Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Robert A. Sells, President, Titan America MABU
July 9, 2013

Chairman Bachus, distinguished congressional committee members, my name is Robert Sells. I serve as President of the Mid-Atlantic Business Unit of Titan America, a heavy construction materials producer in 8 states, employing over 1,600 Americans. Titan America produces cement, concrete, concrete block, aggregates, sand and beneficiated coal ash, which are vital materials needed as America recovers from the recent Great Recession and moves forward in a new era of resilient, sustainable construction and infrastructure. The construction materials we produce create the "Foundation of America".

As a business that is highly regulated under numerous Federal agencies, Titan America supports the HR 2122 – the Regulatory Accountability Act. We believe the process for justifying the regulations, identifying alternatives, evaluating the impact on jobs and the economy, assessing the cost-benefit impact of the regulations, and incorporating input from the regulated business community will be more robust and transparent under this legislation. The result will be greater certainty in business for planning new investments, expansions, and job creation.

While at times we have enjoyed good working relationships and cooperation with such agencies as the EPA, MSHA, OSHA and DOT, there are times, particularly during rule making, where the input of the regulated community has not been sufficiently requested, accepted or considered, resulting in regulations requiring significant revisions or that ultimately are challenged in court and remanded or vacated. One example is the Portland Cement NESHAP (National Emissions

Standards for Hazardous Air Pollutants) rule finalized in 2010 which included some conditions that were technically unattainable and other conditions that were not considered in, or were vastly changed from, the proposal. After various challenges this rule was reconsidered in 2013, but is now under legal challenges from environmental groups. Another example is the MSHA Pattern of Violations Rule. Safety is our number one value at Titan America. This rule, which was implemented this spring, goes too far in removing due process and could close a business without an opportunity to contest the allegations. At the present time, when an MSHA citation is issued, the company is required to implement the MSHA officer's corrective action before the company can protest the citation. Under the HR 2122 legislation there will be greater opportunities to consider input from the regulated community to make for more achievable and rational regulations.

We believe it is important for a regulation to be justified by aspects directly related to the regulatory statute for the regulation in question. However, co-benefits for aspects that are not attributable to a given regulatory statute are often used as justification. We have experienced this in the Portland Cement NESHAP where a limit for hydrochloric acid, which was previously determined to be less than health-based standards, is now justified because of the co-reduction of sulfur dioxide, which is regulated under other statutes. There are cases where cement plants have naturally low sulfur dioxide emissions and there is little if any co-benefit for meeting an arbitrarily low, and costly, hydrochloric acid limit. If there is a benefit for reducing sulfur dioxide emissions, then it should be addressed under the statutes for that emission, not by an expensive backdoor approach. This legislation will require that regulations be justified by their

own direct benefits and that proper rulemaking be followed if there is justification for co-benefits.

Greater input from the regulated community earlier in the process through advanced notice of proposed rulemaking and hearings during the proposed rule stage will provide the regulators with greater understanding of how the proposed regulation may impact businesses, what alternatives may be applicable, and what obstacles may prevent effective implementation of regulations. Often inconsistencies between regulations, or sometimes just lack of common sense, create complications for business without creating any additional benefit or protection intended by the regulation. One example is a cement kiln using tires as an alternative fuel, which has many positive environmental benefits. If a tire is from a state collection program, it is a legitimate fuel, but the exact same tire from a tire dump or landfill is solid waste, triggering a completely different set of regulations. Another example is DOT's Hours of Service regulation which is intended to provide adequate rest for commercial "over the road" drivers who spend considerable time behind the wheel, but it now also applies to local delivery drivers, which includes delivering ready mix concrete for construction, Our delivery professionals will drive an average of 15 to 30 miles for each delivery and in a normal day spend less than 40% of their time behind the wheel Due to the nature of construction work and delays caused by scheduling, weather and traffic, which were not considered in the making of this rule, the result is vastly increased record keeping and a limitation on the hours worked and thus the wages of many ready mix concrete drivers.

Finally, this legislation addresses the propensity of agencies to issue guidance in lieu of formal rules with the effect being that regulators at the regional and state levels often accord this guidance with the weight of a regulation. We have seen this in draft guidance for determining jurisdictional waters, implementing air quality standards, and interpreting standards for guarding on machinery. This legislation would assure that guidance be treated as guidance and rules go through proper rulemaking.

In closing, I would like to say that we understand the need for, and the protections and benefits provided by, regulations. What we are asking for is a balanced and common-sense approach that provides for justifiable, achievable and cost-effective regulations. We believe that this will result in greater certainty for business, increase investment in American manufacturing, construction and infrastructure, and create jobs as we face the challenges before us.

Thank you for this opportunity to testify. I also want to thank each of you for your service in the United States Congress representing the citizens of your district and our great nation. I would be happy to address any questions you may have.

Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Detailed Statement of
Robert A. Sells, President, Titan America MABU
July 9, 2013

I am Robert A. Sells, President of the Mid-Atlantic Business Unit of Titan America, a heavy construction materials producer in 8 states, employing over 1,600 Americans. Titan America produces cement, concrete, concrete block, aggregates, sand and beneficiated coal ash. I have served in various roles with Titan America since 2001 and previously held positions with other major producers of building materials from California to Texas to the southeastern U.S. over the past 35 years. I have experienced first-hand the impacts, both good and bad, that regulations can have on business, whether it is trying to permit a new cement plant or quarry, implement safety or DOT regulations, address healthcare for employees, or develop markets for sustainable and resilient building materials.

In the wake of the Great Recession, various federal agencies have embarked on a series of rulemakings that would deliver uncertain public benefits while undermining economic recovery. Specific recent major regulatory actions impacting our industry include:

- EPA - Portland Cement National Emission Standards for Hazardous Air Pollutants (NESHAP)
- EPA - Portland Cement New Source Performance Standards (NSPS)
- EPA - Commercial and Solid Waste Incinerators (CISWI) Rule
- EPA - Non-Hazardous Secondary Materials (or "Solid Waste Definition") Rule
- EPA - Various revisions to the National Ambient Air Quality Standards (NAAQS)
- EPA - Proposed Rule for Coal Combustion Residuals
- EPA - Various regulations on stationary engines and light to heavy duty vehicles
- EPA and U.S. Army Corps of Engineers – Draft Guidance on Jurisdictional Waters
- MSHA – Various regulations on penalties, notification, reporting and recordkeeping.

- MSHA - Pattern of Violations
- MSHA - Proposed Respirable Crystalline Silica
- MSHA and OSHA – Interpretation on Guarding Regulations
- DOT - The Hours of Service (HOS) regulations
- Various regulations under the Family Medical Leave Act
- Various regulations under the Americans with Disability Act
- Various EEOC regulations and guidance
- Various NLRB regulations and guidance

And, let us not forget regulations that have or will come forth from the Patient Care and Affordability Act and the recent presidential Climate Policy.

The impact of regulation is very apparent in the U.S. cement industry. There are currently approximately 100 cement plants in the U.S. with a capacity of approximately 105 million metric tons. New regulations will cost the industry on the order of $2.4 billion and it is anticipated that 18 plants will close, several which already have. U.S. cement manufacturing capacity is expected to remain relatively static in the future with new capacity being off-set by plant closures. However, due to expansive population and economic growth as well as new demand for cement in the form of green building and energy needs, domestic cement demand by 2035 is expected to increase to over 180 million metric tons[1]. Between 2006 and 2012, U.S. cement manufacturing capacity increased from 101 million to 105 million metric tons, while cement manufacturing capacity increased by 750 million tons in China, 100 million tons in India, 48 million tons in Vietnam, 35 million tons in Iran, 15 million tons in Russia, and 12 million tons in Brazil[2].

We certainly do not seek the lack of regulations as may exist in developing countries, but with an energy-intensive industry, such as cement, there is tremendous environmental benefit to make that material in the U.S. under reasonable regulations. Furthermore, the ability to make up the

[1] Portland Cement Association Long-Term Cement Outlook, July 10, 2012.
[2] U.S. Geological Survey

expected shortfall between demand and domestic capacity with quality imported cement will be a challenge.

We support good regulation that is grounded in legal statute, clearly defines the scope and significance, addresses the risks and alternatives, has real measurable benefit, and addresses all costs, including direct and indirect, as well as evaluating jobs, economic growth, and competitiveness. Furthermore, while guidance from a regulatory agency can be useful and desired, guidance that goes too far as de facto regulation should be neither legally binding nor grounds for agency action. If such "guidance" is needed, it should go through rulemaking.

Below are additional details on examples that our company has experienced and that I believe represent the need for this legislation.

- As a company and with industry groups we have participated in comments on Advanced Notice of Proposed Rulemaking, Proposed Rules, and Draft Guidance, but there is often a disconnect when the Final Rule is issued and it becomes apparent that our comments were misunderstood or worse, ignored. Often the results are rules that are scientifically or technically flawed, with many provisions that are not implementable. This results in petitions for reconsideration, legal challenges, revised regulations and delays in implementation, all of which result in uncertainty for developing new or modified facilities.

- Presidential Executive Orders have addressed many aspects of HR 2122, but still leaves enforcement of those provisions up to the discretion of the White House and does not provide the regulated community with the ability to provide meaningful input to the assessment of some aspects, such as cost/benefit or the evaluation of co-benefits outside the statutory framework of the rule.
    - In 2006 the EPA did not set a limit for hydrochloric acid (HCl) in the Cement NESHAP because the emission levels were determined to be less than health

based standards. However, in 2010 the EPA included a very low limit for HCl claiming the benefit that reducing HCl would result in a reduction of SO_2.

- Concurrently, the 2010 Cement NSPS claimed that SO_2 controls had zero cost because the cost was already attributed to HCl cost under NESHAP. This simply is not the case.
- It often appears that co-benefits are counted multiple times over various rule makings to justify costs, such as SO_2 benefits counted towards NSPS or NESHAP rules also counting towards justifying National Ambient Air Quality Standards (NAAQS), which in themselves are not required to consider costs.

- We have had a relatively good working relationship with EPA the past year or so on the reconsideration of the Portland Cement NESHAP and to some extent CISWI and the "solid waste" definition rule, but much of this cooperation and coordination came after issuance of final rules and the on-set of petitions for review and legal challenges. Under the proposed HR 2122 legislation perhaps many of the issues with these rules could have been addressed during the rulemaking process thus avoiding on-going revisions and legal challenges, which continue with each of these rules today.
  - The 2010 Cement NESHAP had a particulate matter limit that was flawed in its development and significantly lower than what was proposed in 2009. The basis of the PM limit was also such that the current technology was not able to reliably measure emissions for compliance. Industry ultimately prevailed and the EPA revised the PM limit in 2013. Perhaps much of this could have been avoided if there were greater cooperation between EPA and industry between the proposed and final rules.

- Often regulatory or legal issues trump common sense in rules, and the rule making process does not allow the regulatory or legal basis to be challenged.
  - A cement kiln using traditional fuels under the Cement NESHAP and a cement kiln using a solid waste fuel under CISWI both operate in exactly the same manner with the same equipment and pollution controls, yet technical/engineering

operational constraints recognized under NESHAP are ignored under CISWI creating regulatory conditions that cannot be met technically. The CISWI particulate matter standards for a "waste burning" cement kiln are one-half to one-third that of a NESHAP cement kiln, but there is no physical or operational difference to justify the lower standards. Also, CISWI cement kilns have numerical emission limitations during startup and shutdown while NESHAP cement kilns have work practices. This is because in the NESHAP rule, the EPA recognized that it is impossible to measure numerical emission levels accurately for a cement kiln during startup and shutdown, but this reality in operations is not acknowledged under the CISWI rule.

- Under the Non-Hazardous Secondary Materials (or "solid waste definition") rule a tire from a collection program is a "non-waste fuel" while the exact same tire from a tire pile or landfill is "solid waste" triggering the much more onerous CISWI regulations. It may be argued that the "waste" tire can be processed into a "non-waste" fuel by shredding the tire and separating the rubber and metal, but cement kilns can use both the rubber as fuel and the metal as an ingredient, and the cement kilns can accommodate whole tires. Therefore, significant cost and energy would need to be wasted just to satisfy a definition.

- An underlying agenda often overshadows the scientific/technical or cost/benefit assessment of a rule. One needs to look no further than the EPA's proposed rule for regulating the disposal of coal ash for an example. While it is clear that past practices for coal ash disposal were under-regulated and undeniably created some significant problems at some sites, an objective assessment under this proposed regulation would have achieved a rational and protective rule that would have been in-place already. The EPA was able to adequately regulate municipal solid waste through the states. Why should this have been any different?

- Guidance as de facto rulemaking would also be reined in under the proposed HR2122 legislation. As a company we have seen many instances and attempts for agencies to

regulate via "guidance". Prime examples include the recent EPA/Corps of Engineers Jurisdictional Waters Draft Guidance, EPA guidance for various NAAQS implementation, MSHA and OSHA guidance or interpretation on guarding for machinery, EEOC guidance on background checks, and EEOC guidance on reasonable accommodation under the Americans with Disability Act.

- As an example, MSHA created a power point slide presentation last year to inform industry of their new interpretation of guarding standards for equipment and machinery. The slide show was 65 pages long with additional note pages. These new "interpretations" were developed and implemented with no input from the businesses regulated. In subsequent inspections citations (and fines) were issued on guards that had been in place for many years having passed many previous inspections by numerous inspectors. There were no opportunities to contest the citations prior to implementing corrections to the satisfaction of the MSHA inspector.

- DOT's Hours of Service (HOS) Rule recently went into effect and is extremely burdensome to the concrete ready mix businesses. This rule requires:
  - After 8 consecutive hours driver will take a mandatory 30 minute break.
  - Limits use of 34 hour restart provision to just once a week and covering at least two periods between 1 am and 5 am.

Ready mix drivers average trips are 15-30 miles from the plant site and they are only driving between 2 to 6 hours a day. In any other business these drivers would be classified as local short haul operators. The mandatory 30 minute breaks not only create burdensome paperwork to manage, but also takes a perishable product and restricts delivery and appropriate applications. Ready Mix business is partnered with construction. Due to the nature of construction work there are unavoidable delays caused by scheduling, weather and traffic. Construction may also be seasonal in many geographical areas, being very busy during the summer months. Therefore, the restart

provisions and mandated off duty periods under this rule will have no effect on the safety of our drivers, but will limit their hours and thereby lessening their working wages.

- MSHA's 2006 MINER Act has prevented due process once an inspector finds what he believes is a violation of the Act. Under the law operators are required to abate alleged violations to the satisfaction of the inspector and only then are they allowed to contest the citation, which in many instances is found to be erroneous.

- The recent MSHA Pattern of Violations (POV) Rule has several burdensome issues:
  1) Criteria to determine POV currently has specific benchmarks in each category and the new rule states that there will be periodic revisions. Will the 'revisions' (aka adjustments to formula) have public comment periods?
  2) Closure orders on mine sites will be issued <u>before</u> the operator has the opportunity to
     a) Discuss alleged pattern(s) with the agency
     b) Contest the validity of alleged citations used to identify a POV
     c) Verify the accuracy of agency data
     d) Obtain Judicial review of alleged violations/orders
  3) Several standards under this rule apply to very large category/areas. For a large operator (e.g., Cement Plant, Large Aggregates, etc) this will present a problem.
     a) 56.14100(b) can be a catch all for machinery, tools, and equipment. For a site with hundreds and perhaps thousands of opportunity (equipment, tools and machinery) and each citation could have different root cause.
     b) 56.20003 rule on housekeeping is extremely subjective, and could be an issue for a large site that could be issued multiple citations with different conditions.
  4) This rule would deny operators due process in contesting citations and penalties by permitting the use of contested alleged violations to impose POV mine closures.

- OSHA has implemented the Global Harmonization Standard in place of the long standing Hazard Communication Standard. The GHS is being implemented through training by

the end of 2013 with complete implementation by June 2016. This rule will include an estimated 945,000 products in over 7 million OSHA regulated facilities. The implementation of this rule will be spread out over 3 years. The resources and costs for the training, replacement of signage/labels, and the replacing of all MSDS with SDS have not been fully realized by the agencies or business. However, OSHA estimates an annualized cost of 201 million dollars. Furthermore, MSHA has yet to adopt the change but has gone on record stating. "A mine operator who is compliant with the OSHA standard should generally be compliant with MSHA's standard." This comment leaves the door open to interpretation and leaves little to no guidance to the mining industry.

In closing, I would like to say that I agree that there are many protections and benefits provided by good regulations. However, often it seems that agencies are unwilling to fully consider the input from the regulated business community, to fully evaluate alternatives, or to strive to find the most cost-effective solution. We support HR 2122 – the Regulatory Accountability Act, which will require these agencies to follow a rational path to enacting regulations, and we encourage Congress to pass this legislation.