concentrations are below natural background concentrations for certain parts of the country.

Additionally, because of the novelty of a fish tissue-based criterion, EPA also developed four draft guidance documents in Oct. 2016 designed to assist states in adopting and implementing the final 2016 criterion. Like the underlying criterion itself, these documents contain a number of flaws, including an undue emphasis on the water column limits and lack of flexibility for states.

II) Problems with the Regulation

While EPA's final 2016 selenium criterion appropriately utilized a fish-tissue approach, it also includes overly stringent limitations for both fish tissue and water column concentrations that were based on questionable and limited data sets and unduly conservative calculation methods. Furthermore, while recognizing the fact that fish tissue concentrations provide more scientifically accurate measurements of selenium impacts, both the criterion itself and, to an even greater extent, EPA's implementation guidance documents nevertheless require application of the overly stringent water column concentrations in numerous situations. These documents also limit state flexibility in terms of such important issues as National Pollutant Discharge Elimination System (NPDES) permitting, Total Maximum Daily Load (TMDL) calculations, and impaired waters listings.

Significant costs are associated with wastewater treatment for selenium. Notably, stringent limits can often only be met through the installation of reverse osmosis (RO) technology, if at all. While the costs of RO treatment vary, an example of two municipal wastewater treatment facilities in the Indianapolis area shows that the capital costs for installation of RO technology was $700 million, and annual costs for implementation were projected at $40 million – resulting in overall annualized treatment costs of $116.9 million, assuming that capital costs would be financed over 20 years. Furthermore, in

some instances treatment technologies might not be available to meet EPA's stringent limitations, particularly where background concentrations are naturally elevated, resulting in lost job opportunities, decreased economic growth, and a failure to develop the U.S.'s vast mineral potential with no corresponding environmental benefit.

III) E.O. 13771 and E.O. 13777 Criteria

EPA's selenium criterion and draft implementation guidance documents are candidates for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the criterion and implementation guidance (1) eliminate jobs and inhibit job creation; (2) impose costs that exceed their benefits; (3) place undue burden on the development and use of domestic energy resources; (4) offer opportunities for reduction in regulatory costs; and (5) intrude upon the rights of states. The final criterion and its implementation guidance documents utilize unsound science to impose enormous treatment costs upon regulated entities without a corresponding environmental benefit. This will deter the development of U.S. mineral resources and impose substantial costs on existing operations.

Clean Water Act Sec. 404 Guidance Documents

I) Regulations

Several administrative actions over time have fundamentally altered the careful balance between the U.S. Army Corps of Engineers (Corp), Environmental Protection Agency (EPA), and the states in Clean Water Act (CWA) Section 404 permitting. These actions have undermined the principle of cooperative federalism, ignored the Corps' experience in implementing the 404 program, and caused undue permitting delays and expenses that have had a negative impact on economic growth and job creation. Included in these actions are those guidance documents and memoranda related to:

i. CWA Section 401 water quality certifications: Regulatory Guidance Letter 90-04 – Water Quality Considerations, May 13, 1990; and Oct. 29, 2009 Memorandum from Steven L. Stockton, "Water Quality Certification"

ii. Jurisdictional determinations: 43 Opinion of the Attorney General 197, Sept. 5, 1979, "Civiletti Memorandum;" Jan. 19, 1989 "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act" and its Jan. 19, 1989 amendment; and Regulatory Guidance Letter 16-01 – "Jurisdictional Determinations," Oct. 2016

iii. Aquatic Resources of National Importance (ARNIs): "Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and The Department of the Army," Aug. 11, 1992; Jan. 2002 Memorandum, "Designation of Aquatic Resources of National Importance Under Clean Water Act Section 404(q) Memorandum of Agreement with the Army Corps of Engineers;" Oct. 30, 2006 Memorandum for the Field, "U.S. Environmental Protection Agency (EPA) coordination between Regional offices and Headquarters on Clean Water Act (CWA) Section 404(q) actions;" and May 1, 2008 Memorandum, "Revised Coordination between EPA Regional Offices and Headquarters on Clean Water Act Section 404(q) Actions"

II) Problems with the Regulations

These administrative actions do not have a basis in the text of the CWA, have undermined the rights of states to protect their land and water resources, and have caused the 404 permitting process to become overly cumbersome and subject to undue bureaucratic delays. With respect to Sec. 401 water quality certifications, despite the fact that the CWA very clearly provides primacy states with the authority to develop and

determine compliance with state water quality standards, the aforementioned documents allow EPA to impermissibly override state decisions in the context of Sec. 404 permitting. Likewise, the listed actions related to jurisdictional determinations permit EPA to override Corps' jurisdictional determinations, even where neither the State nor the Corps believe federal jurisdiction exists. This authority is not found in the text or legislative history of the CWA, and ignores the Corps' primary role in issuing Sec. 404 permits. Additionally, under the guise of "minimizing duplication and delays," EPA created from whole cloth the "ARNI" designation, which permits EPA to "elevate" 404 permits on an ad hoc basis, delay their issuance, and demand additional extra-regulatory measures from permittees. All of these actions have led to permitting delays and red tape that has stifled economic growth and undermined the role of the states in the CWA.

III) E.O. 13771 and E.O. 13777 Criteria

The listed Sec. 404 administrative actions are candidates for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the documents (1) eliminate jobs and inhibit job creation; (2) impose costs that exceed its benefits; (3) place undue burden on the development and use of domestic energy resources; and (4) infringe upon state primacy under the CWA.

Clean Water Act Sec. 402 Guidance Documents

I) Regulations

The Obama Administration undertook several executive actions that set up barriers to cooperation between the U.S. Environmental Protection Agency (EPA) and the states in the implementation of Clean Water Act (CWA) Sec. 402 – the National Pollutant Discharge Elimination System (NPDES) permitting program. These actions have violated both the text of the CWA and the principles of cooperative federalism established therein, weakened environmental protection, and undermined the relationship between state and federal partners. They include: (1) *Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order* (July 21, 2011 memorandum); (2) Letter from EPA Administrator Lisa P. Jackson to Acting Assistant Secretary (Civil Works) Terrence Salt regarding the review of 110 pending permit applications in Appalachia (June 11, 2009); and (3) *Enhanced Surface Coal Mining Pending Permit Coordination Procedures* (July 11, 2009).

Additionally, EPA's policy documents on the scope of the permit shield provision found in CWA Sec. 402(k) are outdated and do not directly address situations where states include narrative (rather than numeric) limitations in NPDES permits. Those documents include the July 1, 1994 memorandum, *Policy Statement on the Scope of Discharge Authorization and Shield Associated with NPDES Permits*, as well as the memorandum from Robert Perciasepe, Steven A. Herman and Jeal C. Nelson, *Revised Policy Statement on Scope of Discharge Authorization Associated with NPDES Permits*. While the policies espoused in the documents remain sound, courts have inappropriately applied them, particularly in the context of narrative limits, to the detriment of permittees and the primacy of state CWA agencies.

II) Problems with the Regulations

The Obama Administration's guidance documents permit EPA to trample on the rights of states with primacy to administer the Sec. 402 program. Most notably, they espouse the position that EPA may effectuate a de facto change in a state water quality standard via its permit-specific objection authority under the guise of "interpreting" a state standard; attempt to substitute EPA's scientific judgment for the scientifically defensible judgment of the states; attempt to force states to determine when and how to conduct reasonable potential determinations; and inappropriately attempt to substitute a preferred approach to impaired waters listings and total maximum daily load development.

Furthermore, the permit shield documents should be updated to address recent situations, such as those involving the application of the permit shield to the application

of narrative water quality criteria. This lack of clarity has caused courts to limit the scope of the shield in a manner inconsistent with the text of the CWA, EPA's implementing regulations, and EPA's prior interpretations of the scope of the shield. By way of example, one court in West Virginia recently held that a coal company was liable for violating a non-existent "limit" in its permit because the permit generally alluded to narrative water quality standards, and the court – at the behest of environmental organizations – determined that the permit shield did not protect against the imposition of a post-hoc, judicially created numeric limit "interpreting" one such narrative standard that the state agency had expressly rejected during the permitting process. EPA should therefore update its permit shield policies to, among other things, provide for appropriate protections for dischargers in the context of narrative water quality criteria. In particular, EPA should clarify that dischargers can rely on a state's interpretation of what is required to meet both its numeric and narrative water quality standards – including a state's decision not to include any limit on a pollutant in an NPDES permit.

III) E.O. 13771 and E.O. 13777 Criteria

The Sec. 402 guidance and policy documents are candidates for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the documents (1) eliminate jobs and inhibit job creation; (2) impose costs that exceed its benefits; (3) place undue burden on the development and use of domestic energy resources; and (4) infringe upon state primacy under the CWA.

Interpretation of CWA Sec. 404(c) Authority

I) Regulations

On Jan. 13, 2011, the U.S. Environmental Protection Agency (EPA) withdrew the use of certain waters as disposal sites for discharges of fill material that had been authorized under a 2007 Clean Water Act (CWA) Sec. 404 permit for the Spruce coal mine located in West Virginia. The permit had been issued after nearly a decade of environmental reviews conducted by EPA, the Army Corps of Engineers (Corps), and the state, and EPA's withdrawal – which was done over the objection of the state - amounted to the first ever retroactive veto of a CWA Sec. 404 permit. EPA's action effectively eliminated 88% of the Spruce operation. While the D.C. Circuit eventually upheld EPA's action, in a strongly worded dissent Judge Kavanaugh objected to the fact that EPA did not consider the economic costs of its revocation, and found that "EPA's utterly one-sided analysis did not come close to satisfying the agency's duty under the Administrative Procedure Act to consider and justify the costs of revoking [the Spruce permit]."

Then, in July, 2014, EPA again took an unprecedented step with respect to CWA Sec. 404(c), and issued a proposed determination effectively vetoing any mining activities at the Pebble copper, gold, and molybdenum deposit. Importantly, that veto was done prior to the submittal of any 404(c) permit application, and was based on a highly questionable hypothetical mine scenario created by EPA scientists without adequate input from Alaska, the Corps, or, perhaps most notably, mining engineers. This process bypassed the proper state and federal CWA channels for evaluating any given project, and ignored the extensive (8-year, $120 million) environmental studies conducted by the proponents of the Pebble Mine. By stopping mine development, the Obama Administration halted the creation of thousands of near-term construction jobs and 1,000 full-time jobs throughout the mine's first 25 years, and stranded over $700 million in investment in addition to 80.6 billion lbs. of copper, 5.6 billion lbs. of molybdenum, and 107.4 million oz. of gold.

II) Problems with the Regulations

EPA's application of 404(c) during the Obama Administration thwarted the concepts of due process and fundamental fairness, and had significant negative impacts on economic investment and job growth. Investors are unlikely to risk their capital if they know a permit is only as permanent as the current election cycle, nor are they likely to explore opportunities in a regulatory atmosphere that allows the federal government to veto projects before project proponents have even applied for a permit. As underscored by the plethora of amicus briefs filed in the Spruce case, these concerns span the entire spectrum of sectors in the U.S. economy. By allowing the Pebble permitting process to move forward, and by reevaluating the Spruce decision in light of its devastating

economic impacts and failure to properly consider the views of the state CWA agency, the new Administration has the opportunity to reinvigorate investment in U.S. industries and stimulate economic growth and job creation.

Furthermore, EPA should consider updating the regulations related to the use of CWA Sec. 404(c) to ensure that any proposed future use of 404(c) has taken into account economic considerations and is based on sound science.

III) 13771 and E.O. 13777 Criteria

EPA's CWA Sec. 404(c) vetoes of the Spruce and Pebble mines, and 404(c) regulations, are strong candidates for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the regulatory actions (1) eliminate jobs and inhibit job creation; (2) impose costs that exceed their benefits; (3) place undue burden on the development and use of domestic energy resources; (4) offer opportunities for reduction in regulatory costs; and (5) intrude upon the rights of states.

NPDES Updates Rule

I) Regulation

The National Pollutant Discharge Elimination System (NPDES) Applications and Program Updates Rule (NPDES Rule), proposed in May 2016, includes proposed changes to NPDES permit application requirements, the U.S. Environmental Protection Agency's (EPA) ability to object to administratively continued NPDES permits, the general water quality-based permitting process, state documentation of permitting decisions and the Clean Water Act (CWA) Sec. 401 state certification process.

II) Problems with the Regulation

While the proposed rule contains numerous problematic provisions, the most grievous from the perspective of NPDES permit holders is the provision allowing EPA to designate certain administratively continued permits as "proposed permits" if EPA determines that states are not acting quickly enough on renewal applications. Pursuant to that provision, EPA could designate administratively continued "environmentally significant" permits (which would include, among many others, all mining-related NPDES permits which have been administratively continued for either two or five years) as "proposed," thereby effectively taking over the permitting authority of the state on an ad-hoc, permit-by-permit basis. Notably, often times states have not acted on renewals because they are looking at complex scientific, legal, or technical issues associated with the permit, and the proposal provides no evidence that EPA is in a better position to more quickly or efficiently resolve such issues.

The proposal also includes incorrect language with respect to anti-backsliding, as well as multiple other provisions that infringe upon the CWA authority of the states, such as requirements concerning data analysis and dilution.

III) E.O. 13771 and E.O. 13777 Criteria

EPA's final report, *Protecting Aquatic Life from Effects of Hydrologic Alteration*, is a candidate for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the report (1) is unnecessary; (2) intrudes upon the rights of states; and (3) inhibits job creation.

Compensatory Mitigation for Losses of Aquatic Resources

I) Regulation

On Apr. 10, 2008, EPA and the U.S. Army Corps of Engineers jointly promulgated a rule establishing requirements for compensatory mitigation associated with Clean Water Act (CWA) Sec. 404 permits. Those requirements can be found at 40 CFR Part 230 and 33 CFR Parts 325 and 332.

II) Problems with the Regulation

The compensatory mitigation requirements contained in the 2008 rule have been subject to multiple interpretations and inconsistently applied at mining operations. This has resulted in constantly changing requirements and unjustified mitigation rations. The rule has also led to the imposition of requirements that are not practical or appropriate when applied in the context of mining operations, such as certain financial assurance, long-term management, conservation easement and advance mitigation requirements. The inconsistent and inappropriate application of the rule's requirements have imposed considerable costs on the mining industry.

III) E.O. 13777 Criteria

The 2008 compensatory mitigation rule is a candidate for revision under Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda) as it inhibits job growth and contains costs that exceed its benefits. Significant revisions to the rule are required to provided much-needed regulatory certainty with respect to mitigation requirements in the context of the 404 program.

Hydrologic Alteration Report

I) Regulation

In late Dec., 2016, the U.S. Environmental Protection Agency (EPA) and U.S. Geological Survey (USGS) finalized a technical report, *Protecting Aquatic Life from Effects of Hydrologic Alteration*. The report outlines the impacts hydrologic alteration, particularly stream flow modification, can have on aquatic life, and provides a framework states can use to develop numeric flow regime targets necessary to support the biological integrity of streams and protect aquatic ecosystems. While the document is purportedly non-prescriptive in nature, it remains to be seen whether states will have to consider the report in triennial reviews of their water quality standards packages, or how environmental organization may utilize the document in the context of Clean Water Act (CWA) citizen lawsuits. In particular, states that utilize narrative (non-numeric) flow criteria, and permittees that have narrative flow criteria limits, could be especially susceptible to outside lawsuits.

II) Problems with the Regulation

The final report is premised upon the incorrect assumption that any modification in natural stream flow results in a degradation of downstream aquatic life, and as such fails to acknowledge the potential benefits of flow alteration and the fact that numeric flow targets can conflict with CWA programs, state water rights, the Surface Mining Control and Reclamation Act (SMCRA), and other applicable federal and state laws. EPA and USGS also failed to consult with relevant state and federal agencies before finalizing the report, and as such the report fails to provide states that have adopted narrative flow criteria with information critical to implementing that criteria in a manner that best protects water quality goals.

Additionally, while the final report removed an inaccurate legal analysis contained in the draft version, it fails to acknowledge that the only federal case to look at the issue has held that, because flow is not a "pollutant," it is not within EPA's authority to regulate under the CWA. That failure could lead to outside organizations and courts misapplying the document, particularly in the context of CWA National Pollutant Discharge Elimination System (NPDES) permitting situations. This is particularly critical since mining – as well as many other activities such as water management, groundwater pumping, urban development, thermoelectric power generation, and agriculture – often require some form of hydrologic alteration.

III) E.O. 13771 and E.O. 13777 Criteria

EPA's final report, *Protecting Aquatic Life from Effects of Hydrologic Alteration*, is a candidate for revision under Executive Order 13771 of January 30, 2017 (Reducing

Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda). Specifically, the report (1) eliminates jobs and inhibits job creation; (2) imposes costs that exceed its benefits; (3) places undue burden on the development and use of domestic energy resources; (4) is unnecessary; and (5) intrudes upon the rights of states.

Water Quality Standards Regulatory Revisions

I) Regulation

On Aug. 21, 2015, EPA finalized changes to the federal regulations governing the Clean Water Act (CWA) water quality standards (WQS) program found at 40 CFR Part 131. Under the CWA, approved states and tribes are the primary administrators of the WQS program while EPA retains certain oversight authority. The rule updated several aspects of the WQS program in a manner that limited and infringed upon state authority, including the regulations governing designated uses, triennial reviews, antidegradation, and the use of variances and compliance schedules in National Pollutant Discharge Elimination System (NPDES) permitting.

I) Problems with the Regulation

The 2015 water quality standards revisions have infringed upon the primary role of the states in setting CWA WQS, and unnecessarily restrict the use of available CWA mechanisms necessary for the establishment of appropriate WQS and NPDES permit limits. Specifically, the rule: (1) inappropriately codified a "rebuttable presumption" that the uses specified in CWA Sec. 101(a)(2) – fishable/swimmable – are attainable unless a costly use attainability analysis is performed which justifies removing the use, leading to overly stringent and costly permitting requirements; (2) requires states to review any new or revised Sec. 304(a) criteria and explain any decision not to adopt such criteria; (3) established inappropriate stringent new requirements for identifying high quality waters, analyses of alternatives and antidegradation implementation methods; and (4) placed new burdens on the use by states of variances and compliance schedules in NPDES permitting.

EPA also assumed that the proposal would not have an economic impact on the regulated public. However, in doing so, EPA ignored the fact that the regulated community would be substantially impacted by the requirements contained in the rule, and must either directly undertake or pay for the procedures outlined in the rule to be completed when states are unable to fund them.

I) E.O. 13771 and 13777 Criteria

The 2015 water quality standards rule is a candidate for revision under Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), and Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda), as it (1) inhibits job growth, (2) is unnecessary, (3) contains costs that exceed its benefits, (4) places undue burden on the development and use of domestic energy resources, (5) offers opportunities for reduction in regulatory costs, and (6) intrudes upon the rights of states.

Drinking Water Standards for Beryllium

I) Regulation

EPA's six-year review of drinking water standards identified beryllium (and 9 other chemicals) as a candidate for an increase in its maximum contaminant level goal formerly established by EPA based on a new health assessment. 82 Fed. Reg. 3518, 3527 (Jan. 11, 2017). However, in its announcement EPA proposes not to pursue this revision of the beryllium drinking water standards because of its belief that there is not any meaningful opportunity for costs savings from an upward revision. 82 Fed. Reg. 3525.

II) Problems with the Regulation

EPA's position is incorrect. EPA failed to consider several ways in which public and private sector costs would be saved if EPA were to increase the drinking water standards for beryllium. There is no benefit to an overly protective beryllium drinking water standard, but it does impose significant cost penalties. The beryllium drinking water standard is used by numerous federal and state agencies in establishing surface water, groundwater and soil cleanup levels in a variety of programs. For example, EPA requires that remedial actions for contaminated groundwater at Superfund sites attain the agency's drinking water standards. OSWER Directive 9281.1-33 requires that aquifers be restored to drinking water standards wherever possible. EPA's Superfund Management System reports that beryllium was identified as a surface water or ground water as a constituent of concern requiring remediation at 212 National Priority List (NPL) sites. Similarly, EPA reports that beryllium was a contaminant of concern in soils, sediments or sludge at 222 NPL sites. The drinking water standard for beryllium is used to derive the cleanup levels for these media as well.

The beryllium drinking water standard is similarly used in other federal and state remediation programs. For example, remediation by the US Army Corps of Engineers under the Formerly Utilized Sites Remedial Action Program utilizes this standard in soil and water remediation. Developers of brownfield properties under the Ohio Voluntary Action Program are required to remediate groundwater to this standard. In all these programs, requiring cleanup to a standard that is lower than what is necessary to protect public health increases remediation and redevelopment costs and slows the return of properties to productive use and the jobs that result therefrom.

III) E.O. 13777 Criteria

The drinking water standards for beryllium are a candidate for revision under E.O. 13777 as it: (1) is outdated, unnecessary, and ineffective; (2) imposes costs that exceed benefits; and (3) is not based on sound science. As EPA recognizes, the beryllium

drinking water standard is outdated in light of new health assessment information; and to the degree that the current standard is overly stringent, it is ineffective in improving health results and imposes nationwide, adverse effects on remediation and redevelopment costs and jobs.

WASTE

Toxics Release Inventory (TRI) Reporting

I) Regulation

The Toxics Release Inventory (TRI) established under Section 313 of the Emergency Planning Community Right-to-Know Act (EPCRA) requires industrial facilities to report annually the "release" of certain toxic chemicals that meet threshold quantities for specified activities (*e.g.*, manufacture, process, or otherwise use) to the environment (*e.g.*, placed in some type of land disposal or emitted to the air or water). 42 U.S.C. § 11203. The purpose of the TRI is to: (1) inform the public about releases of toxic chemicals to the environment; (2) assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; and (3) to aid in the development of appropriate regulations, guidelines, and standards. 42 U.S.C. § 11023(h). In 1997, EPA added the metal mining sector to the list of industries subject to TRI reporting. 62 Fed. Reg. 23,892 (May 1, 1997); 40 C.F.R. 372.22. The mining industry has been reporting under TRI since 1999 – 16 total years. EPA publishes annual reports on its website. The public can also access company reports.

II) Problems with the Regulation

The TRI was originally established for the manufacturing sector, in response to a series of chemical plant accidents, to support and promote emergency planning and provide information to the public on releases in their community. Today, EPA touts the TRI program as being a part of a "new approach to environmental protection" wherein information disclosure programs can be used to "create a strong incentive for companies to improve environmental performance." EPA emphasizes this aspect of the TRI program by highlighting a sector's pollution prevention (also known as P2) efforts in its annual reports.

Importantly, however, the application of the statutory terminology through regulation to mining has resulted in the requirement to report as "releases" on TRI reports the trace amounts of naturally occurring metal and metal compounds that are present in the rock and dirt that is moved and managed at a mine site. In fact, the vast majority of what the metal mining industry reports – from 85 to 99 percent – consists of the management of these naturally occurring substances in on-site land-based units. These units are engineered facilities permitted and regulated by exacting state and federal laws.

The sheer size of the mining industry's reported "release" numbers dwarfs TRI reporting by any other industry. Most recently, the metal mining sector remains the largest reporting sector at 37 percent, which is more than twice the chemical sector at 15 percent. As EPA acknowledged in the 2015 TRI National Analysis, "toxic chemical quantities reported by [the metal mining] sector are not especially amenable to source reduction, because they primarily reflect the natural composition of the ore and waste rock."

TRI release estimates reported under the TRI program are consistently misused by the public and EPA's program offices to irresponsibly paint an alarmist and inaccurate picture of the metal mining industry's potential for posing health and environmental risk. Most recently, EPA's Office of Land and Emergency Management relied in part on TRI data to target the metal mining industry as a "high risk" sector that warranted new financial assurance requirements under the Comprehensive Environmental Response, Compensation, and Liability Act. *See* 82 Fed. Reg. 3477 (Jan. 11, 2017). The TRI program, however, is strictly a volume-based reporting requirement, not an assessment of risk to public health or the environment.

III) E.O. 13777 Criteria

The TRI program is a candidate for revision under E.O. 13777 as it: (1) is outdated, unnecessary, and ineffective; and, (2) imposes costs that exceed benefits. Over 15 years ago, two successful cases brought by the mining industry produced court rulings that should have substantially reduced the scope of these reporting requirements. *NMA v. Browner*, 2001 U.S. Dist. LEXIS 915 (D. Colo. Jan. 16, 2001); *Barrick Goldstrike Mines v. Whitman*, 260 F. Supp. 2d 28 (D.D.C. Apr. 2, 2003). EPA has resisted full implementation of those rulings in a manner that would imbue the reporting requirements with more rational and less misleading information about the performance of the mining sector. This paperwork exercise burdens the mining industry with millions of dollars of compliance costs annually.

URANIUM

Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings and Uranium in Situ Leaching Processing Facilities

I) Regulation

The U.S. Environmental Protection Agency (EPA) has proposed revisions to "40 CFR 192, Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings and Uranium In Situ Leaching Processing Facilities." The proposal would create new groundwater data collection, monitoring and restoration standards for facilities that recovery uranium via *in situ* recovery (ISR) processes. The rulemaking is premised on the allegation that ISR activities may impact adjacent aquifers that either are now or could someday be sources of drinking water. Under the Atomic Energy Act (AEA) as amended by the Uranium Mill Tailings Radiation Control Act (UMTRCA), EPA does have a role in setting generally applicable environmental standards uranium recovery facilities. The U.S. Nuclear Regulatory Commission, however, is charged with implementation and enforcement of such standards. The proposed rule goes well beyond setting standards, a concern raised by the NRC's General Counsel.

II) Problems with the Regulation

The primary flaw with the rule is EPA's failure to properly assess the risks of ISR operations to groundwater. The agency provides no evidence in the rulemaking record that ISR facilities have ever adversely impacted an adjacent aquifer. Tellingly, EPA admits that the agency finds "it difficult to characterize the probability or magnitude of future contamination problems, or the costs inclined in remediating such future contamination." EPA's unrealistic assumptions about modeling groundwater contamination scenarios and associated cancer risk exposure pathways skewed its risk analysis to justify the rule's long-term groundwater monitoring provisions. Specifically, EPA modeled failure scenarios (catastrophic spills) that are not representative of groundwater incursion scenarios that long term monitoring requirements are designed to prevent and used a model that ignored existence of best management practices routinely used to ensure detection and remediation of leaks before they reach nearby receptors.

In addition, EPA minimizes the importance of studies that show adjacent aquifers have been adequately protected by existing federal and state programs, even their own. As an example, EPA's underground injection control (UIC) program under the Safe Drinking Water Act (SDWA) is designed to prevent endangerment of underground sources of drinking water (USDWs). EPA maintains that reliance on the requirements of the UIC program alone would not adequately address groundwater protection at ISR facilities, given there are not groundwater restoration requirements under the UIC program. EPA is correct that such restoration requirements do not exist but fails to note the lack of such requirements is due to the fact that ISR operations can only occur in exempted aquifers. In order for an ISR operation to proceed, a UIC permit is required and typically, an aquifer exemption is needed. In the case of ISR operations, the aquifer

exemption is granted either due to the mineralization or the poor natural quality of the water or both. The aquifer exemption effectively removes the aquifer from the protection of the SDWA due to the finding that it does not now currently serve as a source of drinking water and it cannot now and will not in the future serve as a source of drinking water. Additionally, EPA ignores the fact that both NRC and state regulatory authorities do require restoration of ISR operations under existing programs. A major flaw in EPA's proposed rule is the failure to adequately acknowledge the impact of existing federal and state programs in protecting adjacent aquifers from any potential risks of ISR operations.

EPA's cost benefit analysis for the rulemaking is also fatally flawed, particularly the calculations relating to social benefits. The analysis is Inconsistent with OMB Circular A-4 because it quantifies social benefits using avoided costs of remediating a hypothetical groundwater plume. EPA's own economic guidelines only allow use of replacement costs when: (1) damage to the asset is the only cost of the environmental deterioration; and (2) the least expensive way to achieve the level of satisfaction realized before the deterioration would be to replace the asset. Further, EPA's analysis ignores many of the costs related to the rule's long-term stability monitoring requirements including costs related to bonding; land rental/mineral rights; labor; utilities; regulatory compliance; transfer payments such as royalties to the Bureau of Land Management, NRC fees and taxes. With all costs and revenue impacts considered, several impacted companies determined that compliance costs per pound of uranium recovered would exceed the current per pound sales price.

III) E.O. 13777 Criteria

This rulemaking is a candidate for revision under E.O. 13777 as it: (1) eliminates jobs and inhibits job creation; (2) is unnecessary as EPA has not identified a risk to human health or the environment; (3) imposes costs that exceed benefits; and (4) creates a serious inconsistency with other federal and state programs.

National Emissions Standards for Radon Emissions from Operating Mill Tailings

I) Regulation

The U.S. Environmental Protection Agency (EPA) finalized its rulemaking, "40 CFR Part 61, Subpart W: Revision of National Emission Standard for Radon Emissions from Operating Mill Tailings" on Jan. 17, 2017. This rulemaking marks an expansion of EPA Clean Air Act (CAA) National Emissions Standards for Hazardous Air Pollutants (NESHAP) authority to include fluid retention impoundments such as evaporation ponds, storage ponds, and other similar ponds at uranium recovery facilities (non-conventional impoundments).

II) Problems with the Regulation

The rulemaking is an unnecessary and unlawful expansion of EPA's Subpart W CAA authority in a manner that undermines the jurisdictional limits placed on EPA in the Atomic Energy Act (as amended by the Uranium Mill Tailings Radiation Control Act). The rule contradicts 20 years of consistent interpretation that Subpart W is only applicable to uranium mill tailings impoundments. EPA's position is inconsistent with the language and the rulemaking history associated with Subpart W since Subpart W specifically references "uranium mills and their associated tailings." In addition, the preamble to the preexisting rule specifically states that the radon cover requirements in Subpart W's work practice standards are not intended to apply to such fluid retention impoundments.

EPA's decision to regulate these non-conventional impoundments means that uranium recovery licensees are now required to obtain an EPA construction permit for each impoundment and evaporation pond *as well as* a U.S. Nuclear Regulatory Commission (NRC) license for the same facilities. This duplicative regulation imposes new costs that are entirely unnecessary as EPA specifically acknowledged in the proposed rule's preamble that the scientific data shows that such impoundments pose little risk to human health and the environment. Recent science confirms EPA's earlier conclusions that risks are minimal. Despite any evidence of risk, non-conventional impoundments will be subject to the burdensome and onerous requirements including the requirements for daily inspections and weekly collection of photographic evidence to verify water levels in such impoundments.

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