AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 110–298

SURFACE MINING ACT

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

TO

RECEIVE TESTIMONY ON THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: POLICY ISSUES THIRTY YEARS LATER

NOVEMBER 13, 2007

Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE

40–968 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON ENERGY AND NATURAL RESOURCES

JEFF BINGAMAN, New Mexico, *Chairman*

DANIEL K. AKAKA, Hawaii
BYRON L. DORGAN, North Dakota
RON WYDEN, Oregon
TIM JOHNSON, South Dakota
MARY L. LANDRIEU, Louisiana
MARIA CANTWELL, Washington
KEN SALAZAR, Colorado
ROBERT MENENDEZ, New Jersey
BLANCHE L. LINCOLN, Arkansas
BERNARD SANDERS, Vermont
JON TESTER, Montana

PETE V. DOMENICI, New Mexico
LARRY E. CRAIG, Idaho
LISA MURKOWSKI, Alaska
RICHARD BURR, North Carolina
JIM DEMINT, South Carolina
BOB CORKER, Tennessee
JOHN BARRASSO, Wyoming
JEFF SESSIONS, Alabama
GORDON H. SMITH, Oregon
JIM BUNNING, Kentucky
MEL MARTINEZ, Florida

ROBERT M. SIMON, *Staff Director*
SAM E. FOWLER, *Chief Counsel*
FRANK MACCHIAROLA, *Republican Staff Director*
JUDITH K. PENSABENE, *Republican Chief Counsel*

CONTENTS

STATEMENTS

	Page
Banig, Bill, Director, Governmental Affairs, United Mine Workers of America, Fairfax, VA	40
Bingaman, Hon. Jeff, U.S. Senator From New Mexico	1
Conrad, Gregory E., Executive Director, Interstate Mining Compact Commission, Herndon, VA	12
Domenici, Hon. Pete V., U.S. Senator From New Mexico	3
Prukop, Joanna, Cabinet Secretary, Energy, Minerals and Natural Resources Department, Santa Fe, NM	8
Quinn, Hal P., Jr., Senior Vice President & General Counsel, National Mining Association	33
Rank, Cindy, West Virginia Highlands Conservancy, Rock Cave, WV	44
Salazar, Hon. Ken, U.S. Senator From Colorado	2
Trujillo, Arvin, Executive Director, Navajo Nation, Window Rock, AZ	20
Wahlquist, Brent, Director, Office of Surface Mining Reclamation and Enforcement, Department of the Interior	4

APPENDIXES

APPENDIX I

Responses to additional questions 55

APPENDIX II

Additional material submitted for the record 121

TUESDAY, NOVEMBER 13, 2007

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m. in room SD–366, Dirksen Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. OK, why don't we go ahead and start the hearing. Today we're having a hearing on the Surface Mining Control and Reclamation Act. This is landmark legislation that was enacted into public law 30 years ago. I think it's appropriate that 30 years after the enactment of the legislation, we have a hearing like this to take stock of the accomplishments achieved under the Act, and to look ahead at what still needs to be done.

SMCRA was enacted to address the serious public health and safety and environmental problems associated with coal mining on private and public lands.

Title V establishes a framework under which States can develop their own regulatory programs that incorporate minimum standards required under SMCRA. Twenty-four States have done this, and Title IV established the Abandoned Mine Land Program to address the serious problem of mines that have been left unreclaimed and abandoned. There are 23 States and 3 Indian tribes that currently administer approved abandoned mine land programs.

Important work has been undertaken pursuant to the Surface Mining act since it enactment. I understand that some 240,000 acres of high-priority, coal-related problems have been reclaimed under the program at a cost of $1.7 billion. This is a significant accomplishment.

However, there's still work that needs to be done under this program. The Office of Surface Mining estimates that there is $3 billion worth of priority one and priority two problems that threaten public health and safety, and $3.6 billion worth of general welfare problems that remain unreclaimed.

Overall, the Office of Surface Mining inventory of coal problems shows more than $11.4 billion worth of unreclaimed sites.

Throughout coal country, people have been seriously injured and killed at abandoned mines, often involving pits and unstable high walls, underground fires and open shafts.

Today, in addition to an update on the work that's being carried out under SMCRA, I look forward to hearing testimony on some of the key policy issues pending in the Office of Surface Mining.

First, the issue of mountaintop mining, also known as mountaintop removal, a mining practice under which—as the name suggests—the tops of mountains are literally removed in order to mine the coal seams that are found underneath. I understand the Office of Surface Mining has a rulemaking pending that has implications for this practice. We obviously need to look at that and its potential impact on the communities affected.

In addition, the Office of Surface Mining is moving forward with implementing legislation enacted last year as part of the Tax Relief and Health Care Act of 2006 that authorizes the AML fund.

Several issues have arisen—one that affects my home State, our home State—is whether there will be limitations imposed on the use of certain funds for non-coal reclamation. This has long been permitted under SMCRA, I'm also interested in hearing what progress the Office of Surface Mining is making on a provision that I urged be included in the 2006 legislation to allow tribes, such as the Navajo Nation to obtain primacy for administering Title V regulatory programs on tribal lands.

I'm glad that we have representatives from the State of New Mexico here, and from the Navajo Nation, as well.

I look forward to hearing from the witnesses. Let me defer to Senator Domenici before we call on the witnesses.

[The prepared statement of Senator Salazar follows:]

PREPARED STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM COLORADO

I want to thank Chairman Bingaman and Ranking Member Domenici for holding today's hearing marking the 30th anniversary of the Surface Mining Control and Reclamation Act.

Colorado's mining heritage has left my state with a legacy of abandoned non-coal mine sites with no identifiable owner or operator who is responsible for site cleanup and reclamation. Currently in Colorado, we have more than 17,000 abandoned mine sites.

In 2006, Congress passed the Tax Relief and Health Care Act to reauthorize the collection of the Abandoned Mine Land fee, and to make other modifications to the AML program. This Act provides continuation of the collection of an AML fee on each ton of coal produced through 2021. Furthermore, the Act ensures the majority of the fees collected are dispersed to states and tribes without further appropriation.

Colorado has relied on funds from the AML fee to safeguard approximately 5600 hazardous openings, and reclaim almost 1600 acres of land. It is important that the AML funding remain available to non-coal sites to allow this important work to continue.

Fees collected for the AML program also fund medical benefits to retired mine workers. Through the United Mine Workers of America, coal miners who worked for companies that no longer exist are provided access to health care. Over $12 million in health and pension benefits went to retired mine workers living in Colorado in 2006. Like my colleagues, I am committed to keeping the promise made to provide these important benefits to the coal miners who spent their careers in our country's mines.

Recognizing that the funding from the AML program will not be adequate to address the abandoned mine sites in Colorado, I have long been a supporter of Good Samaritan legislation that would provide incentives to private companies who step forward to reclaim abandoned mines. I am hopeful that as this committee looks in the upcoming months to amend the Mining Law of 1872 we will find ways to provide incentives to private companies to clean up abandoned non-coal mine sites.

Again, thank you Mr. Chairman and Ranking Member Domenici for your work on these important mining issues.

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

Senator DOMENICI. Mr. Chairman, you've delivered a good opening statement that hits on all of the points. I would have had a shorter one, but I'm just going to make it part of the record and say that the part that I concur with you most, and am most concerned about is, once again, uranium—uranium mining is becoming a desire on the part of a number mining companies, and mining ventures. Clearly the issue that you raised, about using the resources of this Act for some of the cleanup—we have to get to that. If not that, we have to learn from New Mexico what their objections are going to be to uranium mining. It's very much alive, at this point, in terms of quantity could serve the Nation very well if we can do it right.

I think I will add, so that it will be on the record, in the event that occurs, there will be those who will think about uranium mining as it was 50 years ago, or uranium milling as it was 50 years ago, 40. That isn't the way it is. Now, it's all different in terms of the cleanliness, the health in the area—some of which is going to have to be shown to New Mexicans, so that they would understand it better.

But, I yield at this point. Thank you very much for calling this hearing.

[The prepared statement of Senator Domenici follows:]

PREPARED STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

Three months ago, we marked the 30th anniversary of the Surface Mining Control and Reclamation Act.

Originally signed by President Jimmy Carter on August 3rd, 1977, this law established a top-to-bottom approach for regulation of domestic coal production. Between then and now, it has required an impressive balancing act.

Although efforts to implement this law have been contentious throughout its history, the difficulties encountered are ultimately outweighed by the successes achieved. This fact is clearly evidenced by the essential role that the energy feedstock governed by this statute—coal—continues to play in our energy supply.

Coal provides more than half of our electric power.

At a time when demand for electricity is growing twice as fast as supply, coal provides an important safeguard against tenuous power reliability.

At a time when energy prices are volatile and increasing, coal has remained a stable and affordable commodity.

At a time when our reliance on foreign sources of energy has increased, coal has provided an important countermeasure to that trend.

These roles will only grow more important in the future. Coal is an abundant resource that we can produce domestically, and rely upon, for centuries to come.

We need coal to keep the lights on, to keep energy affordable, and to support our economic prosperity in the coming years.

Because we need coal, it is essential that we continue to drive our policies toward deployment of clean coal technologies. Instead of policies that act as a tax on America's domestic coal industry, we should provide incentives for investment in technologies that will allow us to use our most abundant resource in a cleaner, more efficient way.

The Surface Mining Control and Act Reclamation of 1977, and its implementation over the years, has recognized America's need for coal.

Twenty-nine billion tons of coal have been mined in the United States since this law was enacted. This has occurred in conjunction with reclamation of several hundred thousand acres of mine sites abandoned in the past, while ensuring that we not create additional problems for the future.

By striking a balance between domestic resource production and the protection of our environment, this Act has shown that it is possible to meet our energy needs with our own energy resources.

I look forward to hearing from the witnesses.

The CHAIRMAN. Thank you very much.

We have two panels today, and so why don't I introduce the first panel, and then ask that each of them summarize their testimony. We'll put your full statement in the record, of course, but we'd like you to take about 5 minutes or so and focus our attention on the main points that you want us to understand. Then after all four witnesses on the first panel testify, we'll have some questions of this panel, and then go to the second panel.

This first panel is made up of Brent Wahlquist, who is the Director of the Office of Surface Mining, thank you very much for being here, in the Department of Interior.

Joanna Prukop, who is the Cabinet Secretary for the Department of Energy, Minerals and Natural Resources in the State of New Mexico, thank you very much for being here.

Gregory Conrad, who is with the Interstate Mining Compact Commission, thank you for being here.

Arvin Trujillo is here representing the Navajo Nation. Thank you very much for being here.

Why don't you just proceed in that order, if you would, and give us the main points that you think we need to clearly understand.

STATEMENT OF BRENT WAHLQUIST, DIRECTOR, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR

Mr. Chairman, and members of the committee, thank you for the opportunity to appear before you today to share the perspective of the Office of Surface Mining and Reclamation Enforcement, or OSM, as we look back on 30 years of the Surface Mining Control and Reclamation Act of 1977. The Act, which created OSM, was signed into law on August 3, 1977, after 5 years of congressional debate, and two Presidential vetoes.

One of its express purposes is to strike a balance between the protection of the environment and the Nation's need for coal as an essential source of energy. This balance between environmental protection, and energy production is embodied in our logo, and serves as a guiding principle for OSM.

Another fundamental principle embodied in the Act is the concept of State primacy. Congress clearly intended that States would and should be the primary regulators.

State and tribal employees today permit and regulate 97 percent of the Nation's coal production, and use over 90 percent of the Abandoned Mine land Project funds. OSM's task, then, is to provide the regulatory and policy framework, the funding, oversight, assistance training and technical tools needed to maintain stable and effective regulatory and AML programs of the highest quality.

The first years after the Act's passage were filled with controversy, contention, litigation and uncertainty. OSM faced the challenge of striking the proper balance between oversight, direct enforcement and assistance, in order to promote both stable, quality State programs, and achieve a high level of industry compliance.

Through the years, efforts to clarify OSM's oversight role and provide training and technical support, have largely eliminated the

highly contentious relationship with States and other interested parties that existed during our first decade.

Since the Act was passed 30 years ago. Domestic coal production has increased 67 percent, and has gone from third place in U.S. domestic energy production behind oil and natural gas, to a solid first place. At the same time, unlike oil or natural gas, coal is cheaper today than it was 30 years ago. Coal is now the fuel providing more than half of the Nation's electricity that is so essential to the economy and our daily life.

Under our regulatory program, hundreds of thousands of acres have been successfully mined and reclaimed, in addition, numerous AML problems have been eliminated during re-mining by active operations of previously mined areas, substantially reducing the extent of AML problems that must be addressed through the AML fund.

Under the AML program, enormous progress has been made in addressing the 200-year legacy of hazards and environmental degradation from past coal mining. Over the past 30 years, there have certainly been some course corrections, by Congress and by OSM. Most recently, Congress revised and extended the AML program with the 2006 amendments passed and signed into law last December. These changes provide a framework for completing remaining coal-related reclamation, and for the first time, authorize travel primacy.

While there's still some areas of controversy, such as those surrounding mountaintop mining, OSM has made enormous progress in bringing regulatory stability, based upon state primacy, to the coal fields, in a manner that protects the public and the environment during mining, and assures that land is restored to productive uses following mining.

Our emphasis on limiting regulatory changes to areas where greater clarify is needed, training, technical tools, technology transfer and assistance have proven highly cost-effective in lifting the qualify and consistency of State programs, encouraging high-quality reclamation.

Along the way, we have pioneered partnerships with other Federal agencies and academic institutions across the coal fields, to promote emerging technologies and practices.

As we look to the future, we will continue our emphasis on regulatory stability and clarity, in a manner that promotes the development and application of sound science and new technologies, so that the coal so essential to the Nation's well-being can be produced, while minimizing environmental impacts.

Thank you for the opportunity to highlight our challenges and our accomplishments during the past 30 years.

[The prepared statement of Mr. Wahlquist follows:]

PREPARED STATEMENT OF BRENT WAHLQUIST, DIRECTOR, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear before you today to share the perspective of the Office of Surface Mining Reclamation and Enforcement as we look back on 30 years of the Surface Mining Control and Reclamation Act of 1977.

The Surface Mining Control and Reclamation Act (SMCRA) was signed into law on August 3, 1977, after 5 years of Congressional debate and two Presidential vetoes. The Office of Surface Mining Reclamation and Enforcement (OSM) was created

to implement the law. More recently, on December 20, 2006, SMCRA was amended by the Tax Relief and Health Care Act of 2006, Public Law 109-432 (2006 Amendments). One of the purposes of SMCRA is "to assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being 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." This balance between environmental protection and energy production is embodied in our logo and serves as a guiding principle in our implementation of SMCRA.

Another fundamental principle embodied in SMCRA is the concept of State primacy. For express reasons, Congress clearly intended that States would and should be the primary regulators under SMCRA. Of the nearly 2,400 government employees directly involved with implementing the regulatory and restoration programs of SMCRA on a daily basis, less than 25 percent work for OSM. The rest are State and Tribal employees who permit and regulate 97 percent of the Nation's coal production and use 90 percent of the Abandoned Mine Lands (AML) project funds. OSM's task is to provide the regulatory and policy framework, oversight, assistance, training and technical tools needed to maintain stable and effective regulatory and AML programs of the highest quality.

The first years after SMCRA's passage were filled with controversy, contention, litigation, and uncertainty. OSM faced the challenge of striking the proper balance between oversight, direct enforcement, and assistance, in order to promote both quality State programs and achieve a high level of industry compliance. Through the years, efforts to clarify OSM's oversight role, increase cooperation with States, develop a training program, provide technical tools, and promote technology transfer have largely eliminated the highly contentious relationship with States and other interested parties that existed during the early years of SMCRA. We believe that OSM has succeeded in its efforts to develop and implement a stable regulatory structure that achieves the desired balance between environmental protection and energy production, while respecting the role of States as the primary regulators.

Since SMCRA was passed 30 years ago, domestic coal production has increased by 67 percent and has gone from third place in United States domestic energy production, behind oil and natural gas, to a solid first place. At the same time, unlike oil or natural gas, coal is cheaper today than it was 30 years ago. Coal is now the fuel providing more than half of the Nation's electricity that is so essential to the economy and our daily life. Further, 97 percent of that coal production is regulated by States under primacy programs approved by the Secretary.

The coal industry has changed over the past 30 years. At the time SMCRA was passed, coal production occurred mainly in the eastern United States, and small operators and privately-held companies produced much of our Nation's coal. Since that time, many of those small operations have been replaced by larger, publically-held operators. Most of the increase in coal production has largely occurred in the West, while total production in the rest of the country has remained relatively constant.

Under SMCRA's regulatory program, hundreds of thousands of acres have been successfully mined and reclaimed. In addition, numerous AML problems, including hundreds of miles of abandoned highwalls and numerous refuse piles, culm banks, and acid-mine-drainage sources, have been eliminated during remining of previously mined areas, substantially reducing the extent of AML problems that must be addressed through the AML fund.

Under the AML program, enormous progress has been made in addressing the 200 year legacy of hazards and environmental degradation from past coal mining. The AML Program has reclaimed almost 240,000 acres of hazardous high-priority coal-related problems. Safety and environmental hazards have been eliminated on almost 315,000 acres containing coal or non-coal problems. Since 1977, OSM has provided $4.06 billion in grants to its partners in 24 States and three Indian Tribes to clean up dangerous abandoned mine sites. Since 1999, OSM has funded 161 Watershed Cooperative Agreements with local non-profit watershed organizations totaling $14.1 million. This funding has been leveraged with other resources by these organizations to undertake projects valued at over $45 million. Almost 8,000 emergencies have also been addressed.

Over the past 30 years, there have certainly been some course corrections. Congress has passed amendments eliminating the two-acre exemption, and requiring restoration of water supplies damaged by underground mines and repair or compensation for homes damaged by subsidence. Congress has also revised and extended the AML program, with the latest changes contained in the 2006 Amendments to SMCRA passed and signed into law last December. These changes provide a framework for completing remaining coal-related reclamation.

OSM has made changes to the regulations implementing SMCRA in response to identified needs and to issues that arose during litigation. For example, OSM has

developed the Applicant Violator System (AVS) and corresponding regulations that block those responsible for outstanding violations from getting new permits. In support of State primacy and to lift the quality of regulatory and AML programs, OSM:

- Maintains a highly successful training program addressing regulatory and AML issues that now utilizes State/Tribal staff for more than half of its instructors;
- Provides, through our Technical Information and Professional Services (TIPS) program, off-the-shelf technical software at tremendous savings through license sharing arrangements, training on that software, and cutting edge technical tools;
- Provides technology transfer programs to promote the utilization of best practices; and
- Provides an alternative enforcement framework and supports State regulators to help compel reclamation by those with outstanding violations, particularly in bankruptcy cases.

Our AML enhancement regulations have been very successful in stretching the reach of AML funding by allowing and encouraging the sale of coal encountered during the abatement of AML problems to help offset the cost of AML remediation.

Another important shift has been promotion of reforestation as a post-mining land use. Virtually all of the land that has been surface mined for coal over the past 30 years in Appalachia was forested before it was mined. However, the vast majority of that land has not been returned to forest. Instead, much of it has been reclaimed to hayland/pasture with smoothly graded (and thus compacted) surfaces and heavy groundcover unsuitable for growing trees.

Yet, forests moderate temperatures, control runoff, improve water quality, sequester carbon, and provide enormous biological diversity. Researchers at several universities have demonstrated that mined land, if properly reclaimed, can sustain tree survival and growth rates even greater than average sites on unmined land.

Over the past few years, in partnership with a wide range of State and Federal agencies, industry groups, environmental organizations, academic institutions, and individuals, OSM has established the Appalachian Regional Reforestation Initiative to promote reforestation through use of a science-based approach. The challenge before us is to completely change the perception among regulators, mine operators, and landowners, of what good reclamation looks like, while continuing to foster further scientific development and understanding of forest restoration.

This problem demonstrates the value of maintaining collaborative relationships with the academic institutions across the coal fields, since the problems related to reforestation were known within the academic institutions for several years before that knowledge began to work its way into practices accepted by regulators and industry.

In summary, while there are still some areas of controversy, such as those surrounding mountaintop mining, OSM has made enormous progress in bringing regulatory stability, based upon State primacy, to the coal fields in a manner that protects the public and the environment during mining and assures that land is restored to productive uses following mining. Emphasis on limiting regulatory changes to areas where greater clarity is needed, training, technical tools, technology transfer, and assistance have proven highly cost effective in lifting the quality and consistency of State programs and encouraging high quality reclamation. Along the way, we have pioneered partnerships with other Federal agencies, affected communities, and academic institutions across the coal fields to promote emerging technologies and practices. We also have been working with Tribes in implementing those aspects of the 2006 amendments authorizing Tribal primacy.

According to the Energy Information Administration, coal is expected to remain the primary fuel source for electricity generation over the next 20 years and coal production is forecasted to increase to match demand. Meeting that demand for coal, while protecting people, land, and water, will require a stable regulatory environment wherein all parties, including citizens, industry, landowners, and regulators, can make informed decisions affecting their interests.

As we look to the future, we will continue our emphasis on regulatory stability and clarity in a manner that promotes the development and application of sound science and new technologies so that the coal so essential to the Nation's well being can be produced while minimizing environmental impacts.

Thank you for this opportunity to highlight our challenges and accomplishments during the first 30 years of SMCRA.

The CHAIRMAN. Thank you very much.

Secretary Prukop, go right ahead.

STATEMENT OF JOANNA PRUKOP, CABINET SECRETARY, ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, SANTA FE, NM

Ms. PRUKOP. Thank you very much, Mr. Chairman, and thank you for inviting the State of New Mexico to testify today. I will speak today on New Mexico's perspective on the implementation and future of the Surface Mining Control and Reclamation Act of 1977, or SMCRA, as we all know it.

New Mexico has had a challenging, but largely positive, experience under SMCRA. We are a State with significant coal production, but with a small coal regulatory program. Our State has a long history of coal and hard rock mining, that has produced thousands of abandoned, hazardous mines. We seek to diminish these hazards with limited abandoned mine funds, and look for ways to maximize and leverage our less-than-adequate resources to achieve SMCRA's goals.

The biggest lesson from three decades of working with SMCRA is that success is gained when we apply innovative and flexible approaches at the State level to new problems. Our chances of success also improve when the Federal Government supports our approaches, which has been the case in recent years, I'm happy to say.

Today, coal production in New Mexico is roughly three times what it was at the passage of SMCRA. New Mexico has four large active coal mines, three surface, and one underground mine. They produce between 25 to 30 million tons of coal per year.

As coal mining expanded in our State, mine reclamation proceeded, and proved successful, despite our arid climate. Successes can be seen in the overall numbers and the strategies that we've implemented in this program. Of some 26,000 acres disturbed by coal mining in New Mexico during the life of SMCRA, over 75 percent have already been re-graded, covered with topsoil, and reseeded. Over half of the mines permitted under SMCRA have actually reached full reclamation, and have been released.

Success is due, in part, to innovative approaches, such as the geomorphic reclamation strategy adopted by several mines in our State. This strategy recreates natural drainage patterns in reclaimed land, and results in long-term stability and erosion control.

New Mexico's abandoned mine lands program which, as you know, was funded from fees on coal production, has addressed some of our most hazardous abandoned mines in the State. Under SMCRA, New Mexico has safeguarded more than 4,000 mine openings, and reclaimed more than 700 acres of land that had been disturbed by mining, but yet we have over 15,000 hazardous mine openings remaining in New Mexico.

In New Mexico, like other Western States, we face a number of challenges in the future implementation of SMCRA. One is the need to improve and expand our communication with the public. We've had examples of this in recent past. For a new mine, SMCRA only requires a notice published in the legal section of a newspaper to inform the public.

Two weeks ago, under the direction of Governor Richardson, our Mining Commission enacted new rules that significantly expand

the types and number of public notices that are now required for new mines or major permit revisions for mines.

Another critical issue is the failure of Federal grants to keep pace with the rising demand for coal production. As coal production in the West has steadily increased, grants to Western States for regulatory programs have actually decreased in inflation-adjusted dollars. Because of these funding cuts, most Western States are faced with difficult choices, to either find other funding in their State budgets, or reduce their programs in the face of growing demand.

Another challenge is the shift in OSM's position on using SMCRA abandoned mine land funds for abandoned non-coal mines. Section 409 of SMCRA allows a State to use AML funds to address high-priority, non-coal mines, and Western States have long-used AML funds to address significant threats posed by non-coal mines.

Last December, when Congress reauthorized the AML fee, and distributed to the States funds that were previously collected and allocated, but not appropriated, New Mexico now stands to have an additional $20 million come to our State over the next 7 years. While Section 409 was not amended in any way, OSM has suddenly shifted course, and now indicates that none of these new funds can be used for non-coal mine projects.

One result of OSM's position will be to prevent the State from fully participating with the Navajo Nation on a joint project to address abandoned uranium mines near the Navajo Indian reservation. This is an area of concern to Governor Richardson, and our State legislature.

The impact of uranium mining on the Navajo people received national attention very recently at a hearing before the House Oversight and Government Reform Committee 3 weeks ago. For OSM to reverse course and claim we can not use the new AML funds on high-priority uranium sites is difficult for us to comprehend, under the circumstances.

With that, Mr. Chairman, I will conclude my remarks, and thank you, again for having me here.

[The prepared statement of Ms. Prukop follows:]

PREPARED STATEMENT OF JOANNA PRUKOP, CABINET SECRETARY, ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, SANTA FE, NM

Good afternoon, Mr. Chairman and Members of the Committee. Thank you for inviting the State of New Mexico to testify today. I am Joanna Prukop, Cabinet Secretary for the New Mexico Energy, Minerals and Natural Resources Department.

Today I will speak about the implementation of the Surface Mining Control and Reclamation Act of 1977, or SMCRA, and focus on the experience New Mexico had implementing it. I will also discuss issues shared by other Western coal mining states and the Western Interstate Energy Board of the Western Governors Association.

New Mexico brings an important perspective to the discussion on the past, present and future of SMCRA. As a state with significant coal production but with a small regulatory program, we look for ways to utilize our limited resources to achieve SMCRA's goals. Our state has a long history of both coal and hard rock mining. We struggle with using our limited abandoned mine funds to effectively protect the public and the environment from the hazards of coal and non-coal abandoned mines. And with other Western states, we see that expanding populations and recreational use are increasing both the exposure to abandoned mine dangers and the public interest in new mine development.

New Mexico has an extensive mining history. Native Americans mined turquoise, lead, coal and copper hundreds of years before Europeans arrived in North America.

In the 1820s, the discovery of gold near Cerrillos triggered a rush decades before the California Gold Rush. Coal mining expanded in the nineteenth century driven by demand from the military, the railroads and non-coal mines across the Southwest. New Mexico enacted its own coal surface mining law in 1972. New Mexico's version of SMCRA was adopted by its Legislature in 1979.

New Mexico has had a largely positive experience under SMCRA. Prior to its enactment, coal production in New Mexico had never exceeded 10 million tons in a year. Today, there are four large active mines in New Mexico, three surface and one underground, producing between 25 and 30 million tons per year. As coal mining expanded, mine reclamation proceeded and proved successful despite our arid environment. Thanks to funding for abandoned mine reclamation under SMCRA, threats to public safety and the environment have been reduced.

The lesson we have learned from three decades of working under SMCRA is that success is gained when we apply innovative and flexible approaches to new problems. Our relationship with the Office of Surface Mining (OSM) has evolved over the years to give the State greater responsibility, and freedom, to implement SMCRA. Today, our relationship with OSM works best when they give us the flexibility to be innovative and provide support for our successful new approaches.

Coal mine reclamation in the arid Southwest faces significant challenges. Our limited rainfall, which often occurs in torrents, causes problems with both revegetation success and erosion control. Our staff has worked with mine operators to develop approaches to overcome these challenges and achieve reclamation success.

We are especially proud of the geomorphic reclamation strategy adopted by several mines in New Mexico. This strategy recreates the natural drainage patterns in the reclaimed land and results in greater long term stability and erosion resistance. The San Juan and La Plata Mines have won several national and state awards for their implementation of this pioneering strategy. Geomorphic reclamation in New Mexico is so innovative that OSM held a national forum on the topic one year ago including a tour of these mines. We have also worked on standards for revegetation success that take into account the variability in results due to drought years. These standards have now been incorporated into OSM national rules.

Success can also be seen in the overall numbers. Of 26,146 acres disturbed by coal mining in New Mexico during the life of SMCRA, over 75% have been regraded to an approved final surface configuration, covered with topsoil and reseeded. Over 50% of the mines permitted since the implementation of the New Mexico Coal Program have achieved final bond release and have been returned to the land owners. New Mexico has also returned over $40 million dollars of bonds to operators associated with documentation of successful reclamation.

We have also embraced new technologies that allow for more effective oversight and communication. We use mobile computing technology and geographic information system tools to assist field inspections and more effectively monitor ongoing disturbances and reclamation at the large mines in New Mexico. We also now require coal operators to submit permit documents electronically, thereby reducing paperwork and facilitating both analysis and communication.

These projects are examples of the evolving relationship between New Mexico and OSM. We consulted with OSM as we embarked on new approaches, and they provided us flexibility and support by providing the State with equipment and training. OSM has also promoted some of our successful approaches to other regulatory authorities, including sharing knowledge and experience with the Navajo Nation and Hopi Tribe as they move towards developing their tribal programs.

The states, and several tribes, are primarily responsible for the implementation of SMCRA Title IV—the Abandoned Mine Land program (AML). SMCRA includes provisions for the safeguarding of abandoned coal mines and high priority non-coal mines. Funding from the fees collected on coal production has helped New Mexico address some of our most hazardous abandoned mines. In New Mexico, we estimate that there are over 15,000 unreclaimed mine hazards across the State. Since the inception of the SMCRA AML program, New Mexico has addressed approximately 4,000 mine features and reclaimed over 700 acres of mine-disturbed land.

Our annual AML funding in recent years has been about $1,500,000. With these funds, New Mexico successfully completed a number of innovative projects that were recognized by OSM over the past five years. At Sugarite Canyon near Raton, we used a variety of materials and techniques to complete a stable reclamation of very steep and eroding coal mine waste piles that were impacting streams within a state park In the Cerrillos Hills between Santa Fe and Albuquerque, we closed dozens of mines along trails in an historic park using techniques that allowed wildlife access and preserved the historical integrity of the sites. Both of these projects received awards from OSM. Last month, we received the highest national award for

the Real de Delores project in the Ortiz Mountains which safeguarded mine openings within one of the oldest mining districts in America.

We're quite proud of the work we achieved under SMCRA to mitigate the effects of coal mining in New Mexico.

However, New Mexico and Western states face challenges due to the growth of population and the expansion of Western coal mining. These two growth areas can conflict with each other. As population grows and development expands into previously unsettled areas, concerns develop when new coal mines are proposed. Our newest residents along with our oldest have issues over new coal mining. Years of conflict transpired over the proposed Fence Lake Coal Mine, and our State's Native American communities have concerns about coal mining impacting sacred areas and causing environmental impacts.

The lesson learned over the Fence Lake Coal Mine conflict is that procedures for public participation are insufficient to the expectations of citizens. SMCRA only requires a notice published in the legal section of a newspaper for a new mine—even if that mine could exceed 10,000 acres. Two weeks ago, New Mexico's Coal Surface Mining Commission enacted new rules that significantly expand the types and numbers of public notice provided for any new mine or major permit revision. We now provide for radio announcements, postings in the community, large newspaper ads, mailings to nearby residents as well as postings on websites. New Mexico will also hold a public informational meeting for all new permit applications. We are hopeful that OSM will support these changes.

Another critical issue for New Mexico and for other Western states is the failure of federal grants to keep pace with the rising demand for coal production. A report issued last year by the Western Interstate Energy Board of the Western Governors Association documented that, as coal production in the West has steadily grown (and now exceeds the rest of the country combined), grants to Western states for SMCRA regulatory programs have actually decreased in inflation-adjusted dollars. Most Western states have been faced with difficult choices to either cover coal program costs with other state funds or to reduce their programs in the face of growing demands.

New Mexico maintains a lean regulatory program with generally one specialist for each needed area: geology, hydrology, engineering, soil science and plant science. We have kept costs low through the use of technology. Over the past five years, our grant funding has decreased while costs have risen for such things as salaries, benefits, fuel, and travel. Now we are planning to transfer two full-time employee positions in the next month because the coal grant can no longer support them.

Another issue that negatively impacts New Mexico and Western states is the shift in OSM's position on use of SMCRA AML funds for high priority abandoned non-coal mines. Section 409 of SMCRA allows the States to use AML funds to address high priority non-coal mines. Since the beginning of the AML program, New Mexico, Utah and Colorado have balanced the need to reclaim abandoned coal mines with the need to address the significant health and safety threats posed by numerous non-coal mines. OSM has recognized this need for flexibility and supported it in the past.

Last December, Congress passed the reauthorization of the AML fee, which provided that the distribution of funds to States equal the amount previously allocated under SMCRA but never appropriated. For New Mexico, this amounts to approximately $20 million in additional AML funds distributed over the next 7 years. However, while Section 409 was not changed or amended in any way, OSM has suddenly shifted course and now indicates to the States that this "return of state share balances" funding cannot be used for non-coal mine projects.

This loss of flexibility comes at a particularly significant time for New Mexico. After years of discussions, our AML program has reached an understanding with the Navajo Nation to jointly work on abandoned uranium mines in areas of questionable jurisdiction near the Navajo Indian Reservation. The impacts of these uranium mines on the nearby residents, particularly the Navajo people, are finally receiving the necessary national attention as evidenced by the hearing before the House Oversight and Government Reform Committee three weeks ago. With the new AML money available, we have a unique opportunity to finally address these sites which have caused great harm to the Navajo communities. For OSM to suddenly reverse course and deny our ability to expend these new AML funds on this high priority problem is difficult to comprehend.

Mr. Chairman and members of the Committee, I thank you for this opportunity to share New Mexico's perspective on the Surface Mining Control and Reclamation Act. The first 30 years of SMCRA brought significant challenges to the States and the federal government. Today, we can point to many successes under this law. We look forward to the next 30 years and hope that Congress and the federal govern-

ment will continue to provide the States with the flexibility and support necessary for continued and further success under SMCRA. We appreciate the opportunity to present this testimony, and look forward to working with the Committee in the future.

The CHAIRMAN. Thank you very much.

Mr. Conrad, go right ahead.

STATEMENT OF GREGORY E. CONRAD, EXECUTIVE DIRECTOR, INTERSTATE MINING COMPACT COMMISSION, HERNDON, VA

Mr. CONRAD. Good afternoon, Mr. Chairman and members of the committee. I appreciate the invitation to appear before you today, and to provide a perspective from the States concerning the Surface Mining Control and Reclamation Act as we reflect on 30 years of its implementation.

The Compact is comprised of 24 States throughout the country that produce some 90 percent of our Nation's coal, as well as important non-fuel minerals.

The Surface Mining Act is one of several laws passed during the environmental decades of the seventies that provided for a unique blend of Federal and State authority for the implementation of its provisions. In designing a regulatory model that would be both effective and efficient, Congress decided that a State should take the lead in regulating surface mining and reclamation operations within their borders.

Due to the diversity of terrain, climate and other conditions related to mining operations, it simply made sense to rely upon the States to implement programs based upon national standards. The other part of the equation was financial. It was anticipated, and indeed, has proven true that the States would be able to operate their programs at significantly lower costs than the Federal Government.

We are happy to report today, Mr. Chairman, that the regulatory regime established by SMCRA is a success, and is working notably well. The purposes of the Act are being accomplished in the overall goal of establishing a nationwide program to protect society and the environment from the adverse effects of past and present coal mining operations has been achieved. Drainage and runoff controls are in place to ensure that downstream waters are not filled with sediment, or otherwise polluted, blasting operations are controlled to prevent damage to nearby property, final grading and reshaping of mine lands are undertaken to ensure that they are stable and approximate their original contour, topsoil is preserved, and then replaced to accomplish high levels of productivity, and mine lands are reclaimed to a variety of beneficial uses, and then returned to local landowners in equal or better condition than before mining.

Examples of some of the excellent reclamation that is occurring under the Act can be seen in our two exhibits, which highlight various State and national reclamation award winners.

As we look to the future, Mr. Chairman, the States face several challenges. Perhaps the most critical is adequate funding for State regulatory programs, as alluded to by Ms. Prukop. Pursuant to section 705 of SMCRA, OSM is authorized to make annual grants to the States of up to 50 percent of the total costs incurred, for the

purposes of administering and enforcing their programs. This percentage is increased for States regulating on Federal lands.

As you know, Mr. Chairman, these grants are essential to the effective operation of State regulatory programs. Over the past several years, the amount for these Title V grants has been flat lined, as you will note in the graph to my left.

What this does not show is that these grants have been stagnant for over 12 years. Looking again at the graph, another disturbing trend is evident, and that is that the gap between the State's requests and what they are receiving in annual grants is widening. In the end, this increasing gap is compounding the problem caused by inflation and uncontrollable costs, undermines our efforts to realize needed program improvements and enhancements and jeopardizes our efforts to minimize the impact of coal extraction operations on people and the environment.

Should the Federal Government be faced with operating these programs, the impact on their budget will be significant. For all of these reasons, we have urged Congress to increase funding for State Title V grants in OSM's Fiscal Year 2008 to $67 million, and we are encouraged that both the House and the Senate are moving in this direction, and hope to see the full amount approved by Congress.

Let me turn briefly to some of the key successes and future challenges facing the States. Over the past 20 years, State programs have improved to the point that implementation is highly successful. As a result, the overall programmatic emphasis has shifted from structural and administrative issues, to specific technical, on-the-ground challenges that are encountered as reclamation technology and science are advanced. This is where OSM serves a valuable support mechanism for the States, particularly their TIPS program, and the Agency's technical training program, both of which undergird the State's efforts to operate efficient and effective programs.

On another front, the States have worked cooperatively with OSM and others to address acid mine drainage issues, and have made significant strides in advancing reforestation efforts on reclaimed land, and through a partnership among the States, OSM and EPA, we have achieved momentum in the re-mining arena, where thousands of acres of abandoned mine lands have been restored as part of active mining operations, thereby saving valuable AML trust fund moneys, and returning the land to productive use.

Speaking of the AML program, the States were greatly encouraged by he passage of the 2006 amendments, the SMCRA which culminated over 12 years of work by the States and others to reauthorize this vital program. The AML program has been one of the hallmarks of SMCRA and thus, has accomplished much over the years.

An overview of these accomplishments and continuing challenges is contained in a statement for the National Association of Abandoned Mine Land Programs,* which I would request be accepted for the record.

Among the future technical——

* See Appendix II.

The CHAIRMAN. We'll include that following your testimony.

Mr. CONRAD. Thank you. Among the future technical and regulatory challenges facing the States are those related to financial assurance for long-term impacts beyond normal reclamation, prime farmland productivity requirements, and underground mine mapping. In each of these instances, and in others such as subsidence control, blasting and hydrologic protection, the States are actively engaged in seeking technical solutions, as well as regulatory program enhancements that will fully and adequately address concerns associated with these issues.

Thank you very much.

[The prepared statement of Mr. Conrad follows:]

PREPARED STATEMENT OF GREGORY E. CONRAD, EXECUTIVE DIRECTOR, INTERSTATE MINING COMPACT COMMISSION, HERNDON, VA

Good afternoon Mr. Chairman and Members of the Committee. My name is Greg Conrad and I serve as Executive Director of the Interstate Mining Compact Commission. The Compact is comprised of 24 states throughout the country that together produce some 90% of our Nation's coal, as well as important non-fuel minerals. The Compact's purposes are to advance the protection and restoration of land, water and other resources affected by mining through the encouragement of programs in each of the member states that will achieve comparable results in protecting, conserving and improving the usefulness of natural resources and to assist in achieving and maintaining an efficient, productive and economically viable mining industry. Participation in the Compact is gained through the enactment of legislation by the member states authorizing their entry into the Compact and their respective Governors serve as Commissioners. We appreciate the opportunity to participate in the Committee's oversight hearing on "The Surface Mining Control and Reclamation Act of 1977: Policy Issues Thirty Years Later".

The Surface Mining Control and Reclamation Act (SMCRA) is one of several laws passed in the environmental decade of the 1970s that provided for a unique blend of federal and state authority for implementation of its provisions. One of the key underpinnings of the law during its formation was that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the states, due to the diversity of terrain, climate, biologic, chemical and other physical conditions related to mining operations. We are here to report on our role and experience as primary regulatory authorities under SMCRA and to provide our perspective on the various policy issues that attend the implementation of this important law.

By almost all accounts, the implementation of SMCRA by the states has been a resounding success. The anticipated purposes of the Act have been or are being accomplished and the overall goal of establishing a nationwide program to protect society and the environment from the adverse effects of past and present surface coal mining operations has been achieved. Drainage and runoff controls are in place to ensure that downstream waters are not filled with sediment or otherwise polluted by mining activity. Blasting operations are controlled to prevent damage to nearby buildings and other property. Final grading and reshaping of mined lands are undertaken to ensure that they are stable and approximate their original contour. Topsoil is preserved and then replaced on mined lands to accomplish high levels of productivity. Mined lands are reclaimed to a variety of beneficial uses within a few years after the completion of mining. Once reclaimed lands are fully bond released, they are returned to local landowners in equal or better condition than before mining began. All of these statutory requirements are being accomplished while maintaining a viable coal mining industry that is essential for meeting our Nation's energy needs. Examples of some of the excellent reclamation that is occurring under the Act can be seen in our two exhibits, which highlight various state, IMCC and OSM reclamation award winners.

As we reflect back on the past 30 years since the enactment of the Surface Mining Control and Reclamation Act (SMCRA), much has changed and yet some things remain the same. In the early years, we were focused on the development of a comprehensive federal regulatory program that would serve as the baseline for SMCRA's implementation. Many of these initial rules faced legal challenges as being arbitrary, capricious or inconsistent with law, which took many years to re-

solve. A few, like the definition of valid existing rights and the procedural rules concerning ownership and control that underpin the Applicant/Violator System, are still unsettled. However, the majority of the federal rules are in place and working effectively. This is not to say that we are out of the woods with respect to significant future rulemakings. Two examples of rules currently before the Office of Surface Mining, Reclamation and Enforcement (OSM) are stream buffer zones and mine placement of coal combustion by-products. However, in general, the regulatory program is more stable and certain than it was even 10 years ago, which benefits both coal operators and citizens.

One of the key components of SMCRA when first enacted was its reliance on a unique and challenging arrangement of state and federal authority to accomplish its intended purposes and objectives. Pursuant to the state primacy approach embodied in SMCRA, the states serve as the front-line authorities for implementation of the public protection and environmental conservation provisions of the Act, with a supporting oversight role accorded to OSM. It has taken a good portion of the past thirty years to sort out the components of these often competing roles, but the result has been a balance of authority that generally works.

During the past ten or so years, the working relationship between the states and OSM has been particularly productive and non-contentious. We have moved beyond the second-guessing of state decisions that predominated the early years of state program implementation and instead are engaged in more cooperative initiatives where OSM strives to support the states through technical advice and training and where the states and OSM work together to solve difficult policy and legal questions. OSM's oversight program is more focused on results, looking at on-the-ground reclamation success and off-site impacts, which better reflect the true measure of whether the purposes of SMCRA are being met. In fact, over the years, both OSM's oversight program, as well as several state performance-based regulatory programs, have received national recognition for their effectiveness and efficiency.

This is not to say that there are not several challenges ahead of us as we look to the future. Perhaps the most crucial at this juncture is adequate funding for state regulatory programs. Pursuant to section 705 of SMCRA, OSM is authorized to make annual grants to the states of up to 50 percent of the total costs incurred by the states for the purposes of administering and enforcing their programs. This percentage is increased for those states that regulate on federal lands. As you know, Mr. Chairman, these grants are essential to the full and effective operation of state regulatory programs. For the past several fiscal years, the amount for state Title V grants has been flat-lined. (See figure 1)* What this graph does not show is that these grants have been stagnant for over 12 years. The appropriation for state Title V grants in FY 1995 was $50.5 million. Essentially, we have attempted to operate effective, high performance programs with a meager $6 million increase spread over 12 years. By most standards, this is remarkable, and clearly a bargain for the federal government. Over this same period of time, coal production has risen substantially and OSM's own budget for federal program costs has increased by over $25 million. Given the fact that it is the states that operate the programs that address the environmental impacts of coal mining operations, a similar increase would have been expected. But instead, state regulatory grants have remained flat-lined.

For Fiscal Year 2008, in an attempt to reverse this trend, OSM has proposed a modest increase for state Title V grants. However, it may be too little too late, especially for some states such as Virginia and Utah. In Virginia, for instance, coal production and operating costs have increased, while federal funding for state-based coal regulatory programs has consistently decreased. The rise in costs associated with wages, employee benefits, and transportation fuels have risen approximately 15% over the past four years. Due to the loss of federal funds, Virginia is unable to fill many staff postings, including that of the critical field inspector. Without a full staff of reclamation inspectors, Virginia may not meet federal inspection guidelines. Virginia is also unable to fill technical support staff positions. This will limit the assistance the Commonwealth can offer to coal companies and significantly delay the review and approval process for surface mining permits. Virginia's situation is symptomatic of what other states are facing—or will soon face—if the debilitating trend for Title V grant funding is not reversed.

It must be kept in mind that state coal regulatory program permitting and inspection workloads are in large part related to coal mine production. In general, as coal production increases, the need for additional permitting and operational inspections also increases. State programs must be adequately funded and staffed to insure that permitting and inspection duties are both thorough and timely as states experience the reality of accelerating coal mine production and expansion activities. As program

* Graphic has been retained in committee files.

funding shortfalls continue, states risk the possibility of delayed production and negative impacts to the environment. The situation in Colorado exemplifies this reality. From 2002 to 2006, Colorado production increased approximately 10%. Permit revision activity increased nearly 50% during the same period. This reality has stressed existing program resources and caused the delay or elimination of lower priority program functions.

Just as with the federal government, state regulatory programs are personnel intensive, with salaries and benefits constituting upwards of 80 percent of total program costs. And, just like the federal government, state personnel costs are increasing. (See figure 2)* States must have sufficient staff to complete permitting, inspection and enforcement actions needed to protect citizens of the coalfields. When funding falls below program needs, states may struggle to keep active sites free of offsite impacts, reclaim mined areas, and prevent injuries.

Looking again at figure 1, another disturbing trend is evident. The gap between the states' requests, which are based on anticipated expenditures, and what states are receiving in annual grants, is widening. The numbers in this chart are taken from OSM budget justification documents, OSM's website, and estimates provided to OSM from the states. Please note that these numbers have not been adjusted for inflation—which means the situation is actually more bleak. There is no disagreement about the need demonstrated by the states. In fact, in OSM's own budget justification document, OSM states that: "the states have the unique capabilities and knowledge to regulate the lands within their borders. Providing a 50 percent match of Federal funds to primacy States in the form of grants results is the highest benefit and the lowest cost to the Federal government. If a state were to relinquish primacy, OSM would have to hire sufficient numbers and types of Federal employees to implement the program. The cost to the Federal government would be significantly higher." (Page 71 of OSM's Budget Justification)

The enormity of this funding challenge will become increasingly clear as the federal government is faced with the dilemma of either securing the necessary funding for state programs or implementing those programs (or portions thereof) themselves—at significantly higher costs. In Virginia alone, for instance, the cost of OSM running the program would likely amount to $8-10 million based on what it currently costs OSM to run the comparable federal program in Tennessee. For perspective, in Fiscal Year 2007, Virginia has been offered $3.175 million in federal funding to operate its program (although actual needs amount to $3.6 million—an overall shortfall of nearly $1 million when the state match is factored in). If this analysis was expanded to all of the 24 state programs, the overall impacts to the federal government would be dramatic. In addition, as anticipated by SMCRA's framers, the states are closer to the action, are able to account for local conditions and circumstances and can be more responsive.

In the end, the increasing gap between the states' anticipated expenditures and actual Federal funding is compounding the problem caused by inflation and uncontrollable costs, undermines our efforts to realize needed program improvements and enhancements, and jeopardizes our efforts to minimize the impact of coal extraction operations on people and the environment. For all these reasons, we have urged Congress to increase funding for state Title V regulatory grants in OSM's FY 2008 budget to $67 million, as fully documented in the states' estimates for actual program operating costs. A resolution adopted by IMCC at its recent annual meeting addressing this matter is attached to our testimony (Attachment No. 1).** At this point, the House has approved an additional $2 million over the Administration's request of $60.2 million and the Senate Appropriations Committee has approved a $6 million increase over that request. This is very encouraging and we trust that in the end, Congress will approve the full $66.2 million for state Title V grants.

It must be kept in mind that where there is inadequate funding to support state programs, some states will be faced with turning all or portions of their programs back to OSM (as in the case of Virginia) or, in other cases, will face potential lawsuits for failing to fulfill mandatory duties in an effective manner (as has occurred in Kentucky and West Virginia in the past). Of course, where a state does, in fact, turn all or part of its Title V program back to OSM (or if OSM forces this issue based on an OSM determination of ineffective state program implementation), the state would be ineligible for Title IV funds to reclaim abandoned mine lands. This would be the height of irony given the recent reauthorization and revitalization of the AML program.

Speaking of the Title IV AML program, the states were greatly encouraged by the passage of the 2006 Amendments to SMCRA, which culminated over 12 years of

---

* Graphic has been retained in committee files.
** Document has been retained in committee files.

work by the states and others to reauthorize this vital program. The AML program has been one of the hallmarks of SMCRA and has accomplished much over the years, as further articulated in the statement submitted by the National Association of Abandoned Mine Land Programs (NAAMLP). With the infusion of new life and funding, the program holds out great promise for the future. The states have been working closely with OSM to design rules that will appropriately implement the provisions of the 2006 amendments and allow the states to put money into projects that meet the purposes and objectives of the new law. Among the key issues we have addressed in our discussions with OSM are the following:

- Use of the grant mechanism to distribute payments from the U.S. Treasury
- Funding for minimum program states
- Use of unappropriated state share balances for noncoal reclamation and the acid mine drainage set aside
- The effective date of certain payments under the new law
- Adjustments to the current grants process

We look forward to pursuing these issues in greater detail with OSM over the coming months. Should the Committee desire a copy of our more detailed comments on the draft proposed rules, please let us know.

With regard to funding for state Title IV Abandoned Mine Land (AML) program grants, recent Congressional action to reauthorize Title IV of SMCRA has significantly changed the method by which state reclamation grants are funded. Beginning with FY 2008, state Title IV grants are to be funded primarily by permanent appropriations. The only programs that continue to be funded through discretionary appropriations are high-priority federal reclamation programs, state and federal emergency programs, and OSM operations. As a result, the states will receive mandatory funding in FY 2008 of $288.4 million for AML reclamation work. OSM also proposes to continue its support of the Watershed Cooperative Agreement program in the amount of $1.6 million, a program we strongly endorse.

Assuming that permanent appropriations for state AML grants do, in fact, become a reality (and we trust they will), there are three remaining discretionary funding priorities for the states: minimum program funding; federal emergency programs; and Clean Streams funding. With respect to minimum program states, under the new funding formula provided to us by OSM, all of the states and tribes will receive immediate funding increases except for minimum program states. Under OSM's interpretation of the 2006 Amendments, those programs remain stagnant for the next two fiscal years at $1.5 million, a level of funding that greatly inhibits the ability of these states to accomplish much in the way of substantive AML work. Many of these states have pending high priority AML projects "on the shelf" that cost several million dollars. The challenge for these states is putting together enough moneys to address these larger projects given minimum funding. It is both unfair and inappropriate for these states to have to wait another two years to receive any funding increases when they are the states most in need of AML moneys. We have therefore urged Congress to fund these states at the statutorily authorized level of $3 million in FY 2008 so as to level the playing field and allow these states to get on with the critical AML projects that are awaiting funding.

We have also urged Congress to approve continued funding for emergency programs in those states that have not assumed these programs. Funding the OSM emergency program should be a top priority for OSM's discretionary spending. This funding has allowed OSM to address the unanticipated AML emergencies that inevitably occur each year in states without state-administered emergency programs. Without this funding, it will be up to the states to address the emergencies that occur. In states that have federally-operated emergency programs, the state AML programs are not structured or staffed to move quickly to address these dangers and safeguard the coalfield citizens whose lives and property are threatened by these unforeseen and often debilitating events. Finally, we have urged Congress to approve continued funding for the Clean Streams Initiative. OSM has chosen to eliminate funding for this worthwhile program in FY 2008. We believe this is a mistake. Significant environmental restoration of impacted streams and rivers has been accomplished pursuant to this program, to say nothing of the goodwill that the program has engendered among local communities and watershed groups. For the small investment of money that is appropriated for this program each year (approximately $ 3 million), the return is huge.

Future challenges for the AML program include the perpetual operation and maintenance costs associated with acid mine drainage treatment; assuring that maximum flexibility is provided to the states to determine their respective AML project priorities; and enhancing opportunities for economic development (including recreation and tourism) in depressed areas of the coalfields.

As mentioned earlier, one of OSM's primary missions under the Surface Mining Act is evaluating the states' administration of their programs, otherwise known as oversight. This process has undergone a significant metamorphosis, the result of which has been a more credible and useful program for informing Congress and others about the status of state program administration. The first attempt at designing a meaningful oversight program in the mid-1980's was merely an exercise in data gathering or output measurement. We were concerned then with numbers of inspections, numbers of permit reviews and numbers of enforcement actions. OSM also tended to look behind state permitting decisions to determine whether OSM would have handled them the same way as the states. This type of "second guessing" generated significant conflict and even resentment between the states and OSM. In addition, the numbers that were collected into oversight reports told us little or nothing about whether the objectives of SMCRA were being met (i.e. what was happening on the ground? how effectively were state programs actually protecting the environment? how well was the public being protected and how effectively were citizens being served? how well were we working together as state and federal governments in implementing the purposes of SMCRA?).

Following an effort by OSM and the states in the late 1980's to fashion a more effective state program evaluation process based on a goal-oriented or results-oriented oversight policy and another review of the process in the mid-1990's, a performance measurement approach was adopted, based in large part on the requirements of the Government Performance and Results Act (GPRA). The new outcome indicators now focus on the following: the percentage of coal mining sites free of off-site impacts; the percentage of mined acreage that is reclaimed (i.e. that meets the bond release requirements for the various phases of reclamation); and the number of federal, private and tribal land and surface water acres reclaimed or mitigated from the effects of natural resource degradation from past coal mining, including stream restoration, water quality improvement, and correction of conditions threatening public health or safety. These new measurements are intended to provide Congress and others with a better picture of how well SMCRA is working and how well the states are doing in protecting the public and the environment pursuant to their federally approved programs. Much of this can also be told in pictures of reclaimed mined areas like those shown in our exhibits, many of which reflect winners of IMCC's and OSM's national reclamation awards. Effective program implementation by the states and compliance by the coal industry are resulting in the reclamation and restoration of both active and abandoned sites that meet the objectives of SMCRA and benefit both people and the environment.

Over the past twenty years, state regulatory programs have improved to the point that implementation is highly successful. Due to this success, the overall programmatic emphasis under SMCRA has shifted from structural and administrative issues to specific technical issues that are encountered as reclamation technology and science are advanced. These issues tend to manifest themselves as environmental challenges unique to particular regions or states, many of which must be resolved during the permitting process. They may also arise as a result of state inspections at mining sites. In any event, due to constraints on existing state resources, states may be unable to undertake the type of technical analyses that attend these issues. This is where OSM serves a valuable support mechanism for the states (as anticipated by section 705 of SMCRA) by providing technical assistance. In addition to meaningful and properly focused assistance, the states also look to OSM's Technical Innovation and Professional Services (TIPS) program. This has been one of OSM's most valuable and effective initiatives and serves as the cornerstone of the states' computer capability, particularly now that many states are utilizing electronic permitting. We trust that OSM and Congress will continue their support for TIPS and for the hardware and software upgrades that are required to assure the system's integrity and usefulness. TIPS training is also critical.

One of the key successes of SMCRA over the years has been its training program. Through a combination of both state and federal agency instructors, OSM's National Technical Training Program (NTTP) assures that newly hired state and federal employees, especially inspectors and permit writers, receive adequate and credible training both on basic elements of program implementation and on cutting-edge technical and policy subjects. The NTTP has also allowed more seasoned employees to fine tune their skills and update their knowledge on important topics. OSM's training program is especially important for smaller states that do not otherwise have access to such resources. In addition to NTTP classes, IMCC (working in cooperation with NTTP) has developed and facilitated a series of benchmarking workshops for both state and federal agency personnel that has allowed them to improve and enhance their respective regulatory programs and skills in such areas as blasting, subsidence, bonding, underground mine mapping, and permitting related to hy-

drologic balance. OSM has also sponsored several interactive forums on a variety of subjects of mutual interest to the states and we urge the agency to continue this practice, again with state input. All of these training components will become increasingly more critical as OSM and the states face a retiring workforce and the attendant succession planning that follows.

There have been other notable successes in SMCRA's implementation, in both the regulatory and policy areas. The states have worked cooperatively with OSM and others to address acid mine drainage issues through the Acid Drainage Technology Initiative, which focuses on prediction, prevention, avoidance, remediation and treatment. Again working cooperatively with OSM, the states have made significant strides in advancing reforestation efforts on reclaimed lands, particularly through the Appalachian Regional Reforestation Initiative. Through a partnership among the states, OSM and the Environmental Protection Agency (EPA), we have also seen major advances in the remining arena, where thousands of acres of abandoned mine lands have been restored as part of active mining operations, thereby saving valuable AML Trust Fund dollars and returning the land to productive use. We have also been working with EPA and OSM to revisit the current effluent limitation for manganese so as to reduce or prevent the adverse effects and potential hazards arising from some of the treatment technologies related to control of manganese.

In its 1990 monograph on "Environmental Regulation of Coal Mining: SMCRA's Second Decade", the Environmental Policy Institute identified and commented on several challenges facing the states and OSM, as follows:

> The issues facing regulators today are more difficult than they were in 1977. Many of the easier and more blatant problems have been addressed [such as the two acre exemption] . . . . The regulatory issues today include the prevention of hydrologic damage, the control of subsidence and subsidence damage, the establishment of adequate reclamation bond amounts, the use of permit-based enforcement, and the improvement of federal oversight. Also of concern is the massive shortfall in the federal fund meant to reclaim areas abandoned prior to 1977 without reclamation. [Page3]

Throughout SMCRA's third decade, many of these issues have been addressed and resolved. Congress has addressed the shortfall of moneys in the AML Trust Fund with the 2006 Amendments to SMCRA and OSM and the states are well on their way to implementing those adjustments and putting more money on the ground to restore AML sites. Federal oversight (and the attendant state/federal relationship under SMCRA) has advanced by significant degrees and is no longer the flashpoint that it once was. Through advances in electronic permitting and the use of tools available through OSM's TIPS program, state permitting actions are timely, comprehensive and accurate, thereby insuring more effective compliance with the law.

That being said, given the nature and scope of today's mining and reclamation operations and attendant environmental impacts, we continue to face challenges as regulatory authorities under SMCRA. A few examples follow:

- Bonding—one of the larger challenges concerning the bonding provisions of SMCRA is with regard to post closure issues. While SMCRA originally envisioned the bond as a guarantee of performance during mining, it did not anticipate the challenges associated with postmining concerns such as long-term treatment associated with acid mine drainage or long-term impacts from subsidence. For instance, OSM's current rules on bonding require that the bond amount be adjusted for potential subsidence damage repairs. However, nothing is said about how the bond release procedure will apply in these situations. The result is that surety companies are reluctant to write bonds for reclamation because of the long term nature and unknown extent of the liability. The states have been working with OSM to address this matter through the use of other financial assurance mechanisms, such as trust funds. There are also issues associated with bond release in general. Given that the procedures attending release are so cumbersome and expensive, coal operators simply choose not to apply for them. This further impacts the availability of bond capacity in the market and results in unnecessary expenses for states related to continued inspection and enforcement on these essentially completed reclamation sites.
- Prime farmland—the requirements related to proof of productivity (five year minimum) prior to termination of jurisdiction and before the land can be returned to the owner are cumbersome. The mid-continent states are currently undertaking research through a major Midwestern agronomy/soil science university to determine proper testing techniques to ensure soil capabilities are present, in the hope that an alternative method for demonstrating productivity can be attained, thus returning land much sooner back to the owner of record.

- AVS—over the past twenty years, the states have worked diligently with OSM to develop the Applicant/Violator System (AVS), which assists us in implementing section 510(c) of SMCRA, particularly the issuance of permits. Early in the development of AVS, the states focused on designing a system that would allow them to identify and block violators and other scofflaws without bogging down the database with useless or unproductive information. While we have made progress in this regard, we continue to examine ways to improve and enhance overall system effectiveness. For example, a critical aspect of AVS is the rules that define ownership and control; permit and application information requirements; and the transfer, assignment or sale of permit rights. These rules have been under a constant state of flux since their original promulgation in 1988 and a recent OSM rulemaking attempts to bring closure to several key issues that remain unresolved or problematic.
- Underground mine mapping—another continuing challenge that we face concerns accurate and readily available underground mine maps, which are essential for protecting the public, the environment and infrastructure from the threats posed by unknown underground mines. Events such as the Quecreek incident in Pennsylvania and the Martin County Coal Company impoundment failure in Kentucky were high profile demonstrations of the kinds of incidents that can occur when mine maps are inaccurate or unavailable. IMCC has sponsored a series of national and regional benchmarking workshops that have focused on the collection, handling, scanning, georeferencing and validation of mine maps. While the expertise and technology is available to tackle this issue and accomplish these tasks, our biggest challenge is the lack of funding for personnel, hardware, software upgrades and database development to move the initiative forward.

In each of these instances, and in others such as subsidence control, blasting and hydrologic protection, the states are actively engaged in seeking technical solutions, as well as regulatory program enhancements, that will fully and adequately address concerns associated with these issues. As an example, over the past several years, IMCC has sponsored benchmarking workshops on subsidence impacts, blasting, financial assurance, electronic permitting and hydrologic balance, all of which have provided state and federal regulators with an opportunity to examine these issues in detail with an eye toward regulatory program improvements. IMCC is currently preparing for its next workshop on surface and ground water database development and use as part of the permitting process. The overall goal is to continually assess and enhance our performance as regulatory authorities in an effort to achieve ever higher levels of program effectiveness.

Much progress has been made over the past 30 years to accomplish the purposes and objectives of SMCRA. From our perspective, the basic organization of OSM is working well. At this point of SMCRA's implementation, neither the states nor OSM are dealing with the same types of issues or problems that attended the early years of program formation and administration. We have moved away from questions of adequate state program components and state implementation techniques to more substantive issues associated with technical, on-the-ground problems or with thorny legal and policy questions associated with interpretation of our programs. We therefore believe that it is most relevant for OSM to focus its energies and resources on assisting and supporting the states through adequate funding for state grants, sound technical and legal assistance, and opportunities for the states to actively participate in the agency's excellent training program. The overall result will be less federal intrusion in the states' administration of their programs, a concomitant enhancement of the federal/state partnership, and better on-the-ground performance by the regulated industry.

We appreciate the opportunity to present this testimony and welcome the opportunity to work with your Committee, Mr. Chairman, to insure the effective implementation of SMCRA in the 21st century.

The CHAIRMAN. Thank you very much.

Mr. Trujillo, go right ahead, please.

STATEMENT OF ARVIN TRUJILLO, EXECUTIVE DIRECTOR, NAVAJO NATION, WINDOW ROCK, AZ

Mr. TRUJILLO. Thank you, Mr. Chairman, members of the committee. Again, I appreciate the opportunity to come before you to address issues concerning the Navajo Nation.

You have my statement for the record. I'd like to just expand quickly on a couple of points for your consideration.

Looking at the AML program, both the AML program and our primacy efforts are under my Division, which is the Division of Natural Resources.

The AML program has been very successful—we are a certified program, meaning we have completed the reclamation work on the abandoned mine land sites within the reservation, on trust areas.

We're also now working with OSM and also with the National Association of AML programs to develop proposed rules in terms of the allocations of funding, both the trust fund, as well as the fees—as noted by Secretary Prukop and Mr. Conrad.

Again, as Madame Secretary noted, we too are looking at funding flexibility within the appropriations. Again, being a certified tribal program, that has allowed us to earmark funding for public facility programs within the reservation, meaning that we've been able to bring additional dollars to help set up needed infrastructure within the reservation as a whole.

As far as the AML program's concerned, we continue to ask that OSM work to finalize the proposed rules, look at funding flexibility, as well as continue with their efforts to allocate funding for this coming year from the fees collected.

Our main focus with the Navajo Nation has been our work on primacy—looking at how we can take over the overall operations of overseeing mining and reclamation activities within the Navajo Nation. Three areas of concern to us. One, it is our understanding that tribes are to follow a process that would mimic the review process for States. In discussions up to this point in time, there's been thoughts coming out from OSM indicating that they would like to develop a proposed rule for this—we don't think that's necessary.

Second of all, we are requesting that the OSM continue to help us in developing the application for primacy—both looking at the expertise that they have as well as helping us defray costs for that.

Again, from the Nation's side, we're looking at the development of a Surface Mining and Reclamation code which will have to be approved by the Navajo Nation Council. We're also setting up tribal regulations comparable to 30 CFR Subchapter D, and we're also completing a regulatory program, or proposing a regulatory program, looking at staffing, budgeting and detailed descriptions on how regulatory processes will be developed.

A preliminary draft of the Navajo Nation's Mining and Reclamation Code has been completed, and now is before OSM for their review and comment. We ask that this continue, and be done in a timely fashion. We're also developing regulations that will be going before the Navajo Nation Council for final approval.

The last piece is we want to draw OSM into the tribal program development process. OSM has been the regulatory authority within Indian lands for the past 30 years. We're looking to utilize their experience, and we're requesting information and assistance from them in developing our own specific program. Again, we're asking that this be done in a timely manner, and that if possible, timelines be presented to us.

As noted, there are a number of areas that we're focused on, on trying to achieve. Right now, our surface mining program has four individuals and they're doing all of the work, plus everything else in the Navajo Nation, including inspections, mining training, et cetera. So, again, we're asking for assistance through the funding grant, and once the program is established, continued funding through that. Because, unlike State programs, the amendments within SMCRA provide 100 percent funding for tribal programs.

So again, we've been working on this since 1982. We feel we have the capabilities of meeting these responsibilities. Since the enactment of SMCRA, over 675 million tons of coal have been mined from the Navajo Nation. We have 3 active mining operations, one is ready to close, one has closed, due to the closure at the Mojave Generating Station.

But again, I thank you for the opportunity to come before you, and to express our points for the Navajo Nation, Mr. Chairman.

[The prepared statement of Mr. Trujillo follows:]

PREPARED STATEMENT OF ARVIN TRUJILLO, EXECUTIVE DIRECTOR, NAVAJO NATION, WINDOW ROCK, AZ

Chairman Bingaman, Senator Domenici, and members of the Senate Energy and Natural Resources Committee (Committee), good morning. I appreciate the opportunity to come before the Committee to provide the Navajo Nation's (Nation) insight on the implementation of the amendments to the Surface Mining Control and Reclamation Act of 1977 (SMCRA). My name is Arvin Trujillo, and I am the Executive Director of the Navajo Nation's Division of Natural Resources. I have been in this position since 1999, first in the cabinet of former President Kelsey Begaye and now under the leadership of President Joe Shirley, Jr.

This morning I would like to provide information on the Nation's progress in implementing the SMCRA amendments approved in December 2006, as it pertains to the Abandoned Mined Lands (AML) program and the Nation's efforts to obtain primacy over mining and reclamation activities on the Navajo reservation. I would also like to take this opportunity to thank the leadership of the Committee in their support of the amendments made to SMCRA under the Health Care and Tax Relief Act of 2006.

Progress by the Office of Surface Mining Reclamation and Enforcement (OSM) with the amendments to the AML program is steady, but the Nation is respectfully requesting that the timelines stay on schedule with the Proposed Rule. OSM is still in the process of drafting the final Proposed Rule and the Nation is anticipating these regulations to be completed by the summer of 2008. The Nation has been working closely with the National Association of AML Programs (NAAMLP) in providing feedback to OSM on the development of the Proposed Rule and the Nation is in support of the western states' position to allow for funding flexibility for high priority non-coal sites. Navajo AML has met its obligation of reclaiming abandoned coal sites within the reservation and we are certified. This provides the Nation the opportunity to contribute to needed infrastructure development through its Public Facilities Program, which is a program allowed under current legislation to certified state and tribal programs. Finally, OSM is in the process of collecting fees from mining companies for the coming year and it is anticipated 1 that funds will be distributed to both state and tribal programs by mid December of this year. The Nation is requesting that OSM stay with this schedule because the program's planning for fiscal year 2008 is dependent on appropriations received from this distribution in December.

The focus of the Navajo Nation's Division of Natural Resources (Division) and the Minerals Department, which is one of 11 departments under the Division, is for the Minerals Department to obtain primacy under SMCRA to oversee the mining and reclamation activities within the Nation. There are three issues that concern the Nation in developing an application for review and in how the application will be reviewed to determine the qualifications of the Nation to take on responsibilities under SMCRA.

First, it is the understanding of the Nation that tribes will develop an application that will be reviewed in the same manner that state applications are reviewed when they apply for primacy under SMCRA. OSM has stated that they will be developing

proposed rules under which tribes would submit an application for primacy. The Nation does not think this is necessary. This position has been debated with OSM since the Nation first began its efforts to develop an application in January 2007, and the position by OSM adds confusion to the process. Furthermore, there have been interpretations by OSM staff that tribes can only apply for partial primacy, but it is the understanding of the Nation that dependent on the application submitted by an Indian tribe, a tribe can apply for partial or full primacy of activities including permitting, inspection, enforcement, and bonding. It is, therefore, the position of the Nation that proposed rules do not need to be developed and that a tribe has the opportunity to apply for full or partial primacy.

Secondly, the Nation is requesting assistance from OSM to develop a complete application and to provide funding to help defray cost in the development of the application. The Minerals Department has hired a consultant to assist in the development of a formal submission, which would include: 1) the surface mining and reclamation code as adapted by the Navajo Nation Council; 2) a set of tribal regulations comparable to 30 CFR Subchapter D; and 3) a complete discussion of the proposed Tribal Regulatory program including staffing, budget, and detailed descriptions of how the regulatory process will work. OSM has formed a team to work with the Nation in its efforts to develop a formal application for primacy. A preliminary draft Navajo Nation Mining and Reclamation Code (NNMRC) has been prepared and has been sent to OSM for their initial review. We are requesting OSM to provide the Nation with a timeline for 2 completion of their review. Once the NNMRC is completed, this will require the approval of the Navajo Nation Council. While the NNMRC is being finalized, regulations will need to be developed and from our discussions with OSM, our approach will be to develop regulations which will rely on existing regulations within 30 CFR by cross referencing and establishing new regulations where needed for clarification. Finally, the Nation plans to draw OSM into the Tribal Program development process. OSM has been the Regulatory Authority for coal mining operations on Indian Lands for 30 years. We plan on utilizing their experience and will be requesting information and assistance from them. Under one of the purposes of SMCRA (Sec. 201 (c) (9), OSM is to "assist states (tribes) in the development of State (Tribal) programs." This effort will take personnel to accomplish and the Nation will be requesting an increase in its budget to add to the four staff members currently in place with the Surface Mining program. It is requested that OSM complete all reviews of documentation in a timely manner and it would be preferred that timelines be provided as to when these reviews will be completed. The Nation is also requesting OSM to provide assistance and funding to complete the formal submission for primacy consideration.

Tertiary, once primacy is awarded to the Nation, the program will need to be funded. Unlike the funding commitments to State programs, the amendments to SMCRA provides for 100% funding for Tribal programs. The Nation is not advocating a "blank check" for the Nation, but fund those programs to the need requested. This commitment could also be in place for current programs. In all cases, the Nation can and will provide the necessary justification to OSM for the planned budget amounts submitted to OSM. Senators, this is where the Nation could also ask for your support in providing adequate funding to OSM to see that sufficient allocations are provided to both State and Tribal programs.

The Navajo Nation has been working towards this goal since 1982. The Nation is of the opinion that it has the capability of overseeing mining operations within its borders. There seems to be reluctance on OSM's part to move this effort forward in a timely manner. The Nation is aware that this effort will affect the operations of the local field office, but I would like to have this process completed by the end of 2008 at the latest. I would also like to emphasize that the proposed rule for the allocation of funding under AML be completed by the summer of 2008. Again, I would like to express my gratitude to the Committee's leadership in supporting the Nation's effort to obtain primacy under SMCRA.

The CHAIRMAN. Thank you very much. Thank you all for your testimony, and let me just start and we'll do 5-minute round of questions here.

Mr. Wahlquist, let me start with you. On this whole issue of mountaintop mining and mountaintop removal as it's referred to—I guess I'm concerned as I read SMCRA, I tried to review the statute, and it seems to me to have some pretty specific requirements with regard to water protection, with regard to reclaiming of mine land to approximate original contour.

I don't, frankly, understand exactly how that comports with, or is consistent with this practice of mountaintop mining, which your Agency seems to be approving on a fairly regular basis. Could you explain to me how you believe your actions were consistent with the statute?

Mr. WAHLQUIST. As we would look at the statute, there's basically two kinds of operations that would be occurring in the steep slopes and the ridge top mountains of Central Appalachia. Those that would receive a variance from approximate original contour, which are the mountaintop removal operations—in that context, then, they have an express variance, and do not need to restore to approximate original contour. Instead, they are able to leave it flat or gently sloping land, and as long as they use an approved post-mining land use.

The other would be no different than any other kind of surface mine, whether it's New Mexico or Southern West Virginia, and that is that is nary a mine that, as they mine through the area, that they must restore approximate original contour, and restore the land use to an equal or better land use as what was occurring before.

So, those are the two basic types, they can mine through a mountaintop or ridge top, the same as they would any other area, and they must restore to AOC, unless they get an express variance from approximate original contour, and then they must have an alternative land use.

The CHAIRMAN. Can you give me a better understanding of what the criteria is you look at to determine whether to issue a variance? I think I saw somewhere in the background materials here, that you've issued over 6,000 of these variances?

Mr. WAHLQUIST. The primary regulators here, again, are the States, and most of this occurs in Virginia, West Virginia and Kentucky. The criteria, then, are those that are contained in the regulations for seeking a variance, and the primary role for a variance from approximate original contour is whether or not they have an approved post-mining land use.

The CHAIRMAN. Yes, I had thought that there had to be some showing that there would be no impairment of a water, stream or something to the effect, in order to get a variance—am I confused about that?

Mr. WAHLQUIST. The regulations, if we have implemented there, clearly contemplate and recognize that they may, that in mountaintop mining, whether it's done with a AOC variance, or whether it is restoring approximate original contour, will create excess soil. So, the disposal of the excess soil is somewhere out—that is soil that is placed outside of the mine area. So, in general, in Central Appalachia, then, that is going to be placed in the head of a hollow, a nearby head of hollow. The Surface Mining Act has express provisions for disposal spoil that includes a requirement for under drains in those areas where there is stream channels.

The CHAIRMAN. So you can avoid the problem of covering over a stream by some kind of under flow, you said?

Mr. WAHLQUIST. Yes, and in fact it was the 4th Circuit in a case about 3 or 4 years ago, acknowledged that the Surface Mining Act

clearly contemplates the disposal of excess spoil in waters of the United States, including intermittent and perennial streams.

The CHAIRMAN. OK. You've got some new regulations out, as I understand it there's currently a stream buffer zone rule that calls for 100-foot buffer around perennial and intermittent streams, unless regulatory authority specifically authorizes surface mining. That's being changed in the new rule, as I understand it?

Mr. WAHLQUIST. We have proposed a rule that would revise the stream buffer zone, we published that proposal on August 25th. The comment period is still open on that rule, it will close on November the 23rd. That rule includes two parts—one would be a revision or clarification of the stream buffer zone rule, and also a tightening of the requirements related to the disposal of excess spoil, that would particularly include the consideration of environmental effects. To assure that the amount of spoil was no larger than that needed, and that the fills that were designed no larger than required, it would also clarify what kinds of operations are subject to the stream buffer zone.

I would not that the Surface Mining Act itself does not use the term "stream buffer zone," that's a regulatory creation, and the intent of this rule, then, is to clarify the application of that rule.

The CHAIRMAN. My time is up.

Senator Domenici.

Senator DOMENICI. Thank you very much, Senator Bingaman.

I guess I want to get to the bottom of the issue, raised here by Secretary Prukop, with reference to whether or not New Mexico can use their money for uranium mining cleanup, or activities that relate appropriately to the law. She said, if I heard it right, that there had been a change recently from you all saying that they no longer could do that, and I wonder why that is?

Mr. WAHLQUIST. Section 409, which deals with non-coal mining expressly authorizes the use of two types of funding. That is, State share funding, and historic coal funding for use on non-coal. There's been no change in that, and there's certainly nothing that we would look at doing anything differently there.

The 2006 amendments also created a new source of funding, that is, the payback of the unappropriated State share balance over the next 7 years that will be coming from the Treasury. The issue that is now before us, and that we are still dealing with the Solicitor's Office on, is whether or not that money, as well, may be used for non-coal.

No decision has been made on that, we do anticipate a decision will be made in time for the 2008 distribution in mid-December, and we'll be closing the books on our collections at the end of November, anticipate making that distribution in mid-December, and we hope to be able to announce those decisions as to what we will—in coordination with the Solicitor's Office—during the week of December 3.

Senator DOMENICI. We hope so, and we hope that uranium is included then, when you make that distribution.

Secretary Prukop, is there anything else that needs clarifying from your standpoint, with reference to the relationship between your proposed efforts that you're concerned about, and what they are doing, or not doing?

Ms. PRUKOP. Mr. Chairman, Senator Domenici, members of the committee, no, Senator Domenici, I do believe so, I guess we're just anxious to see what that decision is in December, because we do not feel there is any fundamental difference in the language that—actually there's no change in the language in the Act that caused a change in the decisionmaking within OSM, on this issue.

Senator DOMENICI. Thank you. Thank you very much.

Could I ask you, Mr. Trujillo, if the Federal Government under the Acts we've been referring to here today, continues with the position that New Mexico can use some of its money for uranium mining cleanup? I assume that that would be consistent with what the Navajo Nation would like to happen, is that correct?

Mr. TRUJILLO. That's correct, Senator. We're also looking at how we can act, effectively utilize funding to address non-coal sources.

Now, one thing that we have to take a look at and work carefully with New Mexico on, is the allotted land issue. We have addressed areas, within the trust area, but we don't have jurisdiction within the allotted lands area. So, that's one area that we'll have to address, as we go forward.

Senator DOMENICI. But, I understand that Navajo Nation leaders, and you as environmental leader, would like to see some movement toward cleaning up the uranium mining areas, before you approve of uranium mining in the area, is that correct?

Mr. TRUJILLO. That's correct, Senator. Again, we're looking at how we can effectively begin in cleaning up, and through the current efforts of Congressman Waxman, as well as Congressman Udall, we're trying to determine what the Federal agencies will be doing, and then partnering effectively with them, as well as with the State of New Mexico, Senator.

Senator DOMENICI. Yes, Secretary Prukop, I assume your office is well aware of the activity that is going on in New Mexico, particularly in the same areas that it was going on prior to this, when we were the No. 1 uranium producer in the United States. You are involved with those various permittees, and those who are expressing interest in pursuing uranium mining, are you not?

Ms. PRUKOP. Yes, sir. Mr. Chairman, Senator Domenici, members of the committee—it is our Mining and Minerals Division in my Department that permits the exploration permits for all of the new uranium interests in the State. So, they have to get past MMD first, as they seek to either re-open old mines, or move forward with new potential mining interests, that's correct.

Senator DOMENICI. All right, just one last one for Mr. Wahlquist. Has there been any significant difference in the way the Administration treated the steam buffer zone rule compared to previous Administrations?

Mr. WAHLQUIST. In a sense, I guess the answer is both yes and no. The application of the stream buffer zone rule has not really changed since it was last passed in 1983, and in the way that the States have implemented the stream buffer zone rule has really remained the same since 1983. We certainly had a litigation over the stream buffer zone rule that came up in 1998. During that time, and in response to that litigation, the Administration entered into a Memorandum of Understanding in 1999 between OSM, the Corps of Engineers, the Environmental Protection Agency and the State

of West Virginia on how to address the stream buffer zone rule findings.

Then we ended up with a court case in the Southern District of West Virginia that concluded that the stream buffer zone was more stringent than the provisions of that MOU, struck down that MOU, that was at that point, only about 3 or 4 months old, and basically concluded that the stream buffer zone rule prohibited the placement of excess spoil in intermittent or perennial streams.

That court decision was later overturned on procedural grounds, the merits of it were never really addressed, and in the meantime, then, the States have continued to apply the stream buffer zone rule the same way that they were previously.

Senator DOMENICI. Thanks very much.

The CHAIRMAN. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman, and I want to thank all of the committee members for their testimony today. Most of my questions will be directed to Brent Wahlquist, so, I want to thank you, Brent for coming, meeting with me a couple of months ago, and communicating with my staff regarding the prior balance funds. I was sorry to miss your testimony, I got hung up.

But, in your written testimony, you did not specifically mention—and I just wanted to—hope you would clarify, the Administration's position on a timetable for returning to the States the balance of the unappropriated funds in the prior balance fund.

Mr. WAHLQUIST. We would anticipate being able—we're to be providing those funds on an annual basis, we anticipate being able to provide those funds for 2008 in mid-December. Because of the way the fees are collected, and the fees from the prior year are based upon the production for that prior year, we do not collect all of that, the fees on the production from the previous quarter, until, into October and November, so we'll be closing the books at the end of November, and hope to be able to make those distributions in mid-December.

Senator TESTER. OK, and has there been a decision made on the form of these payments?

Mr. WAHLQUIST. There has not. We're still in discussions with the Solicitor's Office, and we anticipate being able to announce a decision on that the week of December the third.

Senator TESTER. OK, and you came out with—or your Agency came out with—a proposed rule to have these funds be granted out, in other words, you'd apply for them, and they'd be given out as grants if——

Mr. WAHLQUIST. Actually, we have not yet proposed a rule there, our intent was that we would develop a proposed rule that would address these issues this fall. However, time got away from us before we reached resolution, and so we will be doing that without a formal proposed rule, we'll be doing that in the context of an informal decision document, once we have the final input from the Solicitor's Office.

Senator TESTER. In regards to the prior balance funds, are those moneys in the bank, currently? I mean, are they on hand, do you have them in hand now? They've already been paid?

Mr. WAHLQUIST. You mean, for the prior year?

Senator TESTER. For the prior balance funds, yes.

Mr. WAHLQUIST. The unappropriated balance, that money will—even under the statute, that money will remain——

Senator TESTER. But you have the money in-hand, is what I'm asking. I mean, this isn't money we have to go borrow, you've the money?

Mr. WAHLQUIST. We have the unappropriate balance, however, the money we'll be giving back to the States will not be that money, the money will come from the Treasury.

Senator TESTER. Right, that's correct, but the fact is, that the money has been paid into your Agency for this purpose, and the money hasn't been spent on something else?

Mr. WAHLQUIST. We deposit that money in the Treasury, we manage it there——

Senator TESTER. OK.

Mr. WAHLQUIST [continuing]. That money is interest-bearing, we manage the investment of that money——

Senator TESTER. Right, gotcha.

Mr. WAHLQUIST [continuing]. It is there earning interest.

Senator TESTER. Good deal, that's what we like to hear. Whose money is it?

Mr. WAHLQUIST. Whose money is it?

Senator TESTER. Mm hm.

Mr. WAHLQUIST. It's money in the Treasury of the United States——

Senator TESTER. Yes, I know, is it—well, to cut to the chase—is it the Federal Government's money or the States' money?

Mr. WAHLQUIST. The money that is there right now is allocated into three different accounts. A portion of it is State shared money, State and Tribal shared money, some of it is RAMP money, some of it is historic coal money, and some of it is the Secretary's money.

Senator TESTER. OK, as far as the prior balance funds go—that is, regardless of what account it's in—whose money is it?

Mr. WAHLQUIST. That money is assumed to be the State and Tribal share, and so that money will be re-colored as historic coal money, as you receive your money——

Senator TESTER. That's what I need to know.

Mr. WAHLQUIST [continuing]. Back from the Treasury.

Senator TESTER. Thank you very much. I think that if I had some money, I'd want to keep it in my bank, too.

The real question is, can you tell me how many mines are going to be reclaimed as long as that money stays in your bank account, and isn't distributed to the State?

Mr. WAHLQUIST. If no money comes out, than no reclamation is going to be done.

Senator TESTER. That's correct. OK, so the question is, is we sent a letter out awhile back, and I know this is a concern of Senator Barrasso's, because it came up during your confirmation. So, it's not just Montana. I think Senator Domenici alluded to it, too, in some of his questions.

Mr. WAHLQUIST. Yes.

Senator TESTER. The question is, is that if the money's there, and the money's really does belong to the States, and we've got mined to be reclaimed, and I believe we're in Montana, I think 600 is a low number—we've got a bunch, and we've done a lot of work. Why

not get this money out, get these environmental problems fixed with the reclamation? Why are we hanging onto the money? It doesn't seem right to me.

I come from the State legislature, and the counties would come up and say, "You know what? You've got our money, we need it back," and we did our best to get it back to them. I'm at the Federal level now, and the States are saying the same thing, and if these aren't good projects to get done, then maybe we ought to do away with the program. But, if there are projects that need to be done—and I believe in the 109th Congress they passed a law that said that money needs to be distributed out—if I'm incorrect, you can correct me on that—so, why aren't we doing it?

Mr. WAHLQUIST. Senator, I want to assure you that we have no interest in hanging onto the money. It is our interest in implementing the law as it was passed. We have no programmatic reason to not hand out the money so that the money can be used for the purposes for which it was intended.

Senator TESTER. So, why aren't we handing out the money?

Mr. WAHLQUIST. Why aren't we handing out the money?

Senator TESTER. Why isn't it being distributed to where it's supposed to go for mine reclamation?

Mr. WAHLQUIST. To begin with, we're to do that on an annual basis, and we're to be doing that based upon the past year's appropriation. That's why we'll be doing it in December.

Senator TESTER. OK. The money's in the bank, there's a potential that it won't occur in equal installments, there is that potential.

Mr. WAHLQUIST. That it won't occur when?

Senator TESTER. In equal installments over the next 7 years.

Mr. WAHLQUIST. No, it will be coming in 7 equal installments.

Senator TESTER. Seven equal installments.

Mr. WAHLQUIST. But at this point, we need to finalize the numbers as to exactly what is the unappropriated balance, and we won't know that number for sure, until early December, as to exactly what is the unappropriated balance, as of the close of the production as of September 30, 2007, all of the coal that was produced prior to September 30, 2007, we need to collect the rest of the AML fee on that production, then we will be able to determine exactly what was the unappropriated State share balance, and then we'll hand that out in 7 equal payments.

Senator TESTER. It sounds fairly complicated, but it's not. It's not. In the overall scheme of what goes on around here, what we're dealing with here is not complicated.

Mr. WAHLQUIST. I would agree with that.

Senator TESTER. My recommendation to you would be the same as it was in the letter, and in fact, I know the State of Montana has told me, they're OK with 7 equal installments, as long as there isn't a lot of red tape to try to get that dollar, so they don't have to hire a bunch of people and build their bureaucracy to get the money out of this bureaucracy.

So, just my recommendation is, is just from a good government standpoint, if we're going to clean up these mines, that money has to get to the local level, the State level—in this particular case—to get that work done. I would hope that you would fight like hell in your position to make sure that that happens soon. Very soon.

The CHAIRMAN. Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman, and thank all of the members of the panel for your testimony today as witnesses.

Mr. Chairman, this Act is particularly important to Wyoming, as our State is responsible for well over a third of the Nation's coal production. These are good jobs, good insurance, good retirement programs, and the production of coal provides an extraordinary amount of income for the State of Wyoming, for our cities, for our counties, and for the State.

This committee, and in particular, Mr. Wahlquist is well aware of my continued concerns over the upcoming distribution of unappropriated AML funds, as required under the Tax Relief and Health Care Act of 2006.

I continue to be troubled—as does Senator Tester—by reports that funds due to our States could be distributed in the form of grants, or through some line of credit scheme, rather than direct payments as contemplated by the Federal law.

I think Senator Tester had it right with his question when he said, whose money is it? Clearly, it is the States money.

I am additionally disturbed by the lengthy time it has taken to obtain a resolution of this matter. We heard that it would be the end of October, now today, what I think I heard is someone say, "Time got away from us."

Every day that goes by with these issues remaining unresolved heightens unnecessary bureaucratic tension. There is fallout from these delays that could and should have been avoided. When I was in the State legislation, we set up a fund so that the money could be—very easily, without strings, without red tape—put in that fund. The fund is still waiting for the money to come from the Federal Government, and it's time for the interest to be earned by the States, the money belongs to the States, it is their money. In Wyoming's case, it is our money, and the people of Wyoming ask every time I go home, Mr. Chairman, every weekend, and I was home again this weekend, "What's going on with the AML money? When will we know? We want to make sure that we get our money." The State is concerned, the legislature is concerned, the Governor is concerned, I am concerned, Senator Enzi and Representative Cuban are concerned.

I guess the question is, when the law was passed, you weren't in that position and I was not in this position—what could this Senate have done differently to make it more clearly evident to folks that the money belongs to the States? Is there something we didn't do right in passing that legislation?

Mr. WAHLQUIST. Certainly the legislation is a complicated piece of legislation, and in that sense, then, it is taken considerable time in terms of working with the Solicitor's Office, and with the Administration, in terms of concluding, "OK, what does this law really mean?"

It is certainly our intent, though, to implement this law consistent with what we have been given. We have no inclination whatsoever to deviate from the law that you passed last December, or that was passed last December.

Senator BARRASSO. Mr. Chairman, I would just add that, it didn't seem to me when I read that that it was going to be grants or a line of credit. Can we get some reassurance here, on both sides of the aisle, that what we're going to do is actually get direct payments to the States, come the time that the money is available in the middle of December.

Mr. WAHLQUIST. I can not give you that assurance today, that is an issue that we're still addressing with the Solicitor's Office and the Administration.

Senator BARRASSO. I can not tell you strongly enough that it is the opinion of the members of this panel that the law is clear, the money belongs to the States, and I for one, as the Senator from Wyoming, I'm going to continue to fight to make it clearly understood by everyone in the Administration that the money belongs to the States.

Mr. WAHLQUIST. I understand.

Senator BARRASSO. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Let me just ask one additional question, Mr. Wahlquist, just to try to understand better. This relates, again, to this mountaintop removal issue. The current rule that you folks operate under states there's to be a "100-foot buffer around any perennial or intermittent stream, unless the regulatory authority specifically authorizes surface mining activities upon a finding that the activity will not cause or contribute to a violation of applicable water quality standards, and will not adversely affect the water quantity or quality, or other environmental resources of the stream." Don't valley fills that cover perennial and intermittent streams, by definition, adversely affect the water quality and quantity, and other environmental resources of the stream?

Mr. WAHLQUIST. Certainly, Senator, one of the issues that we've looked at in the context of the stream buffer zone is the extent to which that applies to the stream as a whole, or whether or not it applies to all segments of the stream.

When we entered into a Memorandum of Understanding in 1999, with EPA and the Corps of Engineers, it was with the understanding that, basically, what that MOU called for was that, meeting the 404(b)(1) guidelines of the Corps of Engineers and EPA, were adequate to meet the standards of the findings required in that regulation that you just cited. Certainly that has been consistent with the basic position that has been applied since that rule was passed, is that the rule did not preclude the disposal of excess spoil in streams.

A concern that we had with the District Court decision was that, if we were to read that rule to actually preclude the disposal of excess spoil in streams, in all cases, that that would be inconsistent with our statutory authority, and we cannot have a rule that inconsistent with our underlying statute.

The CHAIRMAN. The underlying statutory authority says what, now?

Mr. WAHLQUIST. It says, it clearly contemplates the disposal of excess spoil in waters of the United States and in intermittent and perennial streams.

The CHAIRMAN. So, you think that your underlying authority overrides the rule that you've issued?

Mr. WAHLQUIST. If we've issued a rule that's inconsistent with our authority, that's basically when—in 1999, in December 1999, as we were considering what to do with the District Court's decision—why the Solicitor of the Department of Interior recommended an appeal, as a concern that the District Court's finding was inconsistent with our statutory authority.

The CHAIRMAN. All right.

Senator Domenici, go right ahead.

Senator DOMENICI. Let me, Mr. Wahlquist, I think I know a little bit about budgeting and direct spending, and the accounting process which may put you in a bind.

You see, if that money is in a trust fund, it doesn't matter who it belongs to, the problem is when you spend it, you can't understand this, but when you spend it, it costs money to the Treasury. So, if a trust fund is sitting there, whatever amount it is, it is taken advantage of in the budget, the budget includes it, so that it is, in a sense, spent. You come back to go to the trust fund, and you want your money out, and you say, "Well, you're spending it, so you've got to have something to pay for it." That makes it, that means that you've got to pay for it twice.

It's very important that you have somebody on this that understands the rules of the budget, so that they don't stick you at the end of the year, with a budgetary approach that says it isn't available for distribution, because it's in the budget, it's already in the big budget, accounted for and used.

That's probably part of the problem you're going through—I'm just guessing, and I could be wrong, but I have run into it in a bigger trust fund than this, and the biggest one we have around is the one, Senator Bingaman—Mr. Chairman—that was collected from all of the users of the utility companies with reference to nuclear power, it's now up around—does anybody here remember? I'm going to say $13 to $20 billion sits there.

We have a problem every year of paying for things like Yucca Mountain. But we can't use that money. Because, if we use that money, we take it out—if you take it out, you have to replenish it in the same act, or else you've affected the budget by the amount you've taken out.

So, this may be, the big words involved are "directed spending" or an "entitlement," in which event, what I've described does not happen. So, let's hope that yours is considered in the past to be a directed spending, and then they won't have a chance to make you wait for it while it gets accounted for.

Mr. WAHLQUIST. It's certainly our understanding that there are two aspects of this law that call for mandatory spending that is no longer subject to appropriation. One of those is the, each year we're to pay out that, which comes in prior year collections, and then also the payback of the unappropriated State share balance, in 7 equal payments over the next 7 years.

Senator DOMENICI. There's language saying it doesn't need appropriation, there's language to that effect?

Mr. WAHLQUIST. Yes.

Senator DOMENICI. Then it's directed spending, and probably will get done.

Mr. WAHLQUIST. Yes.

Senator DOMENICI. Sorry to waste your time, Mr. Chairman.

The CHAIRMAN. All right, any additional questions of this panel? Or, we'll go to panel two.

Senator Tester.

Senator TESTER. Just one, and I apologize, Brent, but I just got to ask—will you make a commitment to this committee to get these funds, at least the first year distribution done before this Administration leaves office 13 months from now?

Mr. WAHLQUIST. Done, sir. Yes. I promise.

Senator TESTER. That's on the record.

The CHAIRMAN. That's on the official record of the committee.

All right, thank you all very much for testifying, and why don't we call forward the second panel.

The second panel is made up of Hal Quinn, who is with the National Mining Association, Bill Banig who is with the United Mine Workers of America, and Cindy Rank, who is with the West Virginia Highlands Conservancy and the West Virginia Headwaters Waterkeeper, and she's accompanied by Joan Mulhern with Earthjustice.

OK, why don't we just proceed in the order that I introduced you, Mr. Quinn first, Mr. Banig, then Ms. Rank, and Ms. Mulhern if you have comments, as well.

Mr. Quinn, go right ahead.

STATEMENT OF HAL P. QUINN, JR., SENIOR VICE PRESIDENT & GENERAL COUNSEL, NATIONAL MINING ASSOCIATION

Mr. QUINN. Thank you, Mr. Chairman, and members of the committee. My name is Hal Quinn, I'm with the National Mining Association, we appreciate the opportunity to appear here today and share with you our views on the coal industry's experience under SMCRA.

I think what you heard earlier this afternoon, in the first panel, was agreement that SMCRA has been a bold and largely successful effort to balance our Nation's energy needs with the demands for environmental stewardship.

In 30 years since SMCRA's enactment, we have supplied over 29 billion tons of coal to fuel our Nation's growth and prosperity, which is equivalent of about 115 billion barrels of oil, or 5 times our proven domestic oil reserve.

At the same time, we've been able to restore over 2.2 million acres of land which supplied this coal to productive uses.

These accomplishments are the first order in energy production and environmental stewardship, are the product of the collective efforts of the coal industry, State and Federal Governments.

As Senator Domenici alluded to earlier, the history of the implementation of this law has not been totally free of contention, surely there were more than a few moments in the past 30 years that would have dissuaded even the most ardent supporters of the law from declaring success.

For instance, soon after the law's enactment, some predicted that the law's implementation would be met with regulatory delays and

endless litigation. Certainly, the first decade at least, or so, following President Carter's signature would do little to disappoint them.

The first attempt to implement the entire range of requirements of SMCRA resulted in 150 pages of regulatory text which was supposed to be fleshing out an already overly prescriptive 90-page statute. That 150 pages of regulatory text was accompanied by another 400 pages of explanations of what those regulations were supposed to mean.

This excessive detail and complexity delayed the development and approval of State programs, which were to serve as the foundation for SMCRA's implementation nationwide. True to predictions, the program became a fertile ground for litigation, so much so that at least one Federal court used the following metaphor to describe these epic battles, "As night follows day, litigation follows rulemaking under this statute."

This regulatory uncertainty was further compounded by the struggle between the States and the Federal Government in coming to terms with their respective roles. While SMCRA designated the States to be the day-to-day regulator, the coal industry was often confronted with serving, or satisfying, two regulatory masters, oftentimes not in complete agreement about how the law should be viewed.

However, persistence and innovation—aided by the lessons we've learned over the past 30 years—now allows us to report some impressive results.

As I previously mentioned, we've be able to restore 2.2 million acres of mine lands to productive uses. Uses that include farmlands with crop yields that exceed their pre-mining capabilities, land with—capable of grazing more livestock per acre than before mining, wildlife refugees providing new habitat for a diverse variety of species, recreational areas to support fishing, hunting and other leisure activities, and land that now has terrain that is now better-suited for development.

We've also paid over $8 million in abandoned mine land taxes that will go to reclaiming mine lands that were not reclaimed before 1977. We've also been able to restore thousands of acres of abandoned mine lands at no cost to the AML fund through re-mining and reclamation of previously scarred lands.

These accomplishments have all occurred while the coal industry continues to supply the fuel that generates over 50 percent of the electricity used by Americans. This is the power that supports 151 million Americans in all activities of their daily life.

While great progress has been made in the past 30 years, the program is not entirely free of controversy. The coal industry today in Central Appalachia has been subject to a serious legal tax over the past 10 years, that placed coal mines, the fueling supply and the jobs and the economic activity they sustain in great jeopardy.

The controversy surrounds what is often referred to as "mountaintop mining" and for all practical purposes, that includes mining in West Virginia, Kentucky, Virginia and Tennessee. Three prior lawsuits between 1998 and 2005 were momentarily successful, but the claims were ultimately deemed to be lacking merit on appeal.

Most recently, several organizations have obtained further orders that will close four mines, and perhaps a fifth, in West Virginia, mine that are projected to produce 50 million tons of coal, and employ over 600 miners and other personnel with some of the highest wages in the region. The collateral damage from these latest lawsuits includes a permitting process that has ground to a halt. Soon, mines will run out of reserves, and their permits and will have to shut down if permits are not issued to expand existing capacity.

These battles are over displacing policy interpretations along the law that have been in place over 30 years, and often involve disputes over whether these mines can support post-mining land uses. Appended to my testimony are photographs that do show examples of a number of the different, and wide variety of uses that these mountaintop mining operations are put to.

Let me close, if I might, Mr. Chairman, with a couple of observations about 30 years later on our energy picture today. Thirty years ago, when President Carter signed SMCRA, our Nation, at least energy independence was a national imperative. Our Nation was vulnerably dependent upon foreign sources for energy.

Today, we appear to be in the same precarious position. Since SMCRA's enactment, our energy use has jumped 23 percent but our energy production has increased by only 7 percent. Meanwhile, energy imports have climbed by over 70 percent.

There's no question that our Nation will require more energy in the future, just as it did 30 years ago. We will use energy more efficiently, certainly, through both technological advances and conservation, but we will still need more energy. This is a demand that—the meeting of this demand with reliable, affordable, secure sources will be a challenge, but certainly a challenge that can be met with the correct policies to draw upon all of our domestic energy sources, including coal that now serves a critical role, and should serve a critical role in our energy future, as well.

Thank you for the opportunity to appear and share our views with you today.

[The prepared statement of Mr. Quinn follows:]

PREPARED STATEMENT OF HAL P. QUINN, JR., SENIOR VICE PRESIDENT & GENERAL COUNSEL, NATIONAL MINING ASSOCIATION

My name is Hal Quinn, senior vice president, legal and regulatory affairs, and general counsel for the National Mining Association (NMA). I am appearing on behalf of the NMA to testify about the coal mining industry's experience under the Surface Mining Control and Reclamation Act (SMCRA) of 1977.

NMA represents producers of over 80 percent of America's coal—a reliable, affordable, domestic fuel that is the source of more than 50 percent of the electricity used in America. NMA's members also include the producers of metals and non-metal minerals, manufacturers of mining equipment and supplies, transporters of coal and mineral products, and other firms serving the mining industry.

GENERAL INTRODUCTION

In the 30 years since SMCRA's enactment, the coal industry has supplied over 29 billion tons of coal to fuel our nation's growth and prosperity. This is the equivalent of 115 billion barrels of oil and is five times our proven domestic oil reserve. Over 2.2 million acres of the lands supplying this coal resource have been restored to a wide variety of productive uses including farmlands, pastures, wildlife refuges, parks, recreational areas, wetlands, and commercial development. These achievements of the first order in energy production and environmental stewardship are the product of the collective efforts of the coal industry, and state and federal govern-

ments. They underscore the underlying strength of America's coal resource as the foundation of our nation's prosperity and energy security.

SMCRA LEGISLATIVE HISTORY

SMCRA was the culmination of a sustained effort throughout the 1970's to enact a comprehensive federal regulatory policy for coal mining. Unlike environmental legislation directed at the impacts of many industries upon one natural resource—e.g., Clean Water Act, Clean Air Act—SMCRA focuses upon one industry and its effect upon various natural resources. As the legislation proceeded through successive congressional sessions, the product transformed from a 17-page version passed by the House of Representatives in 1972 to a 90-page bill reported by the conference committee and signed by President Carter on the morning of August 3, 1977.

Throughout the protracted legislative process, one theme emerged to become the central purpose of the law: strike a balance between our nation's need for coal as an essential energy source and protection of the environment. Recall that in the 1970's, this country was in the throes of economic turmoil related to its vulnerable dependence upon foreign sources of energy. The oil embargo in October of 1973 focused attention on domestic energy security and the ability of our domestic coal resources to meet increasing energy requirements. At the same time, concerns existed about the potential environmental consequences of increased coal mining.

The balance SMCRA intends to strike between meeting our energy needs and environmental protection rests upon several principles. First, coal is an indispensable and prominent part of our nation's energy requirements and prosperity. Second, coal mining should serve as a temporary use of the land. Third, coal mine development and resource management must be integrated to successfully restore mined lands to support future uses. And, fourth, given the diversity in terrain and other physical conditions among our coal mining regions, states are best positioned to develop and administer programs designed to meet those objectives.

INDUSTRY'S SMCRA EXPERIENCE

The protracted and contentious legislative history of SMCRA caused some lawmakers to predict that the law's implementation would meet with regulatory delays and endless litigation. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 193 (1977). The early SMCRA experience would not disappoint them. The first attempt to implement the entire range of permanent program requirements produced 150 pages of regulatory text to "flesh-out" an already prescriptive 90-page statute. An additional 400 pages were required to explain what the regulations meant. Several years later, a comprehensive review of the rules converted some of the unyielding design standards to more flexible performance standards and empowered states to tailor more suitable versions to accommodate regional differences.

Not surprisingly, SMCRA implementation has proven fertile ground for litigation. The battles waged over SMCRA implementation have extended from the most fundamental questions about the jurisdictional reach of the law to the more arcane, such as the permissible conservation and husbandry practices to demonstrate successful reclamation. One court aptly characterized this early regulatory history with the following metaphor: "As night follows day, litigation follows rulemaking under this statute." National Wildlife Federation v. Lujan, 950 F.2d 765, 766 (D.C. Cir. 1991).

Apart from the turmoil accompanying efforts to establish the basic regulatory framework, the program experienced difficulty in its transition from the initial phase of shared federal and state responsibilities to the permanent phase that vested day-to-day regulatory authority with the states. In the field, the coal industry expected to see only one regulator, the state, for both permit and inspection tasks. The states shared a similar expectation since SMCRA declared that they would assume "exclusive" regulatory jurisdiction upon approval of their laws and regulations, and that the Federal Office of Surface Mining (OSM) would recede to a secondary role of overseeing state performance. In practice, the coal industry found itself positioned between conflicting state and federal applications of the law. States saw their exclusive role undermined with little deference or respect accorded to their applications of the law by OSM.

Serving two regulatory masters further compounded the difficulties coal companies confronted in complying with changing regulations. Uncertainty becomes especially frustrating to a regulated industry that operates under a statute that places a premium upon the principles of planning and sound resource management. The absence of a stable regulatory framework undermines the planning imperative. Changing standards and inconsistent application compromise the integrity of any planned strategy.

CHANGES IN INDUSTRY STRUCTURE

In the midst of this regulatory transition, the coal industry experienced structural changes as a result of a combination of market forces and public policy choices. The number, size and location of coal mines have changed substantially.

Market forces combined with new and changing regulatory requirements caused a rapid consolidation within the industry. Between 1976 and 1986 the number of producing coal mines dropped by 32 percent (from 6,161 mines to 4,201 mines) while production increased by almost the same percent (from 685 million tons to 886 million tons). The trend in consolidation continues, and the coal industry today produces 40 percent more coal (1.2 billion tons) from 75 percent fewer mines than it did just before SMCRA's enactment.

Over the past 30 years there has occurred a significant geographical shift in coal production from the Eastern coalfields to the Western United States. Coal demand in the United States is driven by the electric power sector, which consumes 90 percent of annual coal production. The policy choices arising over the last two decades under the Clean Air Act substantially influenced the fuel choices made by the electric power industry. The increasingly more stringent limits on emissions of sulfur dioxide at power plants made low-sulfur coal in the Western United States a cost-effective compliance strategy for many power plants. Favorable geologic conditions and economies of scale off-set the disadvantages some Western mines confront due to their distance from markets. As a result, coal produced from mines west of the Mississippi—which accounted for only 25 percent of the annual production in 1977—comprises almost 60 percent of production today.

SMCRA SUCCESSES

Both the industry and the SMCRA program have evolved over the past 30 years. Through persistence and innovation and aided in part by maturation in the administration of the regulatory programs, the industry has mastered the demands of the law. The investment to date has been substantial, and we can continue to report impressive returns:

- Restoration of 2.2 million acres of land to productive uses—three times the size of Rhode Island;
- Farmland with crop yields that exceed their pre-mining capabilities;
- Pasture lands that support grazing of more livestock per acre than pre-mining capabilities;
- Wildlife refuges providing new habitats for a diverse variety of species;
- Recreational areas to support fishing, hunting and other leisure activities;
- Forest lands;
- Sites in steep slope terrain that will support commercial, residential and economic development in areas where land suitable for such purposes is limited or unavailable;
- Payment of over $8 billion in Abandoned Mine Land (AML) taxes to restore unreclaimed mined lands abandoned prior to SMCRA;
- Restoration through remining of more abandoned mined lands than the AML program—at no cost to the AML program; and
- Innovations in reclamation technology and practices including post mining landscape design and land use planning, water management and treatment technology, and ground control and subsidence mitigation measures.

These accomplishments have all occurred while the coal industry continues to supply our nation annually with the fuel that:

- Generates over half of all the electricity in America;
- Affordably furnishes the power to support over 151 million Americans in all activities of their daily life;
- Reliably provides the power to support employment of almost 127 million Americans; and
- Accounts for one-third of our primary energy production—the largest portion of any energy source.

LINGERING CONTROVERSY

While we would like to report after thirty years that the program has emerged free of any controversy that is not the case entirely. Organizations opposed to coal mining in Central Appalachia coal region have brought a continuous series of legal attacks that have severely disrupted coal mining in this region.

The controversy surrounds what has been called mountaintop mining—but for all practical purposes this label includes almost all surface coal mining in the steep

slope terrain of the West Virginia, Kentucky, Tennessee and Virginia. When coal is surface mined, the rock and dirt (overburden) that overlies the coal seams is excavated to access the coal. When rock is broken and moved, the material expands, or swells, perhaps as much as 15-40%. As a result, the volume of spoil is greater than the overburden excavated from its original geological location. Some mines generate more excess spoil than others because they are designed to leave more gently rolling or flatter land that can be used for development or other uses after mining is completed and the land reclaimed. This excess spoil must be stored somewhere permanently and in the steep slope terrain of Appalachia the only available and safest place to do so is in the narrow hollows and valleys adjacent to the mines.

Before SMCRA, conventional mining methods in Appalachia typically resulted in the placement of excess spoil on the outslopes of mountain ridges. This practice created unstable slopes of unconsolidated material prone to erosion, slides and prolonged sedimentation of streams. In the early 1970s, several emerging steep slope mining techniques—including the construction of hollow and valley fills—were hailed by various government agencies as preferred practices for avoiding these hazards. Because the construction of hollow and valley fills was found to afford significant environmental advantages, Congress incorporated them into SMCRA as an industry standard. In many respects, the location, design and construction techniques for these fill structures are similar to methods used in highway construction spoil disposal, rock-fill dam construction and highway embankment construction.

SMCRA also recognizes that land suitable for development is scarce in Appalachia and that surface coal mining provides a unique opportunity to leave land in a condition capable of supporting various economic or public uses. To address that need, the law provides that surface mines can be reclaimed without restoring the approximate original contour in order to accommodate use of the land later for industrial, commercial, agricultural, residential, recreational or public purposes. Appended to my testimony are photographs* that provide examples of how the coal industry has afforded these opportunities in the mountainous regions of Appalachia.

But these coal mines, the fuel they supply to generate our electricity, and the jobs and economic activity they provide all remain in jeopardy from a continual barrage of litigation questioning interpretations and policies that have been in place since 1977. For the fourth time since 1998, organizations have sought court orders to stop ongoing mining operations and to prevent new mines from opening. The first three times, they were momentarily successful, but their preferred interpretations of the law were ultimately found to lack merit. See Bragg v. West Virginia Coal Association, 248 F. 3d 275 (4th Cir. 2001); Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F. 3d 425 (4th Cir. 2003); Ohio Valley Environmental Coalition v. Bulen, 429 F. 3d 493 (4th 2005). A Marshall University study found that if the views advocated in the first lawsuit prevailed, the state of West Virginia alone would lose over ten thousands jobs, hundreds of million dollars in wages and $168 million in state and local revenues annually. Burton, Hicks and Kent, The Fiscal Implications of Judicially Imposed Surface Mining Restrictions in West Virginia (Feb. 2001).

This time they have obtained a court order that will close four mines and possibly a fifth one in West Virginia. Together these mines are projected to produce 50 million tons of coal, employ over 600 miners and other personnel, pay some of the highest wages in the region and provide over $100 million in coal severance taxes to the state. And the collateral damage from this latest litigation may well exceed this direct hit. Since the court's initial order last March, less than a handful of permits have been issued in this jurisdiction. There are reportedly about 70 permits pending that have not been issued which are necessary to sustain existing mines or open new ones. As coal mines begin to reach their economic and operational limits, they will be forced to shut down if permits to expand their capacity are not issued in the next several months. The uncertainty and permitting delays are causing investments in new mines to be shelved or shifted to other states.

The interpretational disputes surrounding this litigation have become an epic in itself. While the focus has largely centered on West Virginia and surrounding parts of Central Appalachia, the reversal of longstanding policies advocated in the litigation have implications beyond that region and, perhaps, the coal industry as well.

LESSONS LEARNED

Tomorrow's successes will depend largely upon whether we learn anything from our past. There are many lessons from the 30-years of SMCRA implementation, and we offer several here based upon our experience.

---

*All graphics have been retained in committee files.

Design vs. Performance Standards.—Some have observed that the excessive complexity and detail of the statute, compounded by the zeal of the federal agency to outdo the legislators with even more detailed regulatory design standards, defied comprehension by the industry, states, and even by the legal minds that produced the regulatory product. Design standards are inherently inflexible and counterintuitive for national goals whose success will require the accommodation of diverse physical and geological conditions. A design standard approach to regulation stymies innovation. By contrast, a performance-based approach can accommodate new technology and advancements in mining and reclamation practices and is therefore more responsive to the diverse conditions found in the mining regions and an evolving industry. The switch to performance standards in the 1980's contributed greatly to the mined land reclamation successes we see today.

State Primacy.—The regulation of land use, a historically local prerogative, on a national basis is difficult at best, and all but impossible if local, state and regional differences cannot be accounted for in the implementation of statutory goals. Each state and region has different needs and interests when it comes to land use. But SMCRA recognizes this: indeed, state primacy is the cornerstone of the law precisely because good ideas and practices in one state for achieving a national goal may not be good ones in another. State primacy needs to be supported institutionally and financially to assure continued success. For the most part, the earlier distrust of state capabilities has receded and has been replaced by respect and cooperation between the federal and state agencies. However, fiscal constraints in some states may jeopardize the continued retention of their programs. Consideration should be given to altering the law's federal funding formula, particularly as one considers that some of the increased costs have arisen from new federal mandates imposed by OSM regulatory initiatives. State programs are more cost-effective than federal programs as demonstrated by OSM's experience in administering a federal program in Tennessee after the state relinquished primacy.

Regulatory Duplication and Efficiency.—SMCRA established a comprehensive program for regulating the effects of coal mining upon a wide array of natural resources. Nonetheless, it did not displace all existing laws that address specific resources, for example the Clean Air Act or Clean Water Act. In the past, this overlap has caused confusion and, at times, conflict for the industry in meeting overlapping program goals. The Clean Water Act is a prominent example of this overlap. SMCRA contains extensive requirements for hydrologic analysis, monitoring and protection requirements for coal mines. In some cases, federal and state agencies have strived to reconcile these programs and minimize duplication. Nonetheless, more can still be done to rely upon the regulatory benefits of SMCRA, avoid unnecessary duplication, achieve regulatory efficiencies and reap the attendant environmental benefits as envisioned by both the Clean Water Act and SMCRA.

LOOKING AHEAD

As we reflect today upon SMCRA's 30th anniversary, there appears to be a remarkable similarity between our country's energy situation in 1977 and today. When President Carter signed SMCRA that summer morning in the Rose Garden thirty years ago, "energy independence" was a national imperative. It is no less so today, but it now goes by the name "energy security." Today, we import about 60 percent of our petroleum needs, a share that the Energy Information Agency (EIA) projects will grow to 75 percent by 2030. By that time, we will consume 28 percent more oil and 19 percent more natural gas. Yet the United States has only 3 percent of the world's oil reserves and not much more of its gas reserves. Since SMCRA's passage, our energy use has jumped 23 percent, but our energy production has increased by only 7 percent. Meanwhile, energy imports have climbed by 70 percent.

We sometimes forget that the United States is a growing country. Our population grew by almost 3 million people in 2005 and now exceeds 300 million. Our economic growth has eclipsed most mature economies. So, there is no question that our nation will require more energy in the future, just as it did 30 years ago, to sustain our economic growth. We will use energy more efficiently due to technological advances, conservation and increased efficiency. But, we will still use more energy. Not surprisingly, therefore, our need for coal is projected to increase from 22.9 quads in 2005 to over 34 quads in 2030, reflecting the 156 gigawatts of new coal-based generating capacity that are projected to be needed by the end of the EIA forecast period.

Meeting this demand with reliable, affordable and secure sources will be a challenge, but a challenge that can be met with the correct policies that enhance the role of all domestic energy sources, including policies that ensure that our coal resources can continue to play the critical role in our energy future.

CONCLUSION

Thank you for the opportunity to share with you the mining industry's experience under SMCRA and to express its views on the critical role of our domestic coal resources to our nation's energy security and prosperity.

The CHAIRMAN. Thank you very much.

Mr. Banig, go right ahead.

STATEMENT OF BILL BANIG, DIRECTOR, GOVERNMENTAL AFFAIRS, UNITED MINE WORKERS OF AMERICA, FAIRFAX, VA

Mr. BANIG. Chairman Bingaman, members of the committee, I am Bill Banig, Director of Governmental Affairs for the United Mine Workers of America. We appreciate the opportunity to appear before the committee to celebrate the 30th anniversary of the Surface Mining Control and Reclamation Act of 1977.

When enacting SMCRA, Congress found that surface and underground coal mining operation affect interstate commerce, contributes to the economic well-being, security and general welfare of the Nation, and should be conducted in an environmentally sound manner. That statement is as true today as it was in 1977.

Coal mining contributes to our Nation's economy by providing the fuel for half of our electricity generation. Coal miners are proud to play a part in supplying our Nation with domestically produced, cost-effective, reliable energy. We also live in the communities most affected by coal mining, and support the intent of Congress that coal mining must be conducted in an environmentally sound manner.

Throughout our 117-year history, the UMWA has been in the forefront of bringing social, economic, and environmental justice to our members in the Nation's coal fields. The UMWA's goal is to protect the interests of our members on the job, and when they return home to their families at night. We have fought for compensation laws and occupational disease laws. We have led the fight to enact mine health and safety laws. The UMWA has also been on the forefront of providing health care and pensions to workers.

Coal miners value the natural resources that God has given us. In their free time, you will find many of them fishing in the streams and hunting in the forests throughout the coal fields. Because of their love of the land, they are strong defenders of the need for responsible reclamation laws. Perhaps more than most, they understand the need for responsible policies that balance our need for energy with our need to protect the environment. We believe SMCRA has struck the right balance. We are proud to say that the UMWA has been a steadfast supporter of SMCRA.

While nearly $6 billion have been appropriated for mine site reclamation since 1978, there are many more sites still requiring attention. With the reauthorization of the AML program last December, Congress extended the program for 15 years. States and tribes will finally start to receive the resources they need to take care of their reclamation projects. The reauthorization also provides the long-term financial solution for health care of thousands of abandoned, retired coal miners and their dependents.

With the passage of the 1992 Coal Act, interest earned on the AML principle has been used to help support the health care needs of abandoned, retired miners. In other words, the AML program

has provided support for both the needs of abandoned mines, and abandoned, retired miners and their dependents.

I want to thank the members of this committee who played a vital role in ensuring that the needs of abandoned miners were not forgotten.

When Congress authorized the use of AML interests to help finance the cost of health care for retired miners, it was a logical extension of the original intent of Congress. Congress joined these two programs together for a reason—they both represent legacy costs of the coal industry that compelled a national response.

When Congress created the AML fund, it found that abandoned mine lands imposed social and economic costs on residents in nearby and adjoined areas. When Congress enacted the Coal Act, it also was attempting to avoid unacceptable social and economic costs associated with a loss of health benefits for retired miners and widows.

Although some criticized the use AML interest money to help cover the cost of miners' retired health care, this marriage proved to be the catalyst for last year's reauthorization of the AML program, which successfully addressed the varied, and sometimes conflicting needs of many interested parties.

With all parties working together for the reauthorization last year, Congress was able to forge a political consensus that has alluded us for many years. More importantly, the legislation will mean more funds will be available to address vital reclamation needs in the coal fields.

In terms of abandoned retiree health care, the reauthorization has addressed the financial problem that has plagued the Coal Act.

Mr. Chairman, the UMWA and its members are grateful that Congress forged a bipartisan consensus to reauthorize the AML program, and provide a long-term solution to the coal industry retiree health care crisis. Today, we appreciate having this opportunity to thank every Member of Congress for remembering the plight of retired miners and widows.

I come before you to convey a heartfelt thank you from all of the retirees for the hard work of this committee in keeping that promise. I will be happy to answer any questions you may have.

[The prepared statement of Mr. Banig follows:]

PREPARED STATEMENT OF BILL BANIG, DIRECTOR, GOVERNMENTAL AFFAIRS, UNITED MINE WORKERS OF AMERICA, FAIRFAX, VA

Chairman Bingaman, members of the Committee, I am Bill Banig, director of Governmental Affairs for the United Mine Workers of America (UMWA). The UMWA is a labor union that has represented the interests of coal miners and other workers and their families in the United States and Canada for over 117 years. We appreciate the opportunity to appear before the Committee to celebrate the thirtieth anniversary of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), an historic piece of legislation that continues to be of vital importance to coal mining communities across this nation.

When enacting the Surface Mining Control and Reclamation Act in 1977, Congress found that "surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner." That statement is as true today as it was in 1977. Coal mining contributes significantly to our national economy by providing the fuel for about half of our nation's electricity generation. Coal miners are proud to play their part in supplying our nation with domestically-produced, cost-effective, reliable energy. We also live in the com-

munities most affected by coal mining and support the intent of Congress that coal mining must be conducted in an environmentally sound manner.

Throughout our 117 year history, the UMWA has been in the forefront of bringing social, economic and environmental justice to our members and the nation's coal fields. Our members toil in the nation's coal mines to provide domestically-produced energy that helps fuels our economy. The UMWA's goal is to protect the interests of our members on the job and when they return home to their families after a hard days work. The UMWA has led the fight throughout our history to enact tough mine health and safety laws to protect miners on the job. Unfortunately, advancements in health and safety too often happen only after miners are killed on the job, as we all witnessed again last year at the Sago Mine in West Virginia where twelve miners died and recently at the Crandall Canyon mine in Utah where nine miners lost their lives. We have fought for compensation laws to assist those who are injured and occupational disease laws to provide for those whose health has been taken from them. The UMWA has also been in the forefront of providing health care and pensions to workers, establishing one of the first industry-wide multi employer benefit plans. Through the historic 1946 Krug-Lewis Agreement—signed in the White House between Secretary of the Interior Julius Krug and UMWA President John L. Lewis—the UMWA, the coal industry and the federal government created the UMWA Health and Retirement Funds. Over the last 60 years the UMWA Funds has provided pensions and health care to hundreds of thousands of our nation's coal miners and helped to modernize the delivery of health care in coal field communities across the nation.

Indeed, years ago the Funds established ten regional offices throughout the coal fields with the direction to make arrangements with local doctors and hospitals for the provision of "the highest standard of medical service at the lowest possible cost." One of the first programs initiated by the Funds was a rehabilitation program for severely disabled miners. Under this program over 1,200 severely disabled miners were rehabilitated. The Funds identified disabled miners and sent them to the finest rehabilitation centers in the United States. At those centers, disabled miners received the best treatment that modern medicine and surgery had to offer, including artificial limbs and extensive physical therapy to teach them how to walk again. After a period of physical restoration, the miners received occupational therapy so they could provide for their families.

The Funds also made great strides in improving overall medical care in coal mining communities, especially in Appalachia where the greatest inadequacies existed. Recognizing the need for modern hospital and clinic facilities, the Funds constructed ten hospitals in Kentucky, Virginia and West Virginia. The hospitals, known as Miners Memorial Hospitals, provided intern and residency programs and training for professional and practical nurses. Thus, because of the Funds, young doctors were drawn to areas of the country that were sorely lacking in medical professionals. A 1978 Presidential Coal Commission found that medical care in the coal field communities had greatly improved, not only for miners but for the entire community, as a result of the UMWA Funds. "Conditions since the Boone Report have changed dramatically, largely because of the miners and their Union—but also because of the Federal Government, State, and coal companies." The Commission concluded that "both union and non-union miners have gained better health care from the systems developed for the UMWA."

Coal miners value the natural resources that God has given us. In their free time, you will find many of them fishing in the streams and hunting in the forests throughout the coalfields. Because of their love of the land, they are strong defenders of the need responsible reclamation laws. Because they work in a vital energy industry, they also know that the nation needs the product of their labor. Perhaps more than most, they understand the need for responsible policies that balance our need for energy with our need to protect the environment. We believe the 1977 Surface Mining Act struck the right balance and the authors and supporters of that effort should be proud of their accomplishments. We are proud to say that the UMWA has been a steadfast supporter of SMCRA throughout its 30 year history.

While more than $5.7 billion has been appropriated for mine site reclamation since 1978, there are many more sites still requiring attention. With the reauthorization of the AML program as part of the Tax Relief and Health Care Act last December, Congress extended the AML Fund for 15 years. States and tribes will finally start to receive the resources they need to take care of the reclamation projects within their respective jurisdictions. The 2006 AML reauthorization also provided the long term financial solution for the health care of the thousands of abandoned retired coal miners and their dependents whose employers went out of business and ceased fulfilling their contractual promises to pay for their retirees' health care.

Coal miners especially appreciate the substantial financial support SMCRA has provided through the Abandoned Mine Land Fund (AML) to reclaim abandoned coal mines in the coal field communities. Through the AML Fund, mining communities across this country have received billions of dollars—monies collected through fees imposed on a per ton basis for all coal that is mined in the United States—to clean up abandoned coal mines While the overwhelming majority of these funds have paid for the reclamation of abandoned mines, with the passage of the 1992 Coal Act, interest earned on the AML principal since 1995 has been used to help support the health care needs of abandoned retired coal miners In other words, the Surface Mining Control and Reclamation Act has provided essential support for both the needs of abandoned coal mines and abandoned retired miners and their dependents. I want to thank the members of this Committee who played a vital role in ensuring that the needs of abandoned coal miners were not forgotten.

When Congress authorized the use of AML interest to help finance the cost of health care for retired coal miner, it was a logical extension of the original intent of Congress when the AML Fund was established. Congress joined these two programs together for a specific reason—they both represent legacy costs of the coal industry that compelled a national response. When Congress created the AML Fund in 1977, it found that abandoned mine lands imposed "social and economic costs on residents in nearby and adjoining areas." When Congress enacted the Coal Act in 1992, it also was attempting to avoid unacceptable social and economic costs associated with the loss of health benefits for retired coal miners and widows. Moreover, as the U.S. Government Accountability Office (GAO) found in its 2002 report on the Coal Act entitled "Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue," UMWA retirees traded lower pensions over the years for the promise of their health benefits and engaged in considerable cost sharing by contributing $210 million of their pension assets to help finance the CBF.

Although some criticized the use of AML interest money to help cover the cost of coal miners' retiree health care, this marriage proved to be the catalyst for last year's reauthorization of the AML program which successfully addressed the varied—and sometimes conflicting—needs of the many interested parties. With all parties with a stake in the SMCRA debate—states and tribes, coal companies, environmental groups, and UMWA members—working together for the passage of the Tax Relief and Health Care Act last year, Congress was able to forge a political consensus that had eluded us for many years, allowing us to achieve goals that many of us have been pursuing since the passage of SMCRA in 1977 and the Coal Act in 1992. Not only did that legislation succeed in securing the long term financial support for retired coal miners' health care, the legislation also provided relief to operators by reducing the AML fees by 20%, modified the AML formulas to provide historic production states that have the most serious reclamation problems with higher allocations, and mandated that minimum program states are guaranteed at least $3 million each year for reclamation efforts. In addition, the legislation took a portion of the AML fees collected off budget and over a seven year period, all states and tribes will receive from the General Treasury an amount equivalent to their unappropriated balances in the AML fund. The end result of the legislation is that is that it resolved many longstanding disputes that had blocked AML reform for several years. More importantly, the legislation will mean more funds will be available to address vital reclamation needs in the coal fields.

In terms of abandoned retiree health care, the passage of the Tax Relief and Health Care Act has addressed the financial problems that have plagued the Coal Act since its passage in 1992. As many are aware, adverse court decisions and an unanticipated series of bankruptcies in the coal and steel industries had eroded the original financial mechanism Congress intended to fund Coal Act health care obligation. As a result, on three separate occasions Congress had to provide emergency appropriations, using unused AML interest money, to keep health care benefits from being cut. With passage of last year's AML reauthorization, these and many other issues have been resolved.

Mr. Chairman, the UMWA and its members are grateful that Congress forged a bipartisan consensus to reauthorize the AML Program and provide a long-term solution to the coal industry retiree health care financial crisis. We have in previous appearances before the Committee provided the historic context for the government's unique promise of health care to coal miners. You know all too well that over their working lives, these retirees traded lower wages and pensions for the promise of retiree health care that began in the White House in 1946 when the Krug-Lewis agreement was signed. In 1992, miners willingly contributed $210 million of their pension money to ensure that the promise would be kept. Everything that this nation has asked of them—in war and in peace—they have done. They are part of what has come to be called the "Greatest Generation" and deservedly so. They have

certainly kept their end of the bargain that was struck with President Truman. In 2006 we were delighted that Congress forged the political consensus that allowed the federal government to keep its promise once again.

Today, we appreciate having this opportunity to thank every member of Congress for remembering the plight of our retired miners and widows. I come before you to convey a heartfelt thank you from all the retirees, including the original 112,000 beneficiaries, for the hard work of this Committee in keeping that promise.

I would be happy to answer any questions you may have.

The CHAIRMAN. Thank you very much.

Ms. Rank, why don't you go right ahead.

STATEMENT OF CINDY RANK, WEST VIRGINIA HIGHLANDS CONSERVANCY, ROCK CAVE, WV; ACCOMPANIED BY JOAN MULHERN, EARTHJUSTICE

Ms. RANK. Good afternoon, Chairman Bingaman, and member of the committee, I do appreciate the opportunity to come over here today to talk about what I see as the enforcement, or lack thereof, of SMCRA.

I'm a citizen volunteer with the West Virginia Highlands Conservancy, on of the oldest environmental advocacy organizations in West Virginia, and for the past four decades has been a leader in citizen efforts to protect West Virginia's land, water, and human resources from the effects of illegal and irresponsible coal mining.

I became a member of the Highlands Conservancy nearly 30 years ago, when our own community group was faced with mining that would have ruined our water with acid mine drainage, the water that we use for our homes.

Since that time, my association, with the Conservancy as a member of the Board, President for 6 years, and mining committee chair since 1994, I've seen many other problems crop up in many other different sections of the State. Unbelievably, I've known Director Wahlquist for about 20-some years, and Mr. Conrad, I've been in meetings with for many years, and I'm amazed at how differently we look at what's happening in the coal fields, and how we perceive the enforcement of the Surface Mine Act.

We all recognize that SMCRA meant to create a balance between protecting the environment and producing the coal that's necessary for the country. When OSM first came to town in West Virginia, indeed it was a powerful voice, intent on reigning in the abuses of the coal industry.

Then, as enforcement was handed over to the States, funding and staffing cuts imposed on OSM, and weakening regulatory changes made—mostly at the urging of industry year after year—the office has really become, in our opinion, an empty shell of its former self.

All too often the balance intended under this Act is no longer in existence. The scales of justice are, once again, tipped in favor of coal at any cost, over people and the environment. I say this, not just from the Appalachian Mountains, but we've also heard this from people in the Midwest, and in the Indian Territory, and as far north as Alaska.

OSM's failure of the law has allowed mining operations to permanently damage streams, forests, and generations-old communities. Far in excess of the watchdog role that was meant for us citizens in SMCRA, we unfortunately have to go to great lengths,

and are embroiled in difficult and lengthy administrative and legal efforts that Mr. Quinn doesn't necessarily think are helpful, but we think they are necessary to hold regulatory agencies accountable under the law.

At great personal expense, individual citizens brave enough to challenge illegal permits are forced into the trenches once more, confronting angry workers who depend for work on ill-conceived permits. Just like the bad old days before SMCRA, neighbor is pitted against neighbor, one family's livelihood, against another family's home and heritage.

For us in Appalachia today, the situation is particularly explosive—literally. Not only are thousands of pounds of explosives used every day to blast apart our mountains, the communities near these mines are becoming tinder boxes. Emotions run high as dust, blasting, water pollution and flooding force people out of their homes and hollows. Those who stay suffer constant barrage of problems, large and small, and for those brave enough to challenge illegally granted permits in the Courts, threats against home and family are now rampant.

In my written testimony, I submitted several different examples of problems that I think could be resolved better, with better enforcement by OSM. That includes all of those things you've heard of today from Mr. Wahlquist and others, but in a different light. Acid mine drainage continues to flow, even from mines granted after the passage of SMCRA, our bonding situation in many States is insufficient to take care of mines deserted after the passage of SMCRA, excess subsidence from long-wall mining these days, toxic underground mine pools, when in acid-producing seams that are beginning to seep out into people's wells and yards, sludge dams and slurry injection that have contaminated neighbors water wells—the situation is not as rosy as we heard—and last, the mother of all atrocities, is mountaintop removal strip mining.

Mountaintop removal—we have pictures that are showing on the screen—are also in my testimony, it's become the scourge of Southern West Virginia and adjacent portions of surrounding States, where entire mountains are being blown apart to allow easy access to 6, 10, or more seams of coal that lie within our steep mountains like frosting in a layer cake.

Every part of the human and natural environment is suffering as this strip mining on steroids looms over communities and extends into lightly populated mountain hollows, forcing small communities to seek safer ground in unfamiliar cities and towns far from their roots that have nurtured generations of their families before them.

The very heart and soul of our mountain way of life is being ripped apart with hardly a whimper out of OSM, except to adjust one regulation after another to further aid industry in its destruction of our forests, water and communities that depend upon those resources.

I see I'm probably over my time, I would just like to say briefly that headwater streams are destroyed, groundwater resources are destroyed, land and forest resources are decimated as these ancient mountains are torn apart, and this is going to be centuries, if at all, these things are repaired, or come back.

Contrary to the clear intent and purposes of SMCRA, a whole host of environmental standards, including approximate original contour, the stream buffer zone rule, saving topsoil, the proper use of topsoil substitutes, post-mining land use, cumulative hydrologic impact assessments, have all been bastardized in order to allow this destructive mining to continue.

The industry would have us believe that this is only impacting maybe 1 or 2 percent of West Virginia, but if you look at the map on the tripod over there, or the map that's included with my testimony, you can see that if we look at the 16 or so counties where this kind of mining is concentrated, that percentage shoots up immediately to closer to 15 percent, and that's a very large percent of the counties of Boone, Logan, Mingo and several others in Southern West Virginia.

It took nearly 20 years for OSM to begin to realize the impact and costly legacy of acid mine drainage that resulted from careless permitting after the Act, during the eighties and nineties. If it takes another decade for the Agency to recognize the long-term cost of mountaintop removal mining, we may have precious few mountains, and very few streams left to worry about.

As the late Judge Charles Haden recognized in ruling on our Brag v. Robertson case in 1999, this is a bell that, once rung, cannot be un-rung. Many of our human mistakes can be corrected, even polluted streams can sometimes be corrected and improved over time. But our mountains will never come back, our headwater streams and high-mountain springs never returned again.

I appreciate, again, the opportunity to come over and talk about it. There's far too much to say in 5 minutes and I'd appreciate answering any questions, especially a couple of the legal questions that arose with Mr. Wahlquist, maybe Joan Mulhern can assist me in setting the record straight on stream buffer-zone rule, and 1999 rules.

I would hope that this hearing is only the beginning of what this committee might pursue as oversight of SMCRA over the next years. I would invite everybody on the committee and the staff to indeed, come to West Virginia, we'll be happy to provide the opportunity to fly over the mountaintop removal area and to visit the communities. I'm sure the coal industry would be happy to show you the mine sites on top of the mines, and we'd be happy to show you what's lost in getting to the post-mining land use that some people think are so good.

Thank you, again.

[The prepared statement of Ms. Rank follows:]

PREPARED STATEMENT OF CINDY RANK, WEST VIRGINIA HIGHLANDS CONSERVANCY, ROCK CAVE, WV; ACCOMPANIED BY JOAN MULHERN, EARTHJUSTICE

Good afternoon Chairman Bingaman and members of the Committee. Thank you for the opportunity to speak with you today. I am Cindy Rank, a citizen volunteer with the West Virginia Highlands Conservancy (WVHC) since 1979.

The West Virginia Highlands Conservancy is a nonprofit membership organization with approximately 1,800 members, most of whom reside in West Virginia. Officially incorporated in 1967, the Highlands Conservancy is one of the state's oldest environmental advocacy organizations and for the past four decades has been a leader in citizen efforts to protect West Virginia's land, water and human resources from the effects of illegal and irresponsible coal mining.

I live in southern Upshur County in Central WV. I became a member of the Highlands Conservancy nearly 30 years ago when our local community group, Friends of the Little Kanawha (FOLK) appealed to the Conservancy for assistance in our fight against strip mining planned for our area that would have severely degraded our water with acid mine drainage.

I was president of the Conservancy from 1988 to1994 and continue to serve on the Board of Directors. Since 1994 I have also chaired the Conservancy's Mining Committee.

Although my initial concern about mining centered on the devastating impact of acid mine drainage on the waters that support my own life, home and community, my years with the Highlands Conservancy have introduced me to a broader range of problems and additional concerns. At times focused on specific local problems on behalf of our members, the Conservancy also addresses more programmatic issues and deficiencies in the program, through commenting on regulatory proposals, participating in administrative proceedings, and filing litigation when necessary.

As a volunteer organization the Conservancy often relies on the able assistance and generous pro-bono legal work of local, regional and national groups such as the Appalachian Center for the Economy and the Environment in Lewisburg, WV, Public Justice and Earthjustice here in Washington DC. Joan Mulhern from Earthjustice is here with me today to assist with specific legal and technical questions you may ask.

SMCRA AND OSM

In the opening sections of the Surface Mine Act Congress clearly recognized that achieving the necessary balance of protecting the environment while providing for the Nation's need for coal would require strong guidance and oversight to assure that society would be protected from the adverse effects of strip mining.

When OSM first came to town in the late 1970's it was that powerful force . . . intent on reining in the abuses of the coal industry. Then, as enforcement was handed over to the states, funding and staffing cuts imposed on OSM, and weakening regulatory changes made—mostly at the urging of industry year after year—the Office has become an empty shell of its former self. Despite the good intentions of many dedicated staff members, OSM currently offers more help to the mining industry than it does to citizens and communities where coal is mined. All too often, the "balance" intended under the act no longer exists . . . . The scales of justice are once again tipped in favor of coal at any cost over people and the environment.

PUBLIC PARTICIPATION

From the outset, public participation was recognized as a key component of the overall regulatory program. Citizens were to be watchdogs to keep regulators on their toes and ensure implementation of state regulatory programs in accordance with the requirements of the Surface Mining Act by commenting on regulations, fully participating in the permitting process and other aspects of the program.

However, after years of tweaking, bending and stretching regulations to the benefit of industry ordinary citizens are now hard pressed to be the watchdogs envisioned by Congress in 1977. Individuals can now spend entire lifetimes at great personal and emotional cost following the regulatory agency's every move, educating themselves and others, organizing across the mountain ridges, finding and hiring independent hydrologists, biologists, and other legal and technical experts at great expense. All this to protect their lives, homes and communities—protection that SMCRA assured would be provided by OSM. Only individuals whose health and personal family circumstances can sustain such inordinate amounts of time and effort can survive.

For us in Appalachia today the situation is explosive—literally . . . . Not only are thousands of pounds of explosives used DAILY to blast apart mountains in southern WV, but communities near these mines are becoming tinderboxes of tension. Emotions run high as dust, blasting, water pollution, and flooding force people out of their homes and hollows. Those who stay suffer constant barrage of problems large and small. And for those brave enough to challenge illegally granted permits in the courts, threats against home and family are now rampant.

Much of this is due to newer technologies and mammoth mining machines that have made it possible to cause more destruction both above and below ground. Much also has to do with the entrenched political influence of the coal industry and its ability to sway state and federal regulators to do what benefits industry. For its part, OSM has seen to the dilution of standards and the weakening of any enforce-

ment that stands in the way of profit—leaving citizens more or less to fend for themselves.

OSM's failure to enforce the law has allowed mining operations to permanently damage streams, forests, and generations old communities. We find ourselves embroiled in difficult and lengthy administrative and legal efforts to hold both the state and federal agencies accountable. We've appealed to the courts time and time again. Individual citizens brave enough to challenge illegal permits are forced into the trenches once more—confronting angry neighbors who work in the mines and are dependent for work on ill-conceived permits. Just like the bad old days when SMCRA was first enacted, neighbor is pitted against neighbor. One family's livelihood against another family's home and heritage.

SPECIFIC ISSUES

While my own experience is rooted in the eastern part of the country—and central Appalachia in particular, citizens in the mid west, great plains and as far north as Alaska are experiencing the same disappointment with the agency. Their stories reflect suffering and similar types of harm due to the lack of enforcement of an imperfect but useful SMCRA.

After the mighty struggles that finally resulted in the enactment of SMCRA, lax enforcement of the law has led us back to the beginning. The same problems that spawned the Surface Mine Act in the first place have risen from the ashes with a vengeance—just in different, more modern day clothing . . . and with better PR spin doctors to shine the most favorable light on some of the most despicable . . . horrendous crimes against nature.

While it's impossible to address the many programmatic deficiencies and issues of concern in the short amount of time we have today, I offer the following brief overview of some major concerns that are festering with less than adequate attention from OSM and/or its counterpart state agencies:

- Acid Mine Drainage from mines permitted both before and after SMCRA has left thousands of miles of streams unfit and unsafe . . .
  - —Pre-SMCRA sites.—The Abandoned Mine Lands (AML) program and fund established to reclaim minesites abandoned prior to the passage of SMCRA has had significant problems these past 30 years and hundreds of mines abandoned prior to 1977 still sit untended today. It is my sincere hope that the important (but far from perfect) re-authorization bill enacted by this Congress at the end of last year will help to some degree. But for it to work, it is imperative that the states use the funds wisely and primarily to accomplish the main goal of reclaiming old abandoned minessites.
  - —Post-SMCRA sites.—Beginning in 1977 no permits were to be issued where it was reasonable to assume a perpetual source of acid would be created, and yet today hundreds of those mines plague thousands of miles of WV and PA streams with acid mine drainage.
  - —SMCRA requires that bonding mechanism be in place to assure that enough money will be available to reclaim any site that might be abandoned prior to complete reclamation. Companies would be required to post individual bonds and/or contribute to alternative bonding systems set up to achieve this end. Nonetheless, the bond program in WV was never sufficient. After nearly 15 years of legal and administrative challenges by WVHC and others, the state DID increase the per ton fee companies are required to contribute to the states "Special Reclamation Fund", which did help address the backlog of reclamation. However, by all recent estimates the fund will again be broke within the next few years. Millions of dollars is needed to fix the fund, and that's not even counting at least 364 active sites where water treatment is ongoing and will most likely be needed—by someone—far into the future if not forever.
  - —Toxic underground mine pools have formed where interconnected deep mine workings in acid producing coal seams have become filled with acidic and metal laden water, polluting groundwater relied on for years by individuals and small rural and mountain communities at great distances from city water. . . . Even now a bevy of agencies is thrashing about for solutions to the nearly million acre "Pittsburgh Pool" that exists in northern WV and southwestern Pennsylvania. Pressure is now forcing the metal laden water into wells, yards and streams through cracks and fissures in the surrounding rock. And still OSM stands by while the state issues additional permits in northern WV where the same phenomenon is likely to occur and present extreme water problems in the year to come.

—Subsidence due to longwall mining is causing permanent damage to ponds, streams and homes. Today in WV hearing a group of valiant citizens is challenging the first of two 6,000 acre longwall mines planned for either side of the Tygart Lake in the northern part of the state—just south of Greene County PA where the impacts of this kind of mining have been felt for years . . . .

—Blasting regulations insufficient to protect traditional structures in rural WV and in tribal lands in the west and citizens are required to go to great lengths to prove damage and beg and plead for remuneration.

—Sludge ponds and slurry injection created for the disposal of coal waste from preparation plants threaten the health of citizens in Mingo County WV and other areas where water runs black and brown from indoor faucets and children develop blisters and unidentified rashes after bathing in that water. Citizens have had to fight and lobby our state legislature to get even the slightest bit of official attention and study of the matter.

And, lastly, the mother of all atrocities: Mountaintop removal strip mining.

MOUNTAINTOP REMOVAL

Mountaintop removal has become the scourge of southern WV and adjacent portions of KY, and southwestern VA where entire mountains are being blown apart to allow easy access to 6,10 or more seams of coal that lie within our steep mountains like frosting in a layer cake.

Every part of the human and natural environment is suffering as this strip mining on steroids looms over communities and extends into the lightly populated mountain hollows forcing small communities to seek safer ground in unfamiliar cities and towns far from their roots that have nurtured generations of families before them. The very heart and soul of our mountain way of life is quickly and quietly being ripped out with hardly a whimper out of OSM except to adjust one regulation after another to further aid in the destruction of our forests, water and communities that depend on those resources.

Water is at the heart of it all. Having nowhere to put the deep layers of earth that separate the coal seams, companies blast apart and dump the rock into the stream valleys that originate in the high reaches of the mountain and flow down the hollows between the ridges. Pockets of groundwater, perched aquifers and hillside springs that many of us depend on are gone in an instant.

According to a multi agency draft Programmatic Environmental Impact Statement (PEIS) on Mountaintop Mining/Valley Fills conducted in response to litigation brought on behalf of the WVHC and several brave coalfield citizens, these "valley fills" have buried or otherwise damaged over 1,200 miles of irreplaceable headwater streams. These are not 'dry ditches' as some would have you believe, but streams up to 2 miles long that flow year round and serve a unique role in the health and vitality of downstream reaches. The PEIS predicted that another 1,000 miles of streams would be similarly impacted if no actions were taken to limit or curtail the practice.

No one has predicted what or where—or even IF—groundwater and hillside springs might redevelop . . . or how long it might take for that process to occur. Ancient geologic formations of steep mountains and narrow valleys are replaced with rubble-filled valleys and rock molded into mounds a couple hundred feet lower than the mountains they replace.

Land and forest resources are decimated as these ancient mountains are turned inside out. Blasting hundreds of feet deep, thousands of acres at a time mining has caused the loss of hundreds of square miles of the most productive and diverse temperate hardwood forests in the world. According to the Mountaintop mining EIS well over 400,000 acres have already been impacted and the EIS predicted that figure would increase to 1.4 million acres (that's over 2200 square miles) by the end of the decade if nothing is done to limit the practice.

Contrary to the clear intent and purpose of SMCRA, a whole host of environmental standards including Approximate Original Contour, saving topsoil with the native seed-pools intact, the proper use of topsoil substitutes, Post Mining Land Use (that provide viable economic opportunities for communities once the valuable coal reserves are gone), Cumulative Hydrologic Impact Assessment are all bastardized in order to allow this destructive mining to continue. And the mountains of Appalachia are being reduced to a "field of dreams" for some future undetermined generation.

Industry would have us believe that mountaintop removal mining is doing only minimal damage and that the practice is only impacting about 1 or 2% of the state of West Virginia. While that may be true if you consider the entire acreage of WV

is some 15.5 million acres, if you look at the 16 or so counties where mountaintop removal mining is taking place, that number skyrockets to as much as 15% or more. That can be seen clearly on this map* of the three county area of Boone, Logan and Mingo counties that we've brought with us today.

As the late Judge Charles Haden recognized, this is bell that once rung, can't be unrung. Many of our human mistakes can be corrected, even polluted streams can be restored over long periods of time, but we will never get our mountains and headwater streams and high mountain springs back again.

OSM has engaged in a series of actions to gut long-standing safeguards against the wholesale burial and pollution of streams in Appalachia by the coal mining industry.

- In December 2003, the Office of Surface Mining (OSM) proposed to weaken its oversight of state mining programs, by making federal takeovers for state violations of federal law discretionary rather than automatic. 68 Fed. Reg. 67776.
- In October 2005, the Administration released its final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), which proposed no meaningful mining reforms or limitations on valley fills. 70 Fed. Reg. 62102. Despite scientific studies showing significant harm was already being done . . . and would continue, OSM chose to streamline the permitting process, totally ignoring any effort to reduce the harmful impacts.
- Now, in with its most recent proposal OSM wants to gut the Stream Buffer Zone (SBZ) rule, the most important safeguard under the Surface Mining Control and Reclamation Act (SMCRA) for protecting streams. Again scientific studies cited in the draft EIS for the proposed rule change indicate significant harm is being done. Again, OSM chose to ignore any alternative that might reduce the size or number of fills and thus reduce the impact and prevent further significant harm to the waters of the U.S. The proposed rule would eliminate the standing prohibition against mining within 100 feet of streams if that mining will have an adverse effect on water quantity, water quality, and other environmental resources of the stream. In its place the proposed rule merely asks that a company do what it can to "minimize" harm to the extent possible. The proposed rule is a violation of both SMCRA itself and the Clean Water Act, which SMCRA purports to uphold.

CONCLUDING REMARKS

- OSM should withdraw the Stream Buffer Zone rule change and stop the insanity that is now taking place in central Appalachia.
- OSM needs to maintain strong policy against permitting when acid mine drainage is anticipated.
- OSM must improve its requirements for assessment of Cumulative Hydrologic Consequences to better ascertain what is happening to our ground and surface water resources especially in mining areas where mountaintop removal strip mining and longwall deep mining is taking place.

Again, thank you for the opportunity to speak today. Joan and I are willing to answer any questions you might have and will be happy to provide you with whatever additional information that you might request. We hope that today's hearing will lead to additional oversight by the Committee on Energy and Natural Resources, particularly on the enormous damage being caused in my region by Mountaintop Removal mining. There are many other citizens and coalfield residents as well as scientists and mining experts who could provide the Committee with valuable and compelling information to demonstrate that this practice must be ended.

LASTLY, let me extend an invitation to every one on this committee to come to West Virginia and see for yourself the irreversible harm that is being done as a result of the lax enforcement of the law and OSM's acquiescence. The West Virginia Highlands Conservancy and our sister organizations working to end the abuses of Mountaintop Removal mining will be happy to provide you with the opportunity to flyover the mountaintop removal areas and to meet and talk with citizens who are directly and profoundly impacted by the mining.

The CHAIRMAN. Thank you very much. Let me just ask a few questions.

Mr. Quinn, You've heard Director Wahlquist's testimony about his understanding or interpretation of SMCRA and the way it ap-

* Maps have been retained in committee files.

plies to this issue of streams and water being interfered with. Do you agree with his assessment or do you take exception to any of it?

Mr. QUINN. Let me see if I can be a little clearer, I think, in answer to the question as the application of the stream buffer zone rule changed over the years, the answer would be no. That rule was first promulgated in 1977, has always applied, has been viewed as a best management practice for activities that occurred outside of those streams, but were activities designed and must occur adjacent or in the stream, it does not apply. Otherwise, you would not be able to mine through streams and create reserves whether it be in New Mexico, West Virginia and other places would not be able to be mined.

It's just like a BMP you'd use in oil, gas and other places, you would, if your activity doesn't require you to be in that stream channel, keep back and design a buffer for, so sediment doesn't flow into it.

But if you're designed to occur, your activity to occur in that stream, then design it according to the requirements of the law that talk about minimizing the disturbance downstream from your activity.

If the interpretation advocated in this litigation about the stream buffer zone rule were upheld, literally, parts of SMCRA would be just null and void. The statute talks about mountaintop mining, it talks about valley fills, it talks about valley fills being built where, in stream channels. There is no stream buffer zone rule requirement in SMCRA. There are some buffer zone requirements in SMCRA, and they're very explicit around homes and other places, there is no stream buffer zone, there was one in an early version, but it was never enacted.

So, the point is, is that, I think there's a rule that was intended to be a reminder of a best management practice for mining near or by streams, is now being leveraged to interpretation that would actually bar most mining.

In the studies that Mr. Wahlquist's agency has done, as well as other studies have indicated that in this particular area of West Virginia, 90 percent of the reserves would be rendered unmineable under that interpretation. The economic impact would be devastating.

The CHAIRMAN. Let me ask either Ms. Rank or Ms. Mulhern if you take exception to that interpretation of the law, there seems to be a difference of opinion here.

Ms. RANK. I certainly take exception to that. One of the main goals of the Surface Mine Act was also to uphold the Clean Water Act. Water is one of our most important resources, and will be an important resource on into the future. Some of the environmental regulations that were set forth under SMCRA were to protect the waters that were going to be so important—that are important and will be important. To create a stream, or to interpret the stream buffer zone rule to eliminate the protection of those waters is in complete violation, as far as I'm concerned of SMCRA and the Clean Water Act.

Maybe Joan can be a little more reasonable or rational in her response to that.

The CHAIRMAN. Ms. Mulhern, go right ahead.

Ms. MULHERN. Thank you, Mr. Chairman. I'd like to add my thanks to those of others for your having this hearing today and especially for your focus on mountaintop removal and the stream buffer zone rule.

The 1977 Surface Mining Law is replete with provisions that make it very clear that Congress intended to protect waterways, not only from gross disturbances, but even from increased sedimentation. The Surface Mining Agency, OSM, made it very clear in 1983 when it adopted the stream buffer zone rule, that it was intended to implement those purposes. It was named the buffer zone for a reason, it was actually supposed to be a buffer around intermittent and perennial streams.

The provisions that have been cited, and I can provide the legal citations to you after the hearing, if you wish—or now, I have them with me—that are saying that there is some contemplation that there would be some fills in streams, are talking about exceptions where there might be some seeps, or other small water courses underneath some part of a fill, and the requirement to construct lateral drains where that does occur, so that the seep doesn't go up into the fill.

But certainly, those provisions can't be used to justify the wholesale destruction of hundreds of thousands of miles of perennial and intermittent streams, it clearly wasn't contemplated, and in fact, even the section of section 515 of SMCRA where that lateral drain language occurs, is not the section of SMCRA which the Agency used for its legal authority for the buffer zone rule, which is another subsection of that part of the law.

So, I think that these arguments are really legal red herrings, I think that it's very clear that the agencies are not only authorized, but actually required to take steps to protect streams from the kind of destruction that we're seeing today.

The CHAIRMAN. My time is up.

Senator Barrasso.

Senator BARRASSO. Thank you, Mr. Chairman.

Ms. Rank, it seems the recommendations that you've submitted in your testimony all relate more to administrative actions by the Office of Surface Mining as opposed to specific legislative changes, did I get that right? You weren't really proposing a specific change in the law just to——?

Ms. RANK. I was not. I know others may suggest changes, but I was certainly suggesting that it's been mostly the lack of enforcement and misinterpretation of these laws that I find offensive. That especially with the stream buffer zone rule that's been proposed, the change I find, you know, particularly egregious, and something that should be looked into in more depth, if only because the EIS that accompanied this change really never even looked at how you could enforce the law, and what that would mean. So that, it's really incomplete on its face, in terms of leaping from what the EIS said was damage, to, you know, a different clarification or change in this rule.

Senator BARRASSO. For Mr. Banig and Mr. Quinn, I'm going to read a comment from our former U.S. Senator Hansen, he's now in

his nineties, from Wyoming, and he was involved in this debate in 1977.

He said, "I think the protection of our environment, our land resources, and agricultural way of life, and our water is of the highest importance. I certainly want to do everything I can to see whatever is passed here takes full recognition of these values."

Mr. Banig, I think you said we did strike the right balance, that we are using our resources, we are also protecting our environment as your workers want to make sure that they work, earn a good living, but also have the resources for all the activities that—did Senator Hansen get what he wanted?

Mr. BANIG. The mine workers, we feel that he did. You know, we think that SMCRA has struck the appropriate balance, and you know, we need to mine coal in an environmentally acceptable manner, and we recognized that. Again, we live in these communities, too. We don't home to urban centers after a days' work, we live in the same communities as the other people in these areas.

Senator BARRASSO. Mr. Quinn, anything you'd like to add on that?

Mr. QUINN. I think if the Senator would be pleased at what, the balance has been found today, in terms of the results as I reported on, and the earlier panel reported on. I will comment that Senator Hansen was one of the—if I recall correctly—one of the signatories of the Conference Report on SMCRA, along with Senator Domenici. If you see him, tell him I think he can be proud of his accomplishment here in passing SMCRA.

Senator BARRASSO. One more question, Mr. Quinn, you know, this committee is looking at modernizing the Mining Law of 1872. Could you discuss if you have any ideas, perhaps, you know, what we're learned from SMCRA may help if we move forward in this, in modernizing the mining law.

Mr. QUINN. I think there's a couple of observations, Senator. When it's said SMCRA is a model that should be used, I think there's been a lot of success for the coal industry, but there's some big distinctions between the coal industry and the hard rock industry.

There's been reports done, National Academy of Science did a report as a result of SMCRA. At that point in time, 79 recommended against adopting a similar model for their non-fuel mineral sector. There's a number of reasons, the mineral reserves, the geology is considerably different. Unlike coal, which is uniform horizontally, ore bodies for locatable minerals are vertical and difficult to find and expensive to find.

The markets are different. There's a worldwide market for commodities for most locatable minerals, there's a domestic market for coal, that allow the coal industry to pass on more directly, increased costs associated with these mandates and this law.

Finally, I think there's a different context and different history when SMCRA was passed. Many of the environmental laws were in their infancy. There wasn't even any overarching Federal requirements of any type for surface mining of coal, not even, for that matter, on Federal lands.

In 2007 what we have is a fairly robust regulatory program for hard rock mining on Federal lands both on the Forest Service and

the BLM directed specifically at hard rock mining, and we have a whole host of environmental laws passed since then, and have matured—Clean Air Act, Clean Water Act, RCRA, NEPA and many others. I think that at that point in time there should be real questions about why you need to duplicate and make things more complex.

I would refer you to another National Academy of Science study that was conducted 20 years after the one I just referred to, that looked at this very issue, and concluded that the existing regulatory framework was very effective. If anything, it was a little bit over-complex, but it was very effective at this point in time.

Senator BARRASSO. Thank you, Mr. Quinn.

Thank you, Mr. Chairman.

The CHAIRMAN. Let me just ask one other line of questions, Mr. Banig, you talked about the AML amendments that were passed last year. I take it from your testimony that you believe the implementation of those provisions is going well, and that retirees health benefits are being enjoyed as intended, is that your impression?

Mr. BANIG. At this point, yes. I mean, the UMWA funds, just in October, submitted its request for the funds for Fiscal Year 2008, but all indications are things are working the way that we intended them to work.

The CHAIRMAN. Very good.

That's the extent of my questions, do you have any other questions?

Thank you all very much, I think it's been useful testimony, and we'll conclude the hearing with this. Thank you.

[Whereupon, at 4:05 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

WEST VIRGINIA HIGHLANDS CONSERVANCY,
Rock Cave, WV.

SENATOR BINGAMAN: Thank you for the opportunity to expand on the very important issue of Mountaintop Removal Mining that we only briefly touched on during the Energy Committee Hearing November 13th.

Below are my responses to the questions you've forwarded. I would ask that you pay particular attention to my answer to the final question about what Congress can do.

I strongly recommend that you hold oversight hearings specifically focused on this most destructive form of strip mining. I was honored to be a citizen spokesperson at the November 13th hearing about the Surface Mine Act (SMCRA), but I assure you hearing from many of my friends living in the valleys directly below these mining operations would knock your socks off. I further recommend inviting stream ecologists, mining and terrestrial experts and other persons with valuable information and evidence to testify at such hearings.

I also again encourage members and staff of your committee to visit and fly over areas most impacted by these mining operations to see first hand the profound devastation that eye-popping visual images can only barely hint at. I would be happy to assist in making those arrangements.

Sincerely,

CINDY RANK,
Chair.

RESPONSES TO QUESTIONS FROM SENATOR BINGAMAN

MOUNTAINTOP MINING

Question 1. What do you view as the key impacts of mountaintop mining? How does it affect your community?

Answer. Key Impacts:

- A) Natural environment/ecosystems. . .
  - —Loss of nearly 2,000 miles of irreplaceable headwater streams, streams that, though small, provide unique functions not present in larger, downstream reaches, functions essential to the quality and health of those larger streams. These are also streams that many of us—myself included—depend on for our water supply.
  - —Loss of untold numbers of high mountain springs and groundwater resources that give life to the hills, forests, critters and humans that have relied on them for generations. No one knows where, when—or even IF—pockets of groundwater will be established within the reconstructed 'rubble mountains'—often 200-300 feet lower than before mining.
  - —Loss of over 1,000 square miles of the most productive and diverse temperate hardwood forests, a source of sustainable economic future of the Appalachian region and home to ecosystems replete with known and as-yet undiscovered riches.
- B) Perhaps most heartbreaking and unforgivable is the damage to the human element of the environment.

—Loss of homes, wells, clean sources of drinking water, communities, mountain culture and way of life that has sustained and nourished generations of Appalachian residents.
—Loss of personal dignity and respect as neighbor must confront neighbor and often do battle in court to preserve home, family cemeteries and generations-old ties to the hills and hollows that surround and protect them.
—Loss of valuable resources from some of the poorest counties in the nation as mining the valuable coal reserves continues to yield great profit for a few while leaving the region even poorer than before.

My Community

My own personal homestead is not currently impacted by mountaintop removal mining. By the grace of god and requirements of the Clean Air Act my community's bitter fight in the early 1980's to protect our homes and water supplies from being destroyed by acid mine drainage from mining proposed for our area has been successful in the near term.

However, our good fortune became the misfortune of friends and neighbors further south as mining moved from our high sulfur coal reserves to the lower sulfur reserves in southern West Virginia. Concurrent with that move, weak enforcement of the law, state sponsored tax breaks and other economic incentives benefited the coal industry in its development of the destructive mining method known as mountaintop removal. Technology once reserved for the wide-open spaces of the western portions of the nation become economically viable in the steep terrain of Appalachia. Employing the machinery and engineering techniques of the huge area mines of the west it is now possible for coal companies to level century old mountains and dump waste rock into nearby valleys burying or otherwise impacting thousands of miles of headwater streams. People in small communities and scattered homesteads are forced to leave their generations old homeplaces. Those who can't or won't leave are faced with a barrage of constant problems including damage to homes and wells from blasting, constant dust, diminished property values, fewer neighbors, schools and churches—a life without life.

As much as I believe in the governance of law and learned early on that those laws were meant to protect the dignity and safety of all, I am deeply troubled to see the frustration and desperation of residents living in the path of this type of mining. Increased suffering caused by lax enforcement of SMCRA, the Clean Water Act and other environmental laws is allowing for an expansion of mountaintop removal operations that is now leading many to resort to less reasoned and less reasonable means to protect themselves and their communities. The anger, mistrust and widespread unrest of the bad old days before SMCRA is returning.

Question 2. Is it your position that mountaintop mining and valley fills violate the provisions of SMCRA? If so, which?

Answer. Although allowances for mountaintop removal strip mining were included in SMCRA after a series of difficult compromises, as practiced today mountaintop removal looks very little like anything intended by Congress in 1977. Over the past 30 years, and the last 15 years in particular, the coal industry has been allowed to stretch, distort and evade legal requirements that define acceptable limits of environmental impact from this type of mining. The results have been catastrophic.

Historically the limits set forth in law and regulation were to determine where and how coal could be mined while at the same time affording important protection to the environment and communities near the mines. Today, that precept has been turned upside down. The technology available to industry and the political pressure industry brings to bear on regulations and the agencies responsible for overseeing those regulations are now determining the limits (or lack thereof) of mining with little regard to environment—man or beast alike. OSM has become a willing participant in upsetting that important balance.

The specific portions of SMCRA that are being violated are many, and would best be addressed in additional oversight hearings to specifically consider the practice of mountaintop removal. I mention but a few here.

SMCRA requires Cumulative Hydrologic Impact Assessments, or adequate analysis of the impacts of mining on the hydrology of an area, and that the integrity of the ground and surface waters be protected. OSM is not assuring that either requirement is being met for the region of southern West Virginia, eastern Kentucky, western Virginia and areas of eastern Tennessee where mountaintop removal and valley fill strip-mining is occurring.

One of the fundamental tenets of SMCRA requires that all minesites be restored to conditions capable of supporting similar or better uses than the area could support before mining. The postmining condition of minesites should benefit the nearby communities, and provide for their future wellbeing once mining was completed and

the coal riches gone forever. With the renewable source of timber gone, herbs and other medicinal plants scraped aside and buried deep in rubble it's difficult to imagine what the future holds. What we are left with are thousands of acres that some call "moonscapes." At best these sites are "fields of dreams", left for someone, somewhere, sometime in the future to figure out how to provide the roads, water and other infrastructure necessary for any practical use of the previously mined areas. Only a very small percent (perhaps as much as 3—5% but only after litigation and publicity has forced even that much compliance with the law) of the hundreds of square miles of mountaintop mined areas now have anything that resembles the postmining land uses required by law.

SMCRA requires that topsoil be saved and replaced in reclaiming the site, yet topsoil and the fundamental microbial life it supports is often the first to be dumped over the side of the mountain into the stream valleys below. "Topsoil substitutes" are insufficient to provide for the restoration of forests or for other productive uses of the 'reclaimed' land.

SMCRA was written to protect the people living around minesites. In far too many instances, that is just not happening today. Residents of the area are not being protected, but rather treated as disposable commodities, past over as sacrificial lambs offered up under the guise of the greater good and glory of the state and nation in our quest for greater and greater amounts of energy. Profits from tearing the black gold out of the hills and hearts of Appalachia go elsewhere, into the pockets of industry moguls.

And of course, OSM now proposes to change the Stream Buffer Zone rule that has been in effect since 1983. This is the focus of your next question, which I answer in some detail.

STREAM BUFFER ZONE RULEMAKING

Question 3. I take it that you do not support the modification to the stream buffer zone rule as proposed by OSM. Do you think the proposed regulation violates SMCRA?

Answer. I believe that the proposed regulation violates both SMCRA, AND the Clean Water Act that SMCRA was meant to support.

At the November 13th oversight hearing before the Energy Committee, Joan Mulhern, Senior Legislative Counsel for Earthjustice, submitted wonderfully clear written testimony that focuses for the most part on this very question. I include them here by reference.

Additionally, the West Virginia Highlands Conservancy joined several other state, regional and national groups in submitting comments to the Office of Surface Mining on the proposed rule. I submit the attached set of comments for the record.

For purposes of my answer here, however, I offer the following brief, more general. Overview of our position as expressed in those comments.

First and foremost, we view this proposal to change the Stream Buffer Zone Rule as another in a series of actions by the current administration in Washington to gut long-standing safeguards against the wholesale burial and pollution of streams in Appalachia by the coal mining industry.

- In May 2002, the U.S. Army Corps of Engineers (the Corps) repealed a 25-year-old prohibition on dumping waste material in streams. 67 Fed. Reg. 31129.
- In December 2003, the Office of Surface Mining (OSM) proposed to weaken its oversight of state mining programs, by making federal takeovers for state violations of federal law discretionary rather than automatic. 68 Fed. Reg. 67776.
- In October 2005, the Administration released its final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), which proposed no meaningful mining reforms or limitations on valley fills. 70 Fed. Reg. 62102.
- Now, OSM proposes to gut the stream buffer zone (SBZ) rule, the most important safeguard under the Surface Mining Control and Reclamation Act (SMCRA) for protecting streams.

Taken together, these actions can only accelerate the pace of mountaintop removal mining and valley filling, which has already destroyed nearly 2000 miles of Appalachia's streams and well over 600 square miles of its forests.

While it is true that the Surface Mine Act envisions mountaintop removal mining, the size and extent of that mining was limited by the stream buffer zone rule which—if enforced properly—would allow only the uppermost reaches of any stream to be filled with waste rock from mining operations.

The proposed rule would eliminate the standing prohibition against mining within 100 feet of streams if that mining will have an adverse effect on water quantity,

water quality, and other environmental resources of the stream. In its place, the proposed rule would merely ask coal operators to "minimize" harm to the extent possible.

This is an open invitation to industry to ignore a rule that, as a practical matter, has been routinely abused and violated, as federal and state regulators looked the other way.

Clearly, burying one or two miles of stream under millions of tons of rock violates the intent and letter of this rule. To paraphrase the late Judge Haden in his 1999 ruling interpreting the existing SBZ rule in our Bragg v. Robertson litigation, there is no greater harm to these streams than obliteration. . . . Once a stream is filled with tons of waste rock, there is no more stream, no more water quality.

In a Fact Sheet offered as background for this rule change, OSM would have us believe that burying some upper reaches of streams that fall within the permitted mine area is OK as long as the downstream reaches beyond the permit boundaries are not harmed. Addressing this erroneous perception, Judge Haden wrote that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions existing streams may be destroyed so long as (some other portion of) the stream is saved." Bragg v. Robertson.

The attached comments state and support our belief that:

- OSM's proposal is not a 'clarification', but rather guts the existing SBZ rule and reverses OSM's prior interpretation of the existing rule.
- OSM's reasons for gutting the SBZ rule are irrational and inconsistent with congressional intent to protect the environment, including streams.
- OSM's draft Environmental Impact Statement (DEIS) written in support of this rule change is inadequate because it does not consider all reasonable alternatives including any that would restrict the size, number or impact of fills.
- EPA cannot legally concur with the proposed rule because it will cause significant degradation of streams, in violation of the Clean Water Act.

A 1977 House Report insisted that OSM must obtain concurrence from EPA any proposed rule in order to guarantee consistency with environmental requirements of the Clean Air Act and Clean Water Act. Indeed the proposed rule not only violates the original intent of SMCRA, but also violates the Clean Water Act because the rule will allow significant degradation of streams to continue. The DEIS written to support the proposed rule, as well as other available scientific evidence, demonstrate that surface coal mining activities are causing significant degradation of streams in Appalachia and that degradation is likely to continue under the proposed rule change.

- Stream degradation is significant.
- Water quality degradation is significant.
- Water quantity and community impacts are significant.
- Degradation of aquatic diversity is significant.

—Against this background of scientific evidence of significant degradation to streams the DEIS' analysis of cumulative effects is pathetically inadequate. I.e. A mere 1/2 page rationale is offered and two 20 year old EIS from '79 and '83 are relied upon as further proof of limited impact when in fact the 2005 Mountaintop Mining/Valley Fill EIS concluded that fills are 72% larger in the 1990's than they were in the 1980's and the length of streams buried have increased 224%!!!

—OSM's DEIS evades its obligation to analyze significant degradation.

—OSM's deletion of the requirement that activities that disturb the SBZ must comply with water quality standards is an illegal attempt to exempt activities from water quality standards—an attempt to override—not work in concert with—the requirements of the Clean Water Act. The Existing SBZ Rule is Consistent with the CWA.

SMCRA GENERALLY

Question 4. What do you view as the key accomplishments under SMCRA? What do you view as the goals yet to be accomplished?

Answer. Key Accomplishments:

- Halting the most blatant abuses of the rip-and-run/shoot-and-shove era prior to the 1970's by requiring performance standards intended to limit the impact of mining, to protect the people and environment while allowing for the development of coal resources.

- Providing for meaningful citizen input in the permitting process and citizen suits to appeal programmatic deficiencies.
- Creation of the Abandoned Mine Land (AML) Fund which, though not perfect, has helped reclaim land devastated by mining that took place prior to 1977.

Yet to be Accomplished:

- Enforcement of SMCRA.
- Strong and forceful oversight and commitment by OSM to truly balance the interest of the nations need for coal with protecting the citizens and environment where coal is mined falls far short of the promise of the 1977 Act and the original intent of Congress.

Yielding to the incessant pressure from industry to bend regulations and weaken enforcement, OSM has become a paper tiger and oversight as envisioned in SMCRA has faded to a mere shadow of its former self.

I've always believed that laws to protect the environment us would also protect us, the human part of that environment. I also believe that was the intent of Congress as it passed the Surface Mine Act in 1977. And yet, those good intentions have been lost in the mire of obfuscated regulations and emasculated regulatory agencies orchestrated and created by industry.

HOW CAN WE IN CONGRESS HELP TO ACHIEVE THESE GOALS?

Congress must enter the debate and discussion surrounding the mining of coal, not just the burning of coal.

Oversight hearings by the Senate Committee on Energy and Natural Resources are needed to revisit the original and true meaning of SMCRA and to review the role of OSM at this critical time in our nations history when talk of "clean coal" echoes throughout the halls of Congress.

There is no such thing as "clean coal"—with or without carbon sequestration—as long as mining coal means massive destruction of the environment and the obliteration of generations old communities.

The fundamental reason for enacting SMCRA in the first place was to bring equity preserve dignity, culture and way of life in the coalfields across the country.

Our country is not about the biggest ruling over the smallest, or the most powerful smiting those who have less power, but about justice and equality. . . . Guaranteeing the protections afforded by Congress in passing SMCRA in 1977 means preserving the rights of the communities, protecting the land and water those communities depend on and providing for future beneficial use of mined land while allowing mining within the reasonable limits imposed by SMCRA.

By the 1970's mining practices had overshadowed care and concern for the environment and the communities. Congress in its wisdom recognized that limits had to be set and strong oversight was needed. Congress stepped up to the plate by enacting SMCRA, an imperfect but useful law.

Now 30 years later, we call upon Congress to step in once again.

As citizens, we seek relief in state administrative and procedural public hearings only to be rebuffed as environmental extremists. . .

As citizens, we seek and find relief in federal court only to be met with agency reversals of the very sections of federal law we seek to uphold. e.g: The Army Corps of Engineers and EPA reversal of the 25 year old "fill rule", now the OSM reversal of the Buffer Zone Rule.

Water is the lifeblood of our mountains and the communities that exist in the hollows of Appalachia. As our streams and springs are forests are damaged and destroyed, our ability to live is compromised.

We constantly confront the offensive attitude unspoken for decades, but clearly expressed recently by a representative of a mining equipment company in West Virginia who said in an interview on WV Public Radio:

> Manhattan is an area of 22 square miles. It has 68 thousand people per square mile. Boone County [West Virginia] is 500 square miles. It has 50 people per square mile. We, we have an obligation to the greater good for the people. We export 70 percent of our coal. We have to, we have to provide electricity and power for this country for our urban brothers and sisters. We, we have a great responsibility here in West Virginia, and we can't let that go.

Could just as easily said the same about the entire state of WV. WV is 24,000 square miles with 1.8 million people. That comes to 75 people per square mile.

We call upon Congress to help us end this demeaning representation of our mountain communities as disposable people and once again hold the federal Office of Surface Mining accountable for full and fair enforcement of SMCRA and protecting.

In 1977 Congress saw fit to write meaningful protections into SMCRA. The Congress of 2007 should assure that those protections are maintained. When OSM fails, as it is now, Congress must make bold steps to hold them accountable by reaffirming the fundamental meaning SMCRA.

I end my response as I began.

We ask that you hold oversight hearings specifically focused on this most destructive form of strip mining known as mountaintop removal. I was honored to be a citizen spokesperson at the November 13th hearing about the Surface Mine Act (SMCRA), but I assure you hearing from many of my friends living in the valleys directly below these mining operations would knock your socks off. I further recommend inviting stream ecologists, mining and terrestrial experts and other persons with valuable information and evidence to testify at such hearings.

I also again encourage members and staff of your committee to visit and fly over areas most impacted by these mining operations to see first hand the profound devastation that eye-popping visual images can only barely hint at. I would be happy to assist in making those arrangements.

Thank you for the opportunity to further expand our conversation about mountaintop removal mining and the need for congressional oversight focused on this excessively destructive method of mining.

ATTACHMENT

November 20, 2007.

David Hartos,
Office of Surface Mining Reclamation and Enforcement, Appalachian Region, 3 Parkway Center, Pittsburgh, PA.

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

Re: Comments on Proposed Rule and Draft EIS on Excess Spoil Minimization/Stream Buffer Zones, 72 Fed. Reg. 48678, 48890 (August 24, 2007), RIN 1029-AC04, Docket Nos. OSM-2007-0007 and OSM-2007-0008; OSM-EIS-34.

DEAR MR. HARTOS: On behalf of the West Virginia Highlands Conservancy, Sierra Club, Ohio Valley Environmental Coalition, Coal River Mountain Watch and Waterkeeper Alliance[1], we submit these comments in opposition to the proposed rule.[2] Earthjustice also joins in these comments. The proposed rule is another in a series of actions by the Bush Administration to gut long-standing safeguards against the wholesale burial and pollution of streams in Appalachia by the coal mining industry. In May 2002, the U.S. Army Corps of Engineers (the Corps) repealed a 25-year-old prohibition on dumping waste material in streams. 67 Fed. Reg. 31129. In October 2005, the Office of Surface Mining (OSM) weakened its oversight of state mining programs, by making federal takeovers for state violations of federal law discretionary rather than automatic. 70 Fed. Reg. 61194. Also in October 2005, the Administration released its final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), which proposed no meaning-

[1] The members of the Waterkeeper Alliance are the Altamaha Riverkeeper, Animas Riverkeeper, Assateague Coastkeeper, Black Warrior Riverkeeper, Black Water/Nottoway Riverkeeper, Cape Fear Coastkeeper, Casco Baykeeper, Catawba Riverkeeper, Choctawhatchee Riverkeeper, Colorado Riverkeeper, Cook Inletkeeper, Delaware Riverkeeper, Detroit Riverkeeper, Emerald Coastkeeper, French Broad Riverkeeper, Grand Traverse Baykeeper, Great Salt Lakekeeper, Hackensack Riverkeeper, Housatonic Riverkeeper, Hudson Riverkeeper, Hurricane Creekkeeper, Inland Empire Waterkeeper, Kansas Riverkeeper, Klamath Riverkeeper, Lake George Waterkeeper, Lower Mississippi Riverkeeper, Lower Neuse Riverkeeper, Lower Susquehanna Riverkeeper, Milwaukee Riverkeeper, Mobile Baykeeper, Nantucket Soundkeeper, New Riverkeeper, NY/NJ Baykeeper, North Sound Baykeeper, Ogeechee-Canoochee Riverkeeper, Orange County Coastkeeper, Pamlico-Tar Riverkeeper, Peconic Baykeeper, Prince William Soundkeeper, Russian Riverkeeper, San Diego Coastkeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Saranac Waterkeeper, Savannah Riverkeeper, Severn Riverkeeper, Shenandoah Riverkeeper, South Riverkeeper, St. Clair Channelkeeper, St. Johns Riverkeeper, Tualatin Riverkeepers, Upper Chattahoochee Riverkeeper, Upper Neuse Riverkeeper, Upper St. Lawrence Riverkeeper, Waccamaw Riverkeeper, Western Lake Erie Waterkeeper, West/Rhode Riverkeeper, West Virginia Headwaters Waterkeeper, Willamette Riverkeeper and Youghiogheny Riverkeeper.

[2] We also incorporate by reference our April 23, 2004 comments on the prior proposed rule and our January 5, 2004 comments on the MTM/VF DEIS.

ful mining reforms or limitations on valley fills. 70 Fed. Reg. 62102. Now, OSM proposes to gut the stream buffer zone (SBZ) rule, the most important safeguard under the Surface Mining Control and Reclamation Act (SMCRA) for protecting streams. Taken together, these actions can only accelerate the pace of mountaintop removal mining and valley filling, which has already destroyed 1,200 miles of Appalachia's streams and 387,000 acres of its forests.

The proposed rule would eliminate the standing prohibition against mining within 100 feet of streams if it will have an adverse effect on water quantity, water quality, and other environmental resources of the stream. In its place, the proposed rule would merely ask coal operators to "minimize" harm to the extent possible. This is an open invitation to industry to ignore a rule that, as a practical matter, has been routinely abused and violated as federal and state regulators looked the other way.

For the reasons discussed below we believe that the proposed changes are unwise, inconsistent with the objectives of SMCRA and the requirements of the Clean Water Act, and supported by a draft environmental impact statement ("DEIS") that is facially inadequate. We request that OSM withdraw its proposal and instead retain and enforce the existing requirements regarding the protection of streams. Our detailed analysis and comments on the proposed changes follow.

I. OSM'S PROPOSED REVISION OF THE SBZ RULE IS ARBITRARY AND CAPRICIOUS AND VIOLATES SMCRA

A. OSM's Proposal Contradicts Its Prior Interpretation of the Existing Rule

In the preamble, OSM reviews the history of the 1983 buffer zone rule and claims that it has consistently "applied" that rule to allow valley fills and other stream incursions. 72 Fed. Reg. at 48892, 48895. In the DEIS, OSM goes even further and states that "[n]either OSM nor the State SMCRA regulatory authorities have interpreted or implemented the stream buffer zone rule as an absolute prohibition of [sic] placement of excess spoil material fills or any other surface mining activity within the stream buffer zone." DEIS, pp. 72-73. These statements are clearly intended to create the impression that the current proposal is consistent with all past practices and interpretations, and that there is no shift in agency thinking.

In fact, however, the proposed rule is a reversal of OSM's prior interpretation of SBZ requirements. When it promulgated the existing SBZ rule in 1983, OSM chose to protect intermittent and perennial streams because they were recognized to be especially significant in establishing the hydrologic balance. OSM stated that the buffer zone rule was designed "to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations." 48 Fed. Reg 30312 (June 30, 1983). OSM further stated that "intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act." Id. In the MTM/VF PEIS (p. II.C-34), OSM and the other participating federal agencies admit that one of the principal purposes of the stream buffer zone regulation is to "minimize gross disturbances to the prevailing hydrologic balance, fish and other biologically important plants and animals that may live in the streams or riparian zones adjacent to the streams."

In his 1999 ruling interpreting the existing SBZ rule, Judge Haden, Chief Judge of the District Court for the Southern District of West Virginia, ruled that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved." Bragg v. Robertson, 72 F. Supp.2d 642, 651 (S.D.W.Va. 1999). Further, Judge Haden stated:

> When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.

Id. at 661-662. The Court pointed out the obvious: "Valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream.

The Court holds that placement of valley fills in intermittent and perennial streams violates federal and state water quality standards by eliminating the buried stream segments for the primary purpose of waste assimilation." Id. at 662. Moreover with valley fills, "[t]his concentration of industrial waste is mortal to animal or aquatic life in the stream segment buried. Existing stream uses are not protected,

but destroyed. These effects are inconsistent with State and federal water quality standards." Id. at 663. It is important to note that, while Judge Haden's ruling was overturned on jurisdictional grounds, the substance of his ruling was not addressed by the Court of Appeals. See Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

In their brief on appeal in Bragg, OSM, EPA and the Corps expressly agreed with Judge Haden's interpretation of the SBZ rule:

> [Judge Haden] correctly found that SMCRA's stream buffer zone rule. . . prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil. The elimination of substantial intermittent or perennial stream segment [sic] necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments. As the district court rightly concluded, the elimination of entire stream segments and all the life they contain plainly causes environmental harm. Accordingly, the district court correctly granted summary judgment on plaintiffs' buffer zone claims.

Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000 (hereafter "U.S. Br."), p. 2, Attachment 1 (emphasis in original).[3] Additionally, these agencies stated that the District Court correctly held:

> [T]hat valley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources of the filled stream segments. WVDEP has acknowledged that it has routinely approved valley fills in intermittent and perennial streams without making the findings called for by the buffer zone rule for the stream segment filled. The district court correctly rejected the arguments that WVDEP was not required to make the buffer zone findings, holding that the findings required by the buffer zone rule must be made for the filled stream segments and not at some point downstream from the valley fills; and (2) findings made by the Corps under the CWA section 404(b)(1) guidelines are not a substitute for the buffer zone findings.
>
> The district court also correctly. . .[held]. . .that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the buffer zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial causes adverse environmental effects to the filled stream segments, as such fills eliminate all aquatic life that inhabited those segments.

Id. at 24-25. OSM, EPA and the Corps further stated that "valley fills that disturb intermittent or perennial streams may be approved only if there is a finding that activity will not adversely affect the environmental resources of the filled stream segment." Id. at 41.

In a May 22, 2000 letter (Attachment 3), Acting OSM Director Kathrine Henry adopted the same position that "the stream buffer zone waiver findings must be made not only for segments downstream of the fill, but also for each segment of an intermittent or perennial stream in which excess spoil is placed." In its 2004 proposed rule, OSM admitted that this brief and this Acting Director's letter took the position that the rule applied to valley fills. 69 Fed. Reg. at 1040. However, in its 2007 proposed rule, OSM conveniently omits this material and instead cryptically cross-references it as an "additional discussion of litigation and related matters." 72 Fed. Reg. at 48896.

Now OSM has completely reversed this position and would totally exempt valley fills, waste impoundments and other stream incursions from the rule. Id. at 48907; DEIS, p. S-2. When an agency reverses its position, its burden of justification increases. In such cases, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Mfrs. Assn. v. State Farm Mut., 463 U.S. 29, 42 (1983). OSM has failed to rationally justify its complete about-face from the position it took in the Bragg case. Indeed, OSM has

[3] In the 2004 proposal, OSM suggested that the DOJ brief is "not consistent with our historic interpretation" and that OSM never agreed with it or approved it. 69 Fed. Reg. at 1039-40. That is a bold-faced lie. DOJ told the Fourth Circuit that "Attorneys for EPA and OSM are identified on the cover of the federal appellants' brief as being 'of counsel' to this appeal, and the position taken in the brief for the federal appellants represents the unified position of the federal agencies." Federal Appellants' Opposition to the Motion of the Intervenor-Defendants to Strike the Brief of the Federal Appellants and to Dismiss Appeal No. 99-2683, p. 2, Attachment 2.

failed to even consider the alternative of enforcing the rule as written and as OSM interpreted it in the Bragg case.

B. OSM's Proposal Violates Congressional Intent to Protect the Environment, Including Streams

The first stated purpose of SMCRA is "to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). As the House Report on the 1977 bill explained:

> A basic tenet underlying this legislation is the principle that environmental protection and reclamation, at a minimum meeting the standards in this act, are a coequal objective with that of producing coal. The continued selection of mining techniques by engineers whose primary objectives are the most efficient removal of the overburden and transport of the coal is not sufficient to be fully responsive to the purposes and intent of the act.

H. Rep. No. 218, 95th Cong., 1st Sess., p. 96 (1977). Congress recognized the environmental hazards posed by the valley fills associated with mountaintop removal mining: "Serious problems are presented . . . by operations using head-of-the-hollow or valley fill. For such operations, it is uncertain whether spoil can be placed in an environmentally sound manner." Id. at 157 (quoting Sec. of the Interior Cecil Andrus), reprinted in 1977 U.S.C.C.A.N. 593, 688. See also id. at 615 ("[S]ome mountaintop removal operations have caused serious environmental problems in the Appalachian area. The key cause of these problems has been the 'valley' fill or 'head-of-the-hollow' fill techniques utilized to dispose of excess spoil material."). Congress concluded that valley fills "should be limited to the minimum and that strong spoil placement standards are needed to insure that there will be no offsite damages." Id. at 688-689 (quoting Sec. of the Interior Andrus); see also Cong. Rec. 33,314 (Oct. 9, 1973) (statement of Sen. Jackson) (stating that the disposal of spoil from mountaintop removal mining may be authorized only if fills satisfy "very carefully determined conditions precedent").

The text of SMCRA establishes the "strong spoil disposal standards" required for surface coal mining, including mountaintop removal mining. Several environmental performance standards govern the conditions under which surface mining, including associated spoil disposal, may be authorized. Pursuant to those standards, surface mining operations may be authorized only if the permitting authority finds (1) that the mining operations will "minimize disturbances and adverse impacts . . . on fish, wildlife, and related environmental values"; (2) that "no damage will be done to natural watercourses"; (3) that the excess spoil will be placed in an area that "does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil will be prevented"; and (4) that the disposal "is compatible with the natural drainage patterns and surroundings." 30 U.S.C. §§ 1265(b)(10), (22), (24); § 1265(c)(4)(D).

SMCRA mandates that mining operations must "minimize the disturbance to the prevailing hydrologic balance at the mine site and in associated offsite areas." 30 U.S.C. § 1365(b)(10). By specifying that mining disturbances such as valley fills should minimize environmental harm "at the mine site," Congress expressed its intent to protect streams where the disturbances occur, i.e., in the footprint of proposed valley fills. By specifying that mining disturbances should minimize environmental harm "in associated offsite areas," Congress sought to protect affected downstream areas. Furthermore, applying the buffer zone rule to the filled stream segment advances the purpose of the rule, which was enacted to "protect stream channels" (44 Fed. Reg. 15176), and also advances the general purpose of the standards established under SMCRA, which were promulgated "to ensure that all surface mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with the Act." 30 C.F.R. § 816.2.

OSM repeatedly cites only one of SMCRA's thirteen purposes as the defining standard for issuing regulations under that statute. DEIS, pp. 20, 24-25; 72 Fed. Reg. at 48897, 48908, 48909-10, 48911. That one seeks to "strike a balance between protection of the environment and . . . the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). OSM ignores two other purposes that seek to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations" and "assure that surface coal mining operations are so conducted as to protect the environment." Id., § 1202(a), (d). Thus, OSM skews its analysis of SMCRA in favor of resource development to the detriment of the environment.

Furthermore, OSM uses other sections of SMCRA to set up and demolish a strawman argument. OSM argues that, because § 1265(b)(22)(D) mentions placing

spoil where "natural water courses" are present, Congress did not intend to create an "absolute prohibition" on placing any mining spoil in streams. 72 Fed. Reg. at 48893-94, 48908. That is true. However, it does not follow from this proposition that all Congress expected was for OSM to "minimize" the placement of mining spoil in streams. OSM uses the "minimize" concept in § 1265(b)(24) as the regulatory standard for defining the maximum amount of environmental protection that it is required to provide. OSM assumes that placing any amount of mining spoil in streams is acceptable so long as the amount is "minimized" "to the extent possible." OSM then concludes that this "minimization" standard strikes the only "balance" that Congress could have intended in SMCRA, and that no other alternative measures to protect the environment need be considered.. This ignores Congress' two other purposes to "assure" that the environment is protected from the "adverse effects of surface coal mining." Congress did not rule out other measures in addition to fill minimization if those measures are needed to ensure protection of the environment.

C. OSM's Proposal Is Based on a Flawed DEIS

1. The DEIS Fails to Consider All Reasonable Alternatives

In its DEIS, OSM considered only five alternatives in detail: (1) take no action and retain the existing rules, which OSM interprets to allow mining in the SBZ; (2) adopt the proposed excess spoil and SBZ rules, which allows mining in the SBZ; (3) adopt the 2004 SBZ rule, which also allows mining within the SBZ; (4) change only the excess spoil rule; and (5) change only the SBZ rule. DEIS, pp. 17-18. Thus, these alternatives all allow mining in the SBZ without any restrictions except the minimization of excess spoil. OSM did not consider any alternatives that restrict mining in the SBZ. OSM did not consider the alternative of enforcing the SBZ as written and as Judge Haden and OSM interpreted it in 1999 and 2000. Furthermore, OSM did not consider any alternatives that would limit the downstream effects of valley fills (including changes in stream chemistry, temperature, and flow), even though those effects are known to be significant and adverse.

OSM summarily rejected ten alternatives without any detailed analysis. These alternatives would restrict valley fills by type of stream (ephemeral, intermediate or perennial), fill size (area or volume), watershed size (from 35 to 640 acres), stream length (200 to 2000 linear feet), or the percentage of streams filled in a watershed. DEIS, pp. 19-26. OSM uses two types of arguments to dismiss these alternatives: (1) lack of statutory authority; and (2) insufficient scientific data. Id. Neither argument has merit.

First, OSM erroneously assumed that considering any other alternatives or adding any other measures to protect the environment would result in an "absolute prohibition" on either stream-filling or coal mining, and would therefore be contrary to Congressional intent. DEIS, pp. 20-21. However, it is obvious that limitations on valley fills are not necessarily an all-or-nothing proposition. Size, area, length or volume restrictions can be set at intermediate amounts between nothing and unlimited development. It is also clear that restricting fill size does not necessarily prohibit all mining. The size can be restricted based on the amount of watershed, the amount of stream length, or the type of stream that is buried. Cumulative limits based on the amount filled in a larger watershed or region are also possible. An analysis of past NWP 21 authorizations in West Virginia shows that many mines were able to operate without placing fill in intermittent or perennial streams, or both. See Stream Loss Table, below. Thus, stricter environmental measures could still allow substantial amounts of coal mining to continue.

Second, OSM erroneously assumes that, without more scientific information, no limits are possible or appropriate. This is the same argument that was made in the October 2005 PEIS, and OSM references that document to support its decision. DEIS, pp. 24-26. The primary argument advanced in the PEIS for rejecting fill alternatives was that there was insufficient information at that time to draw a "bright line" that works in every situation, and variations between streams and watersheds made it difficult to apply any "bright line" to differing individual situations. The PEIS stated that "[s]cientific data collected for this EIS do not clearly identify a basis (i.e., a particular stream segment, fill or watershed size applicable in every situation) for establishing programmatic or absolute restrictions that could prevent 'significant degradation.'" PEIS, p. II.D-8. The PEIS therefore posited that since one general rule does not apply in every situation, there is no basis for applying any general rule at all, and the only alternative is to apply a "case-by-case" analysis to every individual situation. PEIS, pp. II.D-1 to II.D-9. The perfect is the enemy of the good, as the PEIS sets up each individual restriction like a straw man and then knocks it down by saying that one problem or another makes it inapplicable in certain situations. Id.

This rationale is not a sufficient basis for eliminating alternatives from analysis under NEPA. "[W]hile inconclusive evidence may serve as justification for not choosing an alternative, here it cannot serve as a justification for entirely failing to 'rigorously explore and objectively evaluate all reasonable alternatives.'" The Fund for Animals v. Norton, 294 F. Supp.2d 92, 110 (D.C. Cir. 2003). In addition, the historical record demonstrates that OSM's claims of insufficient statutory authority and insufficient information are merely a pretext. In fact, OSM refuses to consider more environmentally-protective alternatives because it made a political calculation to protect the coal industry at the expense of the environment.

The 2001 preliminary draft of the PEIS on mountaintop mining/valley fills, which was drafted by the Clinton Administration, considered three action alternatives that restricted valley fills to ephemeral or intermittent streams and retained the SBZ rule. Attachment 4, pp. ES-6, IV-1. Different versions of these same alternatives were present in later drafts until June 2002. For example, a March 2002 draft stated:

> The most significant distinction between the four alternatives is how each one addresses Issue 1, "Direct loss of streams and stream impairment." The question of what portions of a stream can be legally filled under SMCRA authority was central to the Bragg v. Robertson lawsuit. The District Court decision in that case established that the SMCRA stream buffer zone regulations at 30 CFR 816.57 and 817.57 do not allow mining activities (including valley fills) within 100 feet of intermittent or perennial streams. The Fourth Circuit Court of Appeals later vacated the District Court's decision, but on grounds unrelated to the applicability of the stream buffer zone rule. Because of the atmosphere of regulatory uncertainty surrounding this issue, and the importance of allowable valley fill size to mine viability and environmental impacts, the agencies developed the EIS alternatives around it. Each alternative proposes different changes to regulatory programs that determine the allowable extent of stream loss through valley filling. The amount of valley filling that is allowable will affect the amount of mining that can occur, which in turn will determine the environmental and economic consequences of selecting a given alternative.

Attachment 5, Att., p. 5 (emphasis added). The Proposed Agenda for a June 18, 2002 Steering Committee meeting describes the four alternatives as follows:

Table IV—1. Mountaintop Mining/Valley Fill EIS Alternative Summary

Alternative A	No changes to the SMCRA and CWA programs in effect in 1998.
Alternative B	Depending on the outcome of a detailed, permit-by-permit baseline data collection; thorough, site-specific, significant adverse impact analyses; and, consideration of alternatives for avoidance and minimization, valley fills could be allowed in ephemeral, intermittent, and perennial stream segments. Mitigation of unavoidable impacts would require in-kind replacement of aquatic functions and values within the watershed.
Alternative C	Valley fills could be located in ephemeral and intermittent streams. Permit-by-permit baseline data collection and site-specific alternatives analyses would be required (although not necessarily as rigorous as in Alternative B) to demonstrate that avoidance and minimization were considered. Mitigation options for unavoidable impacts would be somewhat more varied and thus more flexible than under Alternative B.
Alternative D	Valley fills could be located only in the ephemeral portion of streams. Permit-by-permit baseline data collection would be more limited than under Alternative B, and alternative analyses would demonstrate that minimization of downstream or indirect impacts were considered. Mitigation could include compensation in lieu of in-kind replacement of lost aquatic function and value.

Attachment 6, Proposed Agenda, p. 7. Thus, these alternatives would have restricted valley fills depending on the type of stream.

When the Bush Administration took office, Deputy Secretary of the Interior J. Steven Griles directed OSM to "refocus" the PEIS to "focus on centralizing and streamlining coal mine permitting" and impact "minimization." 10/5/01 Griles Letter, p. 1, Attachment 7. As a result, the fill-restricting alternatives were abandoned and replaced by process alternatives that merely reshuffled the procedural responsibilities between the various agencies. All of them had the same or very similar environmental impacts and merely sought to streamline permit processing. See 1/5/04 WVHC Comments on the PEIS, pp. 3-6. The final PEIS states that "[a]ll alternatives ... are based on process differences and not directly on measures that restrict the area of mining." PEIS, p. IV.G-3. The PEIS further admits that "[t]he environmental benefits of the three action alternatives are very similar." Id., p. II.B-13.

The paper trail for the PEIS shows how this happened. On June 18, 2002, members of the Steering Committee on the PEIS met to consider the scope of alternatives. Attachment 6, Proposed Agenda. EPA and the U.S. Fish and Wildlife Service (FWS) members of the Steering Committee took the position that the PEIS had to consider alternatives to reduce environmental impacts. Id. at 8. They believed that "the new framework does not meet the NEPA requirements by providing a contrasting choices [sic] among several clear and distinct alternatives." Id. at 2. As a result of this meeting, the Steering Committee changed the alternative framework, but still recommended inclusion of an alternative that "would represent the suite of actions that would result in the most environmentally-protective alternative (i.e., restricting fills to the ephemeral zone...)." Id. at 11. The Steering Committee approved that recommendation. 6/19/02 Hoffman e-mail, Attachment 7. These changes were incorporated into a new alternatives matrix table. 6/26/02 Robinson e-mail, Attachment 9.

However, shortly thereafter, the Steering Committee's decision was overruled by the Executive Committee. Unnamed higher-level agency "executives instructed the SC to attempt to construct the alternatives for the EIS in a framework based largely on coordinated decision making for SMCRA and CWA—with no alternative restricting fills." Attachment 10, 9/23/02 Agenda, p. 1. Minutes of a July 14, 2002 Executive Committee meeting show that a new three-alternative approach was adopted. 8/15/02 email, Attachment 11, Attachment: Executive Committee Discussion. As a result, the prior alternatives restricting valley fills were stripped from the PEIS. Instead, the new alternative framework considered only process alternatives.

OSM has now continued this wholesale evisceration of alternatives by refusing to consider similar fill-restricting alternatives in the SBZ DEIS. However, the fact that two federal agencies previously recommended inclusion of those restrictive alternatives demonstrates that they are serious proposals that deserve and require full analysis and consideration.

It is also outrageous that OSM does not even consider the alternative of enforcing the SBZ rule as written and as it was interpreted by OSM itself in its April 2000 federal court brief and Acting Director letter. Instead, OSM reinterprets the existing rule in conformity with the new proposed rule, so that both of them allow valley fills in intermittent and perennial streams. This eliminates most of the difference between the two rules, and makes the "no-action" alternative a pale shadow of the proposed rule. The "no action" alternative in the DEIS merely substitutes OSM's past practice for its legal mandate to protect streams and the environment generally. A valid "no action" alternative would interpret the SBZ as applying to the footprint of the valley fills, as OSM determined was legally required in 2000.

OSM has failed to analyze a reasonable range of alternatives. All of the alternatives would allow mining activities and valley fills to be placed in any stream without any limitation on the amount of stream that could be buried and destroyed. OSM must consider some alternatives that restrict filling of streams. Absent such consideration, the EIS fails to frame the true range of choices available to the decisionmaker.

Furthermore, OSM must consider some alternatives that address the cumulative impacts of stream filling. As OSM acknowledges, those cumulative impacts involve damaging or destroying over 1,700 miles of streams in Appalachia. DEIS, p. 117. The DEIS fails to address these cumulative impacts. Fill minimization, by itself, only results in a case-by-case analysis of filling for each separate project. It does not analyze or address cumulative impacts. OSM inexplicably assigns zero value to the loss of thousands of miles of headwater streams.

OSM's failure to consider a reasonable range of alternatives has a predictable result: all of the alternatives would have substantially the same impacts. OSM states that it "would not anticipate a major shift in on-the-ground consequences from any

of the alternatives." DEIS, p. 121. The alternatives "would cause no discernable changes to the direct stream impact trend." Id., p. 124. This is unremarkable, since OSM interprets the "no-action" alternative and all the other alternatives to allow continued unlimited filling of the buffer zone. The absence of significantly different impacts demonstrates the artificially narrow range of the alternatives that OSM considered. What is remarkable is that although stream filling in Appalachia is one of the most, if not the most, environmentally destructive practices in the United States today, OSM cannot think of a single reasonable alternative that would result in a "major shift" in the effects of those practices. This inability is based on political considerations, not facts or analysis.

OSM's primary rationale in 2004 for gutting the SBZ rule and eliminating any more restrictive alternatives was its claim that it is "virtually impossible to conduct mining activities within 100 feet of an intermittent or perennial stream without causing some adverse effects," and that "SMCRA recognizes that an absolute standard of 'no adverse impacts' is unattainable." 69 Fed. Reg. at 1043. Similarly, in the DEIS, OSM states that if valley fills were restricted to ephemeral streams, 90.9% of the coal in central Appalachia could not be mined. DEIS, p. 20. OSM also argues that SMCRA does not prohibit filling streams with mine waste, and that it not economically feasible to eliminate such fills. 72 Fed. Reg. at 48891 ("the most economically feasible disposal areas are the upper reaches of valleys"); id. at 48892 ("maintenance of a buffer is neither feasible nor appropriate").

The 92.5% figure is based on the Mountaintop EIS Technical Report in Appendix G of the MTM/VF PEIS. It was based on a study of only ten mines, and did not consider the altered economics of revised mine configurations. MTM/VF PEIS, App. G, Cover Sheet, p. 3. It therefore cannot be extrapolated to all coal mining in central Appalachia. The more comprehensive economic analyses in the MTM/VF PEIS, based on work by RTC and Hill & Associates, showed that restricting valley fills to ephemeral zones would reduce coal production in Appalachia by 20-45%, and would increase coal prices by only two dollars a ton. Id. at 7; MTM/VF PEIS, p. IV-I.3.

Even that analysis is an overstatement of the impacts of the existing rule. We have examined seven recent NWP 21 authorizations issued by the Corps for surface coal mines in West Virginia. If the ephemeral/intermittent/perennial stream delineations used by the Corps to grant those authorizations are valid, they show that mine operators can place large amounts of mine spoil in valley fills without impacting perennial streams. See OVEC 4/23/04 Comments on Proposed SBZ Rule, Attachment 7.

Mine operator/ Mine Name/ NWP 21 Issuance Date	Valley Fill No.	Water-shed Acres	Stream loss in linear feet		
			Ephem-eral	Intermit-tent	Perennial
Kingston Resources, Inc./ Horse Creek 4/1/2003	1	56	973	600	0
	2	94	2916	500	0
	3	36	1035	315	0
	4	188	1247	2580	0
Horizon Resources, LLC/ Synergy 3/28/2003	1	14	0	0	0
	2	13	0	0	0
	3	121	700	1850	0
	6	160	1837	1500	0
Martin Logan Coal Co./ Phoenix No. 3 5/27/2003	2	76	851	0	0
	3	134	749	1290	0
	4	106	2131	0	0
Hobet Mining, Inc./ Westridge 11/24/2003	1	158	n/a	1800	0
	2	233	n/a	2000	0

Mine operator/ Mine Name/ NWP 21 Issuance Date	Valley Fill No.	Water-shed Acres	Stream loss in linear feet		
			Ephem-eral	Intermit-tent	Perennial
Elk Run Coal Co./ West of Stollings 1/5/2004	B	150	310	2655	0
	C	154	778	1662	0
	D	56	600	0	0
	E	124	360	1736	0
Independence Coal Co./ Edwight 1/28/2004	East	517	50	4300	0
	West	497	0	0	0
Hobet Mining, Inc./ Hewitt Creek 2/4/2004	1	<141	1400	900	0
	2	<141	1400	0	0
	3	<141	650	1300	0
	4	<141	1280	0	0
	5	<141	850	0	0
	6	<141	350	0	0
Martin Logan Coal Co./ Phoenix No. 4 Pending	1	180	670	3803	0
	2	68	1779	0	0
	3	58	1040	0	0
	4	139	2240	0	0
	5	226	1485	2300	0
	6	182	2170	200	0
	7	85	470	400	0
Cumulative Totals	32 fills		30321	31691	0

Thus, none of the 32 fills are in perennial streams, and thirteen of them are only in ephemeral streams. Furthermore, nearly half of the stream length filled is in the ephemeral zone. Even though we believe that filling over 30,000 feet of ephemeral streams causes significant environmental harm, this data clearly refutes OSM's claim that it is impossible to mine without filling perennial streams, and also shows that significant mining can occur without filling intermittent streams.

Since 59% to 80% of valley fills (depending on the state) are less than 75 acres (MTM/VF PEIS, pp. III.K-41 to K-47), it is likely that the majority of valley fills could be constructed without impacting perennial streams. Furthermore, these valley fills were built or approved before fill minimization requirements were being enforced, and therefore probably understate the number of fills that could be built without intersecting intermittent or perennial streams.

Even if the existing SBZ rule may cause a limited loss of central Appalachia coal, that does not mean that there would be an overall shortage of coal for the nation. Higher mining costs "will result in coal supplies originating from coal basins outside this EIS study area where compliance can occur." MTM/VF PEIS, p. IV-I.1. In other words, any coal not mined in Appalachia will be replaced by coal mined elsewhere. So overall there will be adequate coal to meet demand and no necessary reduction in overall coal production.

In addition, OSM fails to acknowledge in its rulemaking, unlike its acknowledgment in the MTM/VF PEIS, that "minimizing fills will to some degree also affect mining costs." MTM/VF PEIS, p. IV-I-3. Indeed, all SMCRA environmental standards have that effect. Consequently, the fact that restrictions on mining in the SBZ will increase mining costs and make some coal unrecoverable is not, in itself, a reason to reject those restrictions. "Where mitigation presents significant costs to the applicant, the economic effect will likely be similar, but possibly less pronounced, to the results of the absolute fill restriction studies, inasmuch as mining methods that reduce the amount of excess spoil (and consequently reduce the size of fills and the amount of mitigation) will be selected." Id., p. IV.I-4. OSM has not summarily rejected mitigation of fill impacts on the ground that it will reduce the amount of coal recovered, even though that is likely. Consequently, it is irrational to summarily eliminate all restrictive alternatives on that basis.

2. There Is No Evidence that the Preferred Alternative Would Reduce Environmental Impacts

In the DEIS, OSM claims that the preferred alternative, Alternative 1, would reduce the environmental impacts of the current SBZ rule because: (1) the new excess spoil minimization rule would reduce the footprints of the fills; and (2) the minimization analysis would result in "less adverse functional impacts." DEIS, p. 124. No evidence or studies are presented to support these conclusions. In fact, the change to the SBZ rule is likely to increase environmental harm, because most mining activities that fill streams are being exempted from the rule. This will encourage greater filling of streams, not less.

3. OSM Has No Rational Basis to Conclude that SBZs Are Not BCTA

Section 515(b)(24) requires OSM to use the best technology currently available (BTCA) to minimize disturbances from mining activities on environmental resources. As OSM admits, the existing SBZ rule "manifest[s] an assumption that maintenance of an undisturbed 100-foot buffer around perennial and intermittent streams is the" BTCA. 72 Fed. Reg. at 48902. OSM is now abandoning that assumption, and reversing course, on the ground that "maintenance of a buffer is neither feasible nor appropriate because the activities inherently involve placement of fill material in waters of the United States." Id. at 48892. Thus, OSM claims that, as a factual and technical matter, stream buffer zones are impractical or impossible. However, OSM provides no evidence or studies to support this assertion. In fact, as we have shown above, the PEIS found that mining can feasibly continue even if SBZs are maintained. Even if some mining would be reduced, that is no reason to conclude, as a technical matter, that SBZs are infeasible.

Furthermore, the overwhelming scientific evidence shows that riparian buffer zones consisting of native vegetation communities are the best method for stream protection from disturbances upslope such as mining or logging. When the forests next to a stream are disturbed or destroyed, the streams and aquatic life suffer. Studies show that streams draining grasslands tend to downwaste and are both deeper and narrower than those adjacent to forest regions. Without their surrounding forests, stream runoff is faster, there are no significant litter inputs including woody debris (which help in retention and microbial uptake), and there is less surface area in stream bottoms for secondary production. Furthermore, removing the surrounding forest and changing the vegetation to grass changes the energy base of the natural headwater stream in the Appalachians.[4]

4. The DEIS' Analysis of Cumulative Effects Is Pathetically Inadequate

OSM's analysis of the cumulative impacts of its proposal is pathetic. It consumes a paltry two paragraphs. DEIS, p. 144-45. OSM argues in one paragraph that no further analysis is necessary because the cumulative impacts of surface coal mining were addressed in its 1979 and 1983 EISs on its SMCRA regulations. Id. at 145.

This argument is ludicrous. Those EISs are more than twenty years old. CEQ guidance provides that an EIS should be supplemented if it is more than five years old. CEQ, NEPA's Forty Most Asked Questions, No. 32, 46 Fed. Reg. 18026 (March 16, 1981). CEQ regulations require supplemental environmental analysis when changed circumstances or significant new information arises after an earlier NEPA evaluation is made. 40 C.F.R. § § 1502.9(c)(1)(i), (ii). There is no question that the scope and intensity of mining activities in Appalachia has changed significantly since 1983. The 2005 PEIS states:

> Increased public and government agency concern about MTM/VF operations emerged in 1997 and 1998. It appeared that the number of these types of operations had increased in recent years in Appalachia, and that more and more valley fills were being proposed/built.
>
> . . . [A] comparison of the fills constructed in the period 1985-1989 with those constructed in 1995-1998 showed that the average fill increased in

[4] These facts are supported by the comments submitted on this proposed rule by aquatic scientists Pat Mulholland, et al.,and by the following studies: Lowrance, R., R. Todd, J. Fail, Jr., O. Hendrickson, Jr., and R Leonard. 1984. Riparian forests as nutrient filters in agricultural watersheds. BioScience 34:374-377; Osborne, L. L. and D. A. Kovacic. 1993. Riparian vegetated buffer strips in water-quality restoration and stream management. Freshwater Biology 29:243-258; Peterjohn, W. T. and D. L. Correll. 1984. Nutrient dynamics in an agricultural watershed: observations of the role of the riparian forest. Ecology 65:1466-1475; Meyer, Judy L., David L. Strayer, J. Bruce Wallace, Sue L. Eggert, Gene S. Helfman, and Norman E. Leonard. 2007. The Contribution of Headwater Streams to Biodiversity in River Networks. Journal of the American Water Resources Association (JAWRA) 43(1):86-103.

> size by 72 percent, and the average length of stream impacted per fill increased by 224 percent.

PEIS, p. I-5. This PEIS is no substitute for a full analysis in the SBZ EIS. OSM stated in the PEIS that "[t]he stream buffer zone rule proposal and other regulatory program changes were envisioned and sanctioned by the settlement agreement and do not rely on this NEPA document." PEIS, Response to Comments, p. 19.

OSM also argues that its regulations were, and continue to be, environmentally beneficial because they require mitigation. DEIS, p. 145. However, merely requiring mitigation does not mean it will be successful or effective. OSM cannot rationally conclude that mitigation will offset the loss because federal agencies do not fully evaluate the aquatic functions of streams before they are buried and, therefore, do not know what to replace. OVEC, 479 F. Supp.2d at 646. Furthermore, even if the assessment of lost stream functions were sufficient, OSM's finding that mitigation will replace those functions is irrational because OSM has no reasoned analysis of the effectiveness of mitigation. OSM cannot simply assume that mitigation will eliminate cumulative impacts. OVEC, 479 F. Supp.2d at 659.

In the second paragraph, OSM argues that "all regions" in the U.S. have streams "that are in poor and slightly impaired conditions," caused mostly by "natural and man-induced activities," that mining impacts involve mostly acid mine drainage, and that analyses of mines' probable hydrologic consequences (PHC) will "ensure that no material damage resulting from changes in water quantity or quality occur[s]." DEIS, p. 145. These statements are gross generalizations that completely ignore the government's own scientific studies that it spent $5 million to obtain and that formed the basis for the 2005 MTM/VF PEIS. OSM provides no factual basis for its assertion that burying over a thousand miles of streams is comparable to impaired streams in other parts of the country, or to existing acid mine drainage problems in Appalachia. These statements reveal a complete ignorance of the biology and importance of headwater streams, the serious adverse effects of valley fills on downstream water quality, and the failure of compensatory mitigation to offset the aquatic functions of lost headwater streams. OSM's analysis of cumulative impacts is both quantitatively and qualitatively pathetic.

Judge Chambers recent decision in the OVEC case examined the Corps' analysis of cumulative effects for the four individual permits under this standard. He found that the Corps' analysis was deficient:

> The Corps does not explain how the cumulative destruction of headwater streams already affected by mining in these water in these watersheds will not contribute to an adverse impact on aquatic resources. The Corps fails to "articulate a satisfactory explanation," including a "rational connection," between the facts found and the conclusion reached. [citation omitted] Instead, the Corps recites the data and declares that the cumulative impacts are not significant.

479 F. Supp.2d at 659. Here, OSM has done even less. It cites no data whatsoever and declares that no material damage will occur to streams.

Nor it is enough that OSM has provided a quantitative estimate of the number of valley fills and the number of miles of streams that they have filled. 72 Fed. Reg. at 48891-92. Quantification of affected areas is a necessary, but not a sufficient, analysis of cumulative effects under NEPA. Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.").

II. UNDER THE CLEAN WATER ACT, OSM MUST OBTAIN EPA CONCURRENCE FOR THE FINAL RULE

SMCRA provides that regulations on environmental protection standards cannot be approved by OSM unless it has "obtained the written concurrence" of EPA "with respect to those aspects" of federal regulations "which relate to air or water quality standards promulgated under the" Clean Water and Clean Air Acts. 30 U.S.C. § 1251(b). When it enacted this section, Congress was concerned about direct conflicts between air or water quality standards, and it believed that the EPA concurrence procedure would be sufficient to address such conflicts. The 1977 House Report contains a section entitled "Relation of H.R. 2 to Other Laws" that states, in relevant part:

The committee felt that the requirement for the Secretary of the Interior to obtain the concurrence of the Administrator of the Environmental Protection Agency is necessary to insure that any environmental requirement of this act is consistent with the environmental programs and authorities of EPA and, in particular, those programs authorized under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. Specifically, the Secretary must obtain the Administrator's concurrence in the coal surface mining regulations and requirements under the environmental protection and State program approval provisions of the bill, as well as the final approval of any State program. The EPA has been directed by the Congress to insure the environmental well-being of the country. EPA has established water quality standards, air quality standards, and implementation and compliance requirements for the coal mining and processing industry, and issues permits to the industry to insure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of EPA's abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that any risk of duplication or conflict be minimized.

H. Rep. No. 218, 95th Cong., 1st Sess. 142 (1977).

The proposed SBZ clearly implicates the Clean Water Act. OSM has deleted the "adverse effect" test and the requirement to meet water quality standards in the existing rule. As a result, as we explain below, the proposed rule will cause increased valley filling, leading to significant degradation of waters of the United States, in violation of EPA regulations under the CWA. Yet there is no indication in the proposed rule that OSM has sought, or intends to seek, EPA's concurrence. OSM must do so, or else the rule is invalid.

III. EPA CANNOT LEGALLY CONCUR WITH THE PROPOSED RULE BECAUSE IT WILL CAUSE SIGNIFICANT DEGRADATION OF STREAMS, IN VIOLATION OF THE CWA

EPA cannot legally concur with the proposed rule because it violates the Clean Water Act. Valley fills are permissible only if they do not result in "significant degradation" to the aquatic ecosystem. 40 C.F.R. § 230.10(c); PEIS, p. II.C-38. By eliminating the adverse effects test in the existing rule, the proposed SBZ rule would implicitly allow effects which are adverse and significant, as long as they are minimized. Even if effects of valley fills are minimized, they are still likely to be significant. Minimizing harm does not ensure its insignificance. The proposed SBZ rule does not prevent significant harm from occurring. Cf. Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 361 (D.C. Cir. 1989) (RCRA requirement to "minimize" threats to human health and the environment does not require EPA to set treatment standard at levels where no threat to human health and the environment exists).

A. The DEIS Itself Finds that Valley Fills Cause Significant Degradation

The evidence that valley fills cause significant degradation is clear from the DEIS itself. Headwater streams "serve a number of important ecological functions including . . . improving water quality." DEIS, p. 109. Valley fills have already permanently filled over 700 miles of headwater streams in Appalachia, and are expected to fill 367 more miles. Id. at 117. When streams are buried by valley fills, "those segments no longer exist and all stream functions are lost." Id. This degradation must be deemed significant. There is no evidence showing that buried streams can be recreated successfully elsewhere on mined sites. The DEIS states that "the state of the art in creating smaller headwater streams has not reached the level of reproducible success." Id. at 111. "Attempts to reestablish the functions of headwater streams on the groin ditches on the sides of fills have achieved little success to date." Id. at 117. "Past efforts at compensatory mitigation have not achieved a condition of no-net loss of stream area or functions." PEIS, p. III.D-17. Consequently, this loss is permanent and irreversible.

Valley fills also cause significant harm to downstream water quality. They increase downstream concentrations of sulfate, total dissolved solids, total selenium, total calcium, total magnesium, hardness, total manganese, dissolved manganese, specific conductance, alkalinity, total potassium, acidity, and nitrite/nitrate. DEIS, p. 118. Sulfate doubled in 13 of 52 basins and quintupled in five basins. Id. at 119. Valley fills cause water temperatures to be warmer in the winter and cooler in the summer than for unmined areas. Id. at 120.

B. The Available Scientific Evidence Demonstrates that Surface Coal Mining Activities Are Causing Significant Degradation of Streams in Appalachia

Other available scientific evidence demonstrates that coal mining activities and valley falls are causing significant degradation. In its comments on the proposed 2002 NWP 21, EPA stated that coal mining and valley fill operations in Appalachia cause "significant ecological damage to the headwater stream systems." 10/9/01 EPA Letter, Enclosure, p. 8, Attachment 12. FWS similarly stated that it "believes that surface coal mines often adversely affect large areas of upland and wetland habitat." 7/2/01 FWS Letter, pp. 1-2, Attachment 13. FWS described the environmental impact of coal mines in Appalachia on aquatic and terrestrial ecosystems as "unmitigatable" and "unprecedented." 9/20/01 FWS Letter, p. 1, Attachment 14. FWS said it knew "of no other single type of activity, whether authorized by individual or general permit, with such significant individual and cumulative adverse environmental impacts as those currently authorized by NWP 21." Id., p. 2. FWS described the consensus of scientists working in the field that "small first order streams form the heart and soul of the functional stream ecosystem in . . . every watershed that has been carefully studied. . . . Clearly, any discussion of destroying even one first order stream is out of order. . . ." Id., p. 4. "These experts asserted that stream loss is unacceptable from a biological standpoint, and that there is no scientific basis on which to develop an acceptable loss threshold." Id., p. 5.

In addition, 43 "senior aquatic scientists," including "members of the National Academy of Sciences and its scientific Boards," "president[s] of national scientific organizations, and leading authors on the ecology, water quality, and biota of streams and rivers," stated in their comments on the proposed 2002 NWP 21 that:

> The available scientific evidence clearly demonstrates that the length of headwater streams in the landscape has been significantly reduced because of the mining and development activities that have been permitted under this program. . . . This loss of headwater streams has profoundly altered the structure and function of stream networks, just as eliminating fine roots from the root structure of a tree would reduce its chances of survival.

10/5/01 Univ. of Georgia Comments, p. 1, Attachment 15. These scientists supported their conclusion by citing and attaching thirty articles in scientific journals. Id. In addition, in her recent testimony in OVEC v. Bulen, Civil No. 3:05-784 (S.D.W.Va.), Dr. Margaret Palmer, plaintiffs' expert on stream restoration, stated that in terms of conservation priorities, headwater streams are "at the top of the list" of areas that need to be preserved. Bulen Trial Transcript (hereafter "Bulen Tr.") 6:102-03, Attachment 16.

1. Stream degradation is significant. The PEIS demonstrates that significant degradation of the aquatic and terrestrial ecosystem in Appalachia has likely occurred, and is continuing to occur. Significant stream degradation caused by valley fill and mining activities is best documented for watersheds in West Virginia. In OVEC v. Bulen, Civil No. 3:05-0784 (S.D.W.Va.), expert analysis of GIS data showed that present and pending surface mining permit operations and valley fills conservatively cover the following percentages of streams in these watersheds:

Watershed/Subwatershed	% of total streams covered	% first order streams covered
Upper Guyandotte	7.4	9.5
Dingess Run	19.9	19.5
Coal River	12.0	14.5
Laurel Creek	28.0	37.3
Upper Kanawha	7.9	10.2
Cabin Creek-Headwaters	22.9	32.1

Expert Report of Douglas P. Pflugh, May 16, 2006, Summary, p. 2, Attachment 17. The Corps reviewed this data and found it to be "very reliable." Mullins Testimony, Bulen Tr. 3:202, Attachment 16. In the headwaters of Spruce Fork in West Virginia,

surface mine permits and valley fills cover 35.5% of total stream length and an alarming 44% of first order stream length. FEIS, Spruce Mine No. 1, p. 2-180 (September 2006), Attachment 18. In OVEC v. Bulen, Civil No. 3:05-0784 (S.D.W.Va.), plaintiffs' expert aquatic ecologist, Dr. Bruce Wallace, testified in October 2006 that impacts of this magnitude were "astounding," a "danger signal," and meant lost headwater stream functions in these areas. Wallace Testimony, Bulen Tr. 2:32-34, Attachment 16. Plaintiffs' stream restoration expert, Dr. Margaret Palmer, similarly testified that a loss of 29% of the watershed and 18% of the first order streams in a watershed were "incredibly significant." Palmer Testimony, Bulen Tr. 2:134, Attachment 16. She said that this loss was so huge that it was questionable whether the stream could ever be restored. Id. at 2:135-36.

2. Water quality degradation is significant. In its June 16, 2006 comments on the Draft EIS for the Spruce No. 1 mine, EPA stated "existing data from Spruce Fork indicates MTM/VF activities have degraded streams to the point where they are considered impaired using the West Virginia Stream Condition Index (WVSCI). Considering that water leaving the mined and filled areas in Spruce Fork is degraded, additional caution is necessary in future permitting and mitigation requirements. The Final EIS should consider the strong and statistically significant relationships found between biological condition and these water quality parameters as summarized in Table 1 and supporting data. (see Attachment 2)." FEIS, Spruce No. 1 Mine, p. 2-98, Attachment 18.

In addition, the PEIS stated that valley fills have the following adverse effects on downstream waters:

> Stream chemistry showed increased mineralization and a shift in macroinvertebrate assemblages from pollution-intolerant to pollution-tolerant species. Water temperatures from valley fill sites exhibited lower daily fluctuations and less seasonal variation than water temperatures from reference sites. . . .
>
> The EPA Water Chemistry Report found elevated concentrations of sulfate, total and dissolved solids, conductivity, selenium and several other analytes in stream water at sampling stations below mined/filled sites.

PEIS, p. IV.B-4. In fact, the EPA Water Chemistry Report found that conductivity was "clearly impacted by MTM/VF [mountaintop/valley fill] mining." PEIS, App. D, EPA 2002b, p. 2. "Conductivity at Filled sites can be 100 times greater than that at Unmined sites." Id. at 45. "Unmined sites have a consistently low conductivity no matter what the flow. Filled sites have a broad range of conductivity much higher than Unmined sites indicating that MTM/VF mining increases specific conductance in streams." Id. at 46. Conductivity is generally five to nine times greater below valley fills than below unmined sites. Wallace Testimony, Bulen Tr. 2:34-35, Attachment 16. Sulfates were 41 times greater; calcium, magnesium and hardnesss were 21 times greater; total dissolved solids were 16 times greater, and selenium was 7.8 times greater. Id. at 2:35. These chemical changes have a significant effect on the aquatic ecosystem. Id. Dr. Wallace called them a "witches' brew." Id. at 2:37, 95. EPA found that "[t]he highest values [for conductivity] are consistently at the Sediment Control Structure (MT-24) which is on a reclaimed MTM/VF mine." PEIS, App. D, EPA 2002b, p. 45. The PEIS also found that mining impacts on the nutrient cycling function of headwaters streams "are of great concern." PEIS, App. I, p. 74.

Coal mining and valley fills in WV are also causing significant degradation of the aquatic environment due to selenium contamination. OSM's DEIS confines its discussion of selenium to the following four sentences:

> Selenium concentrations from the "filled" category sites were found to exceed AWQC for selenium at most (13 of 15) sites in this category. No other site categories had violations of the selenium limit.
>
> In the USEPA (2002a) stream chemistry study in West Virginia, selenium was found at elevated levels below several streams where excess spoil fills were constructed. Elevated selenium concentrations may impact aquatic biota and possibly higher order organisms that feed on aquatic organisms [EPA 2003, p.III.D-7].

DEIS, pp. 118, 132. This is grossly inadequate, and omits reference to newer and more disturbing scientific data.

Subsequent to the issuance of the PEIS, the FWS released a study that confirms the seriousness of the selenium problem. During the spring and summer of 2003, FWS conducted a survey of selenium in fish, water, and sediments in streams in southern West Virginia. In a January 16, 2004 letter to the West Virginia Depart-

ment of Environmental Protection (Attachment 19), the Supervisor of FWS' Pennsylvania Field Office, David Densmore, concludes that:

- Selenium was present in all fish samples.
- Selenium concentrations in fish in three watersheds exceeded the toxic effect threshold level for whole fish.
- Selenium is bioavailable in West Virginia streams, and violations of the EPA selenium water quality criterion may result in selenium concentrations in fish that could adversely affect fish reproduction.
- In some cases, fish tissue concentrations were near levels believed to pose a risk to fish-eating birds.

Fish tissue from Sugartree Branch and Stanley Fork contained selenium ranging from 4.13 ppm to 6.85 ppm, which are above Lemly's 4 ppm toxic effect threshold. July 16, 2004 Letter from Chapman to Mullins re: Phoenix No. 4 Surface Mine, p. 11, Attachment 20. FWS has also stated that the total number of fish species was dramatically higher in unmined streams than in either streams with valley fills and no selenium or streams with valley fills and detectable selenium. Id.

In November 2005, WVDEP began a fish tissue study of the impacts of selenium downstream from areas where high selenium coal is being mined. WVDEP's preliminary findings indicate significant bioaccumulation of selenium in downstream lakes and streams (April 28, 2006 powerpoint presentation: DEP Selenium Study, Background and Progress, available at www.dep.state.wv.us/item.cfm?ssid=11&ss1id=747, Attachment 21):

Stream	Location	Avg. Water Column SE (ppb)	Average Fish Tissue Se (ppm)
Beech Creek	Logan County, WV	11.0	10.7
Pond Fork	Near Bob White, WV	1.8	3.8
White Oak Creek	Near Orgas, WV	15.3	5.7
Seng Creek	Garrison, WV	34.0	8.6
Hughes Fork	Near Dixie, WV	5.6	10.1
Upper Mud River Reservoir	Lincoln County, WV	3.9	33.9

The levels found at these sites greatly exceed levels where toxic effects in sensitive species begin to occur, which is 4 ppm. See A. Dennis Lemly, "Selenium in Aquatic Ecosystems: A Guide for Hazard Evaluation and Water Quality Criteria," Springer 2002, p. 31, Attachment 22. In fact, the fish tissue selenium level in the Upper Mud River Reservoir, which is a lake downstream from the Hobet 21 mining complex, exceeds this threshold by 850%.

In general, "[t]he most widespread human-caused sources of selenium mobilization and introduction into aquatic ecosystems in the U.S. today are the extraction and utilization of coal for generation of electric power and the irrigation of high-selenium soils for agricultural production." Bryant, G., McPhilliamy, S., and Childers, H., 2002, A survey of the water quality of streams in the primary region of mountaintop / valley fill coal mining, October 1999 to January 2001, in PEIS, App. D, Stream chemistry final report, p. 74. "[I]n the region MTM/VF mining, the coals can contain an average of 4 ppm of selenium, normal soils can average 0.2 ppm, and the allowable limits in the streams are 5 ug/L (0.005 ppm). Disturbing coal and soils during MTM/VF mining could be expected to result in violations of the stream limit for selenium." Id.

FWS states in its comment letter on the Hollow Mountain project, "The Service believes that it is unlikely that toxic materials can be isolated indefinitely from weathering and in the long-term there will likely be leaching of toxic materials." July 9, 2004 FWS Letter to ACOE, p. 3, Attachment 23. Further, it is clear that prevention is key in controlling selenium contamination of surface water. Dr. A. Dennis Lemly stated in a January 5, 2004, white paper on selenium issues in West Virginia:

> The lessons from Belews Lake, supported by over two decades of research findings from many other locations throughout North America (Lemly 1997b, 1999, 2002b; Skorupa 1998a, Hamilton 2004), underscores the need to take a preventive approach to selenium pollution rather than attempting to deal with it after contamination has taken place. With respect to coal mining this means pre-mine assessment. Failure to adopt this approach can only worsen the selenium pollution and associated ecological risks that have emerged in West Virginia.

Attachment 24, p. 2. The risk of significant ecological harm from selenium contamination in the West Virginia coal fields is real and has been confirmed not only by the PEIS but also by studies conducted by the FWS. "Our results show that selenium present in surface waters in southern West Virginia is bioavailable, and that violations of the EPA selenium water quality criterion may result in selenium concentrations in fish that could adversely affect fish reproduction. In some cases fish tissue concentrations were near levels believed to pose a risk to fish-eating birds." Id., pp. 2-3. More recently, USGS sampling of fish tissue in April 2006 from five bluegill fish taken from the upper Mud River Reservoir near Palermo, WV showed concentrations of 15.1 to 40.1 ug/g in whole body samples and 21.4 to 34.9 ug/g in ovary samples. Attachment 30.

These scientific studies demonstrate that selenium concentrations are already occurring from existing valley fills and are causing significant degradation of water quality. "If mining, permitting and mitigation trends stay the same, an additional thousand miles of direct impacts could occur in the next ten years." MTM/VF PEIS, App. I, pp. 66-67. The proposed rule does nothing to address the selenium issue and would permit more significant degradation to occur, and therefore would violate the CWA.

3. Water quantity and community impacts are significant. OSM has also failed to consider the major adverse effects of valley fills on hydrology. A USGS study found that runoff is 1.75 times greater per unit surface area from mined than unmined catchments. PEIS, App. H, p. 3. Even worse, EPA has found that "base flows of streams with valley fills are 6 to 7 times greater than the base flows of unmined areas." PEIS, App. D, 2002 EPA Water Chemistry Study, p. 86. This means not only that areas downstream from valley fills will experience much higher flows, but also higher loadings of the excessive and harmful chemicals mentioned above. These increased flows have real and devastating impacts on local communities, particularly during more extreme storm events. In addition, mines cause large amounts of noise, blasting impacts and community disruption. PEIS, p. IV.H-3 (noise and vibration caused by mountaintop mining near populated areas generate "relatively high numbers" of complaints). The DEIS fails to consider these hydrological and community effects.

4. Degradation of aquatic diversity is significant. Headwater streams can be responsible for 90 percent of the biodiversity in an entire watershed. Palmer Testimony, Bulen Tr. 2:176. Valley fills reduce biodiversity by favoring pollutant-tolerant macroinvertebrate species over pollution-intolerant species. The coal industry's own water quality expert admitted in OVEC v. Bulen that valley fills cause a dramatic reduction in mayfly taxa in downstream waters, with a shift to more pollution-tolerant taxa. Kirk Testimony, Bulen Tr. 5:88. Dr. Donald Cherry, an expert in aquatic ecotoxicology from Virginia Tech (Bulen Tr. 5:111), testified in OVEC v. Bulen about his research involving water discharges from valley fills in southern West Virginia. Bulen Tr. 5:114-16. His study found a shift in the benthic community to a more tolerant type. Id. at 5:120, 125, 165-66. He agreed that the created streams would not be the functional equivalent of the streams buried by valley fills. Id. at 5:145-46. Indeed, he rated the streams below valley fills as "terrible" with scores well below the score for the reference stream. Id. at 5:152-53. Those streams showed "significant stress." Id. at 5:174. Dr. Wallace stated that there is a well-established correlation between conductivity levels and the loss of sensitive benthic organisms. Wallace Testimony, Bulen Tr. 6:31-36. High conductivity is contributing to major problems with benthic invertebrates. Id. Some of the worst conditions were found below fill sites. Id.

The loss of biodiversity from this loss of benthic taxa is significant. Id. at 6:67-68. Other organisms cannot make up for this loss of biodiversity because they serve different functions. Palmer Testimony, Bulen Tr. 6:103-06. Different species are not necessarily interchangeable. Id. The functions of filled first and second-order headwater streams cannot be replaced in the larger order streams downstream. Wallace Testimony, Bulen Tr. 6:41. Those functions include nutrient retention, water purification, and energy production functions. Id. at 6:43-47; Palmer Testimony, Bulen Tr. 6:101-02.

The only significant vertebrate animal in headwater streams is the salamander. Wallace Testimony, Bulen Tr. 1:258. The Central and Southern Appalachians contain the greatest abundance of species of salamanders in the world. Id. at 1:242, 6:39. Salamanders are being buried by valley fills and not replaced downstream. Id. at 6:40; Cherry testimony, Bulen Tr. 5:166-67. Forest loss associated with mountaintop mining and valley fills has the potential to adversely impact over 1.2 billion salamanders, or 3.4% of the entire four-state population in Appalachia. PEIS, App. I, pp. 92-93.

According to the PEIS, from 1992 through 2002, mountaintop removal mining and associated valley fills in Appalachian have destroyed 380,547 acres of forest (an area almost ten times larger than the District of Columbia). PEIS, pp. III.D-2, IV.C.1. If current trends continue, that amount will double by 2012. Accordingly, in its June 16, 2006 comments on Spruce Mine No. 1, EPA stated that, "[o]f the largely forested mountaintop mining study area, the Final PEIS estimated that approximately 761,094 acres have been or may be affected by recent and future (1992-2012) mountaintop mining. To date, these impacts have not been successfully mitigated, resulting in the impairment of significant natural resources at the watershed level." FEIS, Spruce Mine No. 1, pp. 2-64 to 2-65. In addition, the cumulative effects of past, present and anticipated surface mines in individual watersheds are even greater. For example, in the Coal River watershed, mining activities cumulatively impact 12% of that area, or 72,969 out of 570,713 acres. OVEC v. Bulen, Expert Report of Douglas P. Pflugh, May 16, 2006, Summary, p. 1, Attachment 17.

This forest destruction is profound and permanent because "unlike traditional logging activities associated with management of hardwood forest, when mining occurs, the tree, stump, root, and growth medium supporting the forest are disrupted and removed in their entirety." PEIS, p. IV.C-1. Mountaintop mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions. Id., App. I, pp. v, 23, 93. One recent study has found that "[a]t this point in time, reestablishment of forest on these postmining sites appears questionable. Neither mountaintop removal sites nor the contour mines support a vegetation composition or structure that is likely to resemble regional forests." Edmonds and Loucks, "Woody Establishment Patterns Following Mountaintop Removal in the Coal River Valley," available at www.mcrcc.osmre.gov/PDF/Forums/Reforestation/Poster/P-1.pdf, Attachment 25.

Mining impacts to habitat of interior forest bird species could have "extreme ecological significance." PEIS, App. I, p. 90. A study of cerulean warbler habitat changes due to mountaintop removal mining stated, "[p]reference for ridges suggests that MTMVF may have a greater impact on Cerulean Warbler populations than other sources of forest fragmentation since ridges are removed in this mining process. Generally, our data indicate that Cerulean Warblers are negatively affected by mountaintop mining from loss of forested habitat, particularly ridgetops, and from degradation of remaining forests (as evidenced by lower territory density in fragmented forests and lower territory density closer to mine edges)." Weakland and Wood, "Cerulean Warbler (Dendroica Cerulea) Microhabitat and Landscape-level Habitat Characteristics in Southern West Virginia in Relation to Mountaintop Mining/Valley Fills," Final Project Report, December 2002, p. 1, Attachment 26. Mining could impact 244 terrestrial species. PEIS, App. I, pp. 86. The loss of the genetic diversity of these affected species "would have a disproportionately large impact on the total aquatic genetic diversity of the nation." Id., App. I, p. 78.

FWS has described the impacts of MTM/VFs on forest loss and fragmentation in its comments on the Phoenix 4 Mine in West Virginia:

> Habitat changes will occur in the study area and these changes will involve a shift from forest dominated landscape to a fragmented landscape with considerably more mining lands and eventually grassland habitat. This shift should lead to a shift in the floral and faunal components of the ecosystem. For example, dry grassland species will dominate the once post-mine and forest harvested sites. This will result in an overall reduction in the native woody flora as well as a reduction in the spring herbs and other vegetative components characteristic to the study area.
>
> Wildlife shifts will include a shift from forest to grassland species. The abundance of grassland birds will likely increase while many forest interior, neotropical migrant species will suffer losses in terms of number. There will likely be an increase in game species such as whitetail deer and turkey due to an increase in grasslands and diversification of the habitats. The herpetofauna will likely undergo a shift from mesic favoring salamander dominated communities along the riparian corridors of the small headwater

> streams and in the litter of the forest floor to a snake dominated grassland fauna. Two species, short-tailed shrew (Blarina brevicauda) and eastern chipmunk (Tamias striatus), were more abundant in intact forest than fragmented forest.
>
> Populations of forest birds will be detrimentally impacted by loss and fragmentation of mature forest habitat in the mixed mesophytic forest region, which has the highest bird diversity in forested habitats in the eastern Untied States. Fragmentation-sensitive species such as the cerulean warbler, Louisiana water thrush (Seiurus motacilla), worm-eating warbler (Helmitheros vermivorous), black-and-white warbler (Mniotilta varia), and yellow-throated vireo (Vireo falvifrons) will likely be negatively impacted as forested habitat is lost and fragmented from mountaintop/valley fill mining.
>
> The cerulean warbler, with the highest conservation rating (this species is listed as Action II by Partner-In-Flight (PFI)—in need of immediate management or policy rangewide) was found to be positively related to percent slope and percent canopy from >6-12 m. Based on habitat preference, it is reasonable to conclude that continued mountaintop/valley fill mining will negatively impact cerulean warbler abundance in southwestern West Virginia.
>
> . . . mountaintop/valley fill mining has become a major method of vast landscape change where golden-winged and cerulean warblers may disappear with the changing proportion of mature forest to cleared land. The highest priority bird species other than the golden-winged warbler (Vermivora chrysoptera), in this region are forest-breeder (cerulean warbler, worm-eating warbler, and Louisiana waterthrush) whose center of global importance is along the Appalachian ridges most affected by mountain/valley fill mining.

Attachment 20, pp. 4-5. The FWS continues by commenting on a statement commonly made in mining environmental assessments:

> It is stated in the EID that 'bird and amphibian species richness increased significantly on more fragmented stands . . . and in study plots containing more edge.' This is true but there is failure to acknowledge that the increased richness is achieved by adding widespread generalist species that are taking over most of the landscapes, and the sensitive forest species are negatively affected. This is a common and misleading application of fragmentation and edge studies. This flaw is not that fragmentation will increase diversity; the flaw is that increased diversity is not necessarily desirable, especially if it comes at the expense of a sensitive species such as the cerulean warbler.

Attachment 20, pp. 5-6.

The EPA and FWS scientists who commented on the draft PEIS agreed that significant degradation is occurring. An EPA scientist stated that:

> EPA's studies and other studies have found that the strongest and most significant correlations are between biological condition and conductivity. We do know that the stream segments downstream of some of the fills are impaired, and we believe the impairments are due to water chemistry changes, based on the strong correlations.

12/20/02 Comments by EPA Wheeling Staff, Attachment 27. A FWS scientist objected to the "no significant degradation" statement in that draft PEIS (p. II.D-9), stating that "If impaired aquatic life, and selenium above water quality standards, resulting in streams being placed on the 303(d) list don't constitute significant degradation, what would?" 4/21/03 Rider email, attached file: chIVcomments.wpd, p. 2, Attachment 28.

5. OSM's DEIS Evades Its Obligation to Analyze Significant Degradation. OSM tries to avoid the significant degradation issue by arguing that the proposed rule would not make the current situation worse. It claims it "would not anticipate a major shift in on-the-ground consequences from any of the alternatives." DEIS, p. 121. Similarly, it states that the alternatives "would cause no discernable changes to the direct stream impact trend." Id. at 124. OSM repeatedly states that it "anticipates that the proposed regulatory language changes to the stream buffer zone rule would essentially be 'impact neutral.'" Id. at 126-27, 128, 131, 133, 135, 142.

That is not enough to satisfy the "no significant degradation" requirement in 40 C.F.R. § 230.10(c). OSM assumes it only has to assess the change in impacts between the status quo and the proposed rule. However, OSM must determine wheth-

er significant degradation is already occurring and is likely to continue if activities are maintained at the current pace.

OSM's proposed rules do not have adequate procedural mechanisms to ensure that such degradation does not occur. OSM's proposed rules that summarize the relationship between SMCRA permitting actions and Clean Water Act requirements merely require the applicant to identify the authorizations it needs under the CWA and the steps it has taken or will take to obtain them. 72 Fed. Reg. at 48901. That procedural step does nothing to ensure that significant degradation is assessed or avoided. Nor will the parallel processing of CWA § 404 permits ensure that significant degradation does not occur, since the Corps takes the position that it need not assess the SMCRA-related impacts of mining activities on streams. 72 Fed. Reg. at 11115 ("Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the Office of Surface Mining or the appropriate state agency."). Furthermore, § 402 discharge permits for mining operation only cover discharges from downstream sediment ponds and do not address the permanent loss of stream functions from the filling of headwater streams.

OSM's procedural mechanisms to avoid significant degradation are also inadequate because OSM is removing the existing requirement for a finding that the activity "will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream." 72 Fed. Reg. at 48902. By removing this requirement, OSM will allow activities that can cause such violations or adverse water quality effects without any analysis of their propensity to do so. OSM also specifically disavows any effort to "pass judgment on . . . the adequacy of the steps that the applicant proposes to take" to comply with the CWA. Id. OSM would intentionally blind itself to the potential, indeed the likelihood, of significant degradation. OSM's "minimization" standard is completely untethered to any analysis or measurement of actual adverse effects. Indeed, OSM asserts that "the appropriate standard is minimization of adverse impacts . . ., not absolute avoidance of all adverse effects." Id. at 48902-03 (emphasis in original). See id. at 48906 (SMCRA establishes a minimization standard rather than an absolute 'will not adversely affect' standard"). "[S]ome adverse effects . . . are unavoidable . . ." Id. at 48903. OSM cannot read the word "minimize" as a license to allow some unknown but potentially significant adverse environmental effects, so long as those effects are minimized.

OSM attempts to finesse CWA requirements by including a catch-all provision that "discharges of water from disturbed areas 'be made in compliance with all applicable State and Federal water quality laws and regulations.'" Id. at 48903. This is merely a generalized requirement that the project applicant comply with the law. It does nothing to monitor, assess, measure or determine whether significant degradation is occurring or will occur. It is therefore wholly inadequate to satisfy OSM's independent and mandatory duty to ensure that its actions do not supersede, amend, modify or repeal the CWA. 30 U.S.C. § 1292(a)(3).

OSM's procedures are also insufficient to ensure CWA compliance because its standard for stream restoration does not meet CWA standards. Stream channel diversions are subject to § 404 of the CWA because they cause discharges of fill material into streams. In order to decide whether discharges will cause or contribute to significant degradation of the affected streams, the § 404(b)(1) Guidelines require a determination of "the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms." 40 C.F.R. § 230.11(e) (emphasis added). According to the Corps' May 7, 2004 guidance on "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining," "[t]he Clean Water Act, and the Corps implementing regulations and policies, requires that compensatory mitigation projects replace aquatic functions lost as a result of authorized activities." However, OSM has proposed a performance standard for restoration after stream diversions that does not require restoration of aquatic functions, and instead focuses only on stream structure. OSM would only require that restoration:

> be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening and enlargement, to the extent possible.

72 Fed. Reg. at 48906. Thus, this standard focuses on restoring stream structure and merely "promoting" recovery of aquatic habitat. It does not require restoration of the lost aquatic functions. As the Court recently found in OVEC v. U.S. Army

Corps of Engineers, 479 F. Supp.2d 607, 635 (S.D. W.Va. 2007), the federal government must make "a full assessment of the streams' ecological functions before [it] may conclude that the structure and function of the resources buried by the valley fills is offset by the imposed mitigation measures." OSM fails to explain how it would make this assessment or how it would replace lost aquatic functions. Without such an explanation or assessment, OSM cannot rationally conclude that its methodology would prevent or avoid a significant degradation of aquatic functions.

C. The Proposed Rule Will Result in Significant Degradation of the Stream Segments Between the Toes of the Valley Fills and the Sediment Pond Embankments, Which Are "Waters of the United States"

OSM's proposed rule would only require sedimentation ponds to be constructed "as close to the toes of the fill as practicable." 72 Fed. Reg. at 48909. This will always leave an unprotected stream segment between the mining activity (the toe of the fill) and the downstream outfall of the sedimentation pond. OSM takes the position that this segment is not a water of the United States and instead falls under the "waste treatment system" exclusion of an EPA regulation. OSM relies on a March 1, 2006 letter from EPA to support its position. Id. However, on June 13, 2007, a federal court rejected that EPA letter and held that the "waste treatment system" exclusion is inapplicable to the stream segments below the valley fills. OVEC v. U.S. Army Corps of Engineers, 2007 WL 2200686 (S.D. W.Va. 2007). Consequently, OSM has no legal basis for exempting these segments from the requirement to obtain a NPDES permit for discharges of pollutants into waters of the United States. Without such a permit and treatment of the discharges, these discharges are extremely likely to cause significant degradation. Indeed, the whole purpose of the downstream sedimentation pond is to intercept and collect that pollution.

IV. THE EXISTING SBZ RULE IS CONSISTENT WITH THE CWA

OSM has taken the position that applying the plain language of the existing SBZ to prohibit fills in intermittent and perennial streams would be inconsistent with existing CWA requirements allowing valley fills, and would therefore violate section 702 of SMCRA, 30 U.S.C. § 1292(a)(2), which provides that SMCRA does not supercede, amend or repeal the CWA. 69 Fed. Reg. at 1044.

EPA's Office of Water expressed concern in December, 2002 that this argument in the MTM/VF draft PEIS is incorrect, commenting that:

> There are fairly sweeping legal conclusions here that the stream buffer zone rule could not be used to determine allowable stream segments for filling because doing so would supercede the CWA, something [C]ongress precluded in SMCRA. The lawyers need to look at this more closely. I'm uncomfortable with the breadth of this argument...

1/7/03 Neugeboren e-mail, OGC water law office comments, p. 1, Attachment 29.

Furthermore, OSM's position is directly inconsistent with the position that it took in the Bragg litigation. In its brief in the Fourth Circuit, the United States stated, on behalf of OSM and other federal agencies:

> WVDEP has argued that because SMCRA cannot supersede, amend, modify, or repeal the CWA, SMCRA cannot be construed to prohibit any activity that would be allowed by the CWA. That argument is without merit. ... SMCRA section 702 provides merely that SMCRA does not alter the existing regulatory schemes adopted by Congress in the CWA and other environmental statutes. ...
>
> When Congress has intended that one statute should take precedence over another statute in the regulation of a particular activity, it has done so with language very different and much clearer than SMCRA section 702. ...
>
> While WVDEP has asserted that it would create an impermissible statutory "conflict" to read the buffer zone rule to establish a stricter standard than that established by the 404(b)(1) guidelines, such a statutory construction does not create any such "conflict" as that term is understood in the law. As the Supreme Court has held, two statutes can be said to conflict only when it is impossible to comply with both. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). No such conflict arises if SMCRA is construed to prohibit some activities that would be authorized by the CWA, since it is possible to comply with both statutes by engaging in only those activities authorized by both statutes.
>
> Where an activity is regulated under the CWA and SMCRA—i.e., a surface mining activity that involves the discharge of pollutants from point

> sources into U.S. waters—regulation of the activity is governed by the usual principles that courts apply to reconcile overlapping statutes. Under those principles, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible.'" Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)). See also 2A Sutherland Statutory Construction § 51.05 (4th ed. 1984). An activity governed by both the CWA and SMCRA must therefore satisfy the requirements of both statutes.

U.S. Br. 45-49, Attachment 1. Consequently, the existing SBZ rule does not violate section 702, and there is no need to revise the rule to address OSM's presumed violation of that section.

XI. OSM'S DELETION OF THE REQUIREMENT THAT ACTIVITIES THAT DISTURB THE SBZ MUST COMPLY WITH WATER QUALITY STANDARDS IS AN ILLEGAL ATTEMPT TO EXEMPT ACTIVITIES FROM WATER QUALITY STANDARDS

OSM proposes to delete language in the existing rule that allows a variance only if surface mining activities "will not cause or contribute to the violation of applicable State or Federal water quality standards." 30 C.F.R. § 816.57(a)(1). This change "is intended to avoid the possibility that the SBZ rule could be misinterpreted to supersede the CWA by prohibiting an activity because of water quality standards that would otherwise be authorized under the CWA." 69 Fed. Reg. at 1043. OSM does not explain how such a conflict could occur. As we have explained above, OSM rejected the notion of such a conflict in its appellate brief in Bragg.

OSM's deletion of this language is even more perplexing in light of its statement in the EA that "this proposed change would be impact neutral because, whether or not OSM regulations include this statement, an applicant or operator would still be subject to applicable Federal and State water quality requirements and enforcement concerning matters such as effluent limits, in-stream water quality standards, storm water run-off, and anti-degradation." EA, p. 23 (emphasis added). Thus, OSM wants to throw away its cake and eat it too. It purports to delete a requirement, yet advises the regulated community that it still applies.

Regardless of what OSM says, the effect of its proposal is to imply that although water quality standards still apply, they will not be violated if valley fills are minimized. Otherwise, there is no reason to delete the language in the existing rule. As we show below, this attempted exemption violates the Clean Water Act.

In CWA §§ 301 and 404(t), Congress placed clear limitations on the placement of fill material. Pursuant to those two sections, § 404 fills must comply with water quality standards. The placement of waste material that eliminates substantial portions of waters of the United States necessarily violates those standards, and therefore violates the clear intent of Congress.

The CWA states in its very first sentence that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (emphasis added). The Conference Committee described this objective as the "sole purpose of the Act." 118 Cong. Rec. 33700 (1972). The Senate Report stated that "this legislation would clearly establish that no one has the right to pollute and that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes." S. Rep. No. 414, 92nd Cong., 1st Sess., p. 42 (1971). "The use of any river, lake, stream or ocean as a waste treatment system is unacceptable." Id. at 7. This section "simply mean[s] that streams and rivers are no longer to be considered part of the waste treatment process." 118 Cong. Rec. 33693-94 (1972) (remarks of Sen. Muskie). The Conference Committee stated that it "expects [EPA and the Corps] to move expeditiously to end the process of dumping dredged spoil in water" and to use land-based alternatives, because "the economic argument alone is not sufficient to override the environmental requirements of fresh water lakes and streams." Id. at 33699.

To implement these statutory purposes, Congress wrote several important provisions into the Act. In particular, "§ 301(b)(1)(C) expressly identifies the achievement of state water quality standards as one of the Act's central objectives." Arkansas v. Oklahoma, 503 U.S. 91, 105-06 (1992). Section 301(b)(1)(C) is designed to ensure compliance with these standards. PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 712-13 & n. 3 (1994). It provides that "[i]n order to carry out the objective of this Act there shall be achieved . . . any . . . limitation . . . necessary to meet water quality standards . . . established pursuant to any State law . . . or any other

Federal law or regulation . . ." 33 U.S.C. § 1311(b)(1)(C)(emphasis added).[3] To carry out this statutory requirement, EPA's 404(b)(1) Guidelines expressly require § 404 discharges to comply with water quality standards. 40 C.F.R. § 230.10(b)(1) ("No discharge of dredged or fill material shall be permitted if it: (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard"). Thus, this is a "Federal . . . regulation" that must be "achieved" under § 301(b)(1)©).

Furthermore, Congress added § 404(t) of the CWA in 1977 to reaffirm that state water quality standards are applicable to § 404 discharges. It provides that:

> Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to those requirements.

33 U.S.C. § 1344(t) (emphasis added). The issuance of a SBZ variance by OSM or a primacy state is covered by this section.

The legislative history of § 404(t) fully supports this conclusion. "[U]nder section 404(t) and the amendments to section 313, every Federal activity is subject to State and Federal procedural requirements, including permits, as well as substantive requirements." 123 Cong. Rec. 39189 (1977) (remarks of Sen. Muskie). The "basic thrust of subsection (t)" is that "[t]he Corps of Engineers, like any other Federal agency, in performing maintenance dredging or undertaking other activities, is to comply with State substantive and procedural requirements." Id. The intent of the 1972 CWA "was not to exempt the U.S. Army Corps of Engineers or any other public or private agency from State water quality standards . . ." Id.

Valley fills that eliminate waters of the United States solely for the purpose of waste disposal cannot meet water quality standards. Water quality standards "define[] the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 130.3 (emphasis added). See also 40 C.F.R. § 130.2(d) (water quality standards "consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses") (emphasis added). EPA's regulations on water quality standards have provided since 1983 that "[i]n no case shall a State adopt waste transport or assimilation as a designated use for any waters of the United States." 40 C.F.R. § 131.10(a) (emphasis added). EPA has stated that "[a] basic policy of the standards program throughout its history has been that the designation of a water body for the purposes of waste transport or waste assimilation is unacceptable." 48 Fed. Reg. 51400, 51408-09 (Nov. 8, 1983).

Valley fills that bury waters of the United States with millions of tons of waste cannot achieve this water quality standard. As Judge Haden has stated, "valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream." Bragg, 72 F. Supp. 2d at 662.

This violation of water quality standards is especially clear in West Virginia. West Virginia has several "designated uses" for state waterbodies. These uses include public water supply, propagation and maintenance of fish and other aquatic life, and water contact recreation, among others. See 46 C.S.R. § 1-6. The state water quality standards clearly state, however, that "[w]aste assimilation and transport are not recognized as designated uses." 46 C.S.R. § 1-6.1.a. Also notable is that water quality standards do not allow "[m]aterials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life." 46 C.S.R. § 1-3.2.e. Furthermore, "industrial wastes. . .cause pollution and are objectionable in all waters of the state." 46 C.S.R. § 1-3.1. In addition, no "industrial wastes" shall cause or materially contribute to conditions such as "distinctly visible. . .settleable solids," "deposits. . .on the bottom" of streams, "materials in concentrations which are harmful, hazardous or toxic to. . . aquatic life," adverse alterations of "the integrity of the waters," or "significant adverse impact to the chemical, physical, hydrologic or biological components of aquatic ecosystems." 46 C.S.R. § 1-3.2. "Industrial wastes" are defined as "any. . .solid or other waste substance. . .from or incidental to the development, processing or recovery of any natural resources. . ." W. Va. Code § 22-11-3(12). Accordingly, mining spoil is industrial waste pursuant to West Virginia law. Additionally, the act of filling a stream segment with overburden not only deposits waste

[3] State water quality standards under the CWA must "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." Id., § 1313(c)(2)(A).

and creates distinctly settleable solids, but also destroys the stream segment. Placing mining waste in streams, therefore, violates West Virginia water quality standards by materially contributing to the adverse conditions set forth in 46 C.S.R. § 1-3.2. Neither can the fills comply with the antidegradation provisions of the West Virginia water quality standards.

In short, although compliance with water quality standards is a "central objective" and requirement of the CWA, valley fills designed solely to eliminate waters of the United States and replace them with waste are incapable of such compliance. Evasion of a statute's core mandate and purpose is not a reasonable interpretation, and therefore is not entitled to deference. See, e.g., U.S. Army Engineer Center v. FLRA, 762 F.2d 409, 414 (4th Cir. 1985) ("[C]ourts must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'") (citation omitted); Whitman v. American Trucking Ass'ns., 531 U.S. 457, 481 (2001) (reversing under Chevron step two an EPA interpretation that "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear"); Natural Resources Defense Council v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting under Chevron step two an agency interpretation that "diverges from any realistic meaning" of the statute).

OSM is trying to use its SMCRA rulemaking power illegally to override the CWA. SMCRA does not preempt the Clean Water Act. Section 702(a)(3) of SMCRA provides that nothing therein "shall be construed as superseding, amending, modifying, or repealing the . . . Clean Water Act, the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality." 30 U.S.C. δ 1292(a)(3). Thus, this savings clause specifically preserves the CWA's prohibition against waste assimilation. If SMCRA were construed to authorize waste assimilation in streams, it would not be consistent with, and would be preempted by, the CWA.

For these reasons, the proposed rule should be withdrawn.

Sincerely,

JAMES M. HECKER,
Public Justice.

JOSEPH M. LOVETT,
Appalachian Center for the Economy and the Environment.

COUNSEL FOR WEST VIRGINIA HIGHLANDS CONSERVANCY,
SIERRA CLUB,
OHIO VALLEY ENVIRONMENTAL COALITION,
COAL RIVER MOUNTAIN WATCH,
AND WATERKEEPER ALLIANCE.

STEVE ROADY,
Earthjustice.

ATTACHMENTS TO WVHC, SIERRA CLUB, EARTHJUSTICE, OVEC, CRMW, AND WATERKEEPER ALLIANCE COMMENTS ON PROPOSED RULE ON EXCESS SPOIL MINIMIZATION/STREAM BUFFER ZONES

1. Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000 (excerpts).
2. Federal Appellants' Opposition to the Motion of the Intervenor-Defendants to Strike the Brief of the Federal Appellants and to Dismiss Appeal No. 99-2683, p. 2.
3. Letter dated April 17, 2000 from Kathrine Henry, Acting Director, OSM and John D. Leshy, Solicitor, U.S. Department of the Interior, to Michael C. Castle, Director, West Virginia Division of Environmental Protection.
4. Preliminary Draft EIS on MTM/VF in Appalachia, pp. ES-6, IV-1.
5. 3/25/02 Email from Cindy Tibbott re: Purpose & need/alternatives write-ups, with Attachment: I. Purpose and Need for Action and IV. Alternatives.
6. 6/14/02 Email from Mike Robinson re: Agenda and Handout for 6/18 SES Issue, with Attachment: Mountaintop Mining/Valley Fill Environmental Impact Statement, Senior Executive Issue Resolution Meeting, Interior South Building Room 332, June 18, 2002, Proposed Agenda; Handout for SES/Steering Committee Issue Resolution Meeting, Refresh on Teleconference Meeting Decisions, May 21, 2002.
7. 10/5/01 Letter from J. Steven Griles to CEQ, OMB, EPA, COE re: Mountaintop Mining/Valley Fills Issues.
8. 6/19/02 Email from William Hoffman re: out of office, with Attachment: Proposed EIS Alternative Framework.

9. 6/26/02 Email from Mike Robinson re: Mock-up of Proposed new Alternative Framework, with Attachment: Mountaintop Mining/Valley Fill EIS Alternative Framework (June 26, 2002 v.).

10. Email dated September 20, 2002 from Mike Robinson, OSM, re: Executive Conference Call Agenda—9/23/02, 9-10 am, with Attachment: MTM/VF EIS Executive Meeting Agenda, September 23, 2002 Conference Call Letter dated July 12, 1999 from Michael V. Shingleton, Asst. Chief Coldwater Management, West Virginia Division of Natural Resources, to Tony Barnett, West Virginia Division of Environmental Protection.

11. 8/15/02 Email from Gregory Peck re: Executive Committee Discussion, with Attachment: Alternatives Matrix for Draft MTM/VF PEIS.

12. October 9, 2001 Letter from EPA to U.S. Army Corps of Engineers re NWP 21.

13. July 2, 2001 Letter from FWS to U.S. Army Corps of Engineers re NWP 21.

14. Letter dated September 20, 2001, from Jeffrey K. Towner, Field Supervisor, West Virginia Field Office, U.S. Fish and Wildlife Service, to Colonel John D. Rivenburgh, District Engineer, Huntington District, re: comments on 2002 NWPs.

15. Letter dated October 5, 2001 from The University of Georgia, Institute of Ecology, to Headquarters, U.S. Army Corps of Engineers, re: comments on 2002 NWPs.

16. Trial Transcript, OVEC v. Bulen, Civil No. 3:05-784 (S.D.W.Va.), October 2006 (excerpts).

17. Expert Report of Douglas P. Pflugh in OVEC v. Bulen, May 16, 2006, Summary, pp. 1-2.

18. FEIS, Spruce Mine No. 1, pp. 2-98, 2-180 (September 2006).

19. Letter dated January 16, 2004 from David Densmore, U.S. Fish and Wildlife Service, to Allyn Turner, West Virginia Department of Environmental Protection, re: Selenium Survey in southern West Virginia streams.

20. Letter dated July 13, 2004 to Ginger Mullins, Chief, Regulatory Branch, Huntington District, ACOE. From Thomas R. Chapman, Field Supervisor, USFWS Elkins, WV, Field Office. Re: Public Notice 200400604 and EID, Coal Mac, Inc., Phoenix No. 4 Surface Mine.

21. April 28, 2006 powerpoint presentation: DEP Selenium Study, Background and Progress, available at.

22. A. Dennis Lemly, "Selenium in Aquatic Ecosystems: A Guide for Hazard Evaluation and Water Quality Criteria," Springer 2002, p. 31.

23. July 9, 2004 FWS Letter to U.S. Army Corps of Engineers re: Hollow Mountain Project.

24. Report by A. Dennis Lemly, Ph.D, "Recommendations for Pre-Mine Assessment of Selenium Hazards Associated with Coal Mining in West Virginia," January 5, 2004.

25. Edmonds and Loucks, "Woody Establishment Patterns Following Mountaintop Removal in the Coal River Valley," available at .

26. Weakland and Wood, "Cerulean Warbler (Dendroica Cerulea) Microhabitat and Landscape-level Habitat Characteristics in Southern West Virginia in Relation to Mountaintop Mining/Valley Fills," Final Project Report, December 2002, p. 1.

27. Email dated December 23, 2002 from John Forren, EPA Region 3, re: Comments on Draft EIS for MTM/VF, with Attachment: Comments on the Draft EIS for MTM/VF Coal Mining (Dec 2002) from ESD, OEP, Wheeling Staff 12/20/02.

28. 4/21/03 Email from David Rider re: Ch 14 edits, with Attachment: DEIS, Ch. IV.J., Threatened and Endangered Species, pp. IV.J-1 to IV.J-2.

29. Email dated January 7, 2003 from Steve Neugeboren, EPA, re: MTM legal issues, with Attachment: OGC water law office comments on mountaintop mining EIS 12/26/02.

30. USGS, Water-Data Report 2006, 380930082033101 Upper Mud River Reservoir near Palermo, WV.

NATIONAL MINING ASSOCIATION,
Washington, DC, December 14, 2007.

Hon. JEFF BINGAMAN,
Chairman, Senate Energy and Natural Resources Committee, Senate Dirksen 304, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for the opportunity to appear before the Senate Committee on Energy and Natural Resources on November 13, 2007 to provide testimony on "The Surface Mining Control and Reclamation Act of 1977: Policy Issues Thirty Years Later." This letter provides NMA's responses to the questions you posed after the hearing.

Sincerely yours,

HAROLD P. QUINN, JR.,
Senior Vice President and General Counsel.

RESPONSES TO QUESTIONS FROM SENATOR BINGAMAN

MOUNTAINTOP REMOVAL

Question 1a. Please describe this technology. Are there alternative means of mining this coal?

Answer. "Mountaintop removal" is one of several types of surface mining operations in the mountainous terrain of Central Appalachia. As a general matter, mountaintop removal is an adaptation of the mine planning, sequencing and equipment for area mining used in other regions to the steep slope mountainous terrain of Central Appalachia. The Surface Mining Control and Reclamation Act (SMCRA), which contains specific provisions governing mountaintop removal, describes these operations as those that remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill. These mines obtain a variance from SMCRA's requirement to return the land to its approximate original contour in order to create a more level or a rolling topography that will support industrial, commercial, residential, agriculture or public uses after mining. SMCRA § 515(c)(2)-(3).

An assessment of whether economic and technologically feasible alternatives to mountaintop removal operations are available for mining coal in mountainous terrain requires an evaluation of many physical, technological and economic factors including the topography, geology, surface access, number and thickness of the coal seams, the depth of the coal seams, capital and operating costs of different methods, and the forecasted price of the product over the life of the mine.

It should be noted that as it relates to choices among different surface mining methods, all surface mines in the mountainous terrain generate excess spoil requiring permanent placement in excess spoil fill structures commonly referred to as either valley or head-of-hollow fills. This is true for surface mines that will restore the land to its approximate original contour and those surface mines that qualify for a variance in order to create land suitable to support various post mining land uses in mountainous terrain.

In order to mine the coal by surface mining methods, the rock strata, or overburden, overlying the coal seams must be broken up into fragments and excavated. When rock is broken and moved, it expands, or swells. As a result, the volume of material excavated is greater than the volume of the overburden in its original location. The amount of this expansion (referred to as the swell or bulking factor) can range from 15 percent to 40 percent depending upon the geology. Surface mines with approximate original contour variances will generate even more excess spoil to accommodate the preparation of a final surface configuration suitable to support certain post mining land uses. SMCRA recognizes that in these situations all of the overburden removed in the mining process cannot be returned to the mined area, and prescribes requirements for the design, location and construction of excess spoil fills. SMCRA § 515(b)(22).

Question 1b. How much acreage has been impacted by mountaintop removal and valley fill?

Answer. We do not have specific information about acres within permits for mountaintop removal operations. However, according to a multi-agency study, surface mines (mountaintop removal and other surface mines with excess spoil fills) in eastern Kentucky, Tennessee, Virginia, and southern West Virginia have occurred on approximately 400,000 acres over the last ten years—about 3 percent of the 12 million acres in the study area. Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement (2003). It is important to note that these lands are reclaimed and restored to a condition that supports post-mining uses.

Question 1c. How many of the future mine sites in Appalachia will rely on mountaintop removal and valley fill?

Answer. We cannot forecast how many mines in the future will use mountaintop removal mining techniques. However, all surface mines and underground mines in central Appalachia will rely upon valley and other fill structures to permanently store excess spoil, underground mine development material and coal processing waste. Several studies have documented that restrictions placed upon the use of valley or other fills in connection with surface mining would have devastating economic consequences and reduce coal production at mines by as much as 90 percent. Sandberg, Doss, et al., "The Mountaintop EIS Technical Report" (2000); Marshall University Center for Business and Economic Research, "Coal Production Forecasts and Economic Impact Simulations in Southern West Virginia" (2000).

As I explained in my testimony, since SMCRA's enactment 30 years ago the general trend nationwide has been toward fewer but substantially larger coal mines. This trend is a product of both market forces and public policies that demand greater efficiencies in order to compete.

Question 1d. What are the advantages and disadvantages (economic and otherwise) of mountaintop removal and valley fill?

Answer. Mountaintop removal operations offer economic, environmental and public benefits.

Coal can be mined in many instances where underground methods would not be feasible because of relatively thin seams or unsafe roof conditions. These operations have a greater coal recovery rate since they mine sometimes as many as eighteen coal seams. These high resource recovery rates advance SMCRA's goal for maximum utilization and conservation of the coal resource while minimizing the potential for future disturbance of the reclaimed area for coal mining. SMCRA § 515(b)(1).

The use of engineered valley fills avoids the problems associated with some pre-SMCRA mining that created steep, unconsolidated outslopes of spoil material prone to slides, erosion and prolonged sedimentation of streams.

Many mountaintop mining operations occur on lands previously mined before SMCRA. The mountaintop mining operations eliminate old highwalls, spoil piles and other conditions left by these abandoned mines at no cost to the Abandoned Mined Land Fund.

The rugged terrain of this region has often thwarted economic development opportunities. As Justice Powell observed:

> Bituminous coal . . . is found in a region marked by steep mountain slopes , sharp ridges, massive outcrops of rock, and narrow valleys—conditions that severely limit alternative uses of the land. The requirement in [SMCRA] that steep-slope areas be restored approximately to their original contours seems particularly unrealistic [and] often would diminish rather than increase the land's worth.

Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 306-307 (1981) (Powell, J., concurring).

Mountaintop mining offers a unique opportunity to leave land suitable for commercial, residential, recreational, agricultural and other uses that would otherwise remain unavailable. As part of my testimony, I provided the committee with photographs depicting the realization of these opportunities including housing developments, airports, farms, and wildlife areas.

STREAM BUFFER ZONE RULEMAKING

Question 2. Does the National Mining Association support the proposed modifications to the stream buffer zone rule? Why or why not?

Answer. NMA supports the Office of Surface Mining's proposal to clarify the stream buffer zone regulation in order to avoid future misapprehension about its proper application to a wide range of surface and underground coal mining activities nationwide. The proposal clarifies the rule in a manner that is consistent with 30 years of implementation by every Administration since the rule was first promulgated by the Office of Surface Mining. Such a clarification is necessary to avoid misinterpretations and disputes that would disrupt the production of coal essential to our Nation's energy supply and cost coal miners and other employees their high-wage jobs and benefits.

Again, NMA appreciates the opportunity provided to appear and deliver testimony to the committee about the coal industry's experience over thirty years since SMCRA's enactment.

RESPONSES OF BILL BANIG TO QUESTIONS FROM SENATOR DOMENICI

As Mr. Wahlquist points out, domestic coal production has increased by 67% and gone from 3rd place in U.S. energy production to a solid 1st since SMCRA passed. At the same time, unlike coal or natural gas, coal is cheaper today than it was 30 years ago.

This impressive contribution to our nation's energy supply has largely shown up on the electric grid. While this role has expanded coal production and created good jobs, additional opportunities exist for this abundant, affordable, and domestic resource.

Question 1. If greenhouse gas emissions are no greater than those associated with our existing fuel supply, does the UMWA support the manufacture transportation fuels from our nation's coal reserves?

Answer. The UMWA is a member of the Coal to Liquid Coalition and does support the manufacture of transportations fuels from our domestic coal reserves. The U.S. has 250 years supply of recoverable coal reserves. For energy independence and national security we should rely on our domestic coal reserves, instead of some of the most unstable regions of the world for our transportation fuels.

Question 2. America's ability to meet growing energy needs with domestic resources like coal, wind, nuclear, and natural gas is only as good as our capacity to train the miners, geologists, engineers, and other professionals that make those projects a reality. What role do you believe the federal government should play in preparing the next generation of Americans to do this work?

Answer. With the turndown in the U.S. domestic coal industry in the 1980's and 1990's, the coal industry missed an entire generation of coal miners coming into the industry. Today many of our miners are approaching retirement age. The federal government should provide resources to help train the next generation of miners. One such program is the United Mine Workers of America's Career Center (UMWACC). The UMWACC has developed a training program for potential new miners entering the mining industry.

RESPONSE OF BILL BANIG TO QUESTION FROM SENATOR SALAZAR

Question 1. Given the rising costs of healthcare, the United Mine Workers are to be commended for working hard to reduce health care costs. Have you been able to work with other healthcare systems, like the Veteran's Affairs system to coordinate providing care to miners who are also veterans?

Answer. The UMWA Funds does not have a direct relationship with the Veteran's Administration to coordinate benefits, but does have such relationships with the Department of Health and Human Services' Center for Medicare and Medicaid Services (CMS) and with the Department of Labor's Black Lung program. The UMWA Funds was invited this past April to share its experiences and programs with the Task Force on the Future of Military Health Care, a task force appointed by the Secretary of Defense pursuant to the 2007 Defense Authorization Act. A copy of that presentation, which by request of the Task Force focused on prescription drug programs, is attached.*

RESPONSES OF JOANNA PRUKOP TO QUESTIONS FROM SENATOR BINGAMAN

NON-COAL RECLAMATION

I am pleased to hear that overall, the experience for New Mexico with implementation of SMCRA has been positive. I am concerned, however, that due to an interpretation of the 2006 AML Amendments, some funds may now not be available for non-coal reclamation.

Question 1a. What role does the Abandoned Mine Land program under SMCRA play in New Mexico?

Answer. The SMCRA Abandoned Mine Land program is the core of New Mexico's efforts to address the hazards associated with abandoned mines, particularly public safety hazards. The AML program within the New Mexico Energy, Minerals and Natural Resources Department (EMNRD) is 100% funded through SMCRA. Over the years, various state agencies, including EMNRD, have received small grants from other sources to address some abandoned mine issues. But SMCRA funding is the only regular source of funding.

Question 1b. How important is it that funding be available for non-coal reclamation?

---

* Document has been retained in committee files.

Answer. The primary threat to public safety from abandoned mines in New Mexico is at non-coal sites. Almost all of the fatalities and serious injuries in recent decades have been at abandoned non-coal mines. The overwhelming majority of abandoned mine hazards in New Mexico are at non-coal sites (see question # 2 below). As urban growth continues and recreation use expands, more people are coming into contact with abandoned mining areas once considered remote.

In recent years, New Mexico has balanced the need to complete work on abandoned coal mine sites with the need to address high priority hazards at abandoned non-coal mines. Over the past six years, New Mexico has spent 55% of its AML construction costs on coal projects and 45% on non-coal projects. Given the predominance of public heath and safety threats from non-coal sites, we need to maintain the flexibility to allocate AML funds to address these hazards.

Question 1c. How long has New Mexico used AML funds for non-coal work?

Answer. New Mexico's AML program began in 1981 and work on the first non-coal project began in 1983.

NON-COAL RECLAMATION

Question 2a. Does New Mexico have an inventory of abandoned mines in the state?

Answer. New Mexico did complete an inventory of abandoned coal mines, but has never completed an inventory of abandoned non-coal mines. We have information on various mining areas from prior projects and from other state and federal agencies that have examined various areas of the state.

Question 2b. If so, how many are there?

Answer. We estimate that there are approximately 15,000 abandoned mine openings located in about 800 mining sites. We estimate that about 95% of these openings are from non-coal mining.

URANIUM

Your testimony specifically underscores the importance of AML funds being available for reclamation at abandoned uranium.

Question 3a. What are the types of problems associated with abandoned uranium mines in New Mexico?

Answer. Abandoned uranium mines present a variety of problems from dangerous mine openings to unreclaimed mine waste piles exposing the public to radiological and other contaminants to contamination of ground and surface water from mining and milling activity. AML funds would be used primarily in New Mexico to safeguard dangerous mine openings and reclaim contaminated areas associated with the mines.

Question 3b. Do you have information on how many abandoned uranium mine sites exist in New Mexico?

Answer. New Mexico is currently inventorying all abandoned and inactive uranium mines with past production. At this time, we have found 137 formerly producing uranium mines with no record of reclamation. We estimate over 400 additional mine hazards at locations where no production was recorded.

REGULATORY GRANTS

I understand from your testimony and that of Mr. Conrad that an ongoing problem is the level of funding for grants to the states to conduct their regulatory programs under title V of SMCRA.

Question 4. Can you please describe for us the work of the state under title V and the issues associated with this shortfall in funding?

Answer. New Mexico received approval for its Title V program in 1980 and implements all elements of SMCRA. New Mexico permits all surface coal mining operations not on Indian lands. For each operation, there are monthly inspections followed by any necessary enforcement. Staff members conduct reviews of new permit applications, financial assurance proposals, bond release applications, and permit renewals, modifications and revisions. Permits are also reviewed at regular intervals and at annual reports. EMNRD staff are all trained to conduct inspections as well having particular expertise over various elements of mine operation and reclamation, including hydrology, geology, vegetation, soils, engineering and cultural resources. The Title V program, working with the mine operators, has developed electronic permits and an integrated data base management system and Geographic Information System; each system requires an administrator to facilitate system development and maintenance. EMNRD is also communicating with the public, federal land managers, Native American tribes and other agencies on various issues connected with mine operation and reclamation.

Prior to this year, New Mexico has weathered previous shortfalls in federal funding by creating efficiencies through the use of technology and by using other state funding sources to cover costs associated with the Title V program. This year, however, we are planning to transfer two positions to other programs due to funding shortages. This will result in a loss of both personnel to conduct inspections and permit reviews, and of expertise in evaluating mining operation and reclamation. The State will be at risk of missing or delaying required inspections, and delaying enforcement and permitting actions.

BUFFER ZONE RULEMAKING

Question 5a. Does the State of New Mexico support the proposed changes to the Office of Surface Mining Reclamation and Enforcement's buffer zone rule (72 Fed. Reg. 48890, August 24, 2007)?

Answer. Because the buffer zone rule has not previously impacted mine reclamation in New Mexico, the State has not taken a strong position on this rule change. However, New Mexico does have concerns with the proposed changes. Generally, we are concerned that the changes must meet the purpose of SMCRA to "assure that surface coal mining operations are so conducted as to protect the environment". Specifically, we are concerned that the proposals to use the term "waters of the U.S." and to require alternatives analyses for excess spoil fills will create great confusion and uncertainty. In particular, the term "waters of the U.S." could, depending on how you interpret Supreme Court opinions, greatly expand the use of the buffer zone rule in New Mexico with little benefit for the environment.

Question 5b. Would you prefer to keep the current rule in place?

Answer. We would prefer the current rule to an amended rule that creates confusion and uncertainty.

RESPONSES OF BRENT WAHLQUIST TO QUESTIONS FROM SENATOR BINGAMAN

Question 1a. Mountaintop Removal—How widespread is mountaintop removal mining? How many acres have been affected?

Answer. In estimating the extent of mountaintop removal mining, we must first note that the term mountaintop removal is subject to various interpretations. "Mountaintop removal mining" (MTR) is a specific type of mining authorized in section 515(c) of the Surface Mining Control and Reclamation Act (SMCRA), "where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill....by removing all of the overburden and creating a level plateau or gently rolling contour..." [30 USC 1265(c)(2)]. It is a type of mining authorized under SMCRA for which restoration of the mined area to the approximate original contour (AOC) is not required. While recognizing the economic necessity to allow MTR operations in Appalachia, Congress also spelled out conditions to ensure that the practice would be limited to situations where the reclamation would result in specific and beneficial postmining land uses.

Although MTR has a specific meaning under SMCRA, the public tends to view the practice more broadly to include any steep-slope mining in mountainous terrain. Further, OSM has adopted a broader term—"mountaintop mining" (MTM)—to encompass various mining techniques involving the construction of valley fills. MTM includes MTR and all types of mining in steep-slope terrain that result in the construction of fills, whether or not the mined-out area is reclaimed to AOC. MTM techniques include contour mining, area mining, and combinations of all of these methods. Sometimes these different techniques are used on various portions of the same minesite. Thus, databases segregating information on MTR acreage from overall permitting information are not maintained or available from the states or OSM.

With this explanation as a backdrop, we have some data for the broader category of MTM permits issued over a ten-year period (1992-2002) in eastern Kentucky, northwest Virginia, southwestern West Virginia and a small portion of Tennessee. A study, done as part of a programmatic Environmental Impact Statement completed in 2005 by the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, OSM, and the State of West Virginia, reported that approved MTM permits covered approximately 404,000 acres—3.3% of the 12,000,000 total acres in the study area. [For additional information, see http://www.epa.gov/region3/mtntop/ and http://www.epa.gov/region3/mtntop/pdf/Appendices/Appendix%20I%20Cumulative%20Impact%20Study/Dec02%20report%20text/Report.pdf].

Question 1b. How many valleys are typically affected by one mining operation? (For example, one of the court cases on this subject describes a mining operation that was authorized to construct valley fills in 27 valleys.)

Answer. There is no "typical" number of valley fills constructed per mining operation. The size, number, and location of valley fills are based on site-specific conditions. However, based on available information, a mining operation with 27 valley fills would be very rare.

We queried a database developed as background for a chapter of the "Mountaintop Mining/Valley Fill" EIS mentioned above. The data, which includes over 1100 valley fills permitted from 1985-1998 in West Virginia, provides an idea of the number of valley fills associated with MTM operations. In this sample, the majority of permits (80% of 404 permits) issued from 1985-1998 had 1 to 3 valley fills; 15% (60 permits) had 4-6 valley fills; 4% (16 permits) had 7-10 fills; and 1% (4 permits) had more than 10 fills, the largest number of fills for any single permit being 24.

From 1999 to 2001, which is the period for the available data that follows the beginning of MTM litigation, there were 31 permits (76% of a total of 41 permits issued) with 1-3 fills; 8 permits (20%) with 4-6 fills; and 2 permits (5%) with 7-10 fills. Additional data compiled by OSM in Kentucky for the past eight years show an average of four valley fills per MTM permit (662 valley fills in 155 MTM permits issued from 1999 to the present).

Question 2. Mountaintop Removal—SMCRA (including section 515) imposes specific requirements with respect to water protection and reclamation to approximate original contour. How do you reconcile these requirements of SMCRA with mountaintop mining and the authorization of valley fills that cover streams?

Answer. SMCRA requires OSM to strike a balance between protection of the environment and the Nation's need for coal as an essential source of energy. [30 USC 1202(f)]. Congress recognized that mining activities will cause temporary disruptions to water quality and quantity on the minesite. OSM regulations, at 30 CFR 816.41(a), implementing SMCRA section 515(b)(10) [30 USC 1265(b)(10)], require that coal mining minimize hydrologic impacts onsite and prevent material damage to the hydrologic balance offsite. Otherwise, mining would not be feasible.

Excess spoil disposal, including construction of valley fills, is governed by SMCRA section 515(b)(22), which specifically allows the placement of excess spoil in areas containing streams, provided proper underdrains are constructed. In steep-slope areas, it is physically impossible to return all spoil to the mined area, both because of the swell factor associated with removal of the overburden and the need to ensure that backfilled slopes are stable.

Question 3. Mountaintop Removal and Water—The Surface Mining Act requires that in granting permits, the permitting authority must ensure that "no damage will be done to natural watercourses." How do you reconcile these requirements of SMCRA with the authorization of valley fills that cover streams?

Answer. The SMCRA language [from section 515(c)(4)(D)] quoted in the question is applicable only to MTR mining, which is only one of the various types of mining operations that may require valley fills for the disposal of excess spoil. MTR, by its very nature, generates more excess spoil than MTM sites restored to AOC. Since December 1977, OSM's regulations have recognized that excess spoil would be created by MTR, and have authorized its disposal in valley fills, including those that might extend into intermittent or perennial streams. At 72 FR 48893, the preamble to our proposed excess spoil/buffer zone rule explains this provision as follows:

> The regulations implementing this provision clarify that the prohibition applies only to natural watercourses "below the lowest coal seam mined." See 30 CFR 824.11(a)(9). However, section 515(c)(4)(E) of the Act specifies that "all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subsection (b)(22) of this section." By including this proviso, Congress recognized that not all excess spoil generated by mountaintop removal operations could be retained on benches or placed within the mined-out area. And by cross-referencing section 515(b)(22), Congress authorized placement of excess spoil from mountaintop removal operations in natural watercourses, provided all requirements of section 515(b)(22) are met. As discussed in Part II of this preamble, in the steep-slope terrain of central Appalachia, excess spoil typically can most feasibly be placed in valley fills.

OSM is not proposing to amend the regulations implementing section 515(c)(4)(D), and those regulations continue in effect.

Question 4a. Mountaintop Removal and Water—I understand that SMCRA requires that surface coal mining operations be conducted so as to prevent, "to the extent possible using the best technology currently available" contributions of suspended solids to streamflow or runoff outside the permit area. Another provision requires that "to the extent possible using the best technology currently available," surface and coal mining operations must minimize disturbances and adverse im-

pacts of the operation on fish, wildlife, and related environmental values. Is it the position of the Administration that using valley fills that inundate miles of stream is the "best technology currently available"?

Answer. The application of best technology currently available (BTCA) to the extent possible as mandated by SMCRA does not preclude placement of excess spoil or refuse impoundments in intermittent or perennial streams. Excess spoil and coal waste disposal are necessary aspects of coal mining operations. There is an extensive discussion in the preamble to OSM's 2007 proposed excess spoil minimization/buffer zone rule on the application of BTCA and the phrase "to the extent possible" [72 FR 48911-3].

The requirement in SMCRA section 515(b)(10)(i) to prevent contributions of suspended solids applies to stream flow and runoff outside the permit area. However, excess spoil disposal occurs within the permitted area, and thus is not prohibited by section 515(b)(10)(i). SMCRA requires that BTCA related to protection of fish, wildlife, and related environmental values must minimize disturbances and adverse impacts to the extent possible. However, SMCRA does not require that these impacts be prevented. The purposes of SMCRA include striking a balance between protection of the environment and the Nation's need for coal as an essential source of energy. [30 USC 1202(f)]. Therefore, the minimization requirement does not extend to prohibiting fill construction in stream headwaters.

Question 4b. Don't valley fills that cover perennial and intermittent streams by definition adversely affect water quality and quantity and other environmental resources of the stream?

Answer. Covering streams with excess spoil or coal mine waste does not necessarily adversely affect water quality or quantity downstream of the fill and outside the permit area. In fact, flows from the toe of an excess spoil fill are often more consistent (less seasonal variation in quantity) and of higher overall quality than flows preceding construction of the fill. While fill construction in streams may have an adverse impact on environmental resources in the segment of stream that is covered, SMCRA only requires minimization of that impact to the extent possible. One purpose of our proposed excess spoil rule changes is to clarify how the requirement for minimization to the extent possible is to be applied.

Question 4c. How can valley fills that cover such streams be permitted?

Answer. Valley fills are authorized by SMCRA at section 515(b)(22) and 30 CFR 816.71-74 and the Clean Water Act 404 program. Beginning with the interim program regulations first promulgated in December 1977 and the permanent program regulations first promulgated in March 1979, SMCRA regulations have always authorized "valley fills" that cover water courses, wet weather seeps and springs, so long as appropriate underdrains are provided. By definition, channel flow from a wet weather seep is an intermittent stream, and channel flow from a spring is a perennial stream. The U.S. Court of Appeals for the Fourth Circuit cited section 515(b)(22) as the basis for its statement that, "it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose." Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 443 (4th Cir. 2003).

At 72 FR 48893, the preamble to OSM's 2007 proposed excess spoil minimization/buffer zone rule contains a section that further explains this matter:

> Section 515(b)(22)(D) provides that sites selected for the disposal of excess spoil must "not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented." In adopting this provision, Congress could have chosen to exclude perennial and intermittent streams (or other waters) from the scope of "natural water courses," but it did not do so. In addition, the fact that this provision of the Act authorizes disposal of excess spoil in areas containing springs and seeps further suggests that Congress did not intend to prohibit placement of excess spoil in perennial or intermittent streams. Springs and seeps constitute groundwater discharges. To the extent that those discharges provide intermittent or continuous flow in a channel, they are included within the scope of our definitions in 30 CFR 701.5 of "intermittent stream" and "perennial stream," respectively. The definition of "intermittent stream," which is based upon technical literature, includes any "stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge."

Question 5a. Mountaintop Removal and Approximate Original Contour Standard—Section 515(b) of SMCRA requires mine sites to be reclaimed to their "approxi-

mate original contour" but allows for variances. In addition, Office of Surface Mining guidance does not require "elevation" to be taken into account in creating approximate original contour. How is mountaintop mining consistent with this approximate original contour standard in SMCRA?

Answer. Mountaintop mining operations permitted under SMCRA section 515(c) are exempt from approximate original contour (AOC) restoration requirements. SMCRA section 515(c)(2). Variances from AOC are also permissible for other types of MTM operations, provided land use and other standards are attained. For MTM sites where reclamation to AOC is required, elevation is taken into account as an aspect of contour, under OSM's guidance. (OSM's Directive INE-26, which guides OSM inspectors in evaluating AOC restoration and has been in effect for over 20 years.) Further, beginning almost 10 years ago, OSM worked with West Virginia and other states to clarify their AOC criteria and procedures. Mountaintop mining operations that are permitted under criteria other than section 515(c), and therefore are not exempt from AOC requirements, must achieve AOC, and must be consistent with the SMCRA definition:

> Approximate original contour means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 515(b)(8) of this Act;

SMCRA § 701(2).

Question 5b. Isn't restoring elevation implicit in any requirement for reclaiming to the approximate original contour?

Answer. Approximating the original elevation is implicit in restoring AOC. As stated in OSM's Directive INE-26 on AOC, "The anticipated postmining topography must be determined in the permitting process with typical cross section or contour maps depicting both the premining and anticipated postmining slopes with sufficient clarity and detail to enable a comparison to determine if AOC has been achieved."

The permitting process includes procedures for public participation and review of agency decisions should there be disputes over whether AOC will be achieved through the proposed reclamation plan.

OSM's Directive INE-26 goes on to state, "AOC is achieved through a reasonable, but not necessarily exact, rendering of the approved postmining topography."

Question 6. Mountaintop Removal and Environmental Impacts of Coal—In recent years, we have become more aware of the environmental costs of our reliance on coal for the production of energy—whether this be impacts on land and water, effects on air quality, and most recently, contributions to climate change. What can OSM do to reduce the costs of mountaintop mining and valley fills?

Answer. One purpose of the August 24, 2007, proposed rule is to reduce the environmental impacts of excess spoil disposal. OSM has also addressed some of these concerns through cooperative efforts with State and Federal regulators.µ Cooperative efforts with the Appalachian States to address concerns include the following:

- Guidance was developed on approximate original contour (AOC) to ensure the maximum amount of spoil is returned to the mined area.
- Guidance was developed for allowable postmining land uses to ensure that variances from AOC authorized by the SMCRA are properly applied.
- Inspection techniques for valley fill construction requirements have been developed to ensure stability of fills.
- The Appalachian Regional Reforestation Initiative was established to encourage returning mine land to productive hardwood forests and to address forest fragmentation. Proper forest reclamation sequesters carbon and reduces peak flows that contribute to flooding.
- Work is ongoing with the EPA, U.S. Army Corps of Engineers, and the Fish and Wildlife Service to share data and collaborate during reviews required by the Clean Water Act, the Endangered Species Act, and SMCRA. This coordinated permitting results in better permit decisions and minimizes environmental impacts.

Question 7a. Mountaintop Removal—According to the statement of Joan Mulhern of Earthjustice over the past thirty years and especially during the last 15 years there has been a "vast expansion" in mountaintop removal mining. Her statement references a source that indicates a significant acceleration in mountaintop removal

mining (9,800 acres permitted during the 1980's verses 12,540 permitted acres during 2002 alone). Does OSM have any data that would indicate how many acres were permitted for mountaintop removal mining during the 1980's as opposed to during the past year?

Answer. OSM has compiled data on MTM operations in Kentucky since 1983. This data covers all operations that were permitted for MTM, including both acreage for which a return to AOC was required, and non-AOC mining, such as MTR and AOC variance mining. The data does not specify how much acreage was permitted for mining by any particular non-AOC mining technique. Despite these limitations, the data may be useful as one indication of a trend over time.

Our data indicate that, from 1983 (after Kentucky gained SMCRA primacy) through 1989, 157 new MTM permits were issued by Kentucky, for a total of 81,656 acres. Of that total, 98 permits included mining for which AOC was not required, and the total non-AOC acreage was 39,420. For the period from 2000 through 2006, 134 new MTM permits were issued by Kentucky, for a total of 43,091 acres. Of that total, 7 permits included mining for which AOC was not required, and the total non-AOC acreage was 1,051.

Question 7b. Is the use of this mining technique accelerating?

Answer. The limited data compiled by OSM for Kentucky indicates that mountaintop mining is not accelerating. To the contrary, non-AOC portions of MTM permits accounted for only 2.4% of the acreage permitted over the last 7 years, compared to 48% between 1983 and 1989.

Question 8a. Mountaintop Removal—Am I correct in understanding that the programmatic EIS released in 2005 projects that by 2012 mountaintop removal mining will have occurred on over 1.4 million acres in Appalachia—and over 2000 miles of stream will have been covered by valley fill?

Answer. The EIS estimated that mountaintop mining (which includes MTR and other mining methods) could occur on 1,408,372 acres in Appalachia by 2012. The EIS estimated that existing fills had affected 724 miles of streams in Appalachia. If valley fill construction continues at the same rate, that construction would affect 724 additional miles of streams in the following 17 years, yielding a total of 1,448 stream miles impacted by valley fills. [For additional information, see http://www.epa.gov/region3/mtntop/ and http://www.epa.gov/region3/mtntop/pdf/Appendices/Appendix%20I%20Cumulative%20Impact%20Study/Dec02%20report%20text/Report.pdf].

Question 8b. Is it possible to mitigate or compensate for the loss of these headwater streams?

Answer. Mitigation and compensation are Clean Water Act (CWA) measures to offset the impacts from discharge of fill in waters of the U.S. and fall under the jurisdiction of the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers. We understand that there are instances at SMCRA mine sites where reclamation and stream restoration on the mine received credit by the Corps as mitigation for stream impacts. This offsets additional mitigation that may be required under the CWA outside the minesite permitted under SMCRA.

Question 9. Mountaintop Removal—Please provide a chart that indicates how many permits for mountaintop removal have been authorized by state over each of the past 25 years. Please indicate how much acreage is involved. Please also provide data on how many valley fills are associated with these permits by state and how many miles of stream and headwaters are impacted.

Answer. Most MTM operations are regulated by states, and the types of data we maintain on them are somewhat limited. We do not possess data on acreage, the number of valley fills or stream impacts, broken out by surface mining technique, over the past 25 years. This type of information is very dynamic in nature because permit revisions frequently add and delete mining areas, valley fills, etc. The most comprehensive source of the information that you request exists for mountaintop mining (not MTR) in the aforementioned multi-agency EIS completed in 2005. Chapter III.K shows valley fill trends for seventeen years covering 1985-2002. [For additional information, see http://www.epa.gov/region3/mtntop/pdf/III—%20Affected%20Environment%20and%20Consequences%20of%20MTM%20VF.pdf].

Question 10. Mountaintop Removal—Please describe the equipment that is typically used in mountaintop removal mining. Has this equipment changed in design, size and efficiency since the enactment of SMCRA in 1977? If so, please describe.

Answer. The first large dragline came into use in central Appalachia about 1980, and the use of draglines expanded through the 1990's. These and other changes have increased efficiency and productivity. The previously cited Mountaintop Mining/Valley Fill EIS describes this trend in Chapter III.I and III.J.3, as well as in Appendices G and H—particularly the presentations in Appendix H, "Mining and

Reclamation Technology Symposium," held June 23-24, 1999. [For additional information, see http://www.epa.gov/region3/mtntop/eis.htm].

Question 11a. Stream Buffer Zone Rulemaking—OSM is in the process of revising permanent program regulations relating to excess spoil and stream buffer zones. The agency published proposed rules on this topic on August 24, 2007 (72 Fed. Reg. 48890). The public comment period will close later this month. The current OSM regulations impose a requirement that there be buffer zones around intermittent and perennial streams to protect against disturbance from coal mining activities. The proposed rules would eliminate this requirement with respect to "valley fills" associated with mountaintop mining. Will the new rules facilitate mountaintop mining and valley fills?

Answer. No. The rule would largely reflect current mountaintop mining practices. It would clarify the stream buffer zone rule to ensure that implementation is consistent with SMCRA, and also would tighten environmental restrictions on valley fills.

Question 11b. Do you believe the current regulation is inconsistent with the statute?

Answer. No. The rule has always been implemented to allow valley fills and coal refuse impoundments; and this is consistent with SMCRA. There are differing views on what the current rule means, which is why we are clarifying just what mining activities can occur in or near streams and under what conditions. See also the preamble to OSM's March 2007 proposed rule at 72 FR 48893-48898 for a full discussion of the stream buffer zone rule history and the controversy surrounding its implementation and interpretation.

Question 11c. Is the current regulation being adequately and fully enforced?

Answer. Yes.

Question 12. Stream Buffer Zone Rulemaking—The proposed rule requires that excess spoil be minimized to the extent practicable. Doesn't OSM already require this?

Answer. No. While the rules may imply that the maximum amount of spoil should be returned to the mined out area to minimize excess spoil, the proposed rule language would codify the requirement in a way that is consistent with recent policies issued by the states. The rule, if adopted as proposed, will explicitly require environmental resource data and analysis of alternatives to show that various sizes, locations, and numbers of fills were considered. This will further pressure companies to adopt the most environmentally-protective alternatives in their mining and reclamation plans to minimize the amount of excess spoil.

Question 13a. Stream Buffer Zone Rule—Please summarize the Federal District Court holding in Bragg v. Robertson, 72 F. Supp.2d 642 (S.D.W.V. 1999), rev'd, 248 F.3d 275 (4th Cir. 2001). I understand that the Court of Appeals for the Fourth Circuit reversed the District Court ruling on procedural grounds (sovereign immunity), leaving Judge Haden's substantive pronouncements on the SMCRA as the operative interpretation.

Answer. OSM's 2007 proposed buffer zone rule preamble summarized court rulings on the stream buffer zone rule. In that preamble, we noted that the Plaintiffs in Bragg asserted that the stream buffer zone rule allows mining activities through or within the buffer zone for a perennial or intermittent stream only if the activities are minor incursions. They argued that the rule did not allow substantial segments of the stream to be buried underneath excess spoil fills or other mining-related structures.

On October 20, 1999, the district court ruled in favor of the plaintiffs on this point, holding that the stream buffer zone rule applies to all segments of a stream, including those segments within the footprint of an excess spoil fill, not just to the stream as a whole. The court also stated that the construction of fills in perennial or intermittent streams is inconsistent with the language of 30 CFR 816.57(a)(1), which provides that the regulatory authority may authorize surface mining activities within a stream buffer zone only after finding that the proposed activities, "will not adversely affect the water quantity and quality or other environmental resources of the stream." See Bragg v. Robertson, 72 F. Supp. 2d 642, 660-663 (S.D. W. Va., 1999). [72 FR 48895]

Judge Haden suspended his own decision pending appeal. The U.S. Court of Appeals for the Fourth Circuit reversed the district court on the grounds of lack of jurisdiction under the Eleventh Amendment to the Constitution. This means that, as a matter of law, the district court's statements on the interpretation and applicability of the stream buffer zone rule have no force or effect. See Bragg v. West Virginia Coal Association, 248 F.3d 275, 296 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002).

Question 13b. Do you agree with the District Court that the current buffer zone rule applies to all portions of a perennial or intermittent stream and that the buffer zone rule can be harmonized with other SMCRA regulations?

Answer. No. We do not agree with the district court's interpretation of the existing rule. However, we believe that the stream buffer zone rule can be harmonized with other regulations. If the proposed excess spoil and buffer zone rules are adopted, they will more clearly link to other regulatory requirements, consistent with the underlying authority in SMCRA.

Question 13c. Is the current buffer zone rule being enforced in accordance with this interpretation?

Answer. No. OSM and the States continue to apply our long-standing interpretations of stream buffer zone requirements, as discussed in OSM's proposed rule at 72 FR 48890.

Question 13d. Has the Fourth Circuit's ruling in Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003), impacted the interpretation and application of the buffer zone rule under SMCRA? If so, in what way and why?

Answer. No. The 4th Circuit ruling in Rivenburgh did not disturb OSM's current and historical interpretation and implementation of the rule, and it acknowledged that SMCRA envisioned excess spoil disposal in streams. The circuit court held that, "SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States." Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 442 (4th Cir. 2003). The court further stated that, "it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose." Id. at 443.

Question 14a. Non-coal Reclamation—Last year, Congress reauthorized the Abandoned Mine Reclamation Fund. On June 6, 2007, I wrote to Secretary Kempthorne, along with Senator Domenici and the Senators from Colorado and Utah, expressing concern over a possible interpretation that would limit funds that are currently available for non-coal reclamation in New Mexico. According to Secretary Prukop's testimony, New Mexico alone has over 15,000 unreclaimed mine hazards with a vast majority of these being non-coal. I also understand that all fatalities there in the last few decades have been at non-coal mine sites. Will you work with us to ensure that AML funds can continue to be used for non-coal reclamation in western states such as New Mexico?

Answer. Yes, we look forward to working with the Committee to ensure that AML funds may continue to be used to address serious health and safety problems at non-coal mine sites. The 2006 Amendments did not change how money from the AML Fund can be used relative to non-coal AML problems. Uncertified states and tribes, such as New Mexico, may continue to spend money from the AML Fund as they have in the past on non-coal reclamation. In addition, due to the mandatory nature of the distribution of money from the AML Fund, these states and tribes will receive an increase in funds that can be used on non-coal reclamation.

Recently, we completed our consultation with the Solicitor's Office on whether Treasury funds received by uncertified states and tribes over the next seven years as prior state share balance replacement funds may be used for non-coal work. We have been advised that, under the 2006 Amendments to SMCRA, these funds cannot be used to address non-coal problems.

I am attaching a copy of a December 5, 2007, memorandum* from the Solicitor responding to my request for an opinion on three specific issues under the 2006 Amendments, including the issue you raised (see Issue 2, page 7). I am also attaching a Decision Memorandum* of the same date containing decisions needed for proper distribution and use of funds for Fiscal Year 2008. Issue No. 3 on Page 6 addresses the non-coal issue.

Question 14b. What is the status of OSM's current rulemaking on implementation of the 2006 Amendments?

Answer. We recognize that the 2006 Amendments became effective when enacted on December 20, 2006, and we are taking steps to ensure that they are implemented for the FY 2008 distributions. In addition to issuing the December Decision Memorandum to guide the distribution and use of funds in FY 2008, we have provided notice to coal operators of the reduced rates set forth in the 2006 Amendments. Our Decision Memorandum also will be the basis for the rule we plan to propose in early 2008 to align our existing rules with the 2006 Amendments. Following our review of public comments received on the proposed rule, we expect to issue a final rule prior to the FY 2009 distribution.

---

* Documents have been retained in committee files.

Question 15a. Tribal Primacy—The AML amendments passed last year include a provision that allows Indian tribes to apply for and receive primacy to conduct the Title V regulatory program on lands within their reservations. What is the status of your work in implementing this provision?

Answer. In accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, we are consulting with the Tribes on how best to implement the new tribal primacy provisions and, in particular, whether rulemaking is warranted. We initially met with the tribes that have active coal mining operations on tribal lands—the Crow, Hopi, and Navajo—to discuss their plans for pursuing primacy. OSM also conducted a regulatory analysis of the tribal primacy provisions in the amendments as part of determining whether rulemaking was necessary to implement the new requirement.

Before making a decision on whether to initiate rulemaking, OSM intends to complete consultations with all potentially affected tribes . During this consultation, OSM will identify those aspects of implementing tribal primacy that would benefit from rulemaking, and will solicit specific tribal comments and suggestions on implementing the new provisions.

OSM recognizes that the 2006 Amendments already authorize tribal primacy, and that tribes may now apply for primacy, regardless of whether we propose a rulemaking. We are prepared to review and make timely decisions on tribal program submissions and have informed the tribes that we will not delay any processing of tribal applications pending the development of rules. If we receive an application for primacy, we will establish a schedule for expeditious processing of the application, provide the schedule to the Tribe, and then keep the Tribe informed of our progress during the application review process.

Question 15b. What is the time line for granting primacy to tribes such as the Navajo Nation?

Answer. We expect that the schedule and requirements for processing tribal primacy applications would be similar to those already in place for State programs. The time line for approving a tribal program is, in large part, dependent upon the Tribe's schedule for preparing and submitting a program. Although we have not yet received a formal primacy application from the Navajo Nation, we are reviewing, at the Tribe's request, an informal draft tribal law for implementing primacy. In conducting this informal review, we hope to identify any issues that may need to be addressed as early as possible in the process to avoid delays later on when the Tribe prepares to submit a formal application.

Question 16. Tribal Primacy—I understand that OSM is in the process of a rulemaking to implement the provisions of the 2006 Amendments that provide the ability of tribes to apply for and receive primacy for purposes of their Title V regulatory program on reservation lands. Why is a rulemaking necessary when the process already exists for states to apply for and receive primacy?

Answer. Although we expect our process for reviewing tribal primacy applications to be similar to the existing process for reviewing State programs, there are areas that may require rulemaking. The most significant of these areas include—

- Revising OSM's existing rules to comport with the tribal primacy amendment (e.g., modifying rules regarding OSM as being the sole regulatory authority on Indian lands);
- Clearly stating which lands would be subject to regulation under a tribal program;
- Defining the content of a tribal program submission when a tribe only desires to regulate in part (States could only submit programs to regulate "in whole," and OSM's regulations contain no provision for regulatory programs that regulate in part); and
- Identifying those requirements of a tribal program approval and administration process that would be different from State programs.

We are reviewing the 2006 Amendments and our existing regulations to determine if rulemaking may be beneficial in addressing any of the differences between State and Tribal primacy. This is also one of the issues we are discussing as part of our consultations with Tribes.

Question 17. Tribal Primacy—I understand that the Navajo Nation has requested assistance from OSM in developing a complete application and defraying application costs. The Navajo Nation would also like a timeline for OSM review of the application. Could you please provide me with specific information regarding the assistance that OSM will provide to the Navajo Nation and a specific timeline for the application review?

Answer. OSM is currently providing assistance to the Navajo Nation in developing its tribal regulatory program. We have provided a listing of policies, procedures, and

processes for our regulatory activities on Indian lands; information on State regulatory programs that have incorporated our regulations by reference; and information on litigation resulting from citizen suits.

On October 4, 2007, the Navajo Nation submitted draft Navajo code provisions to OSM for informal review. On November 6, 2007, OSM stated its intention to complete the review and transmit the results to the Navajo Nation by the end of December 2007.

Question 18a. Reclamation and Reforestation—I am interested in your comments about the promotion of reforestation as a post-mining land use and the role that such reforestation could have in sequestering carbon. What is the status of OSM's efforts in this area?

Answer. OSM and the seven Appalachian coalfield states are actively promoting reforestation at proposed and active mines, previously-reclaimed post-law sites, and abandoned mines through the Appalachian Regional Reforestation Initiative (ARRI). The potential sequestration rates withμa reforestation approach are much higher than reclamation using a grassland approach (see graph below).*

Historically, there has been a strong bias against proper forest reclamation techniques among regulators, operators, landowners, and even environmental groups.μ ARRI is working to eliminate these biases and to promote forestry as the postmining land use of choice in Appalachia. Researchers at the University of Kentucky estimate that restoring forest cover to the approximately 1.5 million acres of post-SMCRA mine sites could sequester 33 million metric tons of carbon. If the trees are later harvested for wood products, such as furniture or building materials, the sequestration rate theoretically would be higher because the carbon is tied up as long as the products are being used, and new trees can take the place of the harvested trees in the field, increasing sequestration cumulatively.

Under SMCRA, for sites being restored to AOC, an operator must return mined land to the use it was capable of supporting before mining, or to a higher or better use. Almost all of the land mined in Appalachia, and much of the land mined in other naturally-forested areas of the country, was forested before mining. Coal operators have generally preferred reclaiming land to hayland or pasture rather than forestland because revegetation success can be achieved more quickly, which may translate to more rapid bond release.

However, grass-oriented land uses and reclamation techniques are not conducive to restoring forests. In fact, trees planted in pastures established on reclaimed areas have very low survival and growth rates. Grasslands also sequester far less carbon, and the carbon that is sequestered is much more likely to be returned to the atmosphere as carbon dioxide than carbon sequestered in trees. Reclamation to a pasture or hayland postmining land use also leads to forest fragmentation, increases peak flows that contribute to flooding, adversely impacts threatened and endangered species, and lacks the temperature-moderating influence of forests.

Tree survival and growth rates on mined land can far exceed those on unmined land if reclamation is done properly. However, proper forest reclamation looks rough, rocky, and has far less ground cover than areas reclaimed for grazing or hay production. For the first four years, it just looks "unfinished".

Since SMCRA does not dictate the post-mining land use, it is rightfully a decision made by the land owner and the permittee. Because the SMCRA regulatory authorities cannot compel reforestation, we are seeking to promote reclamation with trees by emphasizing the obvious economic and ecological benefits to landowners, operators, and regulators.

The ARRI endeavors to change the perception of what high quality forest reclamation looks like. It also encourages landowners and operators to reclaim mined lands to forestry-oriented postmining land uses. More than 300 ARRI partners have signed a "statement of mutual intent" to support adopting reforestation techniques for reclamation. These partners are working through government, industry and the public; studying issues related to reforestation; transferring technology through forums and training; and evaluating the results of the initiative to further advance ARRI goals.

Question 18b. I see the pictures attached to Mr. Quinn's statement show areas that have been reclaimed for golf courses, airports, and housing. How receptive is the industry to reforestation? What about the states and landowners?

Answer. There are indeed several golf courses, airports, residential, industrial, and other specific kinds of commercial and public uses (e.g., shopping plazas, factories, aquaculture operations, schools, prisons, and recreational facilities) on former MTR sites. That is in accordance with Congressional intent in authorizing MTR. However, most MTR sites were reclaimed to agricultural use, as also authorized by

* Graph has been retained in committee files.

SMCRA [section 515(c)(3)]. West Virginia includes commercial forestry as an acceptable agricultural post-mining land use.

Question 19. State Regulatory Programs—One of the issues highlighted by the States is concern about funding for state regulatory programs. Please provide data that depicts funding for State regulatory programs for each of the past 15 years.

Answer.

HISTORICAL REGULATORY FUNDING

Fiscal Years 1992–2007

Fiscal Year	Funding
1992	50,221,144
1993	51,583,011
1994	51,348,988
1995	51,531,766
1996	50,761,852
1997	50,676,000
1998	50,176,000
1999	51,156,000
2000	52,156,000
2001	55,574,465
2002	56,575,000
2003	57,200,762
2004	56,863,373
2005	56,837,056
2006	56,365,347
2007	56,365,348

Question 19b. I assume that this funding includes monies for inspection and enforcement. How effective are the state programs in the area of inspection and enforcement? Does OSM evaluate the effectiveness of the state programs in this area? Please describe.

Answer. Section 517(f) of SMCRA requires that OSM make such inspections as are necessary to evaluate the administration of approved state programs. In 2006, OSM conducted 1,458 oversight inspections of mine sites in primacy states (states with approved regulatory programs). As a result of those inspections, OSM issued only 9 enforcement actions, all of which pertained to nonpayment of federal reclamation fees. OSM did not have to take any enforcement actions related to on-the-ground violations at mine sites in primacy states. These statistics demonstrate that the states are effectively administering the inspection and enforcement aspects of their approved programs.

Question 19c. What steps does OSM take to ensure that state regulatory programs are being carried out effectively and consistent with the standards set forth in SMCRA?

Answer. OSM Directive REG-8 establishes detailed substantive and procedural requirements for the oversight of approved state regulatory programs. OSM employs a results-oriented oversight strategy that emphasizes cooperative problem-solving with the primacy states. Among other things, the oversight strategy involves the identification, evaluation, and reporting of the offsite impacts of mining operations.

The purpose of identifying off-site impacts is to gauge how effectively the state is implementing its approved program to protect citizens, public and private property, and the environment outside the areas authorized for mining and reclamation activities. The states and OSM evaluate the severity of offsite impacts, determine the causes of those impacts, and identify measures intended to reduce the frequency and severity of offsite impacts from mining operations. During FY 2006, 91.5 percent of all mines inspected by the states were free of offsite impacts.

With states regulating 97 percent of the Nation's coal production, and with states and tribes administering 90 percent of AML project funds, the major task for OSM is to help them succeed by providing the funding, regulatory and policy framework, oversight, assistance, training, and technical tools necessary to have stable and high quality regulatory and AML programs.

Over the past few years, OSM has made substantial progress in achieving regulatory stability and increasing cooperation with States and Tribes. We have worked closely with our State and Tribal partners to identify best practices, promote technology transfer, provide technical training, encourage the use of sound science, take advantage of emerging technologies, and provide access to the latest computer soft-

ware and hardware technology to help them do their jobs. This focus on improving state and tribal program capabilities has been highly cost-effective in lifting the quality of State programs and promoting stability.

RESPONSES OF BRENT WAHLQUIST TO QUESTIONS FROM SENATOR DOMENICI

Question 1. At your confirmation hearing 4 months ago, you agreed to work with the Solicitor's on an interpretation of the impact, if any, that amendments passed last year would have on Section 409 authority to use AML funds for non-coal reclamation. I do not believe that the authority has changed one bit. In fact, during consideration of the amendments, OSM repeatedly assured us that New Mexico's use of these funds would not be affected. SMCRA anticipates, and I support, the states' ability to prioritize AML funding for sites that pose the most immediate risk to health and safety. To do otherwise would require the use of these funds for low priority coal sites while leaving dangerous non-coal sites unaddressed. This result would be unacceptable. What is the status of your efforts to finalize an interpretation of this authority?

Answer. The 2006 Amendments did not change how money from the AML Fund can be used relative to non-coal AML problems. Uncertified states and tribes, such as New Mexico, may continue to spend money from the AML Fund as they have in the past on non-coal reclamation. In addition, due to the mandatory nature of the distribution of money from the AML Fund, these states and tribes will receive an increase in funds that can be used on non-coal reclamation.

Recently, we completed our consultation with the Solicitor's Office on whether Treasury funds received by uncertified states and tribes over the next seven years as prior state share balance replacement funds may be used for non-coal work. We have been advised that, under the 2006 Amendments to SMCRA, these funds cannot be used to address non-coal problems.

I am attaching a copy of a December 5, 2007, memorandum from the Solicitor responding to my request for an opinion on three specific issues under the 2006 Amendments, including the issue you raised (see Issue 2, page 7). I am also attaching a Decision Memorandum of the same date containing decisions needed for proper distribution and use of funds for Fiscal Year 2008. Issue No. 3 on Page 6 addresses the non-coal issue.

Our Decision Memorandum also will be the basis for the rule we plan to propose in early 2008 to align our existing rules with the 2006 Amendments. Following our review of public comments received on the proposed rule, we expect to issue a final rule prior to the FY 2009 distribution.

Question 2. Also at your confirmation hearing, you shared that OSM intended an interim final rule by September 30th of this year—it's now October 13th. What happened?

Answer. We had considered publishing an interim final rule to take effect in time for the FY 2008 distribution of funds to states and tribes. However, we later determined that the best course of action for a timely implementation of the 2006 amendments in FY 2008 was to prepare the attached Decision Memorandum and, concurrently, develop a proposed rule, provide the opportunity for public notice and comment, and then issue a final rule prior to the FY 2009 distribution.

Question 3. Will OSM adhere to the timeline for promulgation of a final rule by the beginning of fiscal year 2009?

Answer. Yes. We anticipate issuing a final rule by the end of September 2008.

Question 4. New Mexico's Coal Surface Mining Commission has taken a more active approach to public notification of proposed mines. What is the position of OSM on this approach?

Answer. On August 3, 2007, New Mexico's Coal Surface Mining Commission asked OSM to informally review draft rules to expand its requirements for public notice of mining permit applications and revisions beyond those required by the Federal rules. OSM responded on September 27, 2007, and found that all changes proposed in the draft rule would be no less effective than the Federal regulations. OSM supports the New Mexico Coal Surface Mining Commission's efforts toward expanded public notice and public involvement.

RESPONSES OF BRENT WAHLQUIST TO QUESTIONS FROM SENATOR SALAZAR

Question 1. In Colorado, it is often the non-coal sites rather than coal sites that pose a greater hazard to public health and safety. Given that the Tax Relief and Health Care Act of 2006 did not make changes to Section 4 [Title IV] of SMCRA, why has the Office of Surface Mining suggested that it would not allow the use of a state's share and unappropriated funds for non-coal abandoned mine work?

Answer. The 2006 Amendments did not change how money from the AML Fund can be used relative to non-coal AML problems. Uncertified states and tribes, such as Colorado, may continue to spend money from the AML Fund, including funds based on their state share and their historic coal production, as they have in the past on non-coal. In addition, due to the mandatory nature of the distribution of money from the AML Fund, these states and tribes will receive an increase in funds that can be used on non-coal reclamation.

Recently, we completed our consultation with the Solicitor's Office on whether Treasury funds received by uncertified states and tribes over the next seven years as prior state share balance replacement funds may be used for non-coal work. We have been advised that, under the 2006 Amendments to SMCRA, these funds cannot be used to address non-coal problems.

I am attaching a copy of a December 5, 2007, memorandum from the Solicitor responding to my request for an opinion on three specific issues under the 2006 Amendments, including the issue you raised (see Issue 2, page 7). I am also attaching a Decision Memorandum of the same date containing decisions needed for proper distribution and use of funds for Fiscal Year 2008. Issue No. 3 on Page 6 addresses the non-coal issue.

Our Decision Memorandum also will be the basis for the rule we plan to propose in early 2008 to align our existing rules with the 2006 Amendments. Following our review of public comments received on the proposed rule, we expect to issue a final rule prior to the FY 2009 distribution.

Question 2. Can you describe the incentives that are available to promote re-mining of eligible lands in ways that will allow more reclamation than would otherwise be achieved?

Answer. The coal industry historically avoided remining previously mined areas due to the potential for increased liability for non-compliant discharges as well as the potentially higher costs associated with meeting SMCRA performance standards for backfilling, grading, revegetation, etc. These difficulties occur because of past mining exposing acid and toxic-forming minerals; insufficient availability of soil materials to attain productive revegetation; and insufficient spoil to cover old highwalls or achieve approximate original contour.

To encourage the industry to remine, Congress previously adopted two major incentives for remining operations that recognize the practical limitations of reclaiming previously-disturbed areas. The 1987 Rahall Amendment to the Clean Water Act established more lenient effluent limitations for remining operations that encounter acid mine drainage [33 U.S.C. § 1311(p)].

The Energy Policy Act of 1992 amended SMCRA to (1) provide reduced revegetation responsibility periods for remining operations and (2) exempt those operations from the permit block sanction of section 510(c) of SMCRA if the violation that would have otherwise required imposition of that sanction resulted from an unanticipated event or condition on land eligible for remining. [42 U.S.C. § 2503].

The Tax Relief and Health Care Act of 2006 added new section 415 to SMCRA, authorizing us to adopt regulations providing additional incentives, involving the use of amounts in the AML Fund to promote remining of abandoned mine lands in a manner that leverages AML Fund money to achieve more reclamation than would otherwise be possible. Those incentives may include a rebate or waiver of the reclamation fee and the use of Title IV monies to guarantee performance bonds for the remining operation. We are in the process of proposing rules to implement this provision.

RESPONSES OF BRENT WAHLQUIST TO QUESTIONS FROM SENATOR WYDEN

Question 1. In March 2007, the Office of Surface Mining published an Advance Notice of Proposed Rulemaking concerning the disposal of coal combustion waste in mines. In June 2007, OSM received almost 2000 comments voicing concern that the proposed rule completely failed to protect health and the environment. First, please explain how the Office of Surface Mining has the requisite expertise to permit the disposal of toxic waste in mines. This expertise lies uniquely with the Environmental Protection Agency.

Answer. The U.S. Environmental Protection Agency (EPA) has twice determined that coal combustion wastes do not warrant regulation as hazardous wastes under Subtitle C of the Resource Conservation and Recovery Act (RCRA). See 58 FR 42466, August 9, 1993, and 65 FR 32214, May 22, 2000. The 2000 determination further found that placement of these materials in coal mines for beneficial uses other than minefilling did not warrant regulation under either Subtitle C or D of RCRA. With respect to minefilling, the EPA determined that placement of these materials should be regulated by one of the following methods:

- Subtitle D of RCRA, which governs the disposal of non-hazardous solid wastes in landfills;
- SMCRA; or
- A combination of SMCRA and Subtitle D of RCRA.

The 2006 report from the National Research Council contains the same recommendation.

OSM and the states administering SMCRA regulatory and abandoned mine land reclamation programs have the necessary expertise on the geology, hydrology and other environmental conditions at active and abandoned coal mining sites to ensure that placement occurs in a manner that is protective of the environment and the public. OSM and the primacy states have been regulating placement of these materials in mines for many years with no known significant adverse impacts to date.

Question 2. Second, the March 2007 Proposed Rulemaking fails to address the concerns and recommendations of the National Academies of Science in their 2006 Report, "Managing Coal Combustion Residues in Mines." Can you please explain why you failed to address those recommendations and how you intend to correct this failure?

Answer. The notice we published on March 14, 2007 (72 FR 12706) was the first step in addressing the concerns and recommendations in the 2006 National Research Council (NRC) report. In the NRC report, agencies were encouraged to actively seek public participation in decisions involving the disposal of coal combustion wastes in coal mines. In the March 2007 notice, we sought input from the public concerning how we should implement the recommendations contained in the NRC report. We are considering the comments that we received on this notice as we decide how to draft proposed regulations that will address the NRC recommendations. In the preamble to the proposed regulations, we will discuss how the proposed regulations relate to the recommendations. The public will have the opportunity to comment on the proposed regulations before we issue a final rule.

Question 3. Lastly, EPA's recent publication of a risk assessment on the disposal of coal ash has great bearing on the threat to human health and the environment from the disposal of ash in mines. (Notice of Data Availability, August 29, 2007, 72 Fed. Reg. 57572) How will OSM take this critical information into account in its subsequent actions on this issue?

Answer. The EPA notice of data availability published on August 29, 2007, pertained only to the disposal of coal combustion wastes in landfills, surface impoundments, and sand and gravel pits. It did not address the placement of coal combustion byproducts in coal mines.

Since 1999, OSM has been working closely with EPA on all aspects of placement of these materials in coal mines. We have been meeting regularly with EPA staff and are continuing to work with EPA in developing our proposed rules. In fact, EPA's publication of the notice of data availability was part of the joint, coordinated effort between EPA and OSM that included our March 2007 notice and that will include the proposed rule we are currently preparing.

RESPONSES OF GREGORY E. CONRAD TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. State Regulatory Programs—one of the issues you highlight in your testimony is concern about funding for state regulatory programs. I assume that this funding includes monies for inspection and enforcement? How effective are the state programs in the area of inspection and enforcement?

Answer. The grants that the states receive from the Office of Surface Mining (OSM) pursuant to Title V of SMCRA are used to fund the operation of state regulatory programs, including our inspection and enforcement responsibilities. Perhaps the most reliable indicator of how effectively the states are implementing this critical program area is federal oversight by OSM. In its annual oversight reports for each state, OSM includes information on state inspection activity, state enforcement activity and the performance of the states in two critical areas related to inspection and enforcement: off-site impacts and reclamation results (bond release). An analysis of the most recent oversight reports published by OSM (and available on their website) indicates that no significant problems have arisen with regard to inspection frequency or enforcement actions, and that states are meeting performance measures established for minimizing off-site impacts associated with surface coal mining operations and ensuring successful reclamation on lands affected by surface coal mining operations. The biggest challenge for state inspection and enforcement efforts is lack of funding to support this critical program element as laid out in our testimony.

Question 2. Can you please describe for us the work of the states under Title V and the issues associated with this shortfall in funding?

Answer. Pursuant to the provisions of Title V, particularly section 503, in order for a state to receive approval of its regulatory program by OSM, it must demonstrate that it has in place state laws and regulations (no less stringent than OSM's national standards) that provide for inspection and enforcement authority, implementation of a permitting system, authority to issue and hold reclamation bonds and a process to designate areas as unsuitable for mining. As the exclusive and primary regulatory authorities under SMCRA, states are responsible for permitting and bonding all surface coal mining and reclamation operations within their borders, ensuring that these operations are inspected frequently, issuing appropriate enforcement actions when applicable regulations or permit conditions are violated, ruling on petitions to declare lands unsuitable for mining, and coordinating with a variety of federal agencies whose jurisdictional authorities intersect with SMCRA. As noted in our testimony, when states do not receive sufficient funding from OSM to support their programs, many of these program elements are strained to the breaking point. State programs must be adequately funded and staffed to insure that permitting and inspection duties are both thorough and timely, especially as states experience the reality of accelerating coal mine production and expansion activities. When funding falls below program needs, states may struggle to keep active sites free of offsite impacts, reclaim mined areas and prevent injuries. In the end, the increasing gap between the states' anticipated expenditures and actual federal funding is compounding the problem caused by inflation and uncontrollable costs, undermines our efforts to realize needed program improvements and enhancements, and jeopardizes our efforts to minimize the impact of coal extraction operations on people and the environment.

Question 3. Buffer Zone Rulemaking—Does your organization support the proposed changes to the Office of Surface Mining Reclamation and Enforcement's buffer zone rule? Would you prefer to keep the current rule in place?

Answer. A copy of our comments on OSM's stream buffer zone proposed rules is attached.

Question 4. OSM Oversight—What role does OSM play in overseeing the state programs to ensure that the minimum standards of SMCRA are being implemented? Is this working?

Answer. Pursuant to OSM' policy directive on oversight of state regulatory programs (REG-8), OSM annually reviews state programs in a number of different areas including inspection activity, enforcement actions, permitting activity, number off-site impacts, reclamation success (bond release), lands unsuitable activity, bond forfeiture activity, staffing, and use of grant funds. Over the years, this oversight function has moved from a bean-counting approach to a more substantive review of key program elements in an effort to demonstrate whether the purposes and objective of SMCRA are being accomplished. OSM also conducts joint inspections with the states. The overall result is an oversight program that makes sense and provides an accurate and reliable picture of state program implementation.

Question 5. AML Amendments Implementation—From a state perspective, what do you see as the key issues in implementing the Abandoned Mine Land amendments passed by Congress last year?

Answer. A detailed delineation of our concerns with OSM's rules for implementing the AML amendments is attached.

Question 6. Mountaintop Mining—Do you think that mountaintop mining and related use of valley fills are consistent with the requirements of SMCRA relating to water, hydrologic balance, and approximate original contour?

Answer. As required by section 503 of SMCRA, we believe that state regulatory programs are consistent with those provisions of SMCRA concerning mountaintop mining and related use of valley fills. The states do their best to insure that the mining practices authorized by SMCRA comply with state regulatory requirements for the protection of water resources, hydrologic balance and approximate original contour. In this regard, the states most impacted by these types of mining operations (West Virginia, Kentucky and Virginia) have been in the forefront of developing enhanced guidance for coal operators with regard to material balance determinations, spoil management, and approximate original contour determinations so as to lessen the impacts of these operations on the environment.

ATTACHMENT.—AML COMMENTS

May 21, 2007.

Brent Wahlquist,
Acting Director, Office of Surface Mining, 1951 Constitution Avenue, N.W., Washington, DC.

DEAR DIRECTOR WAHLQUIST: This letter represents the comments of the National Association of Abandoned Mine Land Programs (NAAMLP) and the Interstate Mining Compact Commission (IMCC) regarding draft rules (proposed and interim final) developed by the Office of Surface Mining (OSM) to implement the provisions of the Surface Mining Control and Reclamation Act (SMCRA) Amendments of 2006 (P.L. 109-432). OSM provided both the NAAMLP and IMCC with copies of the draft rules in April and also attended a meeting of both organizations on May 2 and 3 in Indianapolis to discuss the rules. We appreciate the opportunity to submit comments on the draft rules as OSM prepares to move forward with their promulgation later this year.

There are several key sections of the draft rules that we will address in these comments, as noted below. However there are a few over-arching issues related to the interpretation of the new law that we will discuss first, as they set the stage for some of our recommended changes to the rules. All of these issues grow out of OSM's "Major Policy Issues" paper that was also shared with the states in April.

I. GENERAL OVERVIEW COMMENTS

Use of Grant Mechanism to Distribute Payments from the U.S. Treasury

Pursuant to the 2006 Amendments to SMCRA, two new types of payments from the U.S. Treasury are established: 1) distribution of the prior unappropriated state/tribal share balances over a seven year period (Section 411(h)(1)) and 2) payments in lieu of future state/tribal shares formerly paid out of the AML Trust Fund pursuant to section 401(g)(1) (Section 411(h)(2)). Section 402(i)(2) requires the Secretary of the Treasury to transfer to the Secretary of the Interior "such sums as are necessary to pay the amount" described above, but no specific payment mechanism is prescribed. OSM prefers to distribute these payments via grants to states and tribes, based on its reading of the law and on past practice, rather than via direct distribution of cash from the Treasury. The states and tribes posit that the new law does not directly address this matter and therefore the Secretary has the discretion to design a payment mechanism that meets the needs of the states and tribes. In line with this discretionary authority, the states and tribes prefer an approach that will provide them with immediate access to those moneys that are due and owing from the Treasury. This can be accomplished through a traditional grant process for those who desire the "protection" and guidance that such a process affords these monetary distributions. However, there is also flexibility to design either a grant or a direct payment mechanism that provides more unrestricted and immediate access to these moneys for states who desire maximum discretion with regard to the use of these moneys in line with the language in Section 411(h)(1)(D)(i) and (ii). In the latter circumstance, the state legislatures will exercise their fiduciary responsibility to insure that the funds are spent legally and appropriately in accordance with the dictates of the 2006 Amendments and state contracting law. Federal audits will also provide a measure of scrutiny and review of project selection and expenditures. There are also other mechanisms available for tracking and facilitating these payments, one example being the management of mineral royalties paid to states under the Mineral Leasing Act and another being a general statement of work detailing how the money will be spent. The states and tribes therefore urge OSM to incorporate significant flexibility and discretion with regard to the types of mechanisms that are available for distributing and expending Treasury payments for both the prior unappropriated state/tribal balances and payments in lieu of future state/tribal share to certified states and tribes.

Funding for Minimum Program States

The 2006 Amendments include several provisions that govern the award of grant funds by OSM to states. Section 402(g) has three paragraphs that bear on that topic. Section 402(g)(1) directs that "50 percent of the reclamation fees collected annually in any State" be distributed to that state. Under section 402(g)(5)(A), "[t]he Secretary shall allocate 60 percent of the amount in the fund after making the allocation referred to in paragraph (1)" for additional grants to states. And section 402(g)(8) states that "In making funds available under this title, the Secretary shall ensure that the grant awards total not less than $3,000,000 annually to each State and each Indian tribe. . ." (emphasis added). This latter provision provides OSM the

justification for insuring annual minimum program grant funding in excess of the base $3 million level as long as OSM does not contribute more than $3 million from its own discretionary funds.

Section 401 of the bill also has relevant provisions. Sections 401(f)(1) and (2) direct OSM to distribute grant funds to states annually, including the amount needed for the adjustment under section 402(g)(8) (i.e., the "minimum program" adjustment up to $3.0 million). Section 401(f)(3) has a similar provision:

> IN GENERAL.— . . . for each fiscal year, of the amount to be distributed to States and Indian tribes pursuant to paragraph (2), the Secretary shall distribute—
>
> (i) the amounts allocated under paragraph (1) of section 402(g), the amounts allocated under paragraph (5) of section 402(g), and any amount reallocated under section 411(h)(3) in accordance with section 411(h)(2), for grants to States and Indian tribes under section 402(g)(5); and
>
> (ii) the amounts allocated under section 402(g) (8).

This again makes it clear that the legislation requires OSM to provide minimum program states at least $3.0 million annually, under section 402(g)(8), commencing October 1, 2007.

In its restrictive reading of the bill, OSM depends upon a single provision in section 401(f)(5)(B) to reduce the amounts of annual grants to minimum program states from the minimum $3.0 million annual required grant amount. That provision reads (with emphasis added):

> (B) EXCEPTIONS.—Notwithstanding paragraph (3), the amount distributed under this subsection for the first 4 fiscal years beginning on and after October 1, 2007, shall be equal to the following percentage of the amount otherwise required to be distributed:
>
> (i) 50 percent in fiscal year 2008; (ii) 50 percent in fiscal year 2009; (iii) 75 percent in fiscal year 2010; (iv) 75 percent in fiscal year 2011.

OSM's reliance on this provision ignores the fact that by its own terms (i.e. the "notwithstanding" phrase), it only overrides the requirements of section 401(f)(3). Yet other provisions of the bill independently require the distribution of the minimum amount of $3.0 million. See sections 401(f)(1) and (2) and section 402(g)(8). The provision cited by OSM does not override the clear requirements of those other parts of the bill.

The phase-in schedule of section 401(f)(5) only applies to such additional funds as might otherwise be provided by OSM to the minimum program states above the guaranteed distributions required elsewhere in the statute. This means that OSM cannot contribute more than $1.5 million in additional funding to each minimum program state in fiscal years 2008 and 2009, and not over $2.3 million in additional funding in each of fiscal years 2010 and 2011, and not over $3.0 million in additional funding in each subsequent year through fiscal year 2024.

This debate goes much deeper than the interpretations of the two sections mentioned above. Congressional intent and history in the passage of P.L. 95-87, the original "Surface Mining Control and Reclamation Act of 1977," deserves merit in the interpretation debate. In the 95th Congress, the late Morris K. Udall (considered by many as the "father" of P.L. 95-87) worked tirelessly with government agencies, industry, and other organizations to make sure this law became a reality. With regard to the reclamation of abandoned mine lands, Title IV of P.L. 95-87 has been the guiding light for both OSMRE and the States/Tribes for almost 30 years. During this time, AML funding issues have overshadowed Congressman Udall's intent as outlined in Section 403 of P.L. 95-87 "Objectives of the Fund." Section 403 set specific priorities as to the expenditure of moneys from the AML fund. The number one priority is "the protection of public health, safety, and property from extreme danger of adverse effects of coal mining practices." It is significant that the Surface Mining Control and Reclamation Act Amendments of 2006 removed the words "general welfare" from the original wording of Section 403(1). In their infinite wisdom, the 109th Congress wanted to further strengthen Section 403(1) by placing a special emphasis on public health, safety, and property.

There are no specific provisions in P.L. 95-87 or the 2006 Amendments that discuss in detail the specific State/Tribe AML funding formulas that embrace historic coal production, state share (present coal production), and federal discretionary expenses. However, in the 2006 Amendments Congress did single out states and tribes specifically in Section 402(g)(8)(A) stating, "In making funds available under this title, the Secretary shall ensure that the grant awards total not less than $3,000,000 annually to each State and each Indian Tribe having an approved abandoned mine

reclamation program pursuant to section 405 and eligible land and water pursuant to Section 404, so long as an allocation of funds to the State or tribe is necessary to achieve the priorities stated in paragraphs (1) and (2) of section 403(a)." The fact that Congress has always (and in the 2006 Amendments continues to) dedicate a section of the law to states and tribes traditionally known as those with "Minimum Programs" solidifies the Congressional intent that these states and tribes annually receive not less than $3,000,000.

In the late 1980s the Mid-Continent Coal Coalition was formed because the Minimum Program States and Tribes had several hundreds of millions of dollars worth of Priority 1 and Priority 2 AML hazards that posed, and continue to pose, a very high public health and safety risk. AML funding had fallen to an annual $1 million level that would not allow the efficient operation of a State/Tribal AML Program. This Coalition gathered Congressional support through letters, resolutions, testimony at Congressional committee hearings, etc. As a result, the budget reconciliation bill passed by the 101st Congress in the fall of 1990 required that the Secretary allocate annually not less than $2,000,000 to Minimum Program States and Tribes. The passage of this bill in1990 was definitive proof that Congress supported an increase in funding for the Minimum Program States and Tribes.

For three years (FY1992, FY 1993, and FY 1994) the Minimum Program States received $2 million annually. Since that time the Minimum Program States have been limited to an annual allocation of only $1.5 million. The primary reason given for not allocating the statutorily mandated annual $2 million was "budget deficits." Then under the Clinton administration, there was a "budget surplus," but the annual allocation remained at $1.5 million. For the last 13 years, Minimum Program States have been critically underfunded in respect to the number of Priority 1 and Priority 2 AML hazards that need to be reclaimed. Respective Administration budgets and Congressional budgets continued to hold the AML Fund "hostage," while unappropriated balances continued to rise.

In early December 2006, much to the surprise of both OSMRE and States/Tribes, the 2006 Amendments took AML funding off budget. No longer would Congress appropriate AML funds on an annual basis. The pressure was now on OSMRE to develop a method(s) to distribute the AML funds to States and Tribes. OSMRE began to develop future funding projections under the new law. Since December 2006, OSMRE has distributed four different funding charts. With each successive chart, the funding numbers for the States and Tribes would change. But in all four of these OSMRE charts, there was one constant—the Minimum Program States (Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, and Oklahoma) would receive no funding increases for FY 2008 and FY 2009. Not until FY 2012 would Minimum Program States receive an annual $3 million.

In the last OSMRE Funding distribution chart (Chart 4), the following funding increases are reflected when comparing FY 2007 AML funding to FY 2008 AML funding, as well as the amount of Priority 1 and Priority 2 coal hazards in the AML Inventory for each state:

	Funding Increases	Amount of Hazards
Alabama	96 %	$49.1 million
Colorado	175 %	$24.9 million
Illinois	45 %	$55 million
Indiana	138 %	$12.3 million
Kentucky	124 %	$338.5 million
New Mexico	187 %	$3.2 million
North Dakota	93 %	$41.6 million
Ohio	65 %	$100 million
Pennsylvania	29 %	$1,016.9 billion
Utah	147 %	$4.9 million
Virginia	115 %	$104.1 million
West Virginia	103 %	$790.6 million
Louisiana	200 %	$0.00
Montana	229 %	$8.5 million
Texas	238 %	$800,000
Wyoming	269 %	$25.8 million
Crow Tribe	260 %	$500,000
Hopi Tribe	250 %	$0.00
Navajo Nation	215 %	$0.00

It should be noted that the term "minimum program" does not refer to lack of AML hazards that a state or tribe has to address, but rather with the lack of funding being generated by active coal mines within the state or tribe for purposes of remediating hazards associated with past coal mining. For example, Oklahoma has an AML inventory of priority 1 and 2 sites that will cost between $125 and 130 million to reclaim using today's cost figures. Kansas has an AML inventory of priority 1 and 2 sites that will cost over $200 million to remediate. However, funds generated by current coal mining activities in these two states generate around $25,000 annually for Kansas and around $100,000 annually for Oklahoma. For perspective, states like Kentucky and West Virginia receive between $6,800,000 and $8,300,000 annually to perform remediation of hazardous AML sites. Interestingly (and in some respects, unfortunately), Oklahoma has an AML inventory of priority 1 and 2 hazards that will cost more to remediate than 14 of the states and tribes listed above and Kansas has an AML inventory of priority 1 and 2 hazards that will cost more to remediate than 16 of the above-listed states and tribes. Therefore, even though the "minimum program" states may get minimum funding, they certainly have their fair share of AML priority 1 and 2 hazards.

From December 2006 through February 2007, OSMRE continued to change their funding distribution charts, using factors such as historic coal production, state share fund balances, and present coal production. During this three month process, each time a new chart was developed OSMRE failed to put emphasis on the real problem; How much is the public affected by Priority 1 and Priority 2 AML hazards? Ignoring AML project sites that are an eminent danger to the health and safety of the public is not what Congress intended.

OSMRE can find the funds in their FY 2008 budget to fund AML Minimum Programs. OSMRE is phasing out the Clean Streams Initiative Program and the Watershed Cooperative Agreements Program. This money could be used to help fund the Minimum Programs at the annual $3 million level. Furthermore, in its News Release of February 5, 2007, OSM noted that it has off-budget funds in its FY 2008 budget that could fully fund AML minimum programs at not less that the $3 million level. This money was provided to OSM for the purpose of, and should be used for, fully funding the minimum programs at the $3 million level. The bottom line is the Minimum Programs have been ignored for too many years. With the passage of P.L. 109-432, Congress has sent a message to OSMRE that Minimum Programs should be funded at an annual rate of $3 million, starting with the FY 2008 budget. The sad part of this impasse is the fact that those living near or visiting these Priority 1 and Priority 2 AML sites are exposed on a daily basis to the possibility of death and/or injury.

Congress gave OSMRE the authority to develop the AML funding distribution numbers for the states and tribes. The NAAMLP and IMCC urge that during the development of proposed rules and regulations for the 2006 Surface Mining Control and Reclamation Act Amendments, OSMRE "look outside the box" and consider the real reason that Title IV was enacted almost 30 years ago.

Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside

Since the inception of SMCRA in 1977 and the approval of state/tribal AML programs in the early 1980's, the states and tribes have been allowed to use their state share distributions under section 402(g)(1) of the AML Trust Fund for high priority noncoal reclamation projects pursuant to section 409 of SMCRA and to calculate the set-aside for acid mine drainage (AMD) projects. Under the new amendments, states and tribes will receive their unappropriated balances in seven equal payments beginning in FY 2008. In its most recent interpretation of the 2006 Amendments, OSM has stated that these moneys cannot be used for noncoal reclamation or for the 30% AMD set-aside. OSM also initially stated that the historic coal distribution to non-certified states and tribes would also not be available for noncoal reclamation, but the agency appears to have relented on this issue and will allow these moneys to be used for both noncoal reclamation and the 30% AMD set-aside. With regard to the unappropriated state and tribal share balances that will be distributed pursuant to Section 411(h)(1) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under section 409 and for the 30% AMD set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it. The unappropriated state and tribal share balances consist of past moneys collected from coal producers in these states and tribes that were never distributed due to restricted and under-funded appropriations. This money has always been "colored" as state/tribal share money, available for expenditure in accordance with the provisions of SMCRA and now 30 years of experience. The fact that the money is being

paid out of Treasury funds does not change the "color" or operation of that money—it has been and will always be state/tribal share money allocated pursuant to section 402(g)(1) of SMCRA.

OSM's new interpretation of SMCRA based on the 2006 Amendments is without support in the law when read as a whole. In interpreting the meaning of section 411, the entire statute must be read in context. Section 403 (which OSM points to) is modified by Section 409, which provides for the expenditure of AML funds at any priority 1 or 2 site, regardless of the commodity that was mined. Section 409(b) indicates that the 50% state share (from 402(g)(1)) and the historic production distribution (402(g)(5)) can be used for noncoal reclamation. If Congress had intended to limit the use of the unappropriated state/tribal share balances (or historic production distributions) that are now finally being returned pursuant to section 411(h)(1), it could have easily done so. However, no changes were made in section 411 to accomplish this. Nor was Section 409 amended in any way.

OSM's new interpretation is also a dangerous policy choice. OSM claims that once a state has completed all of its coal projects, it can then use all of its grant funds for noncoal projects. This will require that states spend years working on high-cost, low-priority coal projects that present little threat to public health and safety, while numerous highly hazardous abandoned noncoal mines remain unattended. In many western states, the AML programs have employed their AML grants to protect people and property threatened by noncoal abandoned mines. In New Mexico, for instance, the state estimates that over 10,000 mine openings remain. The overwhelming majority of these openings are at abandoned noncoal mines. All of the fatalities at abandoned mines in New Mexico over the past few decades have occurred at noncoal mines. With urban growth pushing into undeveloped areas and recreational uses increasing, the danger to public health and safety from abandoned noncoal mines throughout the country is increasing

Much of the above reasoning also holds true for the availability of the unappropriated balances for purposes of calculating the 30% set-aside for AMD abatement. Again, this work falls within the clear purposes of section 403 of SMCRA and thus any type of restriction on the use of these funds for AMD remediation is inappropriate. Section 403(g)(6)(B)(ii)(I) establishes and defines the use of AMD set-aside funds. That section states that a qualified hydrologic unit destined for AML abatement must have land and water that " . . . include any of the priorities described in Section 403." Obviously, this passage provides a clear nexus to section 403 of the Act. The 2006 Amendments at section 411(h)(1)(D)(ii) state that non-certified states must use amounts provided from Treasury funds in place of the unappropriated balances for " . . . purposes described in Section 403." Again, a clear nexus to section 403 is stated. Actually, the references in sections 402 and 411 to section 403 are identical. Therefore AMD abatement is a purpose under section 403 and Treasury funds should not be artificially excluded for use in the set-aside for AMD. Finally, we should note that each appropriation bill over the past several years has included language that supports the use of funds made available under Title IV of SMCRA for the purpose of environmental restoration related to treatment or abatement of AMD without restriction. Based on the above, the NAAMLP and IMCC request that OSM reconsider its interpretation on the use of unappropriated state and tribal share balances for noncoal reclamation and the AMD set-aside. Adjustments to the draft rules based on these arguments appear below.

Reduction of the Treasury 1/7th payments for the unappropriated balance by the amount of the export tax lawsuit loss

The relevant citations:

411(h)(1)(A)(i) of P.L. 109-432

In General—Notwithstanding section 401(f)(3)(B), from funds referred to in section 402(i)(2), the secretary shall make payments to States or Indian tribes for the amount due for the aggregate unappropriated amount to the State or Indian tribe under subparagraph (A) or (B) of section 402(g)(1).

411(h)(1)(B) of P.L. 109 432 (emphasis added)

Amount Due—In this paragraph, the term "amount due" means the unappropriated amount allocated to a State or Indian Tribe before October 1, 2007 under subparagraph (A) or (B) of section 402(g)(1).

As a part of our discussion on the unappropriated balance, OSM has stated that should the export tax lawsuit ultimately be lost on appeal, the loss shall be paid out of the trust fund and the 1/7th payments out of the Treasury to each State or Tribe shall be reduced by the like amounts each State or Tribe owed for the lawsuit.

Section 411(h)(1)(B) of P.L. 109-432 states that the amount due each State or Tribe is the amount allocated to each State or Tribe (State Share) before October 1, 2007. Unless the export tax lawsuit is resolved prior to October 1, 2007, then the amount paid out of the Treasury in 1/7th installments to each State or Tribe for the unappropriated balance should not be reduced due to the lawsuit. Although the trust fund would ultimately be reduced by the amount of the export tax lawsuit loss, the payments out of the Treasury should remain unchanged since the amount the payments will be based upon will be established as of October 1, 2007. Further, we do find any language in P.L. 109-432 that can be interpreted to give OSM the authority to reduce payments from the Treasury for the unappropriated balance.

Effective Date of In-lieu Payments

There has been some confusion about when in-lieu payments from the U.S. Treasury begin under the 2006 Amendments. OSM has stated that they begin in FY 2009, and that payments to certified states and tribes of their 50% share in FY 2008 are made from the AML Trust Fund. Our reading of the 2006 Amendments is that the in-lieu payments from the Treasury begin immediately in FY 2008. The relevant citations are:

Section 401 (f)(3)(B) of P.L. 109-432:

(B) EXCLUSION.—Beginning on October 1, 2007, certified States shall be ineligible to receive amounts under section 402(g)(1).

Section 411 (h)(1)(B & C) of P.L. 109-432:

(B) AMOUNT DUE.—In this paragraph, the term "amount due" means the unappropriated amount allocated to a State or Indian tribe before October 1, 2007 under subparagraph (A) or (B) of section 402(g)(1).

(C) SCHEDULE.—Payments under subparagraph (A) shall be made in 7 equal annual installments, beginning with fiscal year 2008.

Section 411 (h)(2)(A) of P.L. 109-432:

> (A) IN GENERAL.—Notwithstanding section 401(f)(3)(B), from funds referred to in section 402(i)(2), the Secretary shall pay to each certified state or Indian tribe an amount equal to the sum of the aggregate unappropriated amount allocated on or after October 12, 2007, to the certified State or Indian tribe under subparagraph (A) or (B) of section 402(g)(1).

OSM has advanced the following explanation to support its current declared intention to pay state share funds to the certified states under section 402 (g)(1) in FY 2008 (emphasis added):

> Certified states and tribes will receive distributions under section 401(f) only in FY 2008 because the bill adds a new section 401(f)(3)(B), which provides that certified states and tribes are ineligible to receive their state-share or tribal-share allocations with respect to fees collected after FY 2007. However, FY 2008 distributions consist of FY 2007 fee collections, so certified states and tribes are eligible to receive 50% of their state or tribal share allocation of fees collected for that year.

Beginning with FY 2009, certified states and tribes will receive annual payments from the Treasury in lieu of the amount of fee collections during the previous year that would otherwise have been allocated to their state or tribal share accounts in the AML fund in the absence of new section 401(f)(3)(B) of SMCRA. Section 411(h)(2) of SMCRA.[1]

Section 401(f)(3)(B) of P.L. 109-432 states that beginning October 1, 2007, certified states shall not be paid under 402(g)(1). This provision is a complete exclusion. It prohibits certified States or Indian tribes from receiving grants funded by the reclamation fee effective October 1, 2007. There is no language in this section to support an interpretation that a certified State or Indian Tribe can receive after October 1, 2007 grants funded by reclamation fees collected prior to October 1, 2007.

In order to support the position that the exclusion established by Section 401(f)(3)(B) does not apply to grants issued in fiscal year 2008 if funded by reclamation fees collected during fiscal year 2007, OSM staff have explained that the term "received" as used in Section 401(f)(3)(B) means "allocated". This interpretation is contrary to the normal and ordinary usage of the term "received" and is contrary to standard principles of statutory construction. Unless the context clearly indicates

[1] Major Provisions of P.L. 109-432: SMCRA Amendments Acot of 2006, page 3. Distributed to NAAMLP members at its business meeting February 28-March 1, 2007.

otherwise, or the word has been given a specific definition, words in a statute are to be given their normal meaning.

Relying on this interpretation, OSM has developed a distribution chart dated February 22, 2007, showing that $41.6 million will be paid to the certified States or Indian tribes under 402(g)(1) in FY 2008. This distribution represents FY 2007 fee collections. This approach is correct for distributions to non-certified states as required by 401(f)(2) and (3). However, Section 401(f)(3)(B) prohibits certified States or Indian tribes from receiving payments of funds under 401(f) beginning on October 1, 2007. The fees collected and allocated in FY 2007 are to be included in the amounts due to the states that are allocated but not appropriated under Section 411(h)(1)(B). These funds are then paid over seven years, beginning in FY 2008 under 411(h)(1)(C).

The effect of this misinterpretation of Section 401(f)(3)(B) and 411(h)(1)(B) is that $41.6 million would be paid to certified States or Indian tribes with fee collections instead of Treasury funds as required by Section 411(h)(1)(A)(i). The funds so paid will then not be available to be reallocated as historic share funds available for grants under Section 411(h)(4)(A). Furthermore, the interest that should be earned annually on this $41.6 million and paid to the Combined Benefit fund would not be earned and available to be paid.

The draft language in the Proposed and the Interim-final regulations on this subject is consistent with the statutory language in P.L. 109-432 and so does not need to be changed. However OSM's interpretation of P.L. 109-432 is flawed. Based on the above arguments, the NAAMLP and IMCC urge OSM to revise the proposed AML funding distribution chart to show that:

(a) no state share funds are distributed to the certified States or Indian tribes in FY 2008; but,

(b) The $41.6 million should then be included in the calculation of the amount due to certified States and Indian tribes under Section 411 (h)(1)(B).

Adjustments to the Grants Process

There is a fair amount of concern by the states and tribes about how the grants process will work under the 2006 Amendments. With the increased amount of money that will be flowing to the states, it will be incumbent on both OSM and the states and tribes to be particularly sensitive to the impacts on the grants process—especially with regard to the length of grants, rollovers, tracking of grant amount (especially by account), recapture, and paperwork reduction. We assert that the timing is ripe for revisiting the existing simplified grants process to consider additional streamlining and simplification. There is some concern that the 2006 Amendments could unnecessarily complicate the paperwork demands associated with annual grants, especially if we are required to track various kinds of moneys that are received. It will be particularly important to clarify that moneys are "expended" once they are obligated, encumbered or otherwise committed for projects. Even with this, deobligation could become a problem if we are unable to roll grants over from year to year. We understand that OSM will be considering various adjustments to the Federal Assistance Manual and to its AML directives and we request an opportunity to review those revisions once they are available. This may present an ideal opportunity for further clarifications to address the above concerns.

Annual Distribution Charts

It will be critical for the states and tribes to receive the annual distribution charts for AML grants as soon as practicable after the beginning of each fiscal year (i.e. by no later than November 15) . This will be particularly true in the first few years as the states and tribes attempt to forecast how the distribution will impact their respective programs. In this regard, we have attached a chart that, in simplified terms, demonstrates our understanding of the gross distribution formula as presented by OSM to date. It should be noted that the states and tribes do not agree with this distribution formula, as indicated by our comments on the proposed and interim rules. In fact, we have argued in these comments for various adjustments to the formula and to the use of the distributed funds based on our reading of the new 2006 AML amendments. Nonetheless, we would appreciate OSM's comments on our attempt to capture OSM's distribution formula under their interpretation of the 2006 Amendments and any additional explanations (flowcharts) that OSM can share with us regarding their interpretation of the distribution formula under the new law.

Training

It will be very important for the states and tribes to receive the necessary training to implement the provisions of the new rules, once they are in place—especially as

they impact the grants process. We urge OSM to keep this in mind as they consider implementation plans for the future.

Preamble Language

We recognize that one mechanism OSM has available to clarify certain aspects of the proposed and interim final rules is through the use of preamble language. We would encourage OSM to do so. One example is the need to adjust the priority matrix contained in the Federal Assistance Manual (FAM) to reflect regional differences in land use patterns. Given that much of SMCRA's history was predicated on land use patterns and experience with hazards in the Eastern United States, there are unintentional gaps that fail to recognize the uniqueness of circumstances in other regions of the country. Whereas residents of Eastern states, for instance, may have residences or other structures that were built adjacent to known hazards, residents of Western states (and non-resident recreational users of Western lands) are exposed to AML features that consist of largely unknown hazards that are equally, if not more, dangerous than "known" features. Thus, as we consider what would be defined as an "extreme danger", we need to be cognizant of the fact that unknown hazards in remote or rural areas can be even more dangerous than known dangers as the unsuspecting public encroaches on these areas through occasional use or through urban sprawl. Recognizing the exposure of the populace to the hazards associated with abandoned mine sites will assist the states, tribes and the federal government in fully implementing the objectives of the AML program under SMCRA.

II. PROPOSED REVISIONS TO OSM'S DRAFT PROPOSED AND INTERIM RULES

The NAAMLP and IMCC recommend the following changes to OSM's draft proposed and interim final rules based on the above commentary.

Section 870.5—Definitions

"Adjacent"—change to read as follows:

> Adjacent means adjoining, in proximity to or contiguous with eligible lands and waters.

Justification: OSM's draft rule implies that a Priority 1 or 2 project must be undertaken in order for a Priority 3 project to be considered "adjacent to" the Priority 1 or 2 problem. This is not what the law requires. It is not a matter of priority; it is a matter of proximity. As long as the Priority 3 project is geographically connected to the Priority 1 or 2 site, the test is satisfied. Furthermore, OSM's proposed language conflicts with statutory provisions in sections 403(a)(1)(B)(ii) and (2)(B)(ii) that eligible lands include those that "are adjacent to a site that has been or will be remediated." (emphasis added). In its proposed language, OSM is implying that for a priority 3 feature to be eligible, it has to be reclaimed in order to access or remediate the priority 1 or 2 feature. This simply cannot be the case if the priority 1 or 2 feature has already been reclaimed or may be so in the future, as anticipated by the 2006 amendments. We recommend use of the common dictionary definition of "adjacent". We also oppose the concept of tying the definition to a monetary determination. There is nothing in the law to support this criterion and we believe it would be difficult to determine and apply. The use of a proximity criterion will also allow us to take into consideration public rights of way, roads, etc, that may be present at or near the site. Finally, to define the term otherwise would be to severely limit the number and types of Priority 3 projects that could be addressed, which is contrary to the intent of the law.

"In conjunction with"—change to read as follows:

> In conjunction with means reclamation of priority 3 features in phases or through a combination of contracting and construction with priority 1 and/or 2 features.

Justification: It is important to recognize that Priority 3 work cannot only be done in conjunction with a Priority 1 or 2 feature through a combined contracting or construction effort, but in phases of construction with a Priority 1 or 2 project, especially where the project is particularly large or the AML program is small (as with the minimum program states). We recommend deletion of the phrase "would have provided significant savings to the AML fund" for the same reason we recommend deletion of the last sentence in the definition: these terms are elusive and difficult to define and quantify. The law does not specify this type of monetary criterion and it would be challenging to implement. We assert that it is best to focus on the administrative aspects of project work, which are easier to define. Finally, to define

the term otherwise would be to severely limit the number and types of Priority 3 projects that could be addressed, which is contrary to the intent of the law.

"Qualified Hydrologic Unit"—change to read as follow:

> Change the word "and" to "or" between subparagraphs (b)(1) and (2), as in the existing regulations.

Justification: We realize that OSM's new definition is consistent with the statutory language, but actual practice over the past 25 years has been that hydrologic units are defined as containing lands and waters that are either eligible OR the subject of bond forfeitures, but not both. To define the term otherwise would be to severely limit the scope of this important provision of the law. With the new emphasis on allowing states to set aside upwards of 30% of their AML funds for the abatement of acid mine drainage projects, to limit the definition in this way would emasculate the purposes and intent of the program.

Section 872.11(b)(1)—Abandoned Mine Reclamation Fund

Delete section 872.11(b)(4)(ii)(E).

Justification: Based on the arguments articulated above with respect to the use of the states' and tribes' unappropriated share balances, this section should be deleted. There is no basis to restrict the use of these moneys for noncoal reclamation.

Section 872.13—Other Treasury Funds for Abandoned Mine Reclamation Programs

Change the reference in the introductory phrase of subparagraphs (a) and (b) to read: "872.11(b)(1)(vi) and (b)(2)(vi)"—NOT "(vii)".

Change Subparagraph (a) and (b) to read as follows: "Notwithstanding Sec. 872.11(b)(1)(vi) and (b)(2)(vi), from funds in the Treasury not otherwise appropriated and transferred to the Secretary of the Interior pursuant to section 402(i)(2) of the Act, effective October 1, 2007, OSM shall make payments to States and Indian tribes . . . ." Also, in subparagraph (a), change the reference to "prior balance funds" to "prior balance payments".

Change section 872.13(a)(3) to read as follows: "States and Indian tribes may apply for and receive these annual installments in grants, following the provision of Section 886. Unless a certified State or Indian tribe specifically requests that OSM disburse funds due the State or Tribe in whole or in part through a grant or grants, payments referred to in Section 411(h)(1)(A) (prior balance payments) shall be made in one lump sum payment to the State or Tribe no later than 90 days after the start of the federal fiscal year in which the payment is due."

Change section 872.13(b)(3) as follows: delete the current language and insert the following: "Unless a certified State or Indian tribe specifically requests that funds be disbursed through a grant or grants following the provisions of section 886, payments referred to in Section 411(h)(2)(A) (in lieu of payments) shall be made annually in one lump sum payment to the State or Tribe no later than 90 days after the end of the federal fiscal year in which the collections are made."

Change section 872.11(b)(4) by striking the word "shall" and inserting "may".

Justification: All of these changes are intended to reflect the discretionary authority vested in the Secretary to make payments to states and tribes through either grants or direct payments, depending on the preference and needs of the respective state or tribe. Section 411(h) uses the term "payments" which appears to embrace a wider degree of flexibility regarding distribution of funds other than just grants. See also the discussion on this topic above.

Change subparagraph 872.13(a)(5) to read as follows:

> (5) States and Indian tribes that are not certified under section 411(a) of the Act shall use any amounts available under this paragraph to achieve the priorities described in sections 403(a)(1),(2) and (3) of the Act, for water supply restoration under sections 403(b)(1) and (2) of the Act, for AMD abatement under section 402(g)(6) and for noncoal reclamation under section 409 of the Act.

Justification: The 2006 Amendments at Section 411(h)(1)(D)(ii) state that the unappropriated prior state and tribal share funds must be used as described at section 403. In interpreting the meaning of sections 411 and 403, the entire statute must be read in context. When doing so, it is clear that section 403 is modified by section 409. Section 409 provides for expenditure of funds at any priority 1 or 2 site, regardless of commodity mined. Furthermore, section 409(b) states that the 50% state and tribal share can be used for noncoal reclamation (referencing section 402(g)). The unappropriated state and tribal shares are in fact the balance of the 50% shares referenced in section 402(g) that have been held in abeyance over the years. There should be little ambiguity that this money is available for noncoal reclamation (as

well as for the 30% AMD set-aside). If Congress had intended to somehow qualify or restrict the use of the unappropriated balances, it could easily have done so in section 411. However, it failed to do so and thus we can only assume that the traditional funding mechanism that has prevailed over the past 30 years remains intact. Such an interpretation is also consistent with the purposes and objectives of Title IV of SMCRA, which are to protect citizens from the adverse impacts of past mining practices—both coal and noncoal.

Add a new subparagraph 872.13(b)(5) as follows: "Payments referred to in section 872.13(b)(3) to certified States and Tribes shall be used with priority given to abandoned coal mine reclamation needs until the State or Tribe and OSM determine that abandoned coal mine reclamation is substantially complete. Thereafter, current in lieu payments will be used for purposes established by the state legislature or tribal council."

Justification: The law and draft rules are unclear as to how certified states and tribes may use current in lieu funds when the state or tribe has completed abandoned coal mine reclamation. Current in lieu funds in excess of those required for completion of abandoned coal mine reclamation should be used for purposes established by the state legislature or tribal council with priority given to addressing the impacts of mineral development.

Section 873.12—Future set-aside program criteria

In subparagraph (a), change the last phrase to read as follows: " . . . are expended by the State or Indian tribe solely to achieve the priorities stated in Sections 403(a) and 409 of the Act, 30 U.S.C. 1233 and 1239, after September 30, 1995".

Justification: This adjustment is needed to clarify that funds set-aside by the states prior to December 12, 2006 are available for both coal and noncoal work.

Section 875.15—Reclamation priorities for noncoal program.

Delete Subparagraphs (c)—(f).

Justification: These subparagraphs must be deleted in order to be consistent with the new provisions in the 2006 Amendments at section 411(h)(1)(D)(i) regarding use of AML funds by certified states and tribes. Pursuant to this section of the 2006 Amendments, certified states and tribes are allowed to use their AML funds "for the purposes established by the State legislature or tribal council of the Indian tribe, with priority given for addressing the impacts of mineral development". Thus those provisions in OSM's existing regulations that provide for a concurrence role by the OSM Director are no longer applicable and should be removed. Furthermore, as we argue above, the payment mechanism that will attend the distribution of these funds will likely be different than what has occurred in the past, and therefore the provisions in subparagraphs (c), (e) and (f) will likely no longer be applicable.

Section 876—Acid Mine Drainage Treatment and Abatement Program

Section 876.12 Eligibility—add the following: "or up to 30% of the funds received pursuant to Section 4121(h)(1) of the Act."

Justification: this language clarifies that up to 30% of the prior unappropriated state and tribal share balances distributed form Treasury funds may be deposited into state and tribal AMD set-aside funds.

Section 886.12(b)—Coverage and amount of grants.

Change subparagraph (b) to read: "Grants shall be approved for reclamation of eligible lands and water in accordance with sections 404 and 411 of the Act and 30 CFR 874.12, 875.12 and 875.14, and in accordance with the priorities stated in sections 403, 409 and 411 of the Act . . . ."

Justification: We have added section 409 as part of the priority reference to be consistent with the above changes regarding noncoal reclamation and to specifically reference noncoal lands.

Section 886.13 (b)—Grant period

Change subparagraph (b) to read as follows: "The Director shall approve a grant period on the basis of the information contained in the grant application. The grant period should normally be for 3 years, and may be extended. Grants of funds distributed in Fiscal Years 2008, 2009 and 2010 shall be awarded for 5 years."

Justification: We understand that OSM will not require specific projects to be listed in the grant application, so this phrase has been removed. We also understand that OSM will allow extensions of the normal 3 year grant period and that those extensions may be for more than one year, which we believe is appropriate. Finally, we assert that the 2006 Amendments specifically call for a 5 year grant period for Fiscal Years 2008—2010 and that this is a mandatory requirement.

One further note: it does not appear that the section 411(h)(1) Treasury funds are subject to any of the grant period timelines established by section 402(g)(1)(D). Nor does there appear to be any authority in the Act to establish timelines for the use of 411 funds. Thus, an annual distribution payment in the full amount due under section 411 should be available as an option for grants to each state/tribe, which in turn could be deposited into a separate state account and considered state funds and used without restriction for any section 403 priority (including AMD abatement).

Section 886.16(a)—Grant agreements

Change subparagraph (a) to read as follows: "OSM shall prepare a grant agreement that includes a general statement of the types of work to be covered by the grant."

Justification: We assert that the grant agreement need only contain a general statement of the types of work to be covered by the grant, not a listing of specific projects. This change is intended to clarify that intent.

Section 886.26—Unused Funds

Delete subsections 886.26 (a)(iii) and (iv). Also, delete subparagraph 886.26(b) and add the following: "Deobligation requirements do not apply to certified States and Tribes."

Justification: No treasury payments should be subject to deobligation requirements. OSM should work with the states and tribes to insure that funds do not revert back to the Treasury. With maximum flexibility in designing payment protocols and with appropriate grant periods and applicable requirements, there should be no need for reversion of these payments, especially if OSM and the states/tribes are working together to closely monitor the situation.

We appreciate the opportunity to submit these comments and trust that OSM will give them serious consideration as the agency moves forward with the development of the proposed and interim final rules. We would welcome the opportunity to meet with OSM to further discuss the draft rules, should you so desire.

Sincerely,

JOHN HUSTED,
President, National Association of Abandoned Mine Land Programs.

GREGORY E. CONRAD,
Executive Director, Interstate Mining Compact Commission.

ATTACHMENT.—OSM OVERVIEW OF AML FUNDING PER 2006 AMENDMENTS

	State Share (Non-Certified)	Historic Share (Non-certified) 1. Traditional 2. In-lieu transfer	Unapprop. Balance (Everyone) (Treasury (T) Funds)	In-Lieu (Certified) (Begins in 2009)	Min. Program (Non-Certified)
Amounts	50%	30% + 50% From In-Lieu	1/7 of Bal. Per Year (T)	50% (T)	At Least $3 Million
How Can It Be Spent?	P1's & 2's P3's in conjunction with Non-Coal	P1's & 2's P3's in conjunction with Non-Coal	P1's & P2's P3's (coal only unless certified) No Non-Coal	As authorized by State Legislature regarding mineral development	P1's & Ps'2 P3's Non-Coal (But no Federal Make-up Money)
30% AMD Set Aside	Y	Y	N	N/A	Y (Limited to State Share and Historical Coal)

ATTACHMENT.—STREAM BUFFER ZONE COMMENTS

November 19, 2007.

Brent Wahlquist,
Director, Office of Surface Mining, Administrative Record, Room 252 SIB, 1951 Constitution Avenue, N.W., Washington, DC.

RE: RIN 1029-AC04

DEAR DIRECTOR WAHLQUIST: This letter constitutes the comments of the Interstate Mining Compact Commission (IMCC) on proposed rules by the Office of Surface Mining Reclamation and Enforcement (OSMRE) concerning stream buffer zones, excess spoil and coal mine waste. The rules were published on August 24, 2007 at 72 Fed. Reg. 48890. IMCC is a multi-state governmental organization that represents the natural resource and environmental protection interests of its 24 member states. Many of IMCC's member states serve as primary regulatory authorities under the Surface Mining Control and Reclamation Act (SMCRA) and are responsible for the issuance of permits for surface coal mining operations throughout the U.S.

We understand that OSM's intent under the proposed rules is to provide greater clarity regarding the interpretation of the stream buffer zone rules, especially with respect to what the rules require, consistent with underlying statutory authority. These rules have been in place for almost 25 years and have survived legal challenges both on their face and in actual application, as noted in OSMRE's preamble. What remains unclear is the degree to which application of the existing rules will result in continued legal challenges to future permitting actions. OSMRE's proposed rules appear to be aimed at clarifying the scope of their applicability in an effort to minimize future litigation and thereby provide greater certainty in the permitting process.

Our analysis of the rules suggests that by expanding the scope of the rule to include all "waters of the United States" instead of just perennial and intermittent streams, OSM is further complicating the situation. The term "waters of the United States" is fraught with unresolved issues and jurisdictional difficulties particularly in light of the Supreme Court's rulings in Solid Waste Agency of Northern Cook County v. Corps of Engineers (SWANCC), and Rapanos v. Untied States (Raponos). The guidance provided by the U.S. Army Corps of Engineers (Corps) on these deci-

sions is still in limbo and legislation and lawsuits on the issues continue unabated. OSM asks in its preamble whether this proposed change in the administration of SMCRA regulatory programs makes sense, and whether the benefits outweigh the problems. The answer to both questions, from our perspective, is probably not.

With regard to the alternatives analysis that has been proposed for excess spoil fills and coal mine waste disposal, we envision even less clarity. The model proposed by OSM in its proposed rules will, in our opinion, result in unending litigation concerning whether the correct alternative was selected by the permit applicant and approved by the state. Rather than reducing uncertainty, the rule has the potential to perpetuate it. Of greater concern to the states is the impact that these types of analyses will have on resources. We assert that the time and effort which will be required by state permitting personnel to adequately review and rule upon these alternative analyses will be potentially overwhelming. Given the current fiscal constraints under which the states are operating, attempting to accommodate the requirements of the proposed rules could seriously jeopardize these primacy programs. Finally, the alternative analysis is duplicative of requirements under the Clean Water Act that are already encompassed by the SMCRA permitting scheme, as noted in OSM's preamble.

We trust that, as OSM proceeds forward with the rulemaking process, the agency will seriously consider these two significant concerns from the state regulatory authorities. OSM will also likely receive comments from individual states on these and other aspects of the proposed rule, which we commend to your serious review and consideration. In the end, we hope that OSM will develop a final rule that addresses these matters and that clarifies the issues addressed in its preamble. We welcome the opportunity to work with the agency to accomplish this important undertaking.

Sincerely,

GREGORY E. CONRAD,
Executive Director.

RESPONSES OF JOAN MULHERN TO QUESTIONS FROM SENATOR BINGAMAN

Question 1a. Stream Buffer Zone Rule—Please summarize the Federal District Court holding in Bragg v. Robertson, 72 F. Supp.2d 642 (S.D.W.V. 1999), rev'd, 248 F.3 275 (4th Cir. 2001). I understand that the Court of Appeals for the Fourth Circuit reversed the District Court ruling on procedural grounds (sovereign immunity), leaving Judge Haden's substantive pronouncements on SMCRA as the operative interpretation.

Answer. Mr. Chairman, that is correct. The requirements of the current Stream Buffer Zone rule are clear on their face. There are not many federal environmental regulations where compliance can be determined by using a tape measure, but the Stream Buffer Zone is such a rule. It has been interpreted by West Virginia federal district Judge Charles Hayden (as well as the Clinton administration) in a manner that is consistent with its plain language, and that ruling was not overturned on its merits. The rule states:

> (a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—
>
> —(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and
>
> —(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.
>
> (b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11. 30 C.F.R. § 816.57 (1983) (emphasis added).

When adopting the Stream Buffer Zone rule in 1983, the Office of Surface Mining (OSM) recognized the importance of protecting mountain streams consistent with the statute. The agency explained that "intermittent and perennial streams generally have environmental resource values worthy of protection under section 515(b)(24)," and "surface coal mining operations will be permissible as long as envi-

ronmental protection will be afforded to those streams with more significant environmental values" (i.e. intermittent and perennial streams).[1]

Thus, the 1983 rule was clear, both in the language of the regulation itself and the accompanying preamble statement that intermittent and perennial streams needed to be protected pursuant to the statutes. Surface coal mining activities (including valley fills and coal waste impoundments) within 100 feet of these valuable intermittent and perennial streams were not allowed—the streams were to be protected within a designated a buffer zone—except only to the extent that incursions into the zone would not adversely affect stream function, water quality, water quantity, or other environmental values.

In October 1999, Judge Haden, then Chief Judge of the District Court for the Southern District of West Virginia, ruled that "[v]alley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream." Bragg v. Robertson, 72 F. Supp.2d 642, 662 (S.D.W.Va. 1999), vacated on other grounds, Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002). Judge Haden further observed that id. at 662, and went on to note that:

> [w]hen valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Id. at 661-62) (emphasis added).

Not surprisingly, Judge Haden ruled that "placement of valley fills in intermittent and perennial streams violates federal and state water quality standards" and are impermissible under the Stream Buffer Zone rule. Id. at 662. While the case was overturned on jurisdictional grounds, Judge Haden's substantive observations, which the Court of Appeals did not address, are valid and compelling. See Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

It is also worth noting that in its brief on appeal in the Bragg case, the United States Department of Justice, representing OSM, EPA and the Army Corps of Engineers, essentially conceded that Judge Haden's interpretation of the law was correct:

> [Judge Haden] correctly found that SMCRA's stream buffer zone rule. . . prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil. The elimination of substantial intermittent or perennial stream segment [sic] necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments. As the district court rightly concluded, the elimination of entire stream segments and all the life they contain plainly causes environmental harm. Accordingly, the district court correctly granted summary judgment on plaintiffs' buffer zone claims.[2]

Additionally, these agencies stated that:

> The district court also correctly. . .[held]. . .that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the buffer zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial streams causes adverse environmental effects to the filled stream segments, as such fills eliminate all aquatic life that inhabited those segments.[3]

---

[1] 43 Fed. Reg. at 30313 (June 30, 1983).

[2] Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000 (hereafter "U.S. Br."), p. 2. In the 2004 proposal to change the Stream Buffer Zone rule, OSM suggested that the DOJ brief is "not consistent with our historic interpretation" and that OSM never agreed with it or approved it. 69 Fed. Reg. at 1039-40. That is untrue. DOJ told the Fourth Circuit that "Attorneys for EPA and OSM are identified on the cover of the federal appellants' brief as being 'of counsel' to this appeal, and the position taken in the brief for the federal appellants represents the unified position of the federal agencies." Federal Appellants' Opposition to the Motion of the Intervenor-Defendants to Strike the Brief of the Federal Appellants and to Dismiss Appeal No. 99-2683, p. 2, Attachment 2.

[3] Id. at 24-25 (emphasis added).

OSM, EPA, and the Corps further stated that "valley fills that disturb intermittent or perennial streams may be approved only if there is a finding that activity will not adversely affect the environmental resources of the filled stream segment."[4]

In a May 22, 2000 letter, Acting OSM Director Kathrine Henry adopted the same position that "the stream buffer zone waiver findings must be made not only for segments downstream of the fill, but also for each segment of an intermittent or perennial stream in which excess spoil is placed." In its 2004 proposed rule, OSM admitted that this brief and this Acting Director's letter took the position that the rule applied to valley fills.[5]

Now OSM has completely reversed their position and would totally exempt valley fills, waste impoundments, and other stream incursions from the rule. And, quite cynically, in its 2007 proposed rule, OSM conveniently omitted any material indicting that it has reversed itself. Instead, the agency cryptically cross-referenced its former brief and other materials as an "additional discussion of litigation and related matters."[6]

Question 1b. Do you agree with the District Court that the current buffer zone rule applies to all portions of a perennial or intermittent stream and that the buffer zone rule can be harmonized with other SMCRA regulations?

Answer. Yes. In his decision, Judge Haden wrote that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved." Bragg, 72 F. Supp.2d at 651.

As to the second part of the question: it is not at all difficult to harmonize the Stream Buffer Zone with the other SMCRA regulatory and statutory provisions. In fact, the difficulty lies in trying to harmonize the legal and legislative interpretations of those wishing to repeal the rule. They must explain how Congress could have passed a law in 1977 to protect coal field residents from the worst abuses of strip mining, yet would condone environmental abuses that are far worse than those Congress was trying to rein in 30 years ago.

SMCRA grew from decades of concerns about the environmental effects of strip mining practices, and was intended to provide new and significant additional environmental protections for affected local communities. In the legislation, Congress found that:

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.[7]

While recognizing the role played by coal in addressing the nation's energy needs, Congress also found that it was "urgent" in 1977 to establish federal standards to "minimize damage to the environment."[8] The very first stated purpose of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[9] The law that Congress passed was not perfect; some at the time believed the final law was too great a compromise, especially after Congress failed to pass earlier legislation to outlaw strip mining altogether. Nonetheless, SMCRA does place some meaningful restrictions on surface mining operations and require that certain natural resources, including streams and other "watercourses," be protected.[10]

Recognizing several important environmental objectives, the Act provides that surface mining operations may be authorized only if the permitting authority finds:

> (1) that the mining operations will "minimize disturbances and adverse impacts . . . on fish, wildlife, and related environmental values";
>
> (2) that "no damage will be done to natural watercourses";

---

[4] Id. at 41.
[5] 69 Fed. Reg. at 1040.
[6] 72 Fed. Reg. at 48896.
[7] 30 U.S.C. §1201(b).
[8] 30 U.S.C. §1201(c) (emphasis added).
[9] 30 U.S.C. §1202(a).
[10] See, e.g., 30 U.S.C. §1265(c)(3)(D).

(3) that the excess spoil will be placed in an area that "does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil will be prevented"; and

(4) that the disposal "is compatible with the natural drainage patterns and surroundings."[11]

Moreover, SMCRA mandates that mining operations must "minimize the disturbance to the prevailing hydrologic balance at the mine site and in associated offsite areas."[12]

OSM first promulgated the Stream Buffer Zone rule in 1977 in an interim form. The interim rule established the 100 foot buffer-zone as well as the variance provision, although the 1977 rule did not specify under what conditions a permitting authority may grant a variance. In 1979, OSM adopted a permanent Stream Buffer Zone rule that restricted mining activities within 100 feet of any stream "with a biological community," and that included variance criteria.[13] The criteria included in the 1979 rule required that before a permitting authority could authorize mining activity within the buffer zone, it must find "that the original stream channel will be restored" and that "during and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities shall not be adversely affected." OSM explained in the preamble to the 1979 rule that the provisions of the rule were "required to protect streams from the adverse effects of sedimentation and from gross disturbance of stream channels."[14]

In 1983, OSM adopted the current version of the Stream Buffer Zone rule. In so doing, OSM eliminated the reference that was in the 1979 rule to streams with "a biological community" and removed the provision requiring restoration of the original stream channel. Instead, the 1983 OSM rule identified all perennial and intermittent streams as worthy of protection under the rule, and added a requirement that any mining activities authorized within the 100 foot buffer zone may not cause or contribute to a violation of an applicable water quality standard and may not "adversely affect the environmental resources of the stream."[15] So consistent with the language and intent of SMCRA, the current Stream Buffer Zone rule provides meaningful protection for the important water resources most likely to be affected by destructive mining practices like mountaintop removal.

Opponents of the Stream Buffer Zone often point to the language of the statute that says that excess spoil shall only be placed in an area that "does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil will be prevented." Pointing to this single passage, these opponents essentially say: "Aha! Congress created conditions for when excess spoil can be placed in springs or seeps, so that proves Congress must have meant to allow valley fills to go into intermittent or perennial streams!"

Such arguments not only ignore other parts of the statute directing OSM to protect natural water courses (and the entire purpose of the statute, which is to protect communities and the environment), but it is not even what the provision says. This cited language is an exception to the rule about not putting spoil in any wet area; the statute says if any spoil does get placed in a wet area there must be drains. This does not mean that Congress thereby meant that the majority of spoil should be dumped into permanent and seasonally flowing streams. In other words, the language about using lateral drains when some spoil gets in some wet areas—like seeps, springs, of ephemeral watercourse—is perfectly consistent with the view of the law that the Stream Buffer Zone rule prevents spoil from being dumped into intermittent and perennial streams.

Question 1c. In your view, has the current buffer zone rule being enforced in accordance with this interpretation?

Answer. No, it is not. Mountaintop removal mining and valley filling has already destroyed over 2000 miles of Appalachia's streams; some estimate that the number of streams destroyed is much higher. According to the final Programmatic Environ-

---

[11] 30 U.S.C. §§ 1265(b)(10), (22), (24); § 1265(c)(4)(D).

[12] 30 U.S.C. § 1365(b)(10). This provision clearly demonstrates an intent to protect environmental values both within the footprint of the mine site (including at spoil sites and impoundments) and at downstream locations.

[13] 30 C.F.R. § 816.57(a) (1979). The regulation also included specific provisions for identifying the presence of a biological community. 30 C.F.R. § 816.57(c) (1979).

[14] The two types of impacts noted by OSM in its 1979 rule recognized the affects of both the activities within the footprint of the mine site (e.g., valley fills) and downstream adverse affects, respectively "gross disturbances," "sedimentation."

[15] 30 C.F.R. § 816.57(a) (1983).

mental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS),[16] there were 5858 valley fills in the study area of West Virginia and Kentucky permitted between 1985 and 2000. It has been quite some time since the federal and state agencies responsible for implementing SMCRA and the Stream Buffer Zone rule have done their jobs consistent with the law. In fact, it seems that as the mountaintop removal mines have grown in size and destructiveness, the agencies have imposed fewer environmental protections for streams and other effected resources.

Question 1d. Has the Fourth Circuit's ruling in Kentuckians for the Commonwealth v. Riverburgh, 317 F.3d 425 (4th Cir. 2003), impacted the interpretation and application of the buffer zone rule under SMCRA? If so, in what way and why?

Answer. The KFTC v. Rivenburgh has not directly impacted the interpretation of SMCRA's buffer zone rule, although the majority opinion in the case did briefly discuss the regulation. The KFTC case is a Clean Water Act case; a citizen group challenged the use of a § 404 general permit—which are limited by the statute to authorize only dredge and fill activities with no more than a minimal adverse effects—to allow valley fills in waters of the United States. The citizens challenged the Corps' permit decision that allowed Martin Coal company to place coal mining waste ("excess overburden") from one of its mountaintop removal projects into 27 valley fills in Martin County, Kentucky, burying approximately 7 miles of streams just at that one site. Specifically, KFTC argued that the Corps' 1977 regulations defining "fill material" did not allow the Corps to permit valley fills in waters of the U.S. because fill was defined as not including "waste" and therefore outside of the Corps' jurisdiction.

In its analysis, the court considered the relationship between the Clean Water Act and the SMCRA buffer zone rule, and opined that:

> [T]he Clean Water Act's relationship to SMCRA does not provide a clear intent that § 404's definition of "fill material" is limited to a beneficial use. While SMCRA does not define "fill material," its term "excess spoil material," 30 U.S.C. § 1265(b)(22), is defined in the SMCRA regulations as material placed "in a location other than the mined-out area." 30 C.F.R. § 701.5 and 816/817.71-.74. And, regardless of whether the fill has a beneficial primary purpose, SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States. The district court's reference to SMCRA's provision of a "buffer zone," see 30 C.F.R. § 816.57, does not address the scope of the Corps' jurisdiction under the Clean Water Act to regulate all "fill material." Indeed, it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose. Section 515(b)(22)(D) of SMCRA authorizes mine operators to place excess spoil material in "springs, natural water courses or wet weather seeps" so long as "lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented." 30 U.S.C. § 1265(b)(22)(D). In addition, § 515(b)(24) requires surface mine operators to "minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable," implying the placement of fill in the waters of the United States. 30 U.S.C. § 1265(b)(24). It is apparent that SMCRA anticipates the possibility that excess spoil material could and would be placed in waters of the United States, and this fact cannot be juxtaposed with § 404 of the Clean Water Act to provide a clear intent to limit the term "fill material" to material deposited for a beneficial primary purpose.[17]

While we disagree with the court's reading of the Clean Water Act and its relationship to SMCRA, the court's discussion of the statute and the regulation are not inconsistent with our position that SMCRA requires that stream be protected and the buffer zone around intermittent and perennial is a proper (indeed, necessary) exercise of that authority by OSM. As discussed above, just because the statute contemplates that some spoil may be placed in some wet areas does not mean Congress intended—or would even allow—perennial and intermittent streams to be buried by valley fills.

Question 2. Stream Buffer Zone Rule—Is it your legal opinion that the draft EIS for the proposed revisions to the stream buffer zone rule (72 Fed. Reg. 48890, Au-

[16] 70 Fed. Reg. 62102.

[17] Kentuckians for the Commonwealth v. Riverburgh, 317 F.3d 425 (4th Cir. 2003).

gust 24, 2007) complies with the National Environmental Policy Act (NEPA)? Why or why not?

Answer. It is my opinion that the proposed rule change announced in the Federal Register in August 2007 does not comply with NEPA. The draft Environmental Impact Statement (DEIS) accompanying the proposed rule is inadequate on its face because it fails to consider vital information in the agency's possession about the enormous environmental devastation caused by mountaintop removal. It also fails completely to consider any meaningful alternative to changing the buffer rule, and does not give any serious consideration to enforcing the existing rule as written as the "no action" alternative, instead preferring to reserve that category for evaluating the OSM's present practice of completely ignoring the law.

In its DEIS for the proposed rule, OSM considers only five alternatives in detail: a "no action" alternative, in which OSM would retain the current Stream Buffer Zone rule and continue to interpret it as allowing disposal of coal mining waste directly into streams and other mining activities within the Stream Buffer Zone; the proposed rule, which explicitly allows such activities; and three other alternatives that are nothing more than partial versions of the proposed rule. In other words, every alternative considered by OSM allows substantial disposal of coal mining wastes into streams. OSM does not consider any more environmentally protective alternatives, the most obvious of which is to enforce the current Stream Buffer Zone rule as written.

The National Environmental Policy Act requires that an EIS describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented."[18] NEPA implementing regulations make clear that an EIS must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public," and "rigorously explore and objectively evaluate all reasonable alternatives."[19] For failing to meet these requirements, the DEIS and proposed rule change are in violation of NEPA.

OSM's proposed replacement of the Stream Buffer Zone rule is accompanied by a false and misleading description of the current rule that aims at making it sound consistent with OSM's failure to enforce the rule as written. But, as noted about, there is a world of difference between the existing rule as written and the new rewrite. The plain language of the current Stream Buffer Zone rule prevents OSM and state agencies from issuing permits for coal mining activities within 100 feet of streams, unless the permitting agency specifically confirms that the activities will not violate water quality standards and will not adversely affect water quantity, quality, or other stream resources. In comparison, OSM's proposed rule would specifically allow the dumping of coal mining spoil directly into streams that should be protected. By attempting to reinterpret the current rule as not preventing but already allowing such dumping, OSM is trying to create confusion in order to avoid studying a "no action" alternative that leaves the existing rule in place and contemplates the agency and states enforcing it.

OSM's refusal to consider more environmentally protective alternatives based on the agency's judgment about their merit is inconsistent with well-established NEPA principles. Although, in a NEPA analysis, an agency judgment that there is "inconclusive evidence may serve as justification for not choosing an alternative," such an agency judgment "cannot serve as a justification for entirely failing to 'rigorously explore and objectively evaluate all reasonable alternatives.'"[20]

The only alternatives that OSM considered would allow valley fills to be dumped in any stream without any limitation on the length of stream ,or the types of stream, that could be buried and destroyed. The only "limitation" considered is just a vague, case-by-case determination that the overall fill be minimized, "to the extent practical."

To comply with NEPA, and to be responsive and fair to the people of Appalachia, OSM must consider some alternatives that restrict filling of streams, including at the very least the enforcement of the existing Stream Buffer Zone rule as written. The failure to consider an appropriate range of viable alternatives, including alter-

[18] 42 U.S.C. § 4321. 4332(2)(C).

[19] 40 C.F.R. § 1502.14 (emphasis added).

[20] Fund for Animals v. Norton, 294 F. Supp. 2d 92, 110 (D.D.C. 2003) (quoting 40 C.F.R. § 1502.14).

natives with materially lighter environmental impacts, renders this NEPA analysis inadequate.[21]

Finally, by asserting that the proposed rule would not worsen the environmental status quo, and by refusing to consider any more environmentally protective alternatives, OSM also ignores the NEPA requirement to take a "hard look" at the significant adverse impacts of the proposed rule change, including the cumulative impacts that would result from allowing the current coal mining spoil disposal practices to continue unimpeded.

The DEIS does note that mountaintop removal mining resulted in the destruction of over hundreds of mile of Appalachian streams between 1985 and 2001 and an additional 535 miles between 2001 and 2005. If this rate of destruction continues, the proposed rule change would allow more than 1,000 miles of streams to be destroyed each decade into the future. Scientific evidence within the DEIS further confirms that these valley fills significantly degrade ecologically valuable headwater streams. But the DEIS' analysis of these cumulative impacts is completely non-existent.

By discussing environmental impacts only in the narrow, relative terms of its myopic range of alternatives, OSM ignores the overwhelming evidence in the public record that current practices, and specifically valley fills associated with mountaintop removal mining, have devastating impacts on streams, forests, and their associated ecosystems, as well as wildlife and human communities.

Accordingly, OSM's failure to consider any alternatives that are more environmentally protective than the status quo (of ignoring the law completely) is a blatant violation of NEPA.

[Responses to the following questions were not received at the time the hearing went to press:]

QUESTION FOR ARVIN TRUJILLO FROM SENATOR DOMENICI

I support uranium mining as an essential piece of our nation's clean, nuclear power generation. It will be important to our energy security and will be done with safer, modern mining and milling technologies.

The Navajo Nation and the state of New Mexico have engaged in a productive effort—to deal with what remains a separate issue from renewed mining—in cleaning up old, abandoned sites with AML funding.

Question 1. How important is the OSM interpretation of Section 409 authority for non-coal reclamation to this effort?

[21] OSM itself admits that the agency "would not anticipate a major shift in on-the-ground consequences from any of the alternatives," essentially conceding that there is no meaningful distinction between the "alternatives" it considered. Id. at 121; see also id. at 124 (proposed rule "would cause no discernable changes" in direct impacts on streams); see also id. at 126-27, 128, 131, 133, 135, 142.

APPENDIX II

Additional Material Submitted for the Record

STATEMENT OF JOAN MULHERN, SENIOR LEGISLATIVE COUNSEL, EARTHJUSTICE

Chairman Bingaman and Members of the Committee, thank you for holding this hearing to review the purposes and history of the federal Surface Mining Control and Reclamation Act (SMCRA), one of the nation's most important environmental protection laws—and one that is often overlooked, much to the detriment of the communities and natural resources of the coal mining regions of the country.

I am Senior Legislative Counsel for Earthjustice, a national non-profit law firm founded in 1971 as the Sierra Club Legal Defense Fund. Earthjustice represents, without charge, hundreds of public interest clients, large and small, in order to reduce water and air pollution, prevent toxic contamination, safeguard public lands, and preserve endangered species and other wildlife. Thank you for inviting me to this hearing today. I am not an expert on SMCRA as a general matter; most of my work at Earthjustice focuses on Clean Water Act issues. But I have worked on SMCRA policy and legal issues as they pertain to what is, today, the most radical and destructive form of coal strip mining, known as mountaintop removal.

During mountaintop removal mining, hundreds of feet from the tops of mountains are blown off with explosives and removed in order to reveal the coal seams below. The former mountaintops, now reduced to rubble, are pushed over the sides of the mountain to create enormous waste piles, known as valley fills. These fills bury the headwater and perennial streams and everything else that was in the valley. Over the last thirty years, and during the last fifteen years especially, there has been a vast expansion in this form of strip mining.

Whatever they might have predicted at the time about the likely successes (or failures) of the law, it is doubtful that the members of Congress who voted to pass SMCRA thirty years ago could have possibly imagined the widespread and irreversible destruction that is taking place today by mountaintop removal coal mining. Much of this damage is due to the failure of state and federal regulators to enforce key provisions of the Act and its implementing regulations that were designed to prevent this extreme form of environmental abuse.

The Surface Mining Control and Reclamation Act of 1977 grew out of decades of concerns about the environmental effects of strip mining. When Congress passed the law, it clearly intended to provide new and significant protections for the environment and citizens of the region. In the legislation, Congress found that:

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.[1]

While recognizing the role played by coal in addressing the nation's energy needs, Congress also found that it was "urgent" in 1977 to establish federal standards to "minimize damage to the environment.[2] The very first stated purpose in the law is to "establish a nationwide program to protect society and the environment from the

---

[1] 30 U.S.C. §1201(b).
[2] 30 U.S.C. §1201(c) (emphasis added).

adverse effects of surface coal mining operations."[3] The law that Congress passed was not perfect; some at the time believed the final law was too great a compromise, especially after Congress failed to pass earlier legislation to outlaw strip mining altogether. But it did place some meaningful restrictions on surface mining operations and required certain natural resources, including streams and other "watercourses", be protected.[4]

The coal-rich mountains of central Appalachia are home to generations-old families and communities, and the region contains many beautiful hollows through which thousands of pristine and ecologically rich mountain streams flow. Mountaintop removal mining deliberately lays waste to these natural resources—the streams and the mountains—and devastates the human and wildlife communities that depend on them. In less than two decades, mountaintop removal has already transformed huge expanses of one of the oldest mountain ranges in the world into a moonscape of barren plateaus and rubble-filled streams.

This damage is occurring—and even accelerating—today, despite the provisions in SMCRA that Congress enacted to curb this type of extreme environmental abuse. According to one source, mountaintop removal mines involved forty-four permits covering 9,800 acres throughout the 1980s, yet in a nine-month period in 2002 alone, federal and state agencies issued permits for mountaintop removal mines to flatten and destroy an area covering 12,540 acres.[5] Mountaintop removal and other large scale surface mining operations that already have been authorized by permitting authorities to destroy nearly 2,000 miles of Appalachian streams and more than 1,000 square miles of forested mountain terrain.

In 1998, the Office of Surface Mining (OSM), the U.S. Environmental Protection Agency (EPA), the Army Corps of Engineers, U.S. Fish and Wildlife Service and state of West Virginia began preparing a programmatic Environmental Impact Statement on mountaintop removal; the final PEIS was released on 2005.[6] The PEIS's scientific and technical studies documented in thousands of pages (and millions of federal taxpayer dollars) the enormous damage to Appalachia's natural resources and communities already caused by mountaintop removal mining and valley fills over the last two decades, including the pollution and destruction of over 1200 miles of streams.

The PEIS studies also confirmed that, without the adoption of additional environmental restrictions on this extreme form of strip mining, over 1000 miles of streams will be added to this toll by 2012, destroying what many experts believe is one of the most diverse temperate headwater freshwater regions in the world. According to the DEIS's Cumulative Impact Study, without more stringent environmental protections, mountaintop removal coal mining and valley fills will turn a huge area of this country—over 2200 square miles of a unique, biologically diverse, forested, stream filled, mountainous region—into a barren wasteland for the foreseeable future.

The PEIS studies determined that mountaintop removal mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions. Further, mining impacts on the nutrient cycling function of headwaters streams "are of great concern" and impacts to habitat of interior forest birds could have "extreme ecological significance." The PEIS further concluded that mining could impact 244 terrestrial species, including, for example, 1.2 billion individual salamanders, and that the loss of the genetic diversity of these affected species "would have a disproportionately large impact on the total aquatic genetic diversity of the nation." Finally, the EIS observed thatμvalley fills are strongly associated with violations of water quality standards for selenium, a toxic metal that bioaccumulates in aquatic life.

Unfortunately, Mr. Chairman, rather than respond rationally to the overwhelming information contained in its own scientific studies documenting the destruction of Appalachia being caused by mountaintop removal by immediately putting a stop to the practice—or at least enforcing the legal limitations contained in SMCRA and the Clean Water Act to curb the worst abuses—the present administration has taken the exact opposite approach. The federal agencies have been gutting longstanding

---

[3] 30 U.S.C. §1202(a).

[4] See, E.g,. 30 U.S.C. §1265(c)(3)(D).

[5] Burns, Shirley Stewart (2005). "Bringing Down the Mountains: the Impact of Mountaintop Removal Surface Coal Mining on Southern West Virginia Communities, 1970-2004" Ph.D. dissertation. West Virginia University. Available at http://kitkat.wvu.edu:8080/files/4047/Stewart_Burns_Shirley_dissertation.pdf

[6] Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), 70 Fed. Reg. 62102.

laws designed to protect coal field residents and communities and their surrounding natural resources from the mining industry's worst excesses, failing to enforce the law in some areas and outright repealing it in others.

In May 2002, the U.S. Army Corps of Engineers (Corps), aided and abetted by the U.S. Environmental Protection Agency (EPA), repealed a 25-year-old Clean Water Act regulation that prohibited dumping waste material in streams.[7] In October 2005, the OSM weakened its oversight of state mining programs by making federal takeovers for state violations of federal law discretionary rather than automatic.[8] Also in October 2005, the administration released it's the final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), in which—despite the fact that the millions of dollars of scientific studies that accompanied the PEIS found that the harm being done to Appalachia by mountaintop removal coal mining is extremely destructive, widespread, and largely irreversible, as noted above—the agencies proposed no meaningful mining reforms or limitations on valley fills,.[9]

The latest in this serial rollback of longstanding law is currently pending at the OSM. On August 24, 2007, the Bush administration proposed repealing a longstanding stream protection regulation under SMCRA in order to allow the coal mining industry engage in more unregulated "mountaintop removal" mining and additional burial of streams.[10]

The Stream Buffer Zone Rule prohibits coal mining activities from disturbing areas within a 100-foot "buffer" around intermittent and perennial streams. This regulation, finalized in 1983 by the Reagan administration, is one of the most important components of current SMCRA law—and the most important for protecting streams. The Buffer Zone rule prevents the OSM and state agencies from issuing permits for coal mining activities that would disturb areas within 100 feet of streams, unless the permitting agency specifically confirms that the activities will not violate water quality standards and will not adversely affect water quantity, quality, or other stream resources.[11] This regulation is needed to implement the provisions of SMCRA that require the protection of watercourses from mining damage.

In its place, the proposed rule would allow coal operators to dump mining waste, including the waste rubble from mountaintop removal as well as coal slurry, into streams, burying them forever. In return, the new rule merely asks coal operators to "minimize" harm to the extent possible, already a requirement of the Clean Water Act as well as of many state mining programs. This is an open invitation to industry to ignore an important surface mining rule that, as a practical matter, has been routinely abused and violated as federal and state regulators looked the other way. Now the chronic failure of the Department of the Interior and its Office of Surface Mining to discharge its duty to enforce existing law is being used by the agency as one of several excuses to repeal the Stream Buffer Zone rule altogether.

While the OSM states that the new proposed rule is a clarification of the 1983 rule, in fact it is just the opposite. The new proposed rule would allow the dumping of massive amounts of waste directly into streams—including mountaintop removal valley fills and enormous sludge impoundments. In other words, the Bush administration's proposal essentially repeals the existing regulation and would allow coal companies to permanently bury more Appalachian streams beneath hundreds of millions of tons of mining waste. This proposal takes the "buffer" right out of the "Stream Buffer Zone" and allows coal companies to dump waste directly into streams.

OSM's proposal not only guts the existing Stream Buffer Zone rule, it reverses OSM's prior interpretation of the existing rule. In the preamble, OSM reviews the history of the 1983 rule and claims that it has consistently "applied" that rule to allow valley fills and other stream incursions.[12] This statement and others like it made by OSM are clearly intended to create the impression that the current proposal is consistent with all past practices and interpretations, and that there is no shift in agency thinking.

In fact, however, the proposed rule is a reversal of OSM's prior interpretation of Stream Buffer Zone requirements. When it promulgated the existing rule in 1983, OSM chose to protect intermittent and perennial streams because they were recognized to be especially significant in establishing the hydrologic balance. OSM stated

---

[7] 67 Fed. Reg. 31129.
[8] 70 Fed. Reg. 61194.
[9] 70 Fed. Reg. 62102.
[10] Proposed Rule and Draft EIS on Excess Spoil Minimization/Stream Buffer Zones, 72 Fed. Reg. 48678, 48890 (August 24, 2007).
[11] 30 CFR § 816.57.
[12] 72 Fed. Reg. at 48892, 48895.

that the buffer zone rule was designed "to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations."[13] OSM further stated that "intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act."[14]

In 1999, Judge Haden, then Chief Judge of the District Court for the Southern District of West Virginia, had the opportunity to interpret the existing Stream Buffer Zone rule and said that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved."[15] Judge Haden also discussed the history of the Stream Buffer Zone rule and OSM's original concern that broad safeguards for streams were needed to comply with SMCRA. He quoted OSM's consideration of public comments from when it first promulgated the Stream Buffer Zone rule in 1979, where the agency stated that:

> Surface mining is impossible without destruction of a number of minor natural drainages, including some ephemeral streams as defined in section 701.5. The Office, therefore, believes it is permissible to surface mine coal so long as a reasonable level of environmental protection is afforded . . .
>
> [ ] Several other commenters felt only perennial streams should require buffer zones. This would reduce operator cost and increase coal production from deposits underlying nonperennial streams. The Office believes that this alternative is illegal, however, because there are significant fish and wildlife resources in streams other than perennial streams that need protection under section 515(b)(24) of [SMCRA].[16]

Thus, OSM concluded that destruction of streams below natural drainways was illegal, even though some surface mining and coal production might be affected.

Judge Haden continued his analysis of the existing Stream Buffer Zone rule, stating:

> When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.[17]

In their brief on appeal in Bragg, OSM, EPA and the Corps expressly agreed with Judge Haden's interpretation of the Stream Buffer Zone rule:

> [Judge Haden] correctly found that SMCRA's stream buffer zone rule . . . prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil. The elimination of substantial intermittent or perennial stream segments necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments. As the district court rightly concluded, the elimination of entire stream segments and all the life they contain plainly causes environmental harm. Accordingly, the district court correctly granted summary judgment on plaintiffs' buffer zone claims.[18]

Additionally, these agencies stated that the District Court correctly held:

---

[13] 48 Fed. Reg. 30312 (June 30, 1983).

[14] Id.

[15] Bragg v. Robertson, 72 F. Supp.2d 642, 651 (S.D.W.Va 1999). Judge Haden's ruling was overturned on jurisdictional grounds, but the substance of his ruling was not addressed by the Court of Appeals. See Brag v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

[16] 44 Fed. Reg. at 15177 (1979) (emphasis added).

[17] Bragg at 661-662.

[18] Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000 (heareafter "U.S. Br."),p.2(emphasis in original). In the 2004 proosal to repeal the Stream Buffer, OSM suggested that the brief of the United States government in the Bragg case is "not consistent with our historic interpretation" and that OSM never agreed with it or approved it. 69 Fed. Reg. at 1039-40. That is not true. The Department of Justice told the Fourth Circuit that "Attorneys for EPA and OSM are identified on the cover of the federal appellants' brief as being 'of counsel' to this appeal, and the position taken in the brief for the federal appellants represents the unified position of the federal agencies." Federal Appellants' Opposition to the Motion of the Intervenor-Defendants to Strike the Brief of the Federal Appellants and to Dismiss Appeal No. 99-2683,p.2.

> [T]hat valley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources of the filled stream segments. WVDEP has acknowledged that it has routinely approved valley fills in intermittent and perennial streams without making the findings called for by the buffer zone rule for the stream segment filled. The district court correctly rejected the arguments that WVDEP was not required to make the buffer zone findings, holding that the findings required by the buffer zone rule must be made for the filled stream segments and not at some point downstream from the valley fills . . .
>
> The district court also correctly . . . [held] . . . that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the buffer zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial causes adverse environmental effects to the filled stream segments, as such fills eliminate all aquatic life that inhabited those segments.[19]

If further evidence is needed that the OSM previous did take the position the Stream Buffer rule applied to valley fills, in a May 22, 2000 letter, Acting OSM Director Kathrine Henry adopted the same position that "the stream buffer zone waiver findings must be made not only for segments downstream of the fill, but also for each segment of an intermittent or perennial stream in which excess spoil is placed."

Now OSM has completely reversed this position and would totally exempt valley fills, waste impoundments and other stream incursions from the rule.[20] OSM has failed to rationally justify its complete about-face from the position it took in the Bragg case. Indeed, OSM has failed to even consider the alternative of enforcing the rule as written and as OSM interpreted it in the Bragg case.

The Office of Surface Mining first proposed repealing the Stream Buffer Zone in January 2004. At that time, Earthjustice and many other national and regional groups objected and, along with asking that the proposal be withdrawn, stated that the agency was required by law to prepare an Environmental Impact Statement (EIS) before proposing to change a major federal rule. Somewhat surprisingly, OSM agreed and the following summer, in 2005, took public comment on what it needed to study. One point made loudly and consistently by many who submitted comments at that time was that the OSM must consider, as one alternative, enforcing the Stream Buffer Zone as written—as a "buffer" around intermittent and perennial streams, protecting them from damage from coal mining activities, including waste disposal.

As noted above, the proposed repeal of the Buffer Zone that was published in the Federal Register in August of this year was accompanied by a draft Environmental Impact Statement (DEIS). Outrageously, OSM did not select enforcing the existing law as one of the alternatives given full consideration in the new draft EIS. Instead, OSM reinterprets the existing rule in conformity with the new proposed rule, so that both of them allow valley fills in intermittent and perennial streams. This eliminates most of the difference between the two rules, and makes the "no-action" alternative a pale shadow of the proposed rule. The "no action" alternative in the DEIS merely substitutes OSM's past practice of ignoring the Stream Buffer Zone for its legal mandate to protect streams and the environment generally.

A true "no action" alternative would interpret the Stream Buffer Zone as applying to valley fills, as OSM determined was legally required in 2000, and evaluate what it would actually mean for the region and its stream resources if the agency enforced the law.

OSM summarily rejected further consideration of one alternative that does sound like the existing rule—one that would restrict valley fills by type of stream (ephemeral, intermediate or perennial)—and several other options that would have placed some actual limits on valley fills and other coal waste disposal activities. These included acreage or volume limits on fill size, limits on the size of the watershed or length of stream that could be buried, and a limit on the percentage of streams in a watershed that could be filled. These alternatives were cast aside by OSM without any detailed analysis because, the agency claims, it either lacks of statutory authority or the scientific data to pursue any of those options. Neither argument has merit.

---

[19] Id. at 24-25 (emphasis added).

[20] 72 Fed. Reg. at 48907; DEIS, p.S-2.

The only alternatives OSM considered all would allow valley fills to be dumped in any stream without any limitation on the amount of stream or types of stream that could be buried and destroyed, just a vague, case-by-case determination that the overall fill be minimized, "to the extent practical." To comply with the National Environmental Policy Act—as well as SMCRA—and to be responsive and fair to the people of Appalachia, OSM must consider some alternatives that restrict filling of streams, including at the very least the enforcement of the existing regulation.

Furthermore, OSM must consider some alternatives that address the cumulative impacts of stream filling. As OSM acknowledges, those cumulative impacts involve damaging or destroying over 1,700 miles of streams in Appalachia.[21] The DEIS fails to address these cumulative impacts. Fill minimization, by itself, only results in a case-by-case analysis of filling for each separate project; it does not analyze or address cumulative impacts. OSM inexplicably assigns zero value to the loss of thousands of miles of headwater streams.

Already, nearly 2000 miles of mountain streams in Appalachia have been contaminated or destroyed by mountaintop removal and the disposal of mining waste, wiping out these streams and causing pollution as well as flooding and destruction in the surrounding communities. According to the new draft Environmental Impact Study released with the proposed buffer zone rule, this administration's failure to enforce the buffer zone law led to an additional 535 miles of stream impacts nationwide during between 2001 and 2005. If this pace of destruction remains steady, the repeal of the buffer zone rule would permit more than 1,000 miles of streams to be destroyed each decade into the future.

The evidence that valley fills cause significant degradation to valuable headwater streams is clearly confirmed in the new DEIS itself. Headwater streams "serve a number of important ecological functions including . . . improving water quality."[22] When streams are buried by valley fills, "those segments no longer exist and all stream functions are lost."[23] This degradation must be deemed significant, especially because there is no evidence showing that buried streams can be recreated successfully elsewhere on mined sites. The DEIS states that "the state of the art in creating smaller headwater streams has not reached the level of reproducible success"[24] and "[a]ttempts to reestablish the functions of headwater streams on the groin ditches on the sides of fills have achieved little success to date."[25] Consequently, these stream losses must be considered permanent and irreversible.

Significant stream degradation caused by valley fill and mining activities has been best documented for watersheds in West Virginia. Recent expert analysis of GIS data presented in the case of OVEC v. Bulen,[26] showed that present and pending surface mining permit operations and valley fills conservatively cover the following percentages of streams in these watersheds:[27]

Watershed/Subwatershed	% of total streams covered	% first order streams covered
Upper Guyandotte	7.4	9.5
Dingess Run	19.9	19.5
Coal River	12.0	14.5
Laurel Creek	28.0	37.3
Upper Kanawha	7.9	10.2
Cabin Creek-Headwaters	22.9	32.1

[21] DEIS,p. 117.
[22] DEIS, p.109.
[23] Id. at 117.
[24] Id. at 111.
[25] Id. at 117.
[26] Civil No. 3:05-0784 (S.D.W.Va.).
[27] Expert Report of Douglas P. Pflugh, May 16,2006, Summary,p.2.

I have attached to my statement two maps* prepared by the GIS expert, Douglas Pflugh, showing the locations of the mountaintop removal and other strip mines permitted in these watersheds. The plaintiffs' expert aquatic ecologist, Dr. Bruce Wallace, testified in the Bulen case in October 2006 that impacts of this magnitude were "astounding," a "danger signal," and meant lost headwater stream functions in these areas.[28] Plaintiffs' stream restoration expert, Dr. Margaret Palmer, similarly testified that a loss of 29% of the watershed and 18% of the first order streams in a watershed were "incredibly significant" and so huge that it was questionable whether the stream[29] could ever be restored.

In conclusion, Mr. Chairman and Members of the Committee, Earthjustice respectfully asks that you look into OSM's proposal to effectively repeal the Stream Buffer Zone rule. Their proposal would overturn any balance left in SMCRA between coal production and environmental protection, making unfettered production and cheap coal the only values recognized by the federal government. It is as if the OSM is turning back the clock 30 years to when there was no federal program. The OSM proposal completely undermines Congress's intent that the law be interpreted to "protect society and the environment from the adverse effects of surface coal mining operations."

I know that many individuals and organizations in Appalachia and around the country hope that you will join with those of us who are calling on the OSM to withdraw this proposed rule. At the very minimum, OSM should be directed to reopen the DEIS on the proposed rule change to fully study the option of retaining the 1983 version of the rule, and enforcing it as written to keep all mining disturbances, especially waste disposal in valley fill and slurry pools, 100 feet away from flowing streams.

Mr. Chairman, another thing Earthjustice would request is for the Committee to have an oversight hearing specifically on mountaintop removal mining and the irreversible damage being done in the Appalachian region. While I greatly appreciate the opportunity to provide the Committee written testimony today, and appear along with Cindy Rank from the West Virginia Highlands Conservancy who is one of the most knowledgeable and dedicated citizen advocates on this issue, there are many other citizens and residents of the coal fields, as well as stream scientists, mining experts, and others who could provide much valuable evidence to the Committee about the outrageous harm being perpetrated in Appalachia by mountaintop removal.

Thank you again, Mr. Chairman, for the opportunity to present you and the Committee with information about this important issue.

CITIZENS COAL COUNCIL,
Washington, PA, December 17, 2007.

Senator BINGAMAN,
Chairman, U.S. Senate, Energy and Natural Resources Committee, Dirksen Senate Building, Washington, DC.

DEAR SENATOR BINGAMAN: On behalf of Citizens Coal Council, a national federation of grassroots groups and individuals living in directly impacted coalfield communities across the United States and the Center for Coalfield Justice from Washington, Pennsylvania, we want to thank you for holding hearings on SMCRA and the Office of Surface Mining on November 13, 2007. I am writing to request more hearings—to be held in geographically dispersed coalfield states—so that Senators and their staff can actually witness the environmental and health impacts of coal mining and hear directly from coalfield citizens about provisions in SMCRA that need strengthening, provisions that have been weakened, and first hand testimony on OSM's lax enforcement of SMCRA.

Citizens fought hard to include public participation provisions in SMCRA, in particular, public hearings to challenge mining permits and the like. Over the years federal and state mine regulators have found ways to thwart effective public participation by giving short notice, publicizing new permit applications in news media far from the communities where the mining would occur, scheduling hearings during the day when many people have to work, and indirectly limiting the number of people who can speak at "public" hearings. Although we appreciate the fact that hearings were held by the Energy and Natural Resources committee, there was very little public notice of the hearings and therefore lost opportunity for citizens to give

---

* Maps have been retained in committee files.
[28] Wallace Testimony, Bulen Tr. 2:32-34.
[29] Palmer Testimony, Bulen Tr. 2:134 and 2:135-36.

testimony. This only adds to the frustration that people feel when they are not being heard.

The mine operators have had 30 years to weaken citizen and environmental protections in SMCRA. The most recent is the unfolding attempt by OSM to legalize the dumping of mine spoils in streams and valleys (known as valley fills) through the proposed Stream Buffer zone rulemaking.

President Bush signed the reauthorization of the AML mine clean up program about a year ago. And today, the states still do not know the amount of funds that will be allocated to them or when the funds will be available for cleaning up dangerous abandoned mines. OSM has violated the legal mandate to allocate and release these much needed funds.

These short comings are only the tip of the iceberg. So please give citizens a fair and equal opportunity to show the Energy and Natural Resources committee members what is really happening to our coalfield communities and the environment from lax mining regulations.

Sincerely,

RICHARD STOUT,
Chair.

REBEKAH WEIGEL,
Organizer.

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT,
Fruitland, NM, November 10, 2007.

Hon. JEFF BINGAMAN,
Washington, DC.

DEAR SENATOR BINGAMAN: We are aware that on Tuesday, November 13, 2007, the Senate Energy and Natural Resources Committee which you, Honorable Bingaman, serve as Committee Chair, will be holding a hearing on the thirty year anniversary of the Surface Mining Control and Reclamation Act (SMCRA). This Committee has direct oversight over the Office of Surface Mining (OSM) and per a recent discussion with the Staff Assistant of the Energy and Natural Resources Committee, the Director of OSM, Brent Wahlquist, will be testifying before the Committee. It is of the utmost importance that, in this hearing, the OSM agency examines the risks and impacts of a national minefill rule before it proposes a draft rule.

As Navajo residents of a community that is sandwiched in between the two mine fills that collectively comprise the largest Coal Combustion Waste (CCW) mine dump in America (more than 100 million tons dumped in the San Juan and Navajo Mines since the mid 1970s), we are exposed to unregulated toxic CCW. On a daily basis, we are exposed to notoriously poisonous metalloid, arsenic, because of unlined surface impoundments of CCW which causes fugitive coal ash to become airborne, causing plumes of toxic dust over our community. This poses significant concern for us, downwind Navajo communities, who must deal with underfunded Navajo healthcare and the legacy of pollution in Northwest New Mexico.

According to a risk assessment entitled, "Human and Ecological Risk Assessment of Coal Combustion Wastes" (dated August 6, 2007), which was done as part of the Notice of Data Availability published by the United States Environmental Protection Agency (EPA) in the Federal Register on August 29, 2007, page 49714, the EPA estimates that the risk of getting cancer from arsenic exposure to people living around unlined surface impoundments is as high as nine individuals out of 1,000 exposed; in other words, nearly a one in a hundred people is at risk for cancer. This is 1,000 times higher than the acceptable cancer risk according to the EPA. This is an unacceptable level of cancer risks thus, environmental regulations are supposed to prevent CCW exposure to innocent bystanders living around polluting facilities.

Given that CCW is generated by coal-fired power plants and is not directly related to mining, OSM is not the right agency to develop this draft rule. SMCRA is a law that established requirements to make sure that surface coal mining operations (strip mining) stop harming adjacent environments (including water supplies) and that the lands mined for coal are reclaimed for uses equal to or better than premining uses. OSM was established by SMCRA. The framers of this law in Congress, however, did not envision that SMCRA would be used to allow active coal mines to become open dumps industrial wastes like CCW. Thus OSM has never had the expertise to regulate waste disposal. That job was intended to be the responsibility of the US EPA, under the Resource Conservation and Recovery Act (RCRA), the federal law regulating solid wastes. US EPA does have the expertise to regulate waste disposal as that is one of the primary reasons it was created and charged with en-

forcing RCRA. The US EPA, not OSM, should be developing the regulation for the dumping of CCW in coal mines.

Therefore, a critical question to ask the Director of OSM, Brent Wahlquist, during the Committee hearing should be: What analysis is OSM doing to assure that the safeguards that it is going to propose in a national minefill regulation will be adequate to protect people and their environment from unacceptable risk? Given the very high risk posed to people and the environment living around CCW surface impoundments and landfills, that US EPA has just divulged in its Risk Assessment of CCW, what analysis is OSM doing to make sure that its proposed safeguards will minimize that risk to people living around minefills?

In the Navajo communities of Northwest New Mexico, we urge the US EPA to develop proper regulation of CCW dumping so that our health will not be compromised. We respectfully submit this letter for the Hearing's record.

Sincerely,

SARAH JANE WHITE.
LUCY A. WILLIE.
DAILAN J. LONG.

SIERRA CLUB,
ILLINOIS CHAPTER,
Chicago, IL, December 16, 2007.

Regarding: November 13th Committee Hearing on SMCRA: Surface Mining Control Act Policy Issues 30 Years Later

DEAR MEMBERS OF THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE: Thank you for the opportunity to comment on the Surface Mining Control Act in your review of this essential legislation. In the thirty years since the enactment of SMCRA, a significant legacy of coal mining regulation outcomes is available for assessment. I would like to request your consideration of the urgent need to update SMCRA to include current scientific knowledge and demonstrated impacts of mining and the results of SMCRA regulations on land and water resources, and on the human communities in mining areas.

Since SMCRA was written, it is essential to recognized that the mining industry has shifted from room and pillar mining to longwall mining, and other techniques, such as mountaintop removal. SMCRA must be updated with regulations that truly work as the law intended, in light of changes in the mining industry.

Longwall mining, which removes about 80% of the coal over large sections of land, is a huge threat to high quality agricultural lands in Illinois. I urge your every effort to investigating and regulating longwall mining in areas where there is only 0 to 4% grade in the land surface.

Our nation's sustainable resources, including highly productive agricultural lands and the mountains holding forests that serve an essential role supplying oxygen and sustainable resources, are being impaired for the short-term gain of coal extraction. SMCRA is failing to protect the American public in many ways.

I ask you to personally visit the communities next to mountaintop removal mines in Appalachia and to see the sunken farm fields in Illinois where longwall mining subsidence has left impaired lands. In many places, coal mining is robbing citizens of their quality of life and is leaving huge environmental and societal costs in its wake.

No amount of regulations will protect America's water resources, agricultural lands, and other resources when the agency entrusted with enforcing regulations does not function as it was intended. I raise up to you concerns regarding a legacy of lax enforcement of existing mining regulations and significant failures on behalf of the Office of Surface Mining in its responsibility to protect the American public and our nation's natural resources. I ask that an assessment be done of OSM to study how this agency has enforced existing laws regarding mining and reclamation. Please hold additional oversight hearings to truly investigate the Office of Surface Mining and how it has followed SMCRA regulations. Critical failures in SMCRA enforcement can be found from the coalfields of Appalachia to the Illinois Basin to Wyoming. Citizens have been left to contend with loss of water resources or polluted water resources, impaired lands, and serious health effects from coal waste residue and other mining remains.

I live in Illinois and I emphasize to you our current, overwhelming concerns regarding longwall mining. When SMCRA was written, longwall mining and its subsidence impacts were not adequately considered or covered. Very little longwall mining was being done thirty years ago. Now in Illinois, it is the predominant method of coal extraction. Longwall mines have moved from the rolling lands of southern

Illinois into the highly productive and considerably flat agricultural lands to the north.

I urge you to consider that hundreds of thousands of acres of prime ag lands in Illinois are at threat from ground subsidence from longwall mining. These impacts affect the productivity and sustainability of these lands for generations to come. America must wake up to the true costs of coal. Alternatives exist for more sustainable energy sources than coal, if our nation has the will to employ them. Great energy savings could be made if there was a national effort to make our energy use more efficient. Steps can and should be taken now to weigh the full impacts of longwall mining on our essential agricultural lands and water resources, because SMCRA fails to address longwall mining subsidence concerns.

Lax enforcement of SMCRA regulations also impacts citizens via their state agencies entrusted to enforce state mining regulations. I ask your Committee to investigate how SMCRA regulations regarding the declaration of Lands Unsuitable to Mine Petition (LUMP) are handled. I raise to your attention the example in my state of years of efforts to have 643.5 acres at Banner, Illinois, protected under the SMCRA LUMP regulations. This land is located directly between two state conservation areas which are both globally recognized important migrating bird habit. Not only did the Illinois Office of Mines and Minerals declare every issue in our LUMP without merit, they have proceeded to approve a strip mine permit for mining in this acreage, which is also in the Illinois River floodplain and has a host of other environmental risks associated. Illinois Office of Mines and Minerals has approved this strip mine, which will be 300 feet (which is the SMCRA regulation) from the Rice Lake State Fish and Wildlife Area, which has nesting eagles, state threatened and endangered species, and is part of the hydrological system that will be affected by the strip mine. While SMCRA regulations are being followed, they are totally inadequate to protect the highly valuable and sensitive natural resources that are at stake at Banner, Illinois. State mining agencies use SMCRA regulations to avoid taking in the full impacts of what mining will affect. The 300 foot buffer regulation in SMCRA, as far as protecting adjacent parklands, is inadequate.

As another example of issues in Illinois, I would like you to know what has happended in Macoupin County. Flat lakes of stagnant water cover acres where prime ag land was once farmed. This is over four years after these lands were longwall mined. In my visits to Macoupin County, I have seen that longwall mining has not only affected farm fields, it has affected the rural quality of life. County roads are buckled with the earthquake type subsidence effects from longwall mining, and remain impassible and unrepaired years after the mining was done. Local traffic, schoolbuses, emergency vehicles, and other transportation had to use different routes. Homes on farm property owned by the coal company were vacated. Subsidence damage to houses and farm buildings could be seen from public roads, and numerous subsidence damaged homes were mysteriously burned down. Loss of streams, springs, and other water resources because of longwall mining is a major concern for livestock farmers and residents. I ask for your every effort to stop the current expansion of longwall mining in highly productive agricultural lands. Just as there are locations that are suitable for coal mining, there are locations that should not be considered suitable for mining. Flat and nearly flat quality agricultural lands should be protected from longwall mining for their long term importance for crop production. Please update SMCRA with specific regulations pertaining to longwall mining that truly protect prime ag lands and water resources.

In your review of SMCRA, it is essential that an economic assessment be made of what the real costs of coal mining are to governmental entities and public taxpayers in terms of lost or polluted water resources, impacts on public health and well-being, and the greater long-term issues of what kinds of mining allows sustainable use of lands for future generations, and what coal mining leaves incapacitated land.

Thank you for your consideration.

Sincerely,

JOYCE BLUMENSHINE,
Mining Issues Committee Chair.

STATEMENT OF LORETTA E. PINEDA, PRESIDENT, NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS

I am submitting this statement on behalf of the National Association of Abandoned Mined Land Programs. (NAAMLP). The NAAMLP is a tax-exempt organization consisting of 30 states and Indian tribes with a history of coal mining and coal mine related hazards. These states and tribes are responsible for 99.5% of the Na-

tion's coal production. Most of the states and tribes within the NAAMLP administer abandoned mine land (AML) reclamation programs funded and overseen by the Office of Surface Mining (OSM) pursuant to Title IV of SMCRA, P.L. 95-87.

Since the enactment of the SMCRA by Congress in 1977, the AML program has reclaimed thousands of dangerous sites left by abandoned coal mines, resulting in increased safety for millions of Americans. Specifically, more than 285,000 acres of abandoned coal mine sites have been reclaimed through $3.5 billion in grants to states and tribes under the AML program. This means hazards associated with more than 27,000 open mine portals and shafts, 2.9 million feet of dangerous highwalls, and 16,000 acres of dangerous piles and embankments have been eliminated and the land reclaimed. Despite these impressive accomplishments, $3 billion priority 1 and 2 problems threaten public health and safety and remain unreclaimed. These hazardous sites require safeguarding by the states and tribes through their AML programs.

The Association was extremely pleased with the passage of the 2006 Amendments to SMCRA. The 15-year extension coupled with increased funding will provide the states and tribes with the ability to carry out the remaining AML reclamation work. Time will only tell if all of the AML problems can be totally corrected in 15 years but it is the intention of the states and tribes to focus on the protection of the public health and safety while ensuring restoration in the coalfields of America. The Association would also like to thank the Congress for reauthorization of the AML Program and for taking AML funding to states and tribes "off-budget". With the funding off-budget, this will finally allow the states and tribes to make staffing decisions and in turn begin planning for long range design and reclamation activities. Included with our statement is a copy of an AML booklet* called "Safeguarding, Reclaiming, Restoring" for your review. The booklet was developed by the Association and OSM to highlight the various AML problems across the United States that have protected the public's health and safety.

I would like to commend OSM for their efforts to work with the states and tribes in the rulemaking process for the implementation of the 2006 Amendments to SMCRA. OSM has spent considerable time and effort meeting and responding to questions and concerns from the Association regarding rule development. Although much has been done to address problems identified by the states and tribes, there are still significant shortcomings that need to be addressed. The following items still have not been resolved. Thus the states and tribes have serious concerns about how effective the 2006 Amendments to SMCRA will be implemented:

1. Funding for Minimum Program States.
   —The Minimum Program States are Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, and Oklahoma.
   —For the last 13 years, Minimum Program States have been critically underfunded in respect to the number of Priority 1 and Priority 2 AML hazards that need to be reclaimed.
   —For three years (FY1992, FY 1993, and FY 1994) the Minimum Program States received $2 million annually. Since that time the Minimum Program States have been limited to an annual allocation of only $1.5 million. The primary reason given for not allocating the statutorily mandated annual $2 million was "budget deficits."
   —Under the 2006 Amendments to SMCRA all states and tribes will receive increases in AML funding beginning in FY 2008 (29% to 269% increases), while Minimum Program states will receive no increases for FY 2008 and FY 2009.
   —The NAAMLP has passed a resolution supporting the annual $3 million to Minimum Programs states beginning in FY 2008. However, OSM has been reluctant to support that position.
2. Use of Grant Mechanism to Distribute Payments from the U.S. Treasury for both the prior unappropriated state/tribal balances and payments in lieu of future state and tribal share to certified states and tribes.
   —The states and tribes would like the option of receiving the treasury payment by the current grant process or by direct payment from the Treasury similar to mineral royalties paid to states under the Mineral Leasing Act.
   —The states and tribes want flexibility and discretion with regard to the types of mechanisms that are available for distributing and expending Treasury payments.
3. Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside.

---

*Booklet has been retained in committee files.

—Since the inception of SMCRA in 1977 and the approval of state/tribal AML programs in the early 1980's, the states and tribes have been allowed to use their state share distributions under section 402(g)(1) of the AML Trust Fund for high priority noncoal reclamation projects pursuant to section 409 of SMCRA and to calculate the set-aside for acid mine drainage (AMD) projects.

—In its most recent interpretation of the 2006 Amendments, OSM has stated that these moneys cannot be used for noncoal reclamation or for the 30% AMD set-aside.

—Pursuant to Section 411(h)(1) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under section 409 and for the 30% AMD set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it.

These three items represent some of the unresolved issues between OSM and the States and Tribes regarding the 2006 Amendments to SMCRA. These issues are very important and we request that this Committee urge OSM to address these problems as we believe they will lay the foundation for a successful implementation of the AML Program for the next 15 years. Upon request, the Association can provide this committee a copy of a letter to OSM dated May 21, 2007 which provides significant detail and rationale behind our concerns over these listed topics and other important issues. We can also provide a copy of the response letter from OSM dated June 14, 2007.

The following quotes and excerpts are from some of the Association members that I believe are representative of many of the member's views and are intended to address the effectiveness of Title IV SMCRA:

Kentucky: "The Kentucky AML program has reclaimed over 2100 acres of dangerous landslides and closed more than 2300 hazardous mine openings. These actions have safeguarded thousands of Kentuckians from the hazards posed by abandoned coal mines. Perhaps most importantly the KY AML program has installed almost 1,000 miles of water distribution lines and provided fresh water hookups to over 11,700 Kentucky residences to replace drinking water supplies adversely impacted by past mining. The Kentucky Division of Abandoned Mine Lands has reorganized to add resources needed to design and construct the additional reclamation projects that increased funding generated by the 2006 amendments will bring. Projects previously placed on a "wait" list due to funding challenges are being reviewed and scheduled for reclamation. And, for the first time, Kentucky has established an acid mine drainage set-aside account to address the environmental problems associated with acid drainage from past coal mining."

Montana: "From the Montana perspective the Abandoned Mine Reclamation Program under Title IV of SMCRA has been a huge success. Montana's AML program was approved in 1980 and the program has had a high approval rating ever since. Montana's program is a success from the aspect of protecting human health and safety, protecting the environment, and from the perspective of creating jobs and putting people to work. Acceptance of the AML program has run high because AML results in on-the-ground accomplishments that are immediately visually apparent.

From the program management perspective Montana's AML program is a success because of the manner in which the abandoned mined lands program is managed by the Office of Surface Mining. Montana's experience with OSM oversight in the AML program is one of collaborative assistance that focuses on accomplishing the goals of AML. OSM provides the oversight and assistance necessary to keep the AML program on track without creating unnecessary or confusing paperwork or reports.

OSM provides important training in the areas of computer software and modeling geographic information systems, and data systems. This focused training gets staff trained using software packages that would not be available through State computer systems. In addition, OSM sponsors training through their National Technical Training Program in subjects such as subsidence control, mine fire abatement, mine hydrology and project management that are not available through other outlets. This specialized training is just not available from other sources and without it Montana AML would not have the necessary problem solving tools."North Dakota; "Overall, I believe the AML program has been very successful in identifying abandoned mine sites and eliminating safety hazards associated with many of them. As you know, much more AML work remains to be done in most states and re-authorization of the program will allow most of this remaining work to be completed over the next 15 years. However, for the minimum program states, one of the failures has been the lack of full funding for the minimum program states over the past 15

years. SMCRA amendments in 1992 set the minimum program funding level at 2 million dollars per year, but Congress typically appropriated only enough funds for 1.5 million per year. If the other 0.5 million dollars had been appropriated each year, the backlog of AML work in these states would be much less and hazards would have been eliminated sooner and at lower costs. Since there is nothing that can be done about past actions, we shouldn't dwell too much on that and move forward instead. With re-authorization now in place, it's time for OSM to ensure that funding for minimum program states is at the 3 million dollars per year authorized in that legislation. The increased funding to that level for the minimum program states needs to begin in FY 2008."

In closing it is important to remember that the AML program is first and foremost designed to protect public health and safety. The majority of state and tribal AML projects specifically correct AML features that threaten someone's personal safety or welfare. While state and tribal AML programs do complete significant projects that benefit the environment, the primary focus has been on eliminating health and safety hazards first.

Thank you for the opportunity to submit this statement.

STATEMENT OF RONALD E. YARBROUGH, PROFESSOR EMERITUS, EARTH SCIENCES, SOUTHERN ILLINOIS UNIVERSITY, EDWARDSVILLE, IL

I wish to thank the Natural Resources Committee for a review of a 30 year old act-SMCRA and the chance to pass on to our elected leaders a personal view of the coal industry and regulators, which I have worked for and have worked against in legal proceedings and publications. I am now 69 and am Professor Emeritus, Earth Sciences, Southern IL University, Edwardsville. I am also retired from the U.S. Army Corps of Engineers, St. Louis District where I worked part and full time for 17 years. I also worked for the former U.S. Bureau of Mines, Twin-Cities Lab, researching subsidence. My consulting work, over the last 40 years has been focused on coal mine subsidence and environmental problem solving.

The following items are most important to me and are why SMCRA needs to be updated to follow the changes and mistakes made by the coal industry. The writer has been confronted with some of these problems in my consulting career.

1). The underground coal industry has moved from room and pillar mining (50%+-extraction to protect the surface estate) to longwall mining (80% extraction with controlled subsidence, usually about 80% of seam height). An 84 in. seam would yield about 5.5 feet of subsidence. To legally subside the surface estate the company needs a "right to subside" contract with the surface owner. This relationship of mineral estate and surface estate owners was established in English Common Law in the 1500s. In IL, some of the county boards sold old coal mining rights to new companies and also sold the subsidence rights with NO input from the surface estate owner. This type of contract sale must be stopped. CALM (Citizens Against Longwall Mining—they are not against room and pillar mining) in Montgomery County, IL—largely farmers—are presently seeking a declaratory judgment in Federal Court against the coal companies for assuming that they have subsidence rights without a contract with the surface estate owner As one can ascertain, the rich coal companies can wear out the pocketbooks of the farmers in court and their prime farmland will be destroyed by longwall mining, which will be an economic disaster to the farmers, the local economy and America. Congress must not allow the "energy frenzy" to overcome our agricultural economy.

2). Subsidence over room and pillar mines is a rare occurrence and about a million acres of IL is undermined. Seventy-three percent of IL is underlain by coal deposits. It has been estimated that about fifty percent of the coal is recoverable, assuming economics and technology under present day conditions. Most of the surface mineable coal is mined out and underground mining will be the primary method of extraction and the companies wish to have higher extraction—longwall mining, thus, more profit. Occasional subsidence does occur over room and pillar mining, but if in a field, the sags can be easily repaired. If a structure is damaged, PA, IL, KY, OH and IN have a Mine Subsidence Insurance Fund which will repair the home or barn. A major problem today with the coal companies is that they are denying that the round ponds (sags) in the middle of fields are due to subsidence. The State regulators are sometimes helpful, but, since some feel that they work for the coal companies-not the people, they like to brush off investigations and the farmer has to sue to get compensation.

The Office of Surface Mining (OSM) was very helpful with three cases I have worked on in KY.

3). IL also has some of the most productive farmland in the world. Much of the glaciated areas of the State are only 0 to 4% slopes or flat. The farmers who broke the prairie in the 1800s found out that the level areas did not have good drainage. They installed field tile (there is enough field tile in IL to reach to the moon and back) and dug ditches to improve their crop yields. There are millions of dollars invested in the drainage systems in the State. Then, along comes longwall mining. The method involves 100% extraction in a panel that may be 3 miles long and 1000+-feet wide that creates a "bathtub" effect on the surface because room and pillar areas, which function as air and material passageways, parallel the panel and on the ends of the panel there are "room and pillar mains" which do not subside to the same extent as the panel. The Surface Mining Act states: "affected land shall be restored to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood". This has been achieved in a surface mine, for which the law was written, but is impossible with a longwall panel. In the Mt. Vernon Hill Country in Southern IL there have been many successful longwall panels because the land is rolling with slopes between 5 to 15%. Good floodplain land has been undermined and this level land is now largely elongated lakes. But subjacent to our level prime farmland the "bathtubs" on the landscape cannot be restored to a condition capable of supporting the yields of the fields prior to mining. Longwall Mining should be banned under prime farm land that has zero to four percent slopes because it cannot be reclaimed to its original production*.

**NOTE-The Dept. of Agriculture measures slope in their modern SOIL SURVEYS OF THE COUNTIES IN U.S.A.*

4). Rural families usually depend upon groundwater for their water supply for home and animals. The IL. State Geological Survey has conducted studies concerning the effect of longwall mining and bedrock aquifers. They have shown that there is draining of the bedrock aquifer for a year of so but the aquifer normally will recover. Those farmers or rural residents, who depend on shallow wells, usually in glacial derived sandy materials, sometime loose their water supplies for many years. The coal companies who conduct longwall mining in areas of 5%+ slopes and shallow aquifers should conduct studies to determine the effect on aquifers and in both shallow and deep aquifers should be ready to supply resident's adequate water without a law suit. The new SMCRA should make it very clear that the companies have that responsibility.

5). An example of a mining company in IL and longwall mining and landuse—There have been many complaints by the public about the regulatory agencies, OSM and State Departments that enforce SMCRA, are not doing their jobs. The professional people that I have worked with for many years in both agencies are doing their jobs to enforce the 1977 law—the problem is the law is not written to consider longwall mining and the agencies must have a law which has teeth to stop the coal companies from deliberately changing the surface landscape. A good example is a permit which was issued in 2006 by the IL Dept. of Natural Resources. A permit was issued to Steelhead Development Co. LLC, which changed its name to Williamson Development Co., LLC who is affiliated with Cline Resource and Development, LLC whose main offices are in Canada and are largely owned by German and Japanese Companies who are also affiliated with Natural Resource Partners, LP, NRP of Houston—owners unknown. The permit was for 540 acres of land, which they purchased, with 434.25 acres of farm land. The reclamation plan calls for the "bathtub lands" to be converted to wildlife habitat with no cropland, 19.26 acres of water and forest land.

So short term taxes versus long term loss to the county. By the way, Williamson Co. does not need any more wildlife land. The writer is also very suspicious of all of the chain of limited liability corporations, some foreign, who will be like some of the old strip mining companies, who were put out of business by the 1977 law. For some companies the old way to operate strip mines was rape, ruin and run and I am concerned that is what the foreign longwall companies (with local offices) are planning to do. The USA will be treated like a third world country supplying raw materials. The writer is not an attorney—who would a landowner or the states or Federal Government sue in the LLC chain?

6). Disposal of coal waste is a major problem in all coal fields. On the level surfaces of the Midwest slurry (fine material carried to the waste pile by pipeline) and gob (which is transported by truck) contain many hazardous mate-

rials. The Bevill amendment to the Clean Water and Clean Air Acts states that coal cannot be considered a hazardous material. Coal waste contains most heavy metals, materials that change into dangerous gases and high amounts of sulfur compounds which are released into the neighborhood around the waste piles. There is an excellent example in Clinton Co., on level prime farmland, of two waste piles that are 40 to 60 feet high and contain about 30+ million tons of waste. The piles were built on top of an unusual large shallow aquifer and Monterey Coal Co. (owned by Exxon-Mobile) knowingly poisoned the aquifer. Neither IEPA nor IDNR had laws that allowed them to modify the construction methods of the company. In a meeting (I was an expert witness against Exxxon), after the old waste pile had poisoned the aquifer and the coal company was looking to obtain a permit for a new pile—a employee of IL. Dept. of Natural Resources asked "are you not going to put a liner under the new pile since we all know that the old pile leaks".-the coal company representative said nothing. IDNR and IEPA did not have any authority to stop the permit being issued. Now, the mine is closed and they operate pumps to remove the poison, direct the poison into settlement basins and place it a pipe line to the Kaskaskia River, a source of drinking water. The noxious materials will not be leached out of the pile for 500+ years. The company was allowed to place only 2 feet of dirt on top rather than the required 4 feet—why? no one knows, yet the regulators let them get away with it. Unless poor little Exxon could not afford to follow the reclamation law. Who will clean up this mess in the future—the taxpayers of IL and America? The writer recommends that hearings should be held so the decision makers can design a new SMCRA that will be similar to the law for sanitary landfills to stop the pollution from coal waste.

7). Management of a revised SMCRA—recommended changes. As the writer stated, the profession people, who do the work, are limited by the current law to protect the property of the people in their state. One of the major problems is the fact that "the fox is watching the chicken house". The $0.15 tax on underground mined coal and the $0.35 tax on surface mined coal go to the regulators, OSM and the respective state regulatory agencies. The more coal is mined the more dollars the politically appointed managers in the states have to spend. Of course, these managers tell the professionals what to do, they are the boss. It is the writer's opinion, that Congress should review this fact and write into the new law a means to modify this management system and replace it with an independent group that answers to Congress and the people-not to the paying coal companies. Also, the other environmental portions of the present law are not strong enough. Congress has the National Environmental Policy Act which works very well because it MANDATES planning, scoping and public input. Getting a public hearing on a mining permit is like getting a tooth pulled, the agencies are very reluctant to face an angry public. As a geologist and former regulator, I feel sorry for them as all they have to work with is the 1977 law in which underground mining and waste disposal were not emphasized.

The writer would be very willing to work with a congressional aide as the House moves forward with the modification of the Surface Mining Act.

STATEMENT OF JULIA BONDS, ROCK CREEK, WV

I would like to thank Senator Bingaman for holding this hearing,

The good citizens of Appalachia and of all coal mining communities would like to invite you to our communities to witness the destruction, the illegal and immoral activities that OSMRE is allowing the coal industry to get by with. We need your help. Please come and investigate our complaints.

OSMRE and this administration continue to deny the citizens of Appalachia sufficient time to examine rule changes. OSMRE makes it extremely hard for citizens to find out about permits. Citizens in the nearby communities should be notified the minute a permit that affects them is applied for. During the Stream Buffer Zone rule change, we the citizens asked OSMRE for an extension and for hearings in November. We were denied without reason. I ask again WHY??? OSMRE is constantly making changes in regulations that make it easy for the coal industry to pollute, poison and blast our homes and communities.

The Bush administration and OSMRE are treating the good people of Appalachia like second-class citizens. The OSMRE denied the citizens of Virginia the right to even have a hearing, there by disenfranchising this county's citizens. This administration is a fascist regime and OSMRE is a gatekeeper for that regime. History will show their evil and shameful acts upon innocent people. Please do not be part of that shame.

OSMRE does not enforce the SMCRA laws.

OSMRE is allowing coal companies to devastate communities near coal mining operations. Loss of life and homes from flooding, loss of both well water and stream water sources, loss of renewable resources, and loss of quality of life are all consequences of irresponsible mining by outlaw coal companies and OSMRE is allowing this to happen by not enforcing the law. Our water is being poisoned and no one will help us. The coal industry is blasting our homes and mountains with millions of pounds of explosives a day. The coal dust, rock dust and silica dust comes down into the valleys and settles in our homes and our lungs.

OSM must honestly assess the cumulative impacts of mountaintop removal. OSM says the impacts are insignificant but ignores the cumulative impacts of mountaintop removal and other mining in central Appalachia, like longwall mining.

According to the administrations own studies on mountaintop removal coal mining, the immediate and long-term environmental impacts of this form of coal mining are severe and irreversible. The jobs are temporary and the damage is permanent. Lapses in the enforcement of the buffer zone rule have allowed almost 2000 miles of streams to be buried or degraded by mining waste.

The Bush administration released a draft Environmental Impact Statement (EIS) on August 24 to go along with the proposed rule change. That study was supposed to examine the environmental effects of alternatives to repealing the buffer zone rule, which prohibits valley fills and sludge ponds from burying and destroying streams. Yet, incredibly, the EIS did not even study the option of enforcing the buffer zone rule as currently written.

This fact alone proves the administration never considered enforcing the law, but only wants to repeal it, regardless of the facts about the harm that will result.

Using the administration's own figures, more than 1000 miles of streams will be destroyed every decade into the future, poisoning an entire region.

OSMRE is proof that the "fox is guarding the henhouse".

OSMRE is not even enforcing or fulfilling provisions of the AML law signed last year.

Recently the Rahall overhaul and change to the 1872 Hard Rock Mining Law included language that would allow the use of OSM personnel to enforce this law. This means more responsibilities for a regulatory agency that is NOT enforcing the laws now in coal mining communities.

OSMRE could also be given responsibilities of collecting the taxes generated by this law, again, this is even more responsibilities for a lax agency.

This could be perceived as leaders and lawmakers of this great country desires OSMRE to fail in it's job to protect the citizens living in the United States of America, or just fail to protect the citizens that live near coal mining operations.

We are asking that our Congress help us.

STATEMENT OF LINDA LINDSEY, PAONIA, CO

Thank you for the opportunity to submit comments to the Senate Energy and Natural Resources Committee with regard to SMCRA. SMCRA was intended to protect people and the environment from the deleterious effects of coal mining, but it has not bee well enforced and abuse is rampant. I could cite many instances where there has been mining under houses, dams, streams, etc. with horrible results that have not been addressed. There is urgent need for Senate oversight hearings to assist citizens in the coalfields to address the problems created by lax enforcement, to hold OSM accountable to its responsibility to protect our hard working citizens and our natural environment.

STATEMENT OF MARY A. BATES, HILLSBORO, IL

OSM has abdicated it responsibility to regulate SMCRA and protect the citizens and landowners from the ravages and greed of the mining companies. Underground mines have destroyed thousands of acres of prime farmland in the Midwest. Mountaintop removal and the stream buffer zone rule must be better regulated to stop the destruction and protect the natural resources.

In Illinois the Monterey Mine #1 has destroyed homes and families were displaced after being badgered and harassed to sell their land to Exxon Mobile owner of Monterey Mine #1. Planned subsidence from longwall mining has destroyed roads and prime farmland and now the mine is being closed without reclamation because it's not technologically and economically feasible.

Exxon's Monterey Mine #2 was closed several years ago but the Pearl Sand Aquifer was contaminated with leachate from the coal waste because it was poorly de-

signed from the beginning in late 1970's. There was no rule to install an impermeable liner under the coal waste then or now. OSM deferred to the state agency, IDNR, which made decisions in favor of the mining company and against the citizens welfare. Even today, 30 years later, contaminates drain into the Kaskaskia River everyday without warning signs posted anywhere near the output.

The citizens private wells are contaminated with arsenic as well as a multitude of other contaminates because they migrated off the permit area. Exxon was fined a million dollars and required to put surrounding landowners on municipal water supply. The mining activity still continues to pump water out of the aquifer and into the River. The soil cap on the GOB pile is less than SMCRA requirements and coal dust blows into surrounding homes. Many citizens are sick and have died from cancer for lack of information about what was in their drinking water and the air they breath.

The legislators deny responsibility, the mine denies responsibility,OSM has denied responsibility to protect the citizens of Albers and Germantown. USDA ruled the pumping was an ongoing mining activity even though the mine is closed . . . the Illinois Department of Natural Resources allows the pumping to go on designating it "passive reclamation". According to IDNR's own engineers the pumping must go on for 500 YEARS. IDNR denied hearing and comment periods saying it was irrelevant and statically insignificant. The citizens have no voice and continue to suffer.

This same scenario is about to play out again in Montgomery County with Hillsboro Energy LLC proposing to longwall mine and planned subsidence to thousands of acres if prime farmland. The flat (0-4% slope) cannot be drained and will become a swampland. Reclamation is possible on hilly terrain but not technologically or economically feasible on flat farmland.

It's not too late to revise SMCRA to stop the destruction of 205,000 acres of prime farmland in Montgomery County. We must have citizen input as originally written into SMCRA of 1977. There must also be enforcement of existing rules and OSM must the lead as intended.

Most Illinois landowners sold their mineral rights in the early 1900 to 1920 assuming room and pillar mining method would be used. Longwall mining method with planned subsidence was not used in 1977 when SMCRA was written and only added as an afterthought. Revision of the SMCRA rules must include protection for surface landowners from the longwall mining method and destructive planned subsidence. Protections for mountaintop removal and destruction natural resources must be included in a SMCRA revision.

STATEMENT OF VICKI HEDRICK, CARLINVILLE, IL

This email is in response to the need for revising SMCRA in light of the laxity with which mining regulations are enforced. Now it has come to my attention that there is a proposal to allow dumping of debris from mountaintop removal into associated valleys resulting in the damming of streams and rivers. This latter occurrence, if it were approved, would result in the loss of fresh drinking water for many U.S. citizens living in affected areas not to mention the destruction of habitat for many species of wildlife from birds (losing their mountaintop breeding habitats and food sources) to fishes, reptiles, amphibians, and mammals that rely on streams and rivers.

I fear that not enforcing the protection of streams through a buffer zone would also carry here into the midwest where many of our streams and rivers, including the Kaskaskia River (a major Mississippi feeder river) are already contaminated from mining waste. Some of this contamination results from continued leaking of leachate (arsenic, e.g.) into the ground water from abandon mines but also from leakage of those contaminants from gob piles and borrow pits of active mines.

In addition to leachate, longwall mining has become the method of choice in Illinois and other midwestern states. Longwall, of course, extracts a higher percentage of the coal seam. Removing that coal seam results in the subsidence of ground above the seam when mining is completed. Much farmland in Illinois (at a time when biofuels are being promoted) has been lost to subsidence. Since it may not be economically feasible for the mining company to restore the land (as the company is supposed to according to mining regulations), as determined by the mining company, this land may never again be productive since it will hold water late into the spring and summer, at least. Any homes, barns, and other structures are damaged and may not be repaired.

SMCRA was formulated at a time when longwall mining was not the method of choice and so, therefore, too many loopholes exist which allow the mining companies to abbrogate their responsibility to landowners. Therefore, SMCRA should be re-

vised and strengthened. In addition, stream buffers must be protected (and frankly, it would be best if, in states where this is an issue, mountaintop removal must be abolished!), private citizens must have recourse against the mining companies.

SCHMID & COMPANY INC.,
CONSULTING ECOLOGISTS,
Media, PA, December 17, 2007.

Hon. JEFF BINGAMAN,
Chairman, Senate Energy and Natural Resources Committee, Senate Office Building, Washington, DC.

Re: Comments on OSM Administration of SMCRA

DEAR SENATOR BINGAMAN: This letter is to provide comments to the Senate Energy and Natural Resources Committee as a follow-up to the Committee hearing on 13 November 2007 regarding SMCRA policy issues. Specifically, these comments relate to the recent Draft EIS[1] and proposed rule change[2] regarding the "Stream Buffer Rule". I am deeply concerned that OSM is not effectively administering the environmental protections intended by SMCRA, and that as a result, additional Congressional oversight may be necessary.

These comments are provided as a public service and not on behalf of any client. They are based on my professional experience during more than 25 years as a private-sector consulting ecologist, during which time I have worked closely with federal and state regulatory programs relating to mining, wetlands, and water quality.

COMMENT 1.—The basic premise of the Draft EIS and the proposed rule, that excess spoil fills, refuse piles, coal mine waste impoundments, and sedimentation ponds can routinely be authorized in and within 100 feet of perennial or intermittent streams in accordance with SMCRA and its implementing regulations, is fundamentally false. Just because OSM and State regulatory authorities may have historically applied the stream buffer zone rules at 30 CFR 816.57 and 817.57 in a flawed manner, does not make it a correct application of the rules. Indeed, it seems perfectly clear that routinely allowing these mining activities in streams was never intended. As noted on page III-70 of the DEIS, the preamble to the 1979 rules states that "[b]uffer zones are required to protect streams from adverse effects of sedimentation and from gross disturbance of stream channels". Excess spoil fills, refuse piles, coal mine waste impoundments, or sedimentation ponds, if constructed within streams, clearly will and do cause gross disturbance of the stream channels and degrade water quality.

Furthermore, the 1983 revisions of §816.57 (and §817.57) clearly state that "no land within 100 feet of a perennial or an intermittent stream shall be disturbed by surface (underground) mining activities". Although those sections of the regulations do anticipate limited exceptions to the near-prohibition on mining activities within the buffer zone, even those excepted activities may not "adversely affect the water quantity and quality or other environmental resources of the stream". In essence, only if the mining activity can be performed without adversely affecting the stream can it be authorized within the buffer. This is very clear and straightforward language, and I see no opportunity for misinterpretation.

If an excess spoil fill, a refuse pile, a coal mine waste impoundment, or a sedimentation pond is placed within a perennial or intermittent stream, it most certainly will adversely affect the water quantity, water quality, and/or other environmental resources of the stream. Replacing a section of a natural stream (which includes not only the physical structure of that stream but also the ecological functions and benefits that stream provides) with a spoil fill, a refuse pile, a waste impoundment, or a sedimentation pond will permanently and adversely change the stream, because those activities will result in the loss of that section of the stream, and there can be no more adverse effect on that section of stream than the entire loss of the stream section itself.

COMMENT 2.—The administration of the 100-foot buffer zone rule, which should be a very simple concept to implement, has become an elaborate attempt by OSM to rationalize exemptions and variances for activities that clearly were never intended to be allowed. The central focus of the DEIS, as with the past implementa-

---

[1] Draft Environmental Impact Statement (DEIS) on Excess Spoil Minimization—Stream Buffer Zones, Proposed Rule (OSM-EIS-34), prepared by the Office of Surface Mining Reclamation and Enforcement, dated April 2007.

[2] "Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States" (regarding 30 CFR Parts 780, 784, 816, and 817), as published in the Federal Register on 24 August 2007 (Volume 72, No. 164, pages 48890-48926.

tion of the rule, has been diverted from protecting and preserving natural watercourses to rationalizing and justifying how the destruction of whole sections of streams does not represent an adverse impact. The same weasel words and phrases keep being repeated in a deceptive attempt to appear to be providing environmental protection:

> operations must be designed to minimize the creation of excess spoil to the extent possible
>
> excess spoil fill must be no larger than needed to accommodate the anticipated volume of excess spoil generated
>
> steps to be taken to avoid adverse environmental impacts, or if avoidance is not possible, to minimize those impacts
>
> operations must be conducted in a manner that minimizes disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

I have dealt with federal and state regulations for many decades and I can recognize hollow directives such as these that may sound protective, but in fact represent giant loopholes. If an applicant agrees to "minimize disturbances to the extent possible", in reality he will do as he always has done and claim that nothing more protective is possible (typically because it will raise costs and lower profits). A claim to use the "best technology currently available" also is a charade: while advances in technology for mining coal are continually being developed and applied, there have been no comparable technological advances in the methods to protect streams and other environmental resources (because there is no incentive to do so), and so the "best available technology" may be wholly inadequate for stream protection and use of better techniques may be viewed by the applicant as not possible. This is unacceptable.

COMMENT 3.—The best protection a stream can receive is to prevent mining within 100 feet of it. This fact is acknowledged on page II-19 of the DEIS: "... in general, stream buffer zones continue to be the best technology currently available for implementation of SMCRA Sections 515(b)(10)(B)(i) and (24)". It is not necessary to have an absolute prohibition on all mining activities within the entire 100-foot buffer. Mining activities in any part of the 100-foot buffer, however, should be allowed only on a case by case basis and only in the most extraordinary circumstances; they certainly should not be allowed routinely. Most mining activities when conducted in the stream itself (especially excess spoil fills, refuse piles, coal mine waste impoundments, or sedimentation ponds) cause irreversible adverse impacts that cannot be mitigated adequately, and so they should not be allowed in the first place.

COMMENT 4.—OSM proposes to include a requirement that applicants submit an alternatives analysis and an environmental evaluation of each alternative proposed to allow certain mining-related activities in waters of the United States. This alternatives analysis proposal is fatally flawed by the inclusion of the loophole that allows the applicant to select an alternative other than the one with the least overall environmental impact if he can "demonstrate why implementation of that [least impact] alternative is not possible". This proposed "requirement" is just another spurious attempt to justify allowing mining activities that are not appropriate in or near streams. There are many different methods of mining coal. The method used should be the most compatible with the land being mined. If the topography is so steep that mountaintop removal cannot be done without filling in streams, then another mining method should be used. An applicant may produce reams and reams of documents describing how it has tried to avoid and minimize adverse impacts to a stream, and measures it will propose to implement to try to mitigate the impacts, but at the end of the day, if a stream or some section of it is allowed to be used as an excess spoil pile, or for some other mining-related activity, then it will not be available for fishing, hiking, or other recreation, it will not support aquatic life or riparian habitat, it will not store floodwaters, and it will not be able to provide the other ecological functions and benefits it provided previously.

COMMENT 5.—The attempt by OSM to justify impacts to streams under SMCRA by relying on Clean Water Act (CWA) protections associated with Nationwide Permits (NPs) authorized by the Corps of Engineers (Sections 780.28 and 784.28) is disingenuous. This is nothing more than circular regulatory logic which goes like this: if the proposed work in streams and wetlands already is authorized by a CWA Nationwide Permit, then it should automatically be authorized under SMCRA. That might make sense if the Nationwide Permit authorizations entailed a comprehensive review of the proposed work, but they do not; in fact: a) Nationwide Permits

are not carefully reviewed by the Corps in any manner even approaching the review that is required under Individual Permits, b) there are no acreage limitations on impacts associated with the referenced Nationwide Permits (NP 21, NP 49, and NP 50), and c) the Nationwide Permits themselves are considered valid if the proposed work either has been approved or is "being processed" by OSM (the circular logic again). OSM rules should require independent review of any and all mining activities that will affect wetlands or other waters of the United States, even if those activities undergo separate Clean Water Act approval.

COMMENT 6.—The OSM proposal to expand the protections of the stream buffer rule to all waters of the US, and not just to perennial and intermittent streams, would be laudable if it were not so ludicrous. The so-called "protection" that OSM proposes to expand is the watered-down version which allows major mine-related activities (excess spoil fills, refuse piles, coal mine waste impoundments, and sedimentation ponds) to occur within those waters. If OSM is going to lock the henhouse, it hardly can be called "protection" if it locks the fox inside too. If, however, OSM would propose to retain the same standards of protection as the existing rule ostensibly provides, I would applaud its expanding those protections to all waters of the US, including lakes, ponds, and wetlands.

COMMENT 7.—OSM proposes to replace the phrase "adversely affect" with the phrase "significantly degrade" in the conditions under which a variance to the 100 foot buffer could be authorized. This change should not be made. The phrase "significantly degrade" is less restrictive than the existing phrase "adversely affect". To change it would unnecessarily weaken the stream protection currently afforded under the existing rule. OSM should keep the buffer rule language as it is, and allow no mine-related activities within the buffer except in extraordinary cases where no adverse impact will result.

COMMENT 8.—The alternatives OSM proposed and reviewed are fundamentally flawed because they fail to include the most reasonable alternative, which is to protect streams by enforcing the 100 foot buffer zone under the existing regulation. This seems to be an obvious alternative for consideration, and it is outrageous that it was not included.

COMMENT 9.—OSM says that if mining is not allowed within streams and within the 100 foot buffer zone it would result in a significant detrimental effect on US coal production, which OSM says would be contrary to one of the stated purposes of SMCRA. However, three of the other stated purposes of SMCRA, all of which are listed before the one quoted which refers to "the Nation's need for coal", are as follows:

> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
>
> (b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations; . . .
>
> (d) assure that surface coal mining operations are so conducted as to protect the environment. [30 U.S.C. 1202 Sec. 102; emphasis added]

Environmental protection obviously is meant to be a primary consideration under SMCRA. There are many methods of coal mining, and coal is mined in many parts of the country. Local conditions should dictate which method is used in a given situation. If a particular mining method is such that it cannot be conducted in a specific location without causing adverse environmental effects, then it should not be allowed in that location. This does not mean that mining in that location is prohibited, only that another method of extracting the coal should be used, one that will not damage the stream corridors and other environmental resources. Under the current rule, variances can be authorized, but only where the proposed work can be done within the buffer in a manner that "will not adversely affect the water quantity and quality or other environmental resources of the stream".

COMMENT 10.—The existing 100-foot stream buffer rule should be uniformly applied and enforced in connection with underground coal mining as well as surface mining. Certain types of underground mining, longwall mining in particular, cause significant adverse impacts to streams, wetlands, and other surface water resources when the overburden subsides into the mine void. Subsidence is an intrinsic and predictable aspect of longwall mining. Consequently, underground mining activities should be made to comply with the stream buffer rule and should be allowed to occur within the buffer only in exceptional circumstances (e.g., where room and pillar mining is proposed and no subsidence can be anticipated).

COMMENT 11.—The rules should not be weakened to accommodate mining activities that cannot meet the standards. SMCRA became law 30 years ago largely in response to the environmental devastation being inflicted on the Appalachian

coalfields by unregulated strip mining. A major element of the law and its implementing regulations was the inclusion of detailed environmental performance standards. The currently-proposed changes to the 100 foot buffer zone requirement will result in a return to the type of environmental impacts in Appalachia that SMCRA sought to correct. That should not be allowed to happen. As mentioned above, if a particular mining method is such that it cannot be conducted in certain locations without causing adverse environmental effects, then it should not be allowed in those locations. Instead of weakening the rules to accommodate certain coal mining methods, the method of mining must be changed to conform with local conditions and comply with the environmental standards.

COMMENT 12.—OSM should not abandon its regulatory and oversight roles in favor of becoming an advocate for private industry. Environmental standards and regulations too often are viewed (at least by the regulated community) as unwarranted infringements on the right to operate a business and make a profit. The debate typically is framed as a strict choice between economics and the environment. The environmental protection rules are seen as imposing unreasonable costs on a business or industry. What is unreasonable, however, is the expectation that any business should be allowed to destroy mountains and streams, and when it happens, to avoid fixing or paying for the damages caused. In that sense, environmental regulations are a means to level the overall playing field, to ensure that all relevant costs and considerations are factored into the approval process. In their absence, the cost of environmental destruction is not reflected in the price of coal, rendering less destructive alternative sources of energy uncompetitive. So long as the regulations are fairly and consistently applied and enforced, it then becomes a free-market decision for the business owner to modify the proposed mining operation to comply with the requirements, or to use a different method of mining that complies. Good old American innovation and ingenuity is still alive and well in this country, and I know that coal can be mined without destroying streams. OSM should not presume otherwise.

In conclusion, I strongly believe that OSM must retain and enforce the existing 100-foot stream buffer regulatory requirement whereby no mining activity is allowed within 100 feet of perennial or intermittent streams except in specific, extraordinary situations where it can be conclusively demonstrated that there will be no adverse environmental impact on the stream. I call upon the Senate Energy and Natural Resources Committee to hold additional hearings and to provide a higher degree of oversight of OSM's administration of SMCRA. Thank you for the opportunity to provide these comments.

Yours truly,

STEPHEN P. KUNZ,
Senior Ecologist.

STATEMENT OF SCOTT GOLLWITZER, IN-HOUSE COUNSEL, APPALACHIAN VOICES, ASHEVILLE, NC

Thank you for the opportunity to submit comments on the implementation of the Surface Mining Control and Reclamation Act ("SMCRA") by the Office of Surface Mining, Reclamation and Enforcement ("OSMRE"). As part of its duties under SMCRA, OSMRE is required to comply with the National Environmental Policy Act ("NEPA"). The following comments[1] are intended to highlight recent attempts by OSMRE to implement SMCRA while evading its obligations under NEPA.

I. INTRODUCTION

Because more than half of America's electricity is generated from coal, we rely on the people, communities and environments wherever it is mined, processed, burned and discarded. Accordingly, we have a reciprocal moral obligation to reduce or eliminate coal's catastrophic impacts. Congress codified this ethical obligation in, inter alia, the National Environmental Policy Act ("NEPA"). Regrettably, OSMRE has abandoned its duties under NEPA in, inter alia, its recent efforts to weaken existing stream buffer zone protection regulations.

II. THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT'S MANDATORY DUTIES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370d (2007), is a broad national charter designed to ensure that federal agencies, includ-

[1] Excerpted from our comments on the proposed Stream Buffer Zone rule changes.

ing the Office of Surface Mining Reclamation and Enforcement ("OSMRE"),[2] do not relinquish their responsibilities to the public and the environment without first performing an extremely careful, comprehensive evaluation of federal actions affecting the quality of the human environment. See 42 U.S.C. § 4332 (2007). NEPA serves two equally important functions. "First, it 'places upon [OSMRE] the obligation to consider every significant aspect of the environmental impact of a proposed action,' . . . Second, it ensures that [OSMRE] will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). (internal and end citations omitted).

The Court of Appeals for the District of Columbia recently summarized NEPA's procedural duties: "[t]he purpose of NEPA is to integrate environmental review into the agency decisionmaking process to ensure that 'environmental values and consequences have been considered during the planning stage of agency actions.'" City of Dania Beach v. FAA, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting Andrus v. Sierra Club, 442 U.S. 347, 350-51, 99 S. Ct. 2335, 60 L. Ed. 2d 943 (1979)). As explained by the Supreme Court, NEPA was intended to "reduce or eliminate environmental damage," Dep't of Transp. v. Public Citizen, 541 U.S. 752, 756; 124 S. Ct. 2204; 159 L.Ed.2d 60 (2004), by requiring all federal agencies, including OSMRE, to "take a 'hard look' at the environmental consequences [of their actions]." Baltimore Gas & Elec. Co., 462 U.S. at 97. Whenever OSMRE decides to prepare an environmental impact statement, NEPA requires OSMRE to evaluate, inter alia, a reasonable range of meaningful alternatives to the proposed course of action. See 42 U.S.C. § 4332(A)(iii) (2007); see also, 40 C.F.R. § 1502.14 (2007).

III. OSMRE'S DRAFT ENVIRONMENTAL IMPACT STATEMENT DOES NOT COMPLY WITH NEPA

A. OSMRE's Failure to Identify and Evaluate a Reasonable Range of Alternatives is Arbitrary, Capricious, an Abuse of Discretion and Otherwise not in Accordance with Law

Distilled to its essence, the draft environmental impact statement ("DEIS") amounts to nothing more than a post hoc justification for OSMRE's proposed excess spoil and coal waste disposal regulations and a simple choice between adopting the proposed stream buffer zone ("SBZ") regulations or those proposed in the January 7, 2004 Federal Register. See DEIS at II–17–18.

Because Alternatives 3 and 4 are merely subparts of Alternative 1, their implementation and environmental effects will be no different than those associated with Alternative 1. See e.g., DEIS at IV-121 ("OSM[RE] would not anticipate a major shift in onthe-ground consequences from any of the alternatives.") (emphasis added). As such, these options can, indeed must, be jettisoned as bona fide alternatives because they provide no basis for "sharply defining the issues and providing a clear basis for choice among options." 40 C.F.R. § 1502.14 (2007) (emphasis added). When stripped of these bogus alternatives, the DEIS is little more than a confusing amalgam of three separate, yet very distinct, proposed actions. Specifically, whether: (1) to adopt the excess spoil regulations as proposed; (2) to adopt the coal waste disposal regulations as proposed; and (3) to adopt the proposed stream buffer zone regulations or those proposed in the January 7, 2004 Federal Register. Each of these distinct proposed actions is based on a cursory comparison of different, though legally inadequate, alternatives.

For instance, in considering both the proposed excess spoil and coal waste disposal regulations, the DEIS establishes a simplistic choice betwixt either adopting the proposed regulations (Alternative 1) or adhering to the existing regulations (No Action Alternative). OSMRE was recently excoriated for engaging in this type of either/or decision making under NEPA. See Save Our Cumberland Mountains, 453 F.3d 334, 345 (6th Cir. 2006) (NEPA "prevents [OSMRE] from effectively reducing the discussion of environmentally sound alternatives to a binary choice . . .") (citing Davis v. Mineta, 302 F.3d 1104, 1122 (10th Cir. 2002) ("[O]nly two alternatives were studied in detail: the no build alternative, and the preferred alternative. [The agency] acted arbitrarily and capriciously in approving an [environmental assessment] that does not provide an adequate discussion of [p]roject alternatives."); Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999) ("[T]he National En-

[2] Just as it has abrogated its ethical obligation to reduce or eliminate coal's catastrophic environmental and social impacts, OSMRE, as evidenced by its self-truncated acronym ("OSM"), ignores its duties to ensure reclamation and enforcement under the Surface Mining Control and Reclamation Act ("SMCRA"). Because Appalachian Voices firmly believes that reclamation and enforcement are equally important functions of SMCRA and OSMRE, we use the acronym OSMRE. See 30 U.S.C. § 1211(a) (2007) ("There is established in the Department of the Interior the Office of Surface Mining Reclamation and Enforcement") (emphasis added).

vironmental Policy Act and Council on Environmental Quality Regulations require [an agency] to study in detail all 'reasonable' alternatives [in an environmental impact statement] . . . [Courts] have interpreted this requirement to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only one alternative."); Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 666–67 (7th Cir. 1997) ("One obvious way for an agency to slip past the strictures of [the National Environmental Policy Act] is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the [environmental impact statement] cannot fulfill its role.")).

Assuming arguendo, that such dichotomous choices were valid under NEPA, OSMRE has created false dichotomies insofar as the agency has absolutely no intention of retaining the existing regulations. See DEIA at I-1 (explaining that the purpose of the DEIS is to end the "ambiguity" and "controversy" regarding the existing regulations governing excess spoil and stream buffer zones).[3] OSMRE's choice of alternatives regarding the proposed stream buffer zone regulations is, likewise, fatally flawed.

OSMRE establishes a false trichotomy by presenting two so-called alternatives to the proposed SBZ regulations—either the "No Action Alternative" or Alternative 2. Again, the Sixth Circuit Court of Appeals has chastised OSMRE for engaging in this type of tomfoolery. See Save Our Cumberland Mountains v. Kempthorne, 453 F.3d at 344. While three alternatives may satisfy NEPA's requirement for identifying and evaluating a reasonable range of alternatives, see 40 C.F.R. § 1502.14(a), OSMRE has whittled its SBZ decisionmaking down to a choice between Alternative 1 and Alternative 2 because OSMRE has no intention of retaining the existing SBZ regulations. See, DEIS at II-17 (the "No Action Alternative"). As explained supra, NEPA prohibits this type of dichotomous decisionmaking. See Save Our Cumberland Mountains, 453 F.3d at 345 ("the National Environmental Policy Act prevents federal agencies from effectively reducing the discussion of environmentally sound alternatives to a binary choice . . .") (citations omitted).

In sum, the DEIS presents, in the most convoluted manner: (1) the rationale for approving the proposed excess spoil and coal waste disposal regulations; and (2) a binary choice between adopting the proposed SBZ regulations or those contained in the January 7, 2004 Federal Register. OSMRE's poorly veiled attempt to shirk its NEPA duties by obfuscating the nature of the proposed actions and the range of alternatives is contrary to both the letter and spirit of NEPA's requirement to consider alternatives that "reduce or eliminate environmental damage," Public Citizen, 541 U.S. at 756, by identifying and evaluating "alternatives that are more environmentally considerate" than the proposed action. Save Our Cumberland Mountains, 453 F.3d at 344 (emphasis added).

B. OSMRE's Decision to Exclude Certain Alternatives From Detailed Consideration is Arbitrary, Capricious, an Abuse of Discretion and Otherwise not in Accordance With Law

NEPA requires all federal agencies, including OSMRE, to evaluate a reasonable range of "environmentally sound alternatives," Save Our Cumberland Mountains, 453 F.3d at 344 (emphasis added), and "for alternatives which were eliminated from detailed study, [OSMRE shall] briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). OSMRE's decision to exclude a number of reasonable alternatives is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. This is especially so where, as here, the DEIS evaluated an unreasonable range of alternatives. See Section IV.A. supra. As noted earlier, NEPA requires OSMRE to identify and evaluate "alternatives that are more environmentally considerate" than the proposed action. Save Our Cumberland Mountains, 453 F.3d at 344. Accordingly, OSMRE should have further evaluated, inter alia, Alternatives 5–16 because many appear to be more environmentally considerate than the proposed regulations. See Comments of Mulholland et al., October 1, 2007.

Making matters worse is the fact that OSMRE admits that it has failed to consider any alternatives that are more environmentally considerate than the existing or the proposed regulations. See DEIS at IV-121 ("OSM[RE] would not anticipate a major shift in on-the-ground consequences from any of the alternatives."). OSMRE's choice of alternatives regarding the proposed rule changes is especially ar-

[3] It is also noteworthy that OSMRE excluded the "No Action Alternative" from the enumerated set of alternatives in the DEIS. See DEIS at II–17–26.

bitrary and capricious in light of Congress' directive that OSMRE shall require mine operators to "minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable." 30 U.S.C. § 1265(b)(24) (2007) (emphasis added). OSMRE's refusal to consider, in detail, any alternatives that would enhance fish, wildlife and related environmental values (i.e. "alternatives that are more environmentally considerate," Save Our Cumberland Mountains, 453 F.3d at 344) is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

C. OSMRE's Failure to Adequately Identify and Evaluate Mitigation Measures is Arbitrary, Capricious, an Abuse of Discretion and Otherwise not in Accordance with Law

NEPA requires all federal agencies, including OSMRE, to identify and evaluate measures that will mitigate the environmental impacts of proposed actions and alternatives. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351–52 (1989) (citing 42 U.S.C. § 4332(C)(ii)). Yet, the DEIS fails to adequately identify and seriously evaluate the efficacy of such measures. Instead, OSMRE simply makes quick conclusory statements about the potential effects of mitigation measures. For instance, in discussing environmental impacts relative to hydrology, OSMRE states that

> [a]lthough impacts to the hydrologic balance are unavoidable, the permitting process is designed to prevent most impacts that cannot be mitigated or that would materially damage a significant surface- or ground water resource outside the permit area. See the discussion of the applicable regulation in section III.2.C.

DEIS at IV-122. A quick review of OSMRE's discussion of the "applicable regulation in section III.2.C." reveals that OSMRE did not engage in any meaningful evaluation of mitigation measures. Instead, OSMRE simply regurgitates the regulations—noting how baseline data and monitoring is established. OSMRE's failure to adequately identify and evaluate mitigation measures is arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law.

D. OSMRE's failure to Include an Expert in Aquatic Science is Arbitrary, Capricious, an Abuse of Discretion and Otherwise not in Accordance with Law

NEPA requires that an EIS be prepared using an interdisciplinary approach in which "[t]he disciplines of the preparers shall be appropriate to the scope of issues identified in the scoping process." 40 C.F.R. § 1502.6 (2007) (emphasis added). Despite the fact that the proposed rule changes would have significant impacts on aquatic species and systems, none of the ten preparers are experts in any specific field of aquatic science. See DEIS at VII-157. OSMRE's failure to include, as part of its interdisciplinary team, an expert in aquatic science (i.e. stream ecologist or aquatic ecologist) is not in accordance with law.

E. OSMRE's Failure to Insure the Scientific Integrity of the Analyses is Arbitrary, Capricious, an Abuse of Discretion and Otherwise not in Accordance with Law

The Council on Environmental Quality ("CEQ") created to promulgate NEPA's implementing regulations requires OSMRE to insure, inter alia, the scientific integrity of the analyses and discussions in an EIS. See 40 C.F.R. § 1502.24 (2007). Because the scientific integrity of the DEIS and proposed rule changes has been condemned by thousands of scientists, see Comments of Mulholland et al., Rassam et al., and Wrenn et al., the DEIS is fatally flawed.

V. CONCLUSION

"NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of § 102—'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776, 787 (1976). OSMRE's DEIS is the most recent example of the agency making a mockery of this Congressional directive.

We therefore respectfully request this committee to conduct a number of oversight hearings—particularly in the coalfields—regarding OSMRE's implementation of SMCRA and NEPA.

STATEMENT OF ELLEN PFISTER, SHEPHERD, MT

I had occasion to write most of these remarks earlier this summer, but since then I have had some further thoughts on the topic of your hearing. Most of my remarks deal with specific instances that I have seen or been a part of in the last thirty years; however, implementing policies without thinking about what it does on the ground is a futile process. SMCRA was intended to improve real conditions, not virtual ones.

Over the last thirty years the biggest failures of SMCRA have been in the implementation and enforcement of its water protection provisions and the failure to foresee the changes that could occur in the scope and effects of certain methods of coal mining. Lack of enforcement of SMCRA has been a chronic failure from the citizen's point of view. It has seemed that the regulators have identified much more closely with industry than with the third party to this law, the citizens who live in the coal fields.

I would like to suggest that if changes are to be made to SMCRA that it be broadened to cover all surface effects of all kinds of coal mining, regardless of definition of method, and that enforcement be removed from OSMRE and passed to the Justice Department which has law enforcement experience. The kinds of people hired by OSMRE generally do not have the firmness which is required for law enforcement. They prefer to be "administrators". Eventually this law has to be enforced.

I understand that OSMRE is proposing a new mission for itself that it begin to facilitate the coal industry technically , i. e., that it develop new techniques for the industry. OSMRE does have the capability of encouraging experimental techniques in reclamation, a capability it has studiously ignored in dealing with reclamation of water resources within mined area. I have to ask how deeply would OSMRE be involved in guaranteeing reclamation to a permittee if the permittee used an OSMRE technique which failed to be successful when implemented by the permittee?

How much advice industry has wanted from the state regulators has varied over time in Montana. In the beginning the Montana law had quite specific standards for many things such as the construction of sediment ponds. Over time most of that has been eliminated in favor of performance standards. (See section 515 of SMCRA for those). The companies supposedly have been following their permits, which supposedly incorporate the performance standards. You have received a document from the Western Organization of Resource Councils and the Natural Resources Defense Fund called "Undermined Promise." The researchers found that Montana had the lowest rate of final bond release of just about any place. Part of it has to do with the attitude of the largest producer in Montana, which tried to get a Page 2 law approved that said that if the company went through the process that bond release would be guaranteed. The point of the reclamation law was to guarantee bond release. OSMRE did not accept that interpretation, but the Montana legislature swallowed it hook, line, and sinker. There were many other changes that it did accept, but to make its permit comply with the new law, the permittee would have had to come in and amend its permit. Rather than do that, the permittee submitted its bond release permit "as built." Montana could not accept the bond release proposal, because the permittee had not done what it had committed to do even under its permit. This particular permittee thought that the prior law, which had basically one standard for reclamation revegetation, was too hard to meet, and so got the Montana law changed. Even after the Montana law was changed to largely suit this one company, it did not want to comply with the new law.

The other thing that is slowing bond release in the West is the lack of water reclamation to the standards of SMCRA. Because in most cases in the West, the companies depopulate the area, the mine permits are viewed as a cozy arrangement between the mine and the regulators, water is not viewed as particularly important until bond release at the end. Montana has a 4th stage of bond release which is supposed to deal with water, but unless the water in the mined area is dealt with at the beginning, there is very little that can be done for underground water at the end.

I heard an employee of the Wyoming Department of Environmental Quality speak at the annual meeting of the Powder River Resource Council, and she did not mention the reclamation of water once in her speech. It seemed to me that her sole emphasis on reclamation was revegetation. However, I met a couple there who live west of the Black Thunder Mine south of Gillette, and they are suing over water loss caused by the mine. Where has the Wyoming Department of Environmental Quality been that parties adjacent to the mine are losing water and being forced to sue?

Now that the companies are beginning to get interested in getting their bond money back, they proposed a law which mandates ("shall") that the Montana Department of Environmental Quality shall tell the permittee exactly why the proposed area failed to get bond release. The interesting thing about this is that the big 2003 amendments passed to Montana's reclamation law removed the requirement that Montana inspectors tell the operators during their routine inspections over the years where the operators were going wrong. I think the attitude was that the operators were big boys and did not need to hear from any weasel headed inspectors. "We know how to do it." Somebody is trying to hang the Montana DEQ inspectors at the end of the process.

If OSMRE gets into the coal mining technical facilitation business, it could get hung in the same way or face serious liability problems. If OSMRE would enforce the performance standards of SMCRA, it could handle the problems posed by mountain top removal and water loss and diminution of quantity and quality in the coal fields. If OSMRE enforced the law by not granting permits which cannot meet the performance standards of the law, it would spur innovation on the part of industry, because industry wants to mine every scrap of coal possible. (See the Bob Murray mine tragedy in Utah this year.) The innovation should primarily come from industry, not OSMRE. OSMRE is not the Bureau of Mines, much as it would like to be.

There have been some court decisions over the years that have not been helpful. The decision which limited the surface effects of longwall mining to the face up area only, flies in the face of what actually happens with surface damage for longwall. All surface damage should be covered by federal law and standards.

The land use revegetation standards in SMCRE are being interpreted very broadly when requiring native vegetation to support the postmining land use. It has been routine to accept grassland as a replacement for forests in the East, and at least in Montana, when most of the premining land use has been wildlife/grazing use, it will now allow grassland monocultures with a few rocks thrown around for "wildlife enhancement features". The mixed prairies will be lost. Some mines were doing a good job of recreating mixed prairies, but the ones who were not, whined and cried and went to the legislature and got the law changed, and OSMRE saw no problem with it. The problem will only be seen in the future is many more mines open and much more coal is mined, creating much larger acreages of grassland monocultures.

SMCRA is a good law as far as it goes. It has resulted in the regrading of a great many spoils areas and revegetation of those areas with varying degrees of success. There has been little success in reforesting those areas which were previously hardwood forests. Most of the mountain top removal areas are denuded of trees. The western prairies have vegetation ranging all the way from weed patches to some pretty good looking mixed grasslands. The spoils are being regraded to approximate original contour to a greater or lesser extent.

The three biggest failures in SMCRA are the failure to include the reclamation of the surface effects of longwall mining beyond the mine adit areas, the failure to anticipate the expansion of mountain top removal and the failure to reclaim underground water resources. The first two are omissions from the law, and the third is a failure to adequately enforce the law. The first two problems could be remedied by extending SMCRA to the surface effects of all coal mines. A fourth area that SMCRA does not deal with is granting a permit to a speculative venture. I hope that what I have dealt with for the last 18 years is not common on a nationwide basis.

MY PERSONAL INVOLVEMENT WITH MINE PERMITTING

Like many others who were involved in SMCRA's passage, I was naïve enough to believe the law would be enforced, and that I could go about my life. Coal entered my life again at Christmas l988, when two boys from Pikeville, Kentucky, came around wanting to start a coal mine that would affect the north end of our place. Then a bigger fish, Burlington Resources, came around with the idea of a longwall mine and a proposal to trade Federal coal for some of their land. It would be a large block of coal and would support a 3 Million ton a year mine. I knew Burlington Resources would never mine a lump of coal on their own. Their ambition was to be gentlemen royalty collectors. The permitting process began, and regardless of how speculative the mine plan is, a landowner or party adjacent to a mine cannot afford to ignore it. The permitting process grinds on regardless of the economic feasibility of a project. This speculative mine has occupied my time and the Montana Coal Program's time for 18 years with no sign of economic success for the mine.

Burlington Resources put the permit on the market as soon as it was issued in l992 and finally found John Bauges, Jr. of Tennessee in l995. He began mining then, but in l998, the permit was permanently revoked and the bond forfeited. Two

years later the state of Montana had barely begun to clean up Baugues' mess, when John Baugues showed up again, striking a deal with the State of Montana to reduce his fines by about 2/3 and requesting that the State of Montana resurrect the permanently revoked permit . OSMRE was brought in to rule on whether a permanently revoked permit could be resurrected. OSMRE ruled that there was one precedent for doing so from West Virginia; however, no permit number or mine name or location was ever cited. No one that I met from West Virginia had ever heard of it. OSMRE enabled the resurrection of a mine that is a pure speculation.

Once the permit was resurrected in 2000, Baugues et al came back with a bigger and better plan to mine 12 million tons a year, which would take out the whole coal reserve in our area in 30 years and leave the entire heart of the Bull Mountain recharge area with deeply damaged water. In addition to the mine, the Baugues consortium proposed a 700 MW merchant power plant, which has now morphed into a 300 MW power plant and a 22,000 barrel a day coal to liquid fuels plant, which in turn needs an additional 150 million tons of strippable coal to be even remotely feasible.

The Bull Mountain Mine shut down again in March 2007, as it was being sued in foreclosure by bond holders, North Carolina and Florida churches and retirees, who were promised 11% return on their investment bonds. While Baugues et al were defaulting on their bonds, they were running around our country trying to buy ranches, some of which they lost their earnest money on, not being able to make the final payment.

Baugues is resorting to the Western type of coal mine acquisition and operation, which is to buy out the locals and depopulate the country. If the people are gone, there is no one to see or to tell how badly the mines reclaim the mined lands. The only parties to the reclamation contract are the mine company and the regulating agency. Most of the Western mines are far from town, and the miners live in town, so nobody cares as long as mine money rolls into town. The effects on agriculture are secondary.

In January 2007, Montana DEQ finally approved the permit amendment to the Bull Mountain Mine which takes in the North end of our place. They claim our high springs will not be damaged. Our springs are in the vicinity of 500 feet above the coal. Aside from the property owned by the coal company, our ranch will be the second property to be damaged when the second panel begins operation. I am not optimistic about the future of our water; "no damage" does not jibe with what I have seen in other areas of the country. The primary authority relied upon by the state is a consultant paid by the permittee in l992, who would have a vested interest in making his customer happy, and who cited no specific instances in western longwall mining similar to the geologic conditions in the Bull Mountains.

Since the mine was first permitted in l992, it has never operated on the schedule shown on the permit. They are months and years behind schedule. The mine will eventually take out a subdivision in the area. Those homeowners are just trying to ignore the problem of what and when will something happen to their property. The town of Roundup no longer holds its breath with anticipation when the mine makes an announcement, and credit is cash only for the mine. The permit is the only thing that holds this speculation together.

LONGWALL MINING

Most of the longwall mines in the West are under public lands; the people are gone. The effects are between the bureaucrats and the mining companies. The effects are hidden. Since the Bureau of Mines was closed, there are no studies being done on the effects of longwall and the companies aren't talking. The only studies I could find were scientists putting their sensors down well holes in the east, and bewailing the fact that after the longwall machine passed, they couldn't get anymore readings on where the water went. They had no money to pursue the information, and probably no way to access legally the land that was mined. That is a failure in SMCRA. The entire area in an underground permit should be included in SMCRA, because the affects of longwall coal removal go to the surface miles away from the adits and processing plants. Unless there is a jurisdiction through government action, there is no way for follow-up studies to be done are areas of water damage in longwall area and no one with the resources to find the lost water.

Since l989 when longwall came to the Bull Mountains, I have tried to find out what has happened in longwall areas across the country. The water buffalo is the indicator species for the health of water in longwall areas. Where has the original water gone that was once in wells and springs? No one seems to know, and the landowners are powerless to force a search. I cannot think that water stored for home use in water buffaloes is healthy for families.

I met a dairyman in Western Pennsylvania, whose farm dated back to l795 who was ultimately forced out of dairying because the water hauled to his cows was chlorinated, and they could not thrive on it. I have been visiting by e-mail with a farmer in Southeastern Ohio whose land lies about 500 feet over the coal seam being longwalled, who lost springs going back to the late 1700's and old wells. It took about 3 weeks for the water to fail after undermining. The coal company has been very slow to deal with the promises it made him prior to undermining. He has had trouble with water haulers after undermining, plus his historic farm buildings were severely damaged. Floyd Simpson has a website www.countrymilefarm.com with a diary of the damage that occurred when he was undermined in late 2003. He does not know where his water went. He knows he does not have the water he had.

Southwestern Pennsylvania has been devastated by longwall mining; it is a land of leaning chimneys, damaged homes, and water buffaloes. Interstate highways as well as county roads have been undermined. I have seen half a county road slipped 40 feet down the hill from where it had been, thanks to subsidence.

30 YEARS OF SMCRA FROM A CITIZEN'S POINT OF VIEW

Underground coal mining, whether room and pillar or longwall or any other kind of underground extraction, should be included within the purview of SMCRA because when the strippable coal is gone the coal industry will turn to other methods for coal recovery. The surface damages and damage to water will not abate with a change in the method of mining. The surface affects of underground mining should be clearly included.

In its vision of the future, SMCRA failed to grasp the damages that large scale longwall mining can do and failed to grasp the potential for explosion in size of mountain top removal, and in the West surface mining mines the water aquifer. All of them are extremely damaging to water regimes. All of them damage the surface in different ways. Mountain top removal is like beheading a person, and longwall mining and surface mining are like dying of liver or pancreatic cancer. One death is much more spectacular and visual, but one is just as dead from cancer.

OSM has permitted the States to approve permits that I believe violate mandates within SMCRA itself, such as the standard for reclamation to follow behind mining as contemporaneously as possible. Permits that allow a mine to wait 20 years before beginning regrading and other reclamation procedures certainly have no element of contemporaneous reclamation. SMCRA is bent to the mine operator's complete convenience. Certain pits that are left open for years on the chance that the mine may need that coal to blend fall short of contemporaneous reclamation as well.

The rule seems to be that the permit will be enforced even if the permit does not comply with SMCRA, as long as the permit is complete by dealing with every section of the state regulations. Granting the permit gives an easy out on enforcement of the standards of SMCRA to the permittee and the agencies, and the agencies are loathe to admit that a permit may have been improvidently granted.

As a subject and participant in the permitting process in Montana, I have come to the conclusion that it can be summed up as "Promise her anything, but give her Arpege." Any remediation in the permit can be revoked if the permittee cries economic hardship. As a subject of the process, I really do not know what the final remediation will look like. I suspect the permittee's economic hardship will trump my economic hardship. The permit is supposed to be a promise of reclamation and repair by the State to its citizens, because the State approved the reclamation plan and accepted the promise from the permittee. I have grave doubts as to how binding that promise is on the permittee.

Permits that allow acid mine drainage are still being issued. I do not find that a failure in the law, but in the enforcement and administration of the law. Acid mine drainage from Eastern mines seems to be the norm. Save Our Cumberland Mountains fought for 10 years to finally get Fall Creek Falls State Park in Tennessee declared unfit for mining due to the certainty that mining in that water shed would cause acid mine drainage over the falls. I doubt if many permits have been denied on the grounds that mining would cause acid mine drainage. Although SMCRA allows the designation of areas unsuitable for mining, very areas have that designation, and it is difficult to get.

Save Our Cumberland Mountains did a study in l989 on acid mine drainage on reclaimed sites in Tennessee and found a lot of it. My naivete included being so trusting that SMCRA would end acid mine drainage from current mining. I have watched over the years as OSMRE tried different things to mitigate the improvidently granted mine permits that were discharging acid mine drainage. There was the Appalachian Clean Streams Initiative that tried to dip into USDA funds to help

out, as well as waylay any other money that could be found. There was AMD and ART, which was an attempt to show how acid mine drainage treatment areas could be turned into a community enhancement. That, too, used funds other than funds from the party who caused the damage in the first place. OSM has participated in the whine that somebody else's money should fix the damage. OSMRE has not had the guts to face down the companies to make them internalize the costs of their actions, and fix the damage that is occurring on permitted mine sites.

One change that has occurred since the passage of SMCRA in l977 is that the size of Eastern mines, particularly longwall and mountaintop removal, is increasing and beginning to approach the size of some Western mines. The Eighty-four Mine at Washington PA was permitted to undermine 22,000 suburban acres initially. The Mountaintop removal mines are up to 5000 acres and above. The Mountain Top Removal mines are depopulating the towns and settlements that are unlucky enough to reside below them.

The Western mines depopulate areas as well. The practice has been to buy out the rancher and give them an option to buy back at some time in the future. If the mine is on public lands, the public is excluded from the mining area. Both East and West are depopulating coal bearing areas. If one becomes a tenant of the company when he had previously been a landowner, he is no longer independent or in a position to speak his own mind. The company regards the permit as being between the company and the agency and no one else should have anything to say.

WATER DAMAGE

The water in the western mines is regarded as fair game for damage and diminution. There have been no attempts to insulate the water that may come into a pit from contact with the spoils materials. Experimental practices have been suggested from outside the agencies and industry, but those practices would take planning at the permit issuance stage. That has not been done in the past, and it doesn't look like it will be done in the future. Some of the Western mines are dry in the pit, but others have quite a lot of water that pours into the pit. The flushing that does occur within the pit is unpredictable and uncontrolled. Now, to add insult to injury, OSMRE is in the process of considering a new regulation that will allow the dumping of fly ash in the strip pits. I do not believe that SMCRA encourages the dumping of industrial wastes in the surface mining pits. Colstrip, Montana, electric generating plants offer a good preview of what can happen. The fly ash pond at Colstrip was constructed about 1974 to a depth of eighty feet, but only the top 40 feet were lined with impermeable material. Water began leaking from the bottom of the fly ash pond shortly after use began contaminating the wells on the Cluver Ranch downstream. Thirty years later, the pollution has advanced downstream to contaminate the wells on the McRae Ranch. The ranch wells were drilled deeper to get away from the pollution, but there is nothing to keep the pollution from reaching the deeper water as well. The company has been pumping the surface water from the toe of the pond back into the pond, but the water keeps travelling underground. I do not think OSMRE has the will to enforce anything that might approach safe storage of fly ash underground in a wet mine, and I know the State of Montana does not.

Recently the Rosebud Mine at Colstrip cut into an area called Lee Coulee, which was a new mining area. They hit a tremendous vein of water which they pumped on down the coulee, ruining 90 acres of hay land. It drained the springs above the mine cut. They are no more. Don Bailey's hay ground is ruined, and the water is gone. He had to sue the mine to recover his damages. The Rosebud mine also had a twenty mile highwall open for a number of years—10 miles on the north side of the hill, and 10 miles on the south side of the hill, and the mine is moving in a direction which has the potential to create even longer highwalls. The mine was keeping the mine road at the base of the highwall open to have a loop road on which to haul coal.

The State of North Dakota issued a permit to turn Kenney and Gwen Thompson's farm land into a dump for an adjacent mine that was mining on the farm. The farm couple didn't know about it until diesel fuel turned up in the well at their house. OSMRE was no help to them. They eventually sold to mine due to the farmer's ill health. Miners at the mine told the couple about all the hazardous waste the mine dumped in the mine pit on Thompson's land.

Now there is a lawsuit filed in Denver over dumping fly ash in the Navajo Mine in New Mexico and leaving it open blowing ash in the wind. OSMRE is responsible for mining on Indian lands. First, they are allowing dumping fly ash in the mine pit, and second, they are not even covering it in a prompt manner, even if SMCRA

authorized dumping fly ash in a mine. I saw fly ash being dumped in that mine in a flyover in l992. There is a lot more there now.

When we were in the permitting stage of the initial Bull Mountain Mine, we were told by state agency personnel that water replacement would be "opportunistic". I have been told of cases where the mines have buried a spring that could have been developed with a little care—so much for opportunistic development.

The Jacobs Ranch Mine in Wyoming is finally putting in for bond release on the areas against the Rochelle Hills, which were mined when the mine began, because water is finally beginning to infiltrate the mine areas from the undisturbed areas toward the hills. As it advances west the mine is also dewatering the coal in advance of its mining area to get the coalbed methane out before it removes the coal. How long will it be before that area will have any underground water after mining? The combination of surface mining and coalbed methane development may result in an area devoid of any water for a very long time.

Water loss in the East is typically dealt with by either a water buffalo or connecting people to a pipeline from somewhere else. I have always wondered what will happen when the "somewhere else" is also damaged by coal mining, and that water disappears as well.

THE CITIZEN: REGULATION AND THE LAW: STATE AND FEDERAL

To the ordinary person, of the 4 sets of documents that can govern coal mine reclamation, SMCRA is the plainest to read and understand. The language is generally set in terms of "shall" and "will", which most people understand, whether they like it or not. Going back about the last 25 years at least, OSM has been in the business of putting out regulations to bend "shall" and "will" into something else, if possible. I can't think of a regulation that could put a stronger interpretation on the law that has been approved, but thank God, I don't know all the regulation changes that have been proposed.

Neither the States nor OSMRE have done anything on citizen education about their rights under SMCRA or the standards of reclamation established by SMCRA on other than an ad hoc basis. There is no easy reading document for a citizen to read. SMCRA is the plainest of the materials available.

The federal regulations are long and a lawyer's joy. Then when the state laws and regulations are added on top of that, which is the case when a state assumes primacy. The amount of material to digest becomes nearly overwhelming. Montana's education for citizens was to give them a copy of their regulations, but that seems to have gone by the wayside in recent years. Now it seems to be what the last person one saw told him.

A case in point is Montana, where the Montana law has gone from a law which said "shall" and "will" to one which says "must ", "may", and "should" to favor the newly fashionable tenses in legal writing. "Shall" and "Will" are clearly defined in court cases and English classes. Montana is attempting to conceal the mandatory affect of SMCRA, and OSMRE has gone right along with them, although the law under which OSMRE operates has a language of command and immediate compliance. Essentially OSMRE inspection personnel are constables on patrol, and if a State has primacy their inspectors have the same mandate. Montana is trying to obscure that mandate and to remove the sense of immediacy of enforcement under the law changes of 2003 and 2005. OSMRE tried to obscure the sense of immediacy with its Reg. 8.

In addition, it takes years for OSMRE to approve or disapprove changes to Montana's law and regulations. In the mean time, Montana goes ahead and enforces its legislatively passed law and implementing regulations, regardless of whether they comply with SMCRA. I wonder what happens when Montana approves actions under its law while waiting for OSMRE to rule, and later it is found that the approved action was not in compliance with SMCRA. OSMRE must be suffering its own funding short falls to be so slow in processing regulatory packages. It takes so long, that if one has commented on a package by the time the ruling comes out, one has almost forgotten about it. If the non-compliant action is ensconced in the permit, will Montana enforce that rather than an action which would comply with SMCRA?

REGULATION AND MONEY: STATE AND FEDERAL RELATIONSHIP

OSMRE was the victim of the Clinton balanced budget. The first people cut were the inspectors, and the first of those to go were women and minorities. The cuts have not slowed down under subsequent administrations. It is no wonder that now, as OSMRE personnel ages out, OSMRE is running into a shortfall of qualified people to move up.

The inspectors are the face of OSM and the States that protect the citizens from the affects of coal mining. OSMRE has tried to withdraw itself from direct enforcement and contact with possible on the ground enforcement. SMCRA was well-drawn with two enforcement agencies, state and federal, because it is all too easy to co-opt one or the other. It is a little harder to co-opt both, although I am now beginning to wonder. OSMRE has further tried to reduce its presence by refusing to consider offsite impacts from mining unless the States report the offsite damage in state statistics. The Western Area Office of OSMRE is not even listed as tenant in the Denver office building in which it is located on the 33rd floor. Not only has OSMRE tried to withdraw from direct enforcement by way of Regulation 8, in the West, but it has tried to physically hide.

SMCRA intended that the regulating agency keep a presence in the coalfields and that the permits be available for inspection in the coal fields. Montana is just barely in compliance with SMCRA on that point with the Billings Office open with only a generalist and a secretary. The Generalist employee is also an inspector. All the other inspectors in Helena are also specialists in other fields, and every specialist is an inspector. The question is whether academic specialists also have the temperament to make the kinds of decisions that an inspector must make. Billings is about 90 miles from the closest big surface mine. The rest are hundreds of miles further. Helena is 250 miles from Billings. Inspecting from Helena will be difficult, and I think the amount of travel time will render the coal program less effective.

The Montana Coal Program has been losing employees, and the money to hire replacement employees has been declining, especially from Federal sources. The Federal Government was obligated to fund the Western States to the extent that the coal in the State belonged to the United States. The Interstate Energy Board says that the Federal Government is getting a deal on saving money with the States accepting primacy, because the State pay levels are so much lower. Yet the Federal Government still keeps cutting real dollars.

Montana has been saving money by paying wages for people with advanced degrees that are significantly below what they could earn in industry. Either the people who chose to work for Montana are dedicated to something other than top dollar, or they are short on competence, or they have reached a certain age in industry where industry no longer wants to hire them. I do know that the State has been a revolving door for hydrologists of all types. They get a little experience from the State to show on their resume', and then move on. The Montana Coal Program has been defunded and short-changed on personnel, and it is no wonder it is teetering on the brink of someone calling a 731 on it. The legislature got scared this spring and found $250,000 additional temporary funding, but now it may be that only part of the money will be available for another full time employee. The rest is to possibly be spent on consultants due to a "gentlemen's agreement".

If there is not better funding forthcoming, it is possible that the United States will have to pick up the tab for regulating the damage that will come from its appetite for coal. Funding less today will cost you more tomorrow.

I saw the Black Thunder Mine south of Gillette, Wyoming, at 10:00 AM, December 21, 2006. The day was beautiful, sunny and clear. The mine buildings were sitting in a cloud of coal dust higher than the biggest buildings on the mine site, and the dust looked like the mouth of hell had opened and was discharging thick black particulate matter. I wondered where EPA was and where OSMRE was. If that happens often there, people will be filing black lung claims. It was an amazing level of dust pollution.

BOND RELEASE

There are discussions about the low level of bond release in the West. I think there are several reasons. The first is the way the permit mine plans were approved by the agencies. Decker and Spring Creek in Montana were allowed to mine for years before treating any appreciable acreages for regrading, let alone revegetation. I believe the permits which allowed that were granted in violation of SMCRA's standard that reclamation be as contemporaneous as possible. Twenty years does not meet that standard. The State of Montana should not have allowed it, and OSMRE should have held them responsible. Perhaps fining both agencies for dereliction of duty might prevent it in the future. I know a fine is not possible, but it might have a purgative effect on a non-compliant agency.

The second reason is that some companies have it in their minds that they do not want to comply with the revegetation standards. Westmoreland has been head butting Montana over that for some years now. Westmoreland was behind the massive changes in the 2003 Montana law, just as another mine in the State showed that it was possible to meet Montana's then standard for revegetation. The dif-

ference was the company attitude as it stemmed from company management. The mine which did a good job was a Rio Tinto mine, and its company managers had decided it was cheaper to comply with environmental laws than to constantly be hauled into court. The attitude of the managers was reflected on the ground.

Revegetation is possible in most of the northern high plains, given the right company attitudes, but water resource reclamation is the third reason why final bond release is low. Water resource reclamation has had the lowest priority in the permitting and reclamation process. There are promises in the permits to replace individual water resources, but whether and how those promises have been followed through on, I don't know. Replacing individual resources depends on having a resource that can be found and depended upon to be potable at the very least. I don't know how the states are going to meet the standard of not degrading and diminishing the water resource in the mine area. Leaving the mine area to time and fate to clean up water quality and quantity is not satisfactory to those of us who live in the coal fields. There is no research in the area, and the regulators are accepting time and fate. Until the water is reclaimed, there should not be bond release. The States and OSMRE are coupled in ignoring this problem. If the States and OSMRE accept anymore permits or permit amendments that ignore reclamation of the total water resource, a fine would be in order again. The waste of water from Lee Coulee is an act of extravagance like lighting cigars with thousand dollar bills.

Montana has been doing what is called rolling bond release. Stage IV is the final stage indicating that the water resource has been reclaimed, and the State retains a small amount of bond money until Stage IV release. 9/11 raised the costs of bonds across many industries including coal. The stage IV bond money is now mounting up, and there are fears that if large amounts of acreage are suddenly up for bond release, there will be great pressure on the State to release, regardless of quality of reclamation, because if something should cause a bond forfeiture, there would not be enough money left to fix the problem.

Self bonding is allowed in some states. The State of Colorado allowed the Mid-Continent Mine to self bond with a limestone plant as collateral. The sole market for the limestone plant was Mid-Continent mine. Korea cancelled its marketing agreement with Mid-Continent. The mine closed. The bond was forfeited, the limestone plant now a worthless property that had lost its market. Meanwhile, the family that owned Mid-Continent had invested in Colorado mountain real estate. OSMRE had the authority to pursue that money, but did not with any vigor. The taxpayers have picked up the tab for what reclamation has been done on the Forest Service land where Mid-Continent operated.

CONGRESS' RESPONSIBILITY FOR THE ENFORCEMENT OF SMCRA

Some of the agency actions are in effect, actions in contempt of Congress, as evidenced by Congress' intention expressed in SMCRA. I do not believe there is anything especially wrong with SMCRA, with the exception of not covering longwall mining and not coping well with mountain top removal, but I do believe that as an agency OSMRE has long been lacking intent to enforce SMCRA as it should be enforced. The agency has been a great hand to not want to take action on something, unless it is immediately hazardous to human life. That is a judgment call, and the agency is not prescient. The process to pass SMCRA began with the disaster at Buffalo Creek, WVA. Fortunately, a similar tragedy for human life has not happened again, but how much luck was involved with the Kentucky River flood through Louisa, KY or the water break out at the AEP mine in Ohio? There are a number of sludge ponds throughout the East that are known by the agency to be unstable, but they remain unremediated, and the locations are not known to the public. Is OSMRE prescient as to which one will break first? Where are the states and OSMRE on this? Both are negligent and trying to hide out from that unpleasant policeman's task.

Congress could pass more laws and see them twisted and ignored. It is better to seek enforcement of the law you have. When the agency charged with enforcing laws you have passed, attempts to withdraw from enforcement and hide from the public who believed in the law you have passed, the agency causes the public to hold the law in contempt, whether that part of the public is industry or the citizens. You should be angry that SMCRA is being administered in that fashion. You need to do closer oversight on OSMRE, whether by more hearings held both here and in the field, as well as improved reporting from OSMRE. You also have the power to issue contempt citations, and I believe that you should seriously consider doing so. If you cannot get OSMRE to respect and enforce the law which it is paid to administer, then perhaps you should consider housecleaning in the agency.

I would reiterate again that unless OSMRE can bring itself to adequately enforce SMCRA and refrain from going off on wild goose chases to facilitate industry interests, that Congress should seriously consider moving enforcement of SMCRA to the Justice Department.

CITIZEN ACTION

Citizens can file complaints in writing under SMCRA, but there are informal ways to make one's voice heard. The regulators see industry people on a regular basis. They develop a familiarity with each other. They drink beer together in the hotel bar, if they are at an away meeting. If there is a regulatory office in a reasonably convenient location, citizens should stop by when they don't have a complaint. If there is a basis of familiarity, perhaps relations would be a little better. Such visits also help inform the citizens about conditions within their regulatory agency.

In Montana, it would be nice if more of the state regulatory agency were closer to the mines. Because of the travel distances involved, most of the contact between the Montana state agency and citizens near the Eastern Montana mines consists of more formal meetings, and because of the turnover of regulatory personnel in sensitive areas, frequently the sacrificial agency lamb at such meetings is the newest and most inexperienced of Montana personnel.

The Casper Field Office of OSMRE, which regulates the highest producing coal area in the United States, has the most area to cover, and probably the fewest inspectors. Distance operates against a citizen getting a clear idea of how that office operates. It is 379 miles from Casper to Billings, 629 miles from Casper to Helena, and God knows how far to North Dakota. For quite a while last year, the Casper Office operated without a field office director. The Field Office Director from Albuquerque filled in. I would say that is hardly effective administration. Getting acquainted with the regulators will not solve all the problems relating to SMCRA enforcement, but it is a small step that citizens can take.

STATEMENT OF VERNON HALTOM, CO-DIRECTOR, COAL RIVER MOUNTAIN WATCH, WHITESVILLE, WV

On behalf of Coal River Mountain Watch, I wish to thank Senator Bingaman for holding this hearing and accepting comments from those of us most directly impacted by the Surface Mining Control and Reclamation Act (SMCRA).

The mission of Coal River Mountain Watch is to stop the destruction of our communities and the environment by mountaintop removal mining, to improve the quality of life in our communities and to help rebuild sustainable communities. We envision just and caring communities in which residents are aware of and involved in solving community issues and in which public officials and agencies fulfill their responsibility to provide sustainable forms of economic development and a healthy, safe environment.

We invite you to our region to view the horrible destruction to our communities and environment that the Office of Surface Mining, Reclamation, and Enforcement (OSMRE) is allowing, promoting, and enabling. The coal industry is destroying our water, forests, mountains, homes, and economies. Come see for yourself, as so many others have, the devastation, and do not rely on coal industry propaganda or tours of their handful of manicured show sites. We need you to take our problems seriously, which OSMRE has failed to do, and investigate our complaints.

OSMRE and this administration continue to deny the citizens of Appalachia sufficient time to examine rule changes. OSMRE makes it extremely hard for citizens to find out about permits. Citizens in the nearby communities should be notified the minute a permit that affects them is applied for. During the Stream Buffer Zone rule change, we the citizens asked OSMRE for an extension and for hearings in November. We were denied without reason. OSMRE denied the citizens of Virginia the right to even have a hearing.

OSMRE does not enforce the SMCRA laws. Rather than vigorous enforcement, OSMRE makes it easy for the coal industry to pollute, poison and blast our homes and communities.

OSMRE is allowing coal companies to devastate communities near coal mining operations. Loss of life and homes from flooding, loss of both well water and stream water sources, loss of renewable resources, and loss of quality of life are all consequences of irresponsible mining by outlaw coal companies and OSMRE is allowing this to happen by not enforcing the law. Our water is being poisoned and no one will help us. The coal industry is blasting our homes and mountains with millions of pounds of explosives a day. The coal dust, rock dust and silica dust comes down into the valleys and settles in our homes and our lungs.

OSMRE must honestly assess the cumulative impacts of mountaintop removal. OSMRE says the impacts are insignificant but ignores the cumulative impacts of mountaintop removal and other mining in central Appalachia, like longwall mining.

According to the administrations own studies on mountaintop removal coal mining, the immediate and long-term environmental impacts of this form of coal mining are severe and irreversible. The jobs are temporary and the damage is permanent. Lapses in the enforcement of the buffer zone rule have allowed almost 2000 miles of streams to be buried or degraded by mining waste.

The Bush administration released a draft Environmental Impact Statement (EIS) on August 24 to go along with the proposed rule change. That study was supposed to examine the environmental effects of alternatives to repealing the buffer zone rule, which prohibits valley fills and sludge ponds from burying and destroying streams. Yet, incredibly, the EIS did not even study the option of enforcing the buffer zone rule as currently written.

This fact alone proves the administration never considered enforcing the law, but only wants to repeal it, regardless of the facts about the harm that will result.

In several instances, the Environmental Impact Statement describes the permanent destruction to the land and water sources, with no substantial economic benefit to the communities. One example, from Ohio Valley Environmental Coalition and West Virginia Highlands Conservancy comments on the Draft EIS. The DEIS states:

> The information in Table III.B-2 is corroborated by the experience of reclamation personnel and is reflected in West Virginia's recently proposed commercial forestry regulations. In estimating the likely quality of reclamation to be obtained under these regulations, we must recognize the fact that the current regulations (which have been in place since May 16, 1983) require that selected overburden substitutes for soil be "equal to, or more suitable for sustaining vegetation than the existing topsoil, and the resulting soil medium is the best available in the permit area to support revegetation." Also, soil materials are to be redistributed in a manner that prevents excessive compaction of the materials. Be this as it may, the reality of reclamation in Appalachia is that selective overburden handling is rarely practiced beyond that required to keep highly toxic material out of the rooting zone; excessive compaction is commonplace... Production of soils that will support commercial forestry as part of mountaintop mining requires selective overburden handling and replacement procedures on a scale that has never been carried out in Appalachia.

DEIS III.B-15 (citation omitted) (emphases added).

Using the administration's own figures, more than 1000 miles of streams will be destroyed every decade into the future, poisoning an entire region.

It appears that under the Hard Rock Mining Law overhaul, OSMRE will be tasked with additional enforcement duties, further diluting their effectiveness. Placing additional enforcement duties in the hands of an agency that is presently not enforcing laws under its existing mandates is a recipe for disaster.

It appears that OSMRE has no intention of improving protections for mountain communities threatened by mountaintop removal, but instead intends to weaken existing regulations. By proposing to effectively repeal the Stream Buffer Zone, OSMRE has shown itself to be a tool of the coal industry. Even the hallowed halls of Congress are not immune to the industry's machinations, as we have seen in recent months the beginning of efforts to repeal laws that have only now begun to be enforced through lawsuits by groups such as ours.

Coal River Mountain Watch asks that Congress recognize the threats posed to our communities and environment, improve our safety by remediating OSMRE's failings in enforcement, and end mountaintop removal by passing strong legislation such as the Clean Water Protection Act.

Thank you for your concern. We pray for your bold and righteous action.

JOINT STATEMENT OF JOHANNA H. WALD, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL, AND DONLEY DARNELL, CHAIR, WESTERN ORGANIZATION OF RESOURCE COUNCILS

Thank you for holding a hearing in honor of the 30th anniversary of the Surface Mining Control and Reclamation Act (SMCRA). Signed into law in August, 1977, this important legislation was enacted in recognition of the legacy of environmental harm that strip mining had already left in the East and the extensive damage that could result from the then-planned large scale expansion of coal mining in the West.

In anticipation of this important anniversary, the Natural Resources Defense Council (NRDC) and the Western Organization of Resource Councils (WORC) undertook an assessment of the degree to which two fundamental objectives of SMCRA—timely and effective reclamation of mined land, and thorough inspection and enforcement of the Act and its implementing regulations by responsible federal and state agencies—had been achieved over the last ten years on the ground in the five principal western coal mining states—Colorado, Montana, New Mexico, North Dakota and Wyoming. We have attached the report which resulted and respectfully request that it be submitted for the record of your hearing.

As documented in the attached report,* data published over the past ten years by the Office of Surface Mining Reclamation and Enforcement (OSM), the federal agency charged with ensuring and overseeing the on-the-ground implementation of SMCRA, reveal clearly that these key objectives are not being achieved. Given the predicted growth in US coal production, most of which will take place in the West, it is imperative that action be taken soon to realize SMCRA's promise.

Despite the passage of three decades, SMCRA's goal of protecting society and the natural environment of the United States from the ravages of coal mining has not been achieved in key respects. For example, OSM's own data show that both the amount and rate of reclamation occurring in the West are shockingly low:

- During the ten year period covered by our report, less than 23,000 acres were fully reclaimed by OSM's longstanding definition. Four hundred thousand acres were disturbed by mining over this same period.
- Montana has the worst reclamation record of the five states assessed. Wyoming, the nation's leading producer of coal, nearly all of which is strip-mined, had the second worst record.

Data from OSM and the states also reveal that the kind of strong and effective enforcement regime at both the state and federal levels that is essential to the success of SMCRA's regulatory program is not in place at this time:

- State regulatory agencies have failed to conduct the number of mine inspections required by SMCRA during the past ten years. According to the available data, 80 percent of the time, the states failed to conduct the required number of complete inspections, partial inspections, or both.
- Wyoming, with the largest number of permitted acreage, had the highest number of missed inspections.
- Regulatory staff numbers at OSM and the state agencies have declined as has federal funding just as the number of permitted acres and amount of coal mined have increased.

Our report, as indicated, addresses only two key issues related to SMCRA's implementation. It does not address other important issues in the region or in other coal states and regions. The report presents recommendations to address the specific problems that it documents. Policy makers at the state and federal levels, including Congress, and concerned citizens need to develop a comprehensive list of recommendations for improvements in the way coal mines operate for the way SMCRA is being implemented to achieve the law's promise.

Thank you again for holding this hearing. We also thank you for considering our report and recommendations and for including in the record of your hearing.

STATEMENT OF ROBERT L. JOHNSON, COLLINSVILLE, IL

The federal Office of Surface Mining (OSM) has abdicated its responsibility to enforce Surface Mining Control and Reclamation Act (SMCRA) rules. And OSM's Office of the Solicitor recently stated that OSM does not have the authority to correct errant decisions made by State mining agencies (OSM Solicitor, July 12, 2006).

And State mining agencies are the bastion of people connected to the mine companies. State agencies therefore are biased toward sacrificing private and public land for the production of coal.

And, despite the hoopla over SMCRA provisions for public participation and rights to appeal and sue over agency decisions, those provisions are regrettably nothing but a facade. State mining agencies and the mining companies work closely to limit the presentation and content of Public Hearings and to prevent objective appeals of decisions.

---

* Report has been retained in committee files.

Public appeals are sent before Administrative Hearing Officers that are trained and paid for by the State's mining agency whose decision is being appealed; sort of like a defendant in court paying the judge hearing his case.

On a site-specific basis, the local public has virtually no technical or legal persons to which they can turn. In a practical sense, all those with the technical and legal skills to help them are aligned with the mining industry. The cost of appeals, of tens, if not hundreds of thousands of dollars, are beyond the resources of the public adversely affected by individual mine operations. And whatever resources the public has available to launch effective appeals or lawsuits is countered by coal companies willing to spend ten times whatever the public has.

Hearing Officers facing evidence in appeals that overwhelming favor the public, distract the hearing into a myriad of procedural details to the degree that the issue of the appeal is never heard.

Both Hearing Officers and judges routinely defer to the finding of the State's agency decision, the decision that is being challenged. Since OSM has abdicated its responsibility to enforce rules, there is no unbiased, unprejudiced forum for the public to turn, and the decisions being made State mining agencies become almost the force of law.

RECLAMATION OF MONTEREY MINE NO. 2, GERMANTOWN, ILLINOIS

Monterey Mine 2, owned and operated by ExxonMobil, was designed in the 1980's. Its water supply was from the Pearl Sand Aquifer located about ten feet below the mine's coal waste landfill, the Refuse Disposal Areas. There is no liner beneath this landfill containing 30million cubic yards of coal waste. A hydrologic study showed that coal wastes would not leach into the Aquifer.

Immediately upon commencing mining operations, the groundwater was found to be contaminated with leaching coal waste. "Monitoring, investigation, and management of groundwater at the No. 2 Mine have been integrated with the mine operations since 1980." (Groundwater Management Plan, Monterey Coal Company, May 8, 2002.).

The mine closed in 1996 (several months before the original miners were to achieve their 20year pension). Due to the groundwater contamination, a new Reclamation Plan was necessary. The State mining agency brought in the Illinois Environmental Protection Agency (IEPA) to oversee a Groundwater Management Plan. That Plan consisted of placing a impermeable cap over the coal waste landfill. The mine objected, wanting to save $10,000,000 by putting a permeable cover over the waste, allowing the coal contaminants to continue to leach into Aquifer. For reasons still unknown, IEPA agreed.

Both nearby residents and farmers have complained for years that their water supply from the Aquifer was being contaminated and threatened with contamination by mine operations. Some residents have had to connect to a newly installed water supply system, partially paid for by the mine. These residents now must pay for water, where once they had their own. Other residents still rely upon the Aquifer being contaminated by the mine. Farmers and ranchers continue to use the threatened and actually contaminated Aquifer.

The Reclamation Plan, which incorporates the Groundwater Management Plan, is based on the premise that extraction wells restrict coal waste contamination to within the permit boundary. The Groundwater Management Plan, prepared by the mine's engineers states that there is no off-site groundwater data on which to the base the Plans. IEPA once collected 17 off-site groundwater samples. The Plan refers to this data: "It is noted that the IEPA did not provide the location of these sampling points; therefore, only limited interpretation of this data was possible by Monterey." Recently, the location of the 17 wells sampled by IEPA was provided to the public. The natural groundwater flow at the site is southwest; only 1 of the 17 wells monitored by IEPA was southwest of the mine.

The entire Reclamation Plan is premised on there being no off-site groundwater contamination and, therefore, the Plan is entirely based upon a single downgradient water sample whose data cannot be correlated to it. How does this comply with SMCRA rule that requires permits to "affirmatively demonstrate" that mining activities "prevent" off-site contamination?

According the Groundwater Management Plan/Reclamation Plan, the groundwater contamination at this mine will stabilize in maybe 100years. The groundwater model contained in the Plans shows that the coal waste will continue to threatened off-site groundwater resources for more that 500years. The Plan relies upon the mine to maintain the "monitoring, investigation, and management of groundwater at the No. 2 Mine, integrated with the mine operations since 1980," a system of pumps to treat 500,000gallons a day of contaminated groundwater be-

fore it is discharged into the Kaskaskia River, a potable water supply. Both environmental protection rules and SMCRA rules have provisions that prohibit groundwater resources from being threatened by mine activities. Does anyone, including State agencies or OSM, really believe the mine intends to operate and maintain the pumps and treatment of 500,000gallons/day for 500years? Nevertheless, the State approved the Plans.

Furthermore, SMCRA rules require, "Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment." With no impermeable cap over the wastes, water pollution is not minimized by mine operations. With the newly installed slurry wall, the groundwater flow is to the northwest and southeast, the flow having already been thoroughly disrupted by the extraction pumps. And the Plan relies entirely upon a large-scale water treatment system. Nevertheless, the State approved the Plan.

The Public Hearing for the Reclamation Plan lasted 27minutes (transcript available). About fifteen minutes of that time consisted of mine representatives telling local residents what a "good neighbor" the mine was to them. About four minutes of that time was spent explaining the $30,000,000 Plan that would affect the community for the next 500years. And the remaining time was spent with the mine and State mining agency refusing to answer any of the questions posed by the residents. This is the Public Participation envisioned by SMCRA?

Residents appealed the Plan. Mine lawyers delayed the proceeding for months. The State mining agency decided to train a Hearing Officer especially for the occasion. Hearing prep lasted 6months. Unsurprisingly, the Hearing Officer, paid for by the State mining agency, eventually found in favor of the State mining agency. This is the fair and unbiased appeal process envisioned by SMCRA?

Post-mining land use of the site is pastureland but, according to the Reclamation Plan, "this area will not be grazed by livestock or specifically cut and cured for livestock feed." This is because the land after reclamation is still not stable enough for safe and economically viable commercial, agricultural, or recreational use. In effect the post-mining land use is designated as "pastureland that cannot be used as pastureland." This is the restoration of mine sites envisioned by SMCRA?

The appeal of the Reclamation Plan is now under federal appeal process and has languished there since September 2006, almost a year now. This is the timely appeal process envisioned by SMCRA?

In the spring of 2006, a local farmer filed a groundwater contamination complaint with IEPA. His well has high concentrations of coal waste parameters. IEPA dismissed the complaint, stating that the coal waste contamination must have come from some other source than the 30million cubic yards of coal waste present immediately upgradient of the farmer's well. IEPA refused to identify what other possible source there might be.

IEPA then collected off-site groundwater samples just beyond the mine permit boundary. The wells had high concentrations of coal waste parameters. Additional wells were installed and another sampling event conducted. The well samples had high concentrations of coal waste parameters. In December 2006, the mine was directed to prepare an off-site investigation program and provide a solution to the problem. The public through the Freedom of Information Act recently requested that information.

In 2004, the mine installed a permanent 3mile pipeline to continue its discharge of diluted contaminated groundwater into the River. Because the "monitoring, investigation, and management of groundwater at the No. 2 Mine, integrated with the mine operations since 1980, the pipeline was a continuing mining operation and the attendant permit boundary revision, needed to implement the pipeline operations, required, under SMCRA, a Public Hearing. The State mining agency so stated in letter to residents in August 2005. The Public Comment period ended August 31, 2005. By November 2005, no Public Hearing had been scheduled.

When residents inquired when the Public Hearing would be held, the State mining agency replied that the lawyers for the mine had sent a letter "indicating that a public hearing was not required" under SMCRA. The State mining agency sent the mine lawyers' letter to OSM who sent it to the Office of the Solicitor for review. According to OSM, the "Office of the Solicitor effectively advised that the operation of the refuse area, including construction and operation of the pipeline, is an ongoing aspect of the overall surface coal mining operation, and is subject to the requirements of SMCRA section 522(e)," thus a Public Hearing was required. Furthermore, the Solicitor stated that it had reviewed the mine lawyers' arguments and found those arguments, "unpersuasive."

Nevertheless, in December 2006, after 16months during which nothing about the pipeline had changed, the State mining agency unilaterally changed its decision and

decided it would not conduct a Public Hearing. The final decision has no mention of its August 2005 decision or of the findings of the federal Solicitor.

Under SMCRA, once a mine site is reclaimed typically in 3-5years, active reclamation ceases and the land is available for economic redevelopment. But at this mine, the operators characterized the operation and maintenance of extraction pumps ultimately discharging 500,000gallons/day into the Kaskaskia River watershed, a system that has been already operating for 30years and must continue for centuries, as being "incidental to reclamation activity." So has a 3-5year reclamation of the mine site under SMCRA been somehow warped to mean, as characterized by the Solicitor, "coal mining operations" lasting 100-500+ years?

In January 2007, the public appealed the State mining agency's final decision. Despite scores of documents that provided a preponderance of evidence that the pipeline was a continuing mining operation, the Hearing Officer, trained and paid by the State mining agency and whose principle legal expertise is employment law, recently found in favor of the State mining agency. In his decision, the Hearing Officer effectively denied the public's right to a formal hearing on the matter.

All this is the much-exalted right under SMCRA for public participation and appeal? Many provisions of SMCRA need to be updated, but perhaps more importantly, current provisions needed to be fully and properly implemented and enforced.

There are many provisions of SMCRA that need to be updated. But updated the law is an useless effort if the law is not enforced.

SMCRA explicitly states that coal waste impoundments must be removed, see attachment.

Yet huge coal waste impoundments are not only being left when the mine closes but are being proposed as permanent structures in mining permits and being accepted by regulatory agencies.

Monterey Mine 2, near Gremantown, Illinois,µclosed in 1996. It left behind a 400acre 30million yard coal waste impoundment, which, according to the approved reclamation plan, will continue to contaminate the Pearl Sand Aquifer for 500years. The impoundment is constructed with "High Hazard Dams" as regulated by Illinois regulations. Such a permanent waste impoundment is in noncompliance with SMCRA but there it is, an ongoing mining operation that no one cares about, see request to Senator Obama attached.

The proposed Deer Run Mine near Hillsboro, Illinois will include large waste impoundment, again millions of cubic yards of waste. But the permit application does not propose removing the waste, but rather suggests a permanent waste impoundment in noncompliance with SMCRA. In order to confuse the public, the mine calls the waste impoundment a "gob pile" for which there is no definition under SMCRA.

For elements for SMCRA that do require updating, the most critical are to institute provisions that regulate LAND subsidence due to longwall mining. While the mine supposedly is required to repair damages to structures, subsidence to prime farmland is limited to that which is "technologically and economically feasible." How does one repair literally thousands upon thousands of acres of prime farmland? It can't be done so under current SMCRA provisions, the more damage that a mine does with longwall mining techniques, the more likely the damage cannot be technologically and economically repaired, so the mine can just walk away.

The nation seems to be moving in the direction of growing its energy needs: does it make any sense to have SMCRA provisions which allows the destruction of land needed to grow that energy?

ATTACHMENT

PREAMBLE to Final Rule: Discussion "Such structures may not be retained permanently as part of the approved postmining land use."

FEDERAL REGISTER: 48 FR 44006 (September 26, 1983)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 816, and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Coal Mine Waste

ACTION: Final rule.

DISCUSSION

SECTION 816.84(b)

> This provision also explicitly recognizes that impounding structures constructed of or impounding coal mine waste may not be retained permanently as part of the approved postmining land use.

RULE:

SEC. 817.84 COAL MINE WASTE: IMPOUNDING STRUCTURES.

(b) (1) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste shall be designed, constructed and maintained in accordance with Sec. 817.49 (a) and (c). Such structures may not be retained permanently as part of the approved postmining land use.

ATTACHMENT.—LETTER TO SENATOR BARACK OBAMA

RE: FEDERAL NON-RESPONSE TO FOIA REQUEST SURFACE MINING CONSERVATION AND RECLAMATION ACT REQUIREMENTS.

DEAR SENATOR OBAMA: Thanking for your recent response to my May 31, 2007 request for assistance in getting a public document from the United State Department of the Interior, Office of the Solicitor, through the federal Freedom of Information Act.

In summary, on October 27, 2005, The Illinois Department of Natural Resources, Office of Mines and Minerals, (IDNR) requested the federal Office of Surface Mining for a statement of whether a pipeline at Monterey Mine No. 2 was a "continuing mining operation." That request was forwarded to the Knoxville Office of the Office of the Solicitor, see attachment. In a response that was eventually forwarded back to IDNR, the Washington Office of the Solicitor stated, "the Field Office of the Solicitor effectively advised that the operation of the refuse area, including construction and operation of the pipeline, is an ongoing aspect of the overall surface mining operation, and is subject to the requirements of SMCRA section 522(e)."

Since November 2006, I have sent FOIA requests to various governmental agencies for a copy of the document, including the Justice Department, see enclosure. For the most part, these requests have simply been ignored. On March 1, 2007, the Office of the Solicitor stated to me, "we hope that you will delay filing a lawsuit" regarding this matter. The requested document readily exists in the federal Offices of the Solicitor, both in Knoxville and in Washington, why should I need to file a lawsuit? Meanwhile, the pipeline continues to operate outside the requirements of SMCRA section 522(e).

It is one simple document. All it would take to resolve this matter is for someone with authority, someone that has concern on whether applicable provisions of SMCRA are being enforced, to contact the Field Office of the Solicitor in Knoxville (865-545-4294), and tell them to make a copy of the document and mail it to:

Robert L. Johnson, PE
8 Cypress Point Dr.
Collinsville, IL 62234

○