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west virginia department of environmental protection

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Jim Justice, Governor  
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January 27, 2017

The Honorable Paul Ryan  
Speaker  
United States House of Representatives  
H-232, US Capitol  
Washington, DC 20515

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, DC 20510

Dear Speaker Ryan and Majority Leader McConnell:

**Re: *The Stream Protection Rule and the Congressional Review Act***

I am writing regarding a subject of utmost importance to the people and the economy of West Virginia. The coal industry has been a central part of West Virginia's economy for over one hundred years. The "Stream Protection Rule," 81 Fed. Reg. 93,066, (the "Rule"), which the Interior Department's Office of Surface Mining Reclamation and Enforcement ("OSM") issued on December 20, 2016, will cause a drastic reduction in coal mining and employment in West Virginia and throughout the coal mining regions of the country. I respectfully urge you and your fellow members of Congress to nullify this Rule under the Congressional Review Act.

Among all the regulations Congress might consider as targets for a veto under the Congressional Review Act (CRA), the Stream Protection Rule is one that particularly begs for attention. It conflicts with the very act of Congress which established OSM, the Surface Mine Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1251 to 1328. Fourteen states and one mining company have already challenged the rule in court. Still more legal challenges are expected. All of them will raise many fine legal arguments in opposition to the Rule. In this letter, though, I draw your attention to three fundamental conflicts with SMCRA.

First, SMCRA was adopted during the Energy Crisis of the 1970's. In it, Congress recognized the need for *expansion* of coal mining to meet the nation's energy needs. 30 U.S.C. § 1201(d). One of the stated purposes was to "assure that the coal supply essential to the Nation's energy requirements is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy". 30 U.S.C. § 1202(f). The initial regulations OSM issued shortly after SMCRA's adoption respect the balance that was intended. In contrast, nearly every sentence of the Stream Protection Rule calls for greater restriction of coal mining than ever before. Clearly, the Rule upsets the balance that was a fundamental purpose of SMCRA.

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Promoting a healthy environment.

The Honorable Paul and The Honorable Mitch McConnell  
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Second, the Rule conflicts with the role of the states under SMCRA. States which gain primacy under SMCRA are granted "exclusive" jurisdiction over the regulation of coal mining. 30 U.S.C. § 1253(a). "[B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions," SMCRA gives the states "primary responsibility" for developing and issuing regulations. 30 U.S.C. § 1201(d). The Rule regulates so extensively and pervasively as to leave no room for states to exercise this "primary responsibility" Congress gave them. The Rule also vitiates the states' exclusive regulatory authority by giving another agency in the Interior Department, the Fish and Wildlife Service, what amounts to veto authority over state permits.

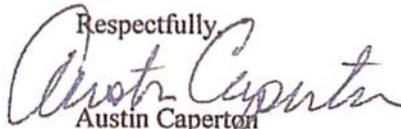
Third, SMCRA cannot supersede, amend, modify or repeal the federal Clean Water Act or state laws adopted pursuant to it. 30 U.S.C. § 1292(a)(3). The Rule is replete with conflicts with the Clean Water Act and state water quality laws. It is unlawful in each of the many ways in which it conflicts with the Clean Water Act and state water pollution laws.

Another problem with the Rule of both practical and legal import is that OSM excluded state regulators from the development of the Rule and its accompanying Environmental Impact Statement (EIS), even though West Virginia and other states had enlisted as cooperating agencies on the EIS. Exclusion of the states is a critical defect because the states, not OSM, are the front line, first-hand regulators under SMCRA - less than one percent of the nation's coal is produced in states where OSM operates the regulatory program. The important perspectives of the states, the primary regulators under SMCRA, are completely absent from this Rule.

One might wonder why OSM undertook to substantially re-write the minute details of a mature regulatory program. No justification for these sweeping changes can be found in thirty plus years of OSM's evaluations of state programs. Neither can it be found in the thousands of oversight inspections OSM has conducted. Instead, the impetus for the Rule appears to be political. The last administration's first priority for OSM, even before appointing a Director to lead it, was to order the law to be rewritten. In June 2009, EPA, the Army Corps of Engineers and the Interior Department were required to sign a Memorandum of Understanding (MOU) that changed the way coal mining is regulated. The MOU required OSM to re-write certain rules. In its zeal to comply, OSM completely changed the rules governing the way coal is mined.

In view of all the many problems surrounding this Rule, it is hard to believe the courts will uphold it. However, due to the time and effort litigation will necessarily involve, its uncertainties and the harm this rule will have on a coal industry that is already facing difficulties on many fronts, I respectfully urge you and your colleagues to pass a joint resolution disapproving the Rule under the procedures of the Congressional Review Act.

Thank you for your attention to this matter.

Respectfully  
  
Austin Caperton  
Cabinet Secretary

cc: Vice President Pence  
West Virginia Congressional Delegation  
Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission