

**JOBS AT RISK: COMMUNITY IMPACTS  
OF THE OBAMA ADMINISTRATION'S  
EFFORT TO REWRITE THE STREAM  
BUFFER ZONE RULE**

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**OVERSIGHT FIELD HEARING**

BEFORE THE

SUBCOMMITTEE ON ENERGY AND  
MINERAL RESOURCES

OF THE

COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

Monday, September 26, 2011, in Charleston, West Virginia

**Serial No. 112-66**

Printed for the use of the Committee on Natural Resources



Available via the World Wide Web: <http://www.fdsys.gov>

or

Committee address: <http://naturalresources.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

68-511 PDF

WASHINGTON : 2012

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**OVERSIGHT FIELD HEARING ON “JOBS AT RISK: COMMUNITY IMPACTS OF THE OBAMA ADMINISTRATION’S EFFORT TO REWRITE THE STREAM BUFFER ZONE RULE.”**

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**Monday, September 26, 2011  
U.S. House of Representatives  
Subcommittee on Energy and Mineral Resources  
Committee on Natural Resources  
Charleston, West Virginia**

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The Subcommittee met, pursuant to call, at 9:00 a.m., in the Historical Courtroom 4, 407 Virginia Street, East, Charleston, West Virginia, The Honorable Doug Lamborn [Chairman of the Subcommittee] presiding.

Present: Representatives Lamborn and Johnson.

Also Present: Representative Capito.

Mr. LAMBORN. The Committee will come to order. The Chairman notes the presence of a quorum, which under Committee Rule 3(e) is two Members. The Subcommittee on Energy and Mineral Resources is meeting today to hear testimony for an oversight hearing on “Jobs at Risk: Community Impacts of the Obama Administration’s Effort to Rewrite the Stream Buffer Zone Rule.” Under Committee Rule 4(f), opening statements are limited to the Chairman and Ranking Member of the Subcommittee. However, I ask unanimous consent that Mrs. Capito and Mr. Johnson be permitted to give an opening statement and to include any other Members’ opening statements in the hearing record submitted to the Clerk by close of business today.

Hearing no objection, so ordered. I now recognize myself for five minutes.

**STATEMENT OF THE HON. DOUG LAMBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO**

Mr. LAMBORN. Thank you everyone for being here today. I’m Congressman Doug Lamborn of Colorado, and I am the Chairman of the House Natural Resources Committee’s Subcommittee on Energy and Mineral Resources.

We are here today to hear testimony on the job and community impacts stemming from the Obama Administration’s rewrite of the stream buffer zone rule.

All right. Thank you. OK. Thank you for your patience. Technical glitch there.

In 1996, the National Wilderness Institute published the American Conservation Ethic, which comprised eight principles that the nation’s policymakers should consider in the development of environmental policies and associated laws, rules and regulations. Several of those principles are worth examining in light of the topic of today’s hearing, “Jobs at Risk, Community Impacts of the

Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule."

An independent contractor hired by the Administration found that the rewritten stream buffer zone rule will result in the direct loss of over 7,000 jobs nationwide and place an additional 29,000 people living in the Appalachian Basin below the poverty level. Some believe that this is a low number. In any case, the numbers do not even begin to assess the indirect cost to jobs and to our economy if and when the price of electricity goes up.

The first principle of the American Conservation Ethic provides important insight that we should all take to heart—that is, people are the most important resource. Continuing to work on a rule that knowingly will directly eliminate thousands of jobs and will result in 29,000 people living below the poverty level is inexcusable policy. It is our job as lawmakers to institute policies that create jobs and make lives better for Americans. Instead, this Administration is pursuing a rule that will do exactly the opposite.

However, rather than reinstating the 2008 rule after the economic impacts of the Administration's preferred alternative in the proposed rule were leaked to the press, the Administration instead severed ties with the initial contractor, Polu Kai, and has continued down this ill-advised path of rulemaking.

I am deeply concerned that the Obama Administration may be guilty of suppressing inconvenient facts simply because they stand in the way of a different agenda. Chairman Hastings and I have initiated an investigation into the Office of Surface Mining's attempt to rewrite the 2008 stream buffer zone rule and the ongoing fiasco resulting from the Administration's rushed effort to fast track major changes to the nation's coal mining regulatory program established by the Surface Mining Control and Reclamation Act of 1977.

Let's examine Principle Four of the American Conservation Ethic, which states, "Our efforts to reduce, control and remediate pollution should achieve real environmental benefits." The environmental benefit of the proposed stream buffer zone rule is achieved through less mining; that is, less mining of a vital national resource, coal, a resource that currently provides thousands of Americans with good-paying jobs and more than 45 percent of the nation's electrical power.

Twenty-two of the 25 states with the lowest electricity costs get at least 40 percent or more of their electricity from coal-fired power plants. And just exactly what are the so-called benefits of less coal mining? Certainly not monetary.

Reducing coal production nationwide will adversely impact revenues to Federal, State and local treasuries. It will reduce monies flowing into the Surface Mining Control and Reclamation Act Abandoned Mine Land Fund, where some of the interest earned is used to support the United Mine Workers of America retirees.

Furthermore, reducing the amount of coal available for power generation will lead to higher electricity costs for American businesses and families, which lowers our standard of living, and thousands of Americans will be put out of work.

We have repeatedly seen the unforeseen consequences and job loss that can follow unnecessary regulatory changes. The final

stream buffer zone rule issued in December of 2008 was the result of a rulemaking process that took five years and was supported by 5,000 pages of environmental analysis and included thirty original research projects.

That brings me to the final principle from the American Conservation Ethic that I'll share with you this morning. Principle Seven states, "Science should be employed as a tool to guide public policy." The 2008 stream buffer zone rule employed science to guide public policy as exemplified by the extensive research conducted during the rulemaking process.

The 2008 rule was more protective of the environment than the original 1983 rule issued during the Reagan Administration, the rule that is now in effect since the 2008 rule has been shelved by the current Administration.

We have a full hearing today with ten witnesses, including Governor Earl Ray Tomblin, regulators from the states of West Virginia, Virginia and Wyoming, the West Virginia and Ohio Coal Associations, the Mountaintop Mining Coalition, CONSOL Energy, Coal River Community Watch and a community organizer.

I look forward to hearing from all of our witnesses. I know many of you have been involved in the development of the programmatic mountaintop mining environmental impact statement, the 2008 stream buffer zone rule and the litigation that precipitated the production of the environmental impact statement, the rule in the current rulemaking process.

In closing, I would like to reaffirm my belief that the United States is a nation of excellence. Our achievements through the development of our abundant natural resources have allowed America to prosper and constantly raise the standard of living for the next generation. Increasing responsible access to these resources will allow us to be less dependent on foreign sources of energy and mineral resources, will create new, private-sector jobs and will add revenue to government coffers, reducing the national debt and thereby increasing our national and economic security.

I will now recognize Congresswoman Capito for five minutes for an opening statement.

[The prepared statement of Mr. Lamborn follows:]

**Statement of The Honorable Doug Lamborn, Chairman,  
Subcommittee on Energy and Mineral Resources**

Thank you everyone for being here today. I'm Congressman Doug Lamborn, and I am Chairman of the House Natural Resources Committee Energy and Minerals Subcommittee. We are here today to hear testimony on the job and community impacts stemming from the Obama Administration's rewrite of the Stream Buffer Zone Rule.

In 1996, the National Wilderness Institute published the "*American Conservation Ethic*," which comprised eight principles that the Nation's policy makers should consider in the development of environmental policies and associated laws, rules and regulations.

Several of those principles are worth examining in light of the topic of today's hearing: *Jobs at Risk: Community Impacts of the Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule.*"

An independent contractor, hired by the Administration, found the rewritten Stream Buffer Zone Rule will result in the loss of over 7,000 direct jobs nationwide and place an additional 29,000 people living in the Appalachian basin below the poverty level.

The first principle of the American Conservation Ethic provides important insight that we should all take to heart. And that is:

**“People are the most important resource:**

Continuing to work on a rule that knowingly will eliminate thousands of jobs and will result in 29,000 people living below the poverty level is inexcusable policy. It is our job as lawmakers to institute policies that create jobs and make lives better for Americans—instead, this Administration is pursuing a rule that will do exactly the opposite.

However, rather than reinstating the 2008 rule after the economic impacts of the Administration’s preferred alternative in the proposed rule were leaked to the press, the Administration instead severed ties with the initial contractor Polu Kai, and has continued down this ill advised path of rulemaking.

Chairman Hastings and I have initiated an investigation into the Office of Surface Mining’s attempt to rewrite the 2008 stream buffer zone rule and the ongoing fiasco resulting from the Administration’s rushed effort to fast track major changes to the Nation’s coal mining regulatory program established by the Surface Mining Control and Reclamation Act of 1977.

Let’s examine Principle Four of the American Conservation Ethic which states:

**“Our efforts to reduce, control and remediate pollution should achieve real environmental benefits.**

The ‘environmental benefit’ of the proposed rule is achieved through **less mining**. That is less mining of a vital national resource—**Coal**—a resource that currently provides thousands of Americans with good paying jobs, and more than forty-five percent of the Nation’s electrical power. Twenty-two of the 25 states with the lowest electricity costs get at least 40 percent or more of their electricity from coal-fired power plants.

And just exactly what are the benefits of less coal mining?

Certainly not monetary; reducing coal production nationwide will adversely impact revenues to Federal, State and local treasuries, and monies flowing into the Surface Mining Control and Reclamation Act Abandoned Mine Land fund where some of the interest earned is used to support the United Mine Workers of America retirees.

Furthermore, reducing the amount of coal available for power generation will lead to higher electricity costs for American businesses and families and thousands of Americans being put out of work. We have repeatedly seen the unforeseen consequences and job loss that can follow unnecessary regulatory changes.

The final Stream Buffer Zone Rule, issued in December of 2008, was the result of a rulemaking process that took five-years and was supported by 5,000 pages of environmental analysis and included thirty original research projects. That brings me to the final principle from the American Conservation Ethic that I’ll share with you this morning.

Principle Seven states: **“Science should be employed as a tool to guide public policy.**

The 2008 Stream Buffer Zone Rule employed **‘Science’** to guide public policy as exemplified by the extensive research conducted during the rule making process. The 2008 rule was more protective of the environment than the original 1983 rule issued during the Reagan Administration, the rule that is now in effect since the 2008 rule has been shelved by the current Administration.

We have a full hearing today with ten witnesses, including Governor Earl Ray Tomblin; regulators from the states of West Virginia, Virginia and Wyoming; the West Virginia and Ohio Coal Associations; the Mountaintop Mining Coalition; Consol Energy; coal River Community Watch; and a Community Organizer.

I look forward to hearing from our witnesses. I know many of you have been involved in the development of the Programmatic Mountain Top Mining Environmental Impact Statement, the 2008 Stream Buffer Zone Rule, and the litigation that precipitated the production of the EIS, the Rule and the current rulemaking process.

In closing I would like to reaffirm my belief that the United States is a nation of excellence. Our achievements through the development of our abundant natural resources have allowed America to prosper and constantly raise the standard of living for the next generation. Increasing access to those resources will allow us to become less dependent on foreign sources of energy and mineral resources, create new private sector jobs and add revenue to government coffers reducing the national debt and thereby increasing our national and economic security.

**STATEMENT OF THE HON. SHELLEY MOORE CAPITO, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST  
VIRGINIA**

Mrs. CAPITO. Thank you, Chairman Lamborn and welcome to West Virginia. For those of you in the audience, most of you know this is my home county and my hometown and you know me well, and I would like to just give you a little lay of the land. This is basically what goes on in our committee hearings in Washington. Many of you have been to the committee hearings. We have panels where everybody will give five minutes of testimony and then questioning from the Members of Congress.

But the whole point is to get the information from you all to us as we do our policies and make legislative decisions in Washington. And while we can sit in Washington and listen to what people are saying, it's so helpful to come out to the different regions that are most highly impacted to really get a flavor for the impact of a regulation such as we're talking about today or any kind of legislative endeavor that we're engaged in.

Mr. Lamborn is from the Natural Resources Committee, Chairman of the Subcommittee, and Mr. Johnson is from Ohio, just drove in from Marietta. They're well aware of energy and energy production in their own states and the important and critical economic impacts that regulations can make. I welcome you on behalf of my fellow West Virginians.

As you know, West Virginia is one of the largest coal producing states in the nation, and is home to some of the most valuable coal reserves. But in West Virginia, since I've been in the Legislature in 1996 and certainly living here, weaving the balance between the environment and the economy has been a challenge, as it is for the nation, it has certainly been a challenge here in West Virginia.

As we know, the West Virginia coal mining industry itself employs over 50,000 people with some incomes reaching \$80,000 a year, and we're proud of our natural resources here. We're proud that we have the natural resources that can help bring this country out of a national recession.

But we do have an issue with the Federal regulatory actions that have been taking place most recently because I believe that it inhibits job growth and it sometimes can stymie our economic development.

So in this hearing we're going to be examining, as you've heard, the Office of Surface Mining's proposed stream protection rule. How does that impact our job growth, our community and economic growth, because I think these are issues that we need to look at, as we're also looking at the environmental impacts, as well.

The original rule mining activities of perennial and intermittent streams and was a clarification of the long-term regulatory interpretation of a prior rule. However, less than a year after that rule was finalized, and before the rule would even be in effect, the Administration tried to vacate the rulemaking review, but their actions were overturned by a Federal court.

So what we're looking at now is sweeping changes to OSM's regulatory programs and expanding the scope of its stream protection rules. But the Office of Surface Mining's own analysis says—and Chairman Lamborn mentioned this in his statement—that this

stream protection rule could result in 29,000 hard working American coal miners losing their jobs and wiping out \$650 million in wages, and certainly here in the Appalachian Basin we take those numbers very seriously. It could result, and it would result most certainly, I think I've seen numbers anywhere from a 10 to 20 percent increase in energy prices. When you think about that, we all live with neighbors who are on fixed incomes, trying to pay their electric bills through a cold winter and a hot summer, and we know that that's difficult, especially with our economy in such a stagnant pace. And I think it could eliminate as much as twenty to thirty percent of West Virginia's surface mining production.

It's important to remember, too, that this rule does influence, and we'll hear this, I'm sure, in the committee testimony, does influence the underground mine industry as a fact.

Now, one of the rules in Congress is when the red light goes off, you're supposed to stop talking. And so I see the red light went off when I was not watching, so I don't want to abuse my privilege. But I do welcome you. I know that there are many in the audience that we've met in my office who are opposed to looking at maybe job impacts and are very heavily influenced by the environmental impacts and very passionate about that, and your testimony will be a part of the record and will be heard by all the gentlemen and this is being streamed on the web, so a lot of people will hear this.

So I want to thank you so much for the opportunity. I also am going to apologize because I am going to have to leave and not be able to attend the entire hearing. But thank you for coming to my hometown. Thanks.

[The prepared statement of Mrs. Capito follows:]

**Statement of The Honorable Shelley Moore Capito,  
a Representative in Congress from the State of West Virginia**

Chairman Lamborn, I would like to welcome you and your subcommittee to West Virginia. On behalf of my constituents, let me thank you for your leadership on this issue and your efforts to prevent the Obama administration from destroying West Virginia jobs.

My home state of West Virginia is one of the largest coal producing states in the nation, and is home to some of the most valuable coal reserves in the world. The coal industry is one of the state's largest sources of jobs and tax revenue. As of 2008, the mining industry employed over 50,000 West Virginians, with incomes often reaching \$80,000 per year.

West Virginia has the natural resources to help create jobs and bring this economy out of recession. However, the federal government continues to take regulatory actions that inhibit job growth, and prevent West Virginians from putting food on their tables. In this hearing, you will be examining the Office of Surface Mining's proposed Stream Protection Rule. In 2008, OSM's initial Stream Buffer Rule was finalized after several years of review by multiple federal regulators. The original rule governed mining activities near perennial and intermittent streams, and was a clarification of the longstanding regulatory interpretation of a prior rule with enhanced environmental protections. However, less than a year after the rule was finalized, and before the rule could even go into effect, this Administration attempted to vacate the rule without any rulemaking review, or opportunity for public comment. The Administration's actions were rightly ruled a violation of law by a federal court.

The administration subsequently invoked upon a new rulemaking process that includes sweeping changes to OSM's regulatory programs, while expanding the scope of its stream protection rules to include both surface and underground mining activities. Some have claimed that these rules are of questionable environmental benefit, according to the West Virginia DEP, the environmental review conducted in support of the Stream Protection Rule has been universally characterized as junk.

OSM's own analysis says that the Stream Protection Rule will result in 20,000 hardworking American coal miners losing their jobs, wiping out \$650 million in wages. In the Appalachian basin alone, this rule would throw nearly 30,000 folks into poverty. The rule would also necessarily result in increased energy prices, including my constituent's electric bills, as it would eliminate 20 to 30 percent of West Virginia's surface mining production, while also eliminating 50% of West Virginia's underground coal mining activity.

Mr. Chairman, West Virginians are ready to lead this nation out of recession while making us more energy independent. Unfortunately, this cannot happen in the current regulatory environment. Folks I talk to back here West Virginia keep telling me that they are ready and willing to create jobs if only the federal government would get off their backs.

If the administration thinks their policies are helping folks across the country, I invite them to visit my state to see how their actions are hurting families across Appalachia. It's time to take advantage of the resources found right here in America. Doing so will launch our economy in the right direction and create thousands of good-paying jobs.

West Virginia is truly blessed to have abundant supplies of natural resources. As a native West Virginian I enjoy my State's beauty and appreciate its pristine water, and want to do what is reasonably necessary to maintain our state's environment. But instead of helping West Virginians tap into our full economic potential while implementing common sense environmental regulations, this Administration would rather implement its ideologically driven agenda.

It is time for this administration to get off the backs of West Virginia's job creators by using common sense and not ideology. Thank you again for holding this very important hearing.

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Mr. LAMBORN. Thank you, Representative. It's an honor to be here in your district and to be in the great State of West Virginia, so thank you for your opening statement.

And before we hear our first panel, we'll have one more opening statement, and this is from Representative Bill Johnson of Ohio.

**STATEMENT OF THE HON. BILL JOHNSON, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO**

Mr. JOHNSON. Well, thank you, Mr. Chairman, for holding this important hearing on the economic impact that the Department of the Interior's Office of Surface Mining Reclamation's rewrite of the stream buffer zone rule could have on local communities like Charleston and other mining towns across the country. And I'd like to thank Congresswoman Capito for hosting us here in her hometown and all the great folks from West Virginia. It's good to see all of you out here this morning. Thanks for letting us come in.

I represent eastern and southeastern Ohio and live just 90 miles away in Marietta, Ohio. In the parts of eastern and southeastern Ohio that I represent, we have double-digit unemployment, reaching as high as 12.7 percent. There are entire communities that depend largely on the coal industry both for direct and indirect jobs and they would be devastated by this proposed rule change.

According to the Obama Administration's own analysis of the rule, it would eliminate up to 7,000 direct coal jobs and tens of thousands of indirect jobs, cut coal mining production by 50 percent and increase the cost of electricity for families and small businesses.

As most of you may know, OSM, the Office of Surface Mining and Reclamation in December of 2008 issued a clarification of the stream buffer zone rules after a five-year process that included 40,000 public comments, two proposed rules and 5,000 pages of environmental analysis from five different agencies.

The final rule clarified and codified coal surface mining practices that had been in effect for over 30 years. But on January 20th, 2009, the Obama Administration decided to reopen the carefully crafted and properly vetted stream buffer zone rule.

This proposed sweeping regulatory action would radically alter the definition of a stream, as well as how the agency measures material damage outside of the permit area. To date, the agency has provided no studies, no data or support to justify these radical changes. A judge later ruled that the Administration could not reopen the rulemaking process without cause. So what did the Administration do? They did what we've seen over and over again when settled rules by the Administration, if they don't like them. They practically sent out invitations to environmental groups to sue the Department of the Interior over the rule. Not surprisingly, they got their desired result, and before too long, two environmental groups filed a lawsuit protesting the rule.

Then, instead of fighting the lawsuit in court, they entered into closed-door negotiations with the environmentalists and reached a settlement that would allow them to do what they wanted to do all along, rewrite the stream buffer zone rule and make it more restrictive.

I don't know about you, but this sounds like collusion to me. And then in a slap to all tax payers, the same environmental groups that sued the Department of the Interior had their legal fees paid back by the taxpayer funded Judgment Fund. Now, I wish I could say that this is a special circumstance and that it doesn't happen often, but there are at least fifteen instances of this so-called practice of sue and settle that this Administration has participated in, to reopen rules they don't like. However, that's a problem and a discussion for a different day.

Let me get back to the Administration's economic analysis of the rewrite of the stream buffer zone. Like I said, before this analysis completed by a leading environmental consulting firm showed that 7,000 direct and tens of thousands of indirect jobs would be lost if the rule went forward as written. This firm was paid millions of dollars to conduct this study. However, once the analysis leaked to the public, OSM fired the contractor without getting any of the money back. OSM claims that the contractor miscalculated the job loss, but it seems to me that they simply didn't like the results of the analysis and the press reports that came with it.

For these reasons, I offered an amendment to the first continuing resolution from this year that would have stopped OSM from going forward with the proposed rewrite, their revision to the stream buffer zone. The amendment passed the House on a bipartisan vote of 239 to 186. Unfortunately, the language did not make the final continuing resolution that eventually became law. However, I have and I will continue to fight to have this language included in any new spending bill passed by Congress.

The President, as you all know, has been touring the Midwest trying to promote what he calls a jobs bill. I find it ironic that this Administration has admitted that the rewrite of the stream buffer zone rule will cost thousands of direct and indirect jobs. If the President was serious about job creation, he would direct OSM to

stop going forward with a regulation that will result in thousands of hard-working Americans losing their jobs.

Thanks again, Mr. Chairman, for hosting this hearing and I look forward to hearing from the witnesses and their testimony today and I yield back the balance of my time.

[The prepared statement of Mr. Johnson follows:]

**Statement of The Honorable Bill Johnson,  
a Representative in Congress from the State of Ohio**

Thank you, Mr. Chairman for holding this important hearing on the economic impact that the Department of Interior's Office of Surface Mining, Reclamation rewrite of the Stream Buffer Zone rule could have on local communities like Charleston and other mining towns across the country.

I represent Eastern and Southern Ohio and live just 90 minutes away from Charleston in Marietta, Ohio.

In the parts of eastern and southeastern Ohio that I represent, we have double-digit unemployment reaching as high as 12.7%. There are entire communities that depend largely on the coal industry—both direct and indirect jobs—that would be devastated by this proposed rules change.

According to the Obama Administration's own analysis of the rule—eliminate up to 7,000 direct coal jobs and tens of thousands of indirect jobs, cut coal mining production by 50%, and increase the cost of electricity for families and small businesses.

As most of you may know, OSM in December of 2008 issued a clarification of the stream buffer zone rules after a five-year process that included 40,000 public comments, two proposed rules, and 5,000 pages of environmental analysis from 5 different agencies. The final rule clarified and codified coal surface mining practices that had been in effect for over 30 years.

But on January 20, 2009, the Obama Administration decided to re-open the carefully crafted and properly vetted stream buffer zone rule. This proposed sweeping regulatory action would radically alter the definition of a stream as well as how the agency measures material damage outside of the permit area.

To date, the agency has provided no studies, data, or support to justify these radical changes. A judge later ruled that the Administration couldn't reopen the rule-making process without cause.

So what did the Administration do? They did what we have seen over and over again with settled rules the Administration does not like, they practically sent out invitations to environmental groups to sue the Department of Interior over the rule.

Not surprisingly they got their desired result and before long two environmental groups filed a lawsuit protesting the rule.

Then, instead of fighting the lawsuit in court, they entered in closed-door negotiations with the environmentalists and reached a settlement that would allow them to do what they wanted all along, to re-write the stream buffer zone rule.

I don't know about you, but this sounds like collusion to me.

And then in a slap to all taxpayers, the same environmental groups that sued the Department of Interior had their legal fees paid back by the taxpayer funded Judgment Fund.

I wish I could say that this is a special circumstance and that this doesn't happen often, but there are at least 15 instances of this so called practice of 'sue-and-settle' that this Administration has participated in to reopen rules they don't like. However, that is a problem and a discussion for a different day.

Let me get back to the Administration's economic analysis of the rewrite of the rule. Like I said before this analysis, complete by a leading environment consulting firm, showed that 7,000 direct and tens of thousands of indirect jobs would be lost if the rule went forward as written.

This firm was paid millions of dollars to conduct the study. However, once the analysis leaked to the public, OSM fired the contractor, without getting any of the money back.

OSM claims that the contractor miscalculated the job loss, but it seems to me that they simply didn't like the results of the analysis and the press reports that came with it.

For these reasons, I offered an amendment to the first Continuing Resolution from this year that would have stopped OSM from going forward with a proposed revision to the 'Stream Buffer Zone' rule.

The amendment passed the House on a bipartisan vote of 239—186.

Unfortunately, the language did not make the final Continuing Resolution that eventually became law.

However, I have and will continue to fight to have this language included in any new spending bill passed by Congress.

The President as you all know has been touring the Midwest trying to promote what he calls a jobs bill. I find it ironic that his Administration has admitted that the rewrite of the Stream Buffer zone rule will cost thousands of direct and indirect jobs.

If the President was serious about job creation, he would direct OSM to stop going forward with a regulation that will result in thousands of hard-working Americans losing their jobs.

Thanks again for the Chairman for hosting this hearing and I look forward to hearing from our witnesses. I yield back the balance of my time.

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Mr. LAMBORN. OK. Thank you. We will now hear from our witnesses. The first panel consists of The Honorable Earl Ray Tomblin, the Governor of West Virginia. Thank you, Governor, for being here. It's an honor to be in West Virginia today and so I welcome you to be our first witness in this important hearing. Like all of our witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statement to five minutes, as outlined in the invitation letter. Our microphones are not automatic, so you need to turn them on when you're ready to begin. And after four minutes a yellow light will come on, then after five minutes a red light will come on, and you may complete at that time. Thank you again for being here, and you may begin, Governor.

**STATEMENT OF THE HON. EARL RAY TOMBLIN,  
GOVERNOR, STATE OF WEST VIRGINIA**

Governor TOMBLIN. Thank you very much and welcome to West Virginia. We're pleased to have you here today. I'm Governor Earl Ray Tomblin and I would like to thank you for the opportunity to testify today. I'd also like to thank you for taking time to come to West Virginia and listen to the voices of people who, perhaps more than anyone, are threatened by the regulatory philosophy of the Environmental Protection Agency and the Federal Office of Surface Mining.

Coal mining has always been a vital part of West Virginia and the national economy. For West Virginia, coal mining provides a significant number of jobs for our citizens and substantial tax revenue for the operation of our state and local governments.

As a lifelong resident of a coal-producing area of southern West Virginia, I have a deep personal understanding of the importance of this industry to our state. There are millions of Americans who are unemployed. Millions more are struggling to make ends meet, working two or three jobs. Millions more have lost their homes and have had to declare bankruptcy. American families are suffering. They don't want a handout. All they want is a job.

In contrast to most of America, we are fortunate in West Virginia, we are one of only a small handful of states that have been able to balance our budget and add to our rainy day fund reserves. For example, I'm proud to tell you that last year West Virginia had a surplus of approximately \$330 million. In large part, we owe our current financial health to coal. We've had a crisis in waiting with

implementation of the rule before you today and other Federal initiatives hanging in the balance.

Over the past three years the EPA and other regulatory agencies have relentlessly pursued an ill-advised agenda, threatening one of our state's leading industries and tens of thousands of West Virginia jobs. I am deeply concerned about the direction the Federal agencies, including the EPA and OSM have recently taken in the regulation of the coal industry. It has been well-publicized that the preferred alternative for the stream protection measures rule that OSM identified in a draft environmental impact statement is one that will cause drastic reductions in coal production in the Appalachian region.

These impacts are entirely inconsistent with the mandate Congress gave OSM in the Surface Mining Act and unacceptable to any type of economic development and job creation for my home state.

For the good of West Virginia and other coal producing states, I hope the Energy and Natural Resources Subcommittee will take appropriate action to force OSM to act within its Congressional authority.

EPA's obstruction of mining permits and this rule from OSM threatens the very existence of the coal industry in West Virginia and across the nation. These actions by the EPA and OSM are doubly problematic. Not only are they destroying coal mining and other good paying industrial jobs, but they are also increasing the cost of electricity and every product made using electricity. I think the Congress must act to restrain the OSM and the EPA. You must restore balance to the relationship of the states and the Federal Government. You must demand an end to legislation by regulation and restore the proper constitutional balance between the executive and legislative branches.

I thank you and I apologize, I've got another appointment I must go to, but I certainly appreciate you being here today to listen to comments of the audience today. Thank you.

[The prepared statement of Governor Tomblin follows:]

**Statement of The Honorable Earl Ray Tomblin,  
Governor of West Virginia**

Good afternoon. I am Governor Earl Ray Tomblin. I would like to thank you for the opportunity to testify today. I would also like to thank you for taking time to come to West Virginia and listen to the voices of people who, perhaps more than anyone, are threatened by the regulatory philosophy of the Environmental Protection Agency (EPA) and the federal Office of Surface Mining (OSM).

The EPA's anti-coal agenda is having an extraordinarily negative effect on the spirit and minds of every hard working West Virginian. And it should be setting off alarm bells for our Country.

Coal mining has always been a vital part of the West Virginia and National economy. For West Virginia, coal mining provides a significant number of jobs for our citizens and substantial tax revenue for the operation of our state and local governments. As a lifelong resident of the coal-producing area of Southern West Virginia, I have a deep, personal understanding of the importance of this industry to our State.

All told, more than 63,000 West Virginians work in jobs provided by the coal industry. That is 63,000 families. Think about it for a moment—that means approximately 250,000 people in a state with less than 2 million citizens are supported, in one way or another by the mining of coal.

There are millions of Americans who are unemployed. Millions more are struggling to make ends meet working two or three jobs. Millions more have lost their homes and have had to declare bankruptcy. American families are suffering. They don't want a handout. All they want is a job.

In contrast to most of America, we are fortunate in West Virginia. We are one of only a small handful of states that have been able to balance our budget and add to our Rainy Day Reserves. For example, I am proud to tell you that last year West Virginia had a surplus of approximately \$330 million. In large part, we owe our current financial health to "Coal." West Virginia has also been successful in attracting several new businesses to our state due to our aggressive team of economic development professionals. But we have a "crisis in waiting" with the implementation of the rule before you today and other federal initiatives hanging in the balance.

Over the past three years, the EPA and other regulatory agencies have relentlessly pursued an ill-advised agenda, threatening one of our state's leading industries and tens of thousands of West Virginia jobs. I am deeply concerned about the direction federal agencies, including the EPA and the OSM, have recently taken in the regulation of the coal industry. Since the EPA, the Interior Department, and the Corps of Engineers signed a Memorandum of Understanding on June 11, 2009, these agencies have undertaken extraordinary efforts to seize regulatory authority that legitimately resides with the states and Congress. The EPA has attempted to re-write the Clean Water Act and regulations to incorporate new policy judgments, without the benefit of a new mandate from Congress or at least the transparency and opportunity for public involvement that would accompany formal rulemaking.

With the OSM Stream Protection Measures Rulemaking that is the subject of the subcommittee's current focus, I am concerned that OSM is also acting in contravention of its mandate from Congress. OSM's actions must be based on the federal Surface Mining Act. One of the principal purposes Congress established in the Surface Mining Act was 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."

It has been well publicized that the preferred alternative for the Stream Protection Measures rule OSM identified in the draft environmental impact statement is one that will cause drastic reductions in coal production in the Appalachian region.

As I understand it, OSM's draft environmental impact statement projects the following impacts from its proposed alternative:

- A decrease in surface mine coal production in the Appalachian Basin of approximately 30%;
- A loss of approximately 10,00 jobs in the Appalachian basin under the worst case scenario;
- An approximate 13.1% loss in severance tax; and
- An approximate 11.7% decrease in income taxes.

These impacts are entirely inconsistent with the mandate Congress gave OSM in the Surface Mining Act and unacceptable to any type of economic development and job creation for my home State. For the good of West Virginia and other coal producing states, I hope the Energy and Natural Resources Subcommittee will take appropriate action to force OSM to act within the limits of the authority Congress has given it.

West Virginia's coal miners, the bravest workers in world, should be confident about their future, enjoying the fruits of their hard work, building new homes, and saving for their children's education and their own retirement. They should not be worrying about an overbearing federal bureaucracy that threatens the very backbone of their lives.

EPA's obstruction of mining permits and this rule from OSM threatens the very existence of the coal industry, in West Virginia and across the nation. These actions by the EPA and OSM are doubly problematic. Not only are they destroying coal mining and other good-paying industrial jobs, but they are also increasing the cost of electricity and every product made using electricity.

If enacted, OSM's proposed re-write of the Stream Buffer Zone rule will drastically reduce coal production in West Virginia and across the nation. It will apply new standards that have no basis in the law.

Congress must act to restrain the OSM and the EPA. You must restore balance to the relationship of the states and the federal government. You must demand an end to legislation by regulation and restore the proper Constitutional balance between the executive and legislative branches.

Tens of thousands of coal miners in West Virginia, Appalachia and across the nation need your help. While our national leaders speak of stimulating the economy, federal regulatory agencies are erecting substantial barriers to the continued existence of the mining industry at every turn.

While national leaders plead their case for more jobs, the agencies under their authority seem determined to drastically increase unemployment in our region.

We, here in the great state of West Virginia, do not seek subsidies or handouts. We just want to continue to work at the jobs we know and love. To continue doing what we've done for decades—providing our nation and the world with the energy and industrial fuel it needs to pull itself out of a global economic recession. Industries fueled by West Virginia coal provide the wages and taxes that support our states and communities. I call on you to restore balance in the federal government—to reign in the out-of-control EPA and OSM—and to give our great nation a chance to lead the world out of its current economic downturn. We are leading the nation here in West Virginia with the help of Coal—let us now take a great step forward and use our Coal to lead the world forward into a prosperous new era.

Thank you.

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Mr. LAMBORN. I would like to also mention that we've been joined by the U.S. Senator for West Virginia and former Governor, Manchin, who's in the back of the room. If he would like to come up and if the Governor has no objection, and you have a comment or two to add on this important subject, you're very welcome to do that. And this is an example of how well the House and the Senate tries to work together in Washington.

Governor, if you have to go, I have one question for you. If you have to go right this minute, let me ask you the question before the Senator speaks.

Governor TOMBLIN. Sure.

Mr. LAMBORN. Some have said, and I happen to share this concern, so I could be saying this just as well as anyone else out there, that the Obama Administration seems to be waging a war on coal. Do you agree with that statement?

Governor TOMBLIN. Well, I feel that the OSM and EPA are being completely unrealistic as far as the mining of coal goes. And obviously, under the previous Administration and my Administration, we have a lawsuit in the Federal court in Washington, D.C., questioning their authority and we feel like they've overstepped their bounds as far as the regulation of the coal industry.

Mr. LAMBORN. Did anyone else on the panel have a question for the Governor before the Senator speaks?

Mr. JOHNSON. I actually do, and I'll make it quick because I know the Governor has got to go. Governor, do you think OSM is being a good steward of taxpayer dollars after spending millions on the first contractor, firing them because they didn't like the answers they got and then spending millions more on a new contractor?

Governor TOMBLIN. Well, I feel my focus today is on coal mining and coal mining jobs in West Virginia, and I feel that some of the actions they're taking are overstepping the bounds that Congress has authorized them to have in West Virginia, or across the country, as far as coal mining goes. And obviously, my biggest concern is about the jobs of West Virginians here today and the continued production, responsible production of coal in the State of West Virginia.

Mr. JOHNSON. Thank you, Governor.

Mr. LAMBORN. Governor, we know you're on a tight schedule, so at any time that you feel you need to leave, please do so, and thank you for being here.

Governor TOMBLIN. Thank you, sir.

Mr. LAMBORN. And Senator Manchin, thank you for joining us, and if you have any comments that you would care to add on this important subject, we'd love to hear to from you.

**STATEMENT OF THE HON. JOE MANCHIN, A SENATOR IN  
CONGRESS FROM THE STATE OF WEST VIRGINIA**

Senator MANCHIN. More than happy. Thank you so much for the courtesy and the kindness, and to all my colleagues, to you all for coming. I know that our Congresswoman Capito from our wonderful state here has been a good hostess and I know that she's very appreciative and, I am, too, of you all bringing this inquiry down here.

Let me just say that under this Administration it's been very onerous as far as trying to get a level playing field or a balance. And all we're saying is this country needs coal. It can turn its back all it wants to, but the bottom line, when it's all said and done, there's about 150 million people in America that depend on the energy that we have produced for a hundred years and we'll continue for as long as needed. We don't have a fuel of the future. In West Virginia, people don't realize we probably have more wind farms east of the Mississippi than most any other state. We're trying everything we can to be diverse and be totally independent of foreign oil. And we believe security of the Nation is the most important thing. West Virginia has always done the heavy lifting. We're not afraid of hard work. We've helped build this great country by producing the coal and make the steel and build the factories in defense of our country.

So with all that being said, we think it's really unreasonable the approach that they're taking in making one so onerous. You've just heard where we have to close maybe five power plants. I don't think that that's necessary. I think there's a better way that we could save some of those plants, giving dependable, reliable and affordable energy. Coal has been able to do that and it will continue to.

We know that with some of the investments that's been made in the sake of clean energy, we know that didn't go as well as it should have gone. Solyndra, I don't need to tell you all about it, \$538 million. It was something that was rushed to show as the poster child that didn't work. Fine, those things happen. I understand that. But the bottom line is we could have used half of that money to complete a commercial operation as far as coal sequestration, showing that we could take the clear stream of carbon, sequester it, and also find better uses for it. We could have finished that project, so we know that has a payback and guarantee to the American taxpayers.

I know that what you talked about, the amount of money that was spent in a prior Administration for a three- and four-year study, then the new Administration comes and rushes it through in five or six months and they found out that it had a tremendous, tremendous employment impact; a lot of people would have been displaced. And I think Congresswoman Capito will tell you, in West Virginia all we want is a balance between the environment and the economy. Can we do it better? Absolutely. But we need government as our partner, not our adversary.

And we'll continue, if you've seen our terrain flying in here, you know that we have some challenges, but we have been blessed with the beauty and the natural resources. We can't build a road in West Virginia without making some adjustments. And if they take the approach that OSM is willing to take or wanting to take, it would stop everything as you know it. The economy would go to "you-know-what" in a handbasket and we'd be in serious trouble.

Can we do it better? Absolutely. Can we do it? I always said this. If it's unreasonable, it's unattainable. The approach they're taking—and I've spoken to the OSM officials—it is totally unreasonable. The aggressive approach they're taking, it makes no sense at all when we're in such dire need of the energy that we have in this great country and we've been blessed with in our state.

I just thank all of you and I thank Shelley for bringing everybody and for you all coming down. I know that Congressman Rahall feels the same, Congressman McKinley feels the same, Senator Rockefeller feels the same. We're all in on this one. It doesn't have a party here. This is the most bipartisan approach I think you can take and it's refreshing because we don't see it too much in Washington. And I appreciate you all being here.

Mr. LAMBORN. Senator, thank you so much for your comments. Does anyone on the Committee have a comment in response? Thank you so much for being here. We appreciate it.

Senator MANCHIN. Thank you for allowing me to say it. I appreciate it very much. Thank you.

Mr. LAMBORN. Thank you. We will now have our second panel and the witnesses on the second panel, of the three panels that we'll be hearing from today, and we're going to be getting all kinds of views on this important subject. But the second panel will consist of Mr. Thomas L. Clarke, Director of the West Virginia Division of Mining and Reclamation, Department of Environmental Protection; Mr. Bradley C. Lambert, Deputy Director of the Virginia Department of Mines, Minerals and Energy; and Mr. John Corra, Director of the Wyoming Department of Environmental Quality.

And I would remind the witnesses as they come forward and get seated that members of the Committee may have additional questions for the record. I would ask for you to respond to these in writing. Like all of our witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to five minutes as outlined in the invitation letter. You have to push a button at the base of the microphone to get them to work. And if you watch the light, you'll see that you have five minutes. And the yellow light comes on when you have one minute. The red light comes on when your five minutes are over.

We will now begin with Mr. Clarke, and you may begin. Thank you for being here.

**STATEMENT OF THOMAS L. CLARKE, DIRECTOR OF MINING AND RECLAMATION, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Mr. CLARKE. Good morning. My name is Tom Clarke. I'm Director of the West Virginia—

Mr. LAMBORN. Could you speak into the microphone, please?

Mr. CLARKE. OK. Good morning. My name is Tom Clarke. I'm Director of the West Virginia Department of Environmental Protection's Division of Mining and Reclamation. I would like to welcome the Subcommittee to West Virginia and thank it for allowing me to talk about the Office of Surface Mining's Stream Protection measures environmental impact statement and rulemaking.

What OSM is contemplating is a rewrite of all the rules governing the way coal mining is conducted in America. The Federal Surface Mining Act, SMCRA, governs OSM in this rulemaking. SMCRA was adopted in 1977, after six years of debate. This was in the midst of the energy crisis. In light of this, and in spite of the positions of those who advocated abolition or severe limitations on mining, Congress decided to strike a balance between environmental protection and meeting the nation's energy needs.

With stream protection measures rulemaking, OSM is trying to alter the balance Congress establishment in 1977. This balance involved increased production of coal with environmental controls. Against the balance that Congress struck, consider that OSM's proposal by OSM's own numbers would radically alter the economy in the Appalachian region. Results like these are wholly inconsistent with the balance Congress struck in OSM should not be allowed to defy the intent Congress expressed in the Act establishing it.

Mining, particularly mountaintop mining has been controversial. However, instead of abolishing surface mining or mountaintop mining, as some called for at the time, Congress authorized both and contemplated expansion of coal mining to meet the nation's energy needs. If there's political will to change this, the change needs to come from Congress, not from OSM. With this EIS and rulemaking, OSM is going to once again destabilize the regulatory structure for mining. Consider that every regulation of any significance that OSM originally promulgated to implement was challenged. Only in the last few years have legal challenges to the rules implementing some of its basic concepts been resolved and a degree of regulatory stability achieved. It took thirty years to get to this point. OSM's rulemaking will end that and is likely to lead to years of litigation and the uncertainty that goes with it.

The EIS OSM is conducting has been a debacle. It engaged a contractor for this that apparently had never done an EIS and knew nothing about mining or the regulatory structure. On top of this, OMS expected the EIS to be completed in record time. It expected a draft EIS in eight months. By comparison, the draft EIS for the 2008 stream buffer zone rule, which OSM intends to replace with the stream protection measures rule, took 26 months, knowing this EIS built upon a previous one.

The stream protection measures EIS is being performed as a standalone EIS. My agency and other state agencies have been cooperating agencies on this EIS. As the entities with 30 years of experience directly applying, we have valuable perspective to lend if OSM is really interested in taking the hard look at its proposed actions that NEPA contemplates. Instead, thus far the process has been conducted so as to effectively deny meaningful state participation. We were allowed five, four and nine business days to review and comment on Chapters 2, 3 and 4, respectively. This involved hundreds of pages of material.

There is no indication that OSM paid any attention to our comments. Under the circumstances, it is not surprising that the drafts OSM's contractor provided were very poor. My Deputy Director, who led our effort to review and comment on the drafts, said that the draft EIS looked like something a college student put together by cutting and pasting from the Internet.

In SMCRA, Congress recognized that the terrain and climate vary widely across the country, and accordingly, chose to assign primary responsibility for implementing it to the states. Two of the concepts in that most peculiarly warrant the state specific approach are approximate original contour and material damage to the hydrologic balance. Contrary to the expressed purposes of Congress, in this rulemaking OSM intends to seize the authority to define these terms from the states and dictate Federal standards for them from Washington.

Several other aspects of OSM's attempt to define material damage are troubling. One of them is that OSM has indicated it will include a biologic component in this definition. The Subcommittee may be aware that an emerging issue in the regulation of mining has been the extent of the protection provided for by Biota, an aquatic ecosystem under state water quality standards issued under the Clean Water Act. It's fair to say that EPA and states are not quite seeing eye to eye on this. OSM's entry into this debate by establishing biologic standards may violate SMCRA. SMCRA states that it does not supersede, amend or repeal the Clean Water Act. Because of this, a previous account by OSM to establish what amounted to water quality standards was rejected by the courts.

There are many more troubling aspects to the proposed stream protection measures rulemaking. In the interest of staying within our time limits, I won't go into them further, but I encourage the Subcommittee to examine my written submission where I have summarized some of them.

In closing, OSM needs to be held accountable to Congress. And I thank you again for taking the opportunity and time to hear from me.

[The prepared statement of Mr. Clarke follows:]

**Statement of Thomas L. Clarke, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection**

**The Decision as to Where the Balance Between Environmental Protection and Energy Production Should be Struck is for Congress to Make, Not OSM**

Somewhere along the path that Congress established for it in the Surface Mining Control and Reclamation Act ("SMCRA" or the "Act"), the Office of Surface Mining Reclamation and Enforcement (OSM) has lost its way. SMCRA was adopted in the midst of the Energy Crisis in 1977. Accordingly, a balance between environmental protection and energy production through coal mining was central to the policy Congress established in this Act. Thirty four years after Congress established the guiding principles for OSM's existence in SMCRA, OSM is disregarding its Congressional charter in favor of an aggressive regulatory agenda that runs directly contrary to these principles. In Appalachia, the country's top coal producing region at SMCRA's adoption, by OSM's own projections, the set of new regulations OSM is pursuing, the Stream Protection Measures Rule, would cause:

- A decrease in surface mine coal production in the Appalachian Basin of 30%;
- A loss of 10,749 jobs in the Appalachian basin under the worst case scenario;
- Lowering an additional 29,000 people in the Appalachian Basin beneath the poverty level;
- A 13.1% loss in severance tax; and,

- An 11.7% decrease in income taxes.

Recently, there has been a good deal of public discourse over the appropriate level of environmental protection that should govern the coal mining industry. The debate is reminiscent of the issues that were debated publicly and in Congress in the years leading up to SMCRA's adoption. In OSM's Stream Protection Measures environmental impact statement and rulemaking, it is playing to a constituency that, like their predecessors a generation ago, favors abolishing or greatly restricting surface coal mining in Appalachia. After at least six years of debate in the 1970's, Congress rejected this approach and chose to strike a balance between energy production and environmental protection. In adopting SMCRA, Congress found, "expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public" 30 U.S.C. § 1201(d). Among the express purposes Congress set forth in the Act was to:

[A]ssure 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. . . .

30 U.S.C. § 1202(f). First among the requirements Congress included in the performance standards section of SMCRA is a mandate that operators "conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel source. . . ." 30 U.S.C. § 1265(b)(1). OSM is now trying to significantly alter the balance struck by Congress in SMCRA and substitute its judgment as the appropriate level of environmental protection for the well-considered judgment Congress made on this subject in the Act. Policy judgments that would radically change the economy of West Virginia and Appalachia need to be made by Congress or the states and not federal bureaucrats at OSM.

*The Basis for OSM's Decision to Undertake the Stream Protection Measures Rule-making*

With neither a new mandate from Congress, nor a record developed over the many years of experience under this Act to support OSM's regulatory agenda, one might wonder what the impetus behind this attempt to totally change the rules on how coal mining is conducted in America might be. The agency's only formal answer is disclosed in two Federal Register notices it has published. OSM explained:

On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency (EPA), and the Acting Assistant Secretary of the Army (Civil Works) entered into a memorandum of understanding (MOU) implementing an interagency action plan designed to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states, while ensuring that future mining remains consistent with Federal law.

75 Fed. Reg. 34667 (June 18, 2010); 75 Fed. Reg. 22723 (April 30, 2010). The June 11, 2009 MOU committed OSM to making "[r]evisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone Rule and Approximate Original Contour (AOC) requirements". In addition to the OSM rulemaking effort that is the subject of the Energy and Mineral Resources Subcommittee's current focus, this June 11, 2009 MOU has been the genesis of other efforts undertaken by both OSM and the United States Environmental Protection Agency ("USEPA") to unlawfully seize regulatory authority that legitimately resides with the states and other agencies under SMCRA and the Clean Water Act ("CWA") and adopt what amount to new regulations for the regulation of coal mining that are contrary to these agencies' enabling statutes.

The authors of this MOU apparently understood that accomplishment of their regulatory goals would fundamentally change and, perhaps, devastate the economy of the Appalachian region, which has historically been dependent on coal mining. To address this, the MOU anticipates that, "the Federal government will help diversify and strengthen the Appalachian regional economy. This effort will include the agencies to this MOU, and other Federal agencies, as appropriate, and will work to focus clean energy investments and create green jobs in Appalachia." Clearly, economic and social engineering is well beyond any legitimate role Congress has granted to agencies like OSM, EPA and the other signatories to the June 11, 2009 MOU. These agencies need to be accountable to Congress and be required to operate within the legal authority Congress has granted them.

**OSM is Promoting Regulatory Uncertainty**

SMCRA was adopted thirty four years ago. Through years of regulatory experience under the Act since then, we have only recently arrived at a point at which

some regulatory certainty exists. Litigation has been said to follow the promulgation of regulations under the Act “as night follows day”. Nearly all of the regulations promulgated to implement the Act, mostly from the late 1970’s and early 1980’s, have been challenged in court. Only in the past few years have challenges to some of the regulations implementing some of the Act’s basic concepts been finally resolved (e.g., ownership and control, valid existing rights, subsidence impacts). A degree of regulatory certainty has only recently been achieved under this thirty-plus year old law. Just as this has happened, and without the benefit of a new mandate from Congress supporting its actions or even a basis in the regulatory record developed over years of oversight of state regulatory programs, OSM is attempting to undertake a radical re-write of nearly all of the rules governing the manner in which coal mining operations are conducted. After over thirty years of efforts by OSM leadership, through administrations of differing political viewpoints, to “get it right” under SMCRA, today’s OSM has decided that everyone who has preceded it has gotten it one hundred percent wrong. In doing so, the current OSM is boldly making quantum shifts in regulatory policy that are Congress’ business to make.

#### **The EIS Process Has Excluded Meaningful State Participation**

OSM correctly realized that its planned Stream Protection Measures rulemaking was sufficient in scope to require the preparation of an environmental impact statement (EIS) in accordance with the National Environmental Policy Act. However, OSM’s schedule for completing this EIS was unrealistically ambitious. When the June 11, 2009 MOU committed OSM to changing its 2008 stream buffer zone rule, OSM was already in litigation with environmental groups challenging the 2008 rule. On March 19, 2010, after OSM was unsuccessful in persuading the court to allow it to simply cast aside the 2008 rule, OSM entered into a “friendly” settlement agreement with the opponents of this rule. In this settlement, OSM committed to issuance of a proposed regulation replacing the 2008 rule, i.e., the Stream Protection Measures rule, by February 28, 2011. This necessarily required OSM to complete the draft EIS for the Stream Protection Measures rule within the same time frame, by February 28, 2011. The unreasonableness of the timeframe OSM targeted for completion of this EIS might be best illustrated by a comparison with the EIS it conducted for the 2008 stream buffer zone rule, which it aimed to replace. From OSM’s announcement of its intent to prepare an EIS for the 2008 stream buffer zone rule through issuance of a draft EIS, a little more than 26 months passed. Importantly, the EIS for the 2008 rule built upon the more extensive Mountaintop Mining—Valley Fill EIS that had recently been completed in 2005. In contrast, the EIS for the Stream Protection Measures Rule has been conducted as a stand-alone EIS for a much more sweeping regulatory change than the 2008 stream buffer zone rule. OSM announced its intent to prepare the Stream Protection Measures EIS in April, 2010 and again in June, 2010. This allowed OSM only eight months to complete a draft EIS for the Stream Protection Measures Rule.

OSM’s schedule for the Stream Protection Measures EIS was totally inadequate for the undertaking involved. Cooperating agencies on the EIS, like the West Virginia Department of Environmental Protection, were not allowed to comment on Chapter 1 of the preliminary draft EIS that OSM prepared. The time cooperating agencies were allowed for comment on hundreds of pages of material in Chapters 2, 3 and 4 was 5, 4 and 9 business days, respectively. OSM has either allowed the time commitments it made in its settlement with environmental groups to turn what should be an open, transparent EIS process into a sham or it has intentionally designed a process so as to avoid a transparent, hard look at the consequences of its proposed actions. Either way, OSM’s procedure thus far has been a rush to a predetermined result, without any indication that it has paid attention to the comments of state agencies that have years of valuable experience directly regulating the coal industry under SMCRA.

It is difficult to discuss the shortcomings of OSM’s process for the EIS for the Stream Protection Measures Rule without also mentioning the problems with the content of the portions of the draft EIS cooperating agencies have been permitted to review. The contractor OSM engaged to prepare the draft EIS had no experience with coal mining or the surface mining regulatory program. This lack of experience shows throughout the drafts OSM has shared. We understand that OSM has been re-writing the drafts its contractor produced. It is our hope that this will result in a greatly improved product. However, with the way OSM has proceeded on the previous drafts of the EIS, we are greatly concerned about whether we will be given an adequate opportunity to review and comment on OSM’s re-draft of the EIS. Again, the process for a change as significant as OSM’s complete re-write of the rules on how coal mining is conducted in America should be done in a much more transparent fashion.

*The West Virginia Regulatory Program's Existing Stream Protection Requirements*

The regulatory programs in West Virginia and other states have not been static. The state programs have evolved over time to deal with state issues as they have arisen. The current OSM rulemaking will diminish the regulatory flexibility that states have in favor of national solutions dictated from Washington. West Virginia has been successful in addressing new issues as they arise, within SMCRA's regulatory framework. There are many requirements for the protection of the hydrologic balance an applicant for a permit must meet before a surface mining permit will be issued:

- Core drilling must be conducted in the area where surface mining is proposed. Each layer of rock in the core sample is analyzed for chemical content. The data is used to determine which rock layers have potential to leach and produce pollutants. The principal focus has been on prevention of acid mine drainage (low pH and iron) and selenium pollution. Rock layers that exhibit this potential are required to be specially handled and placed, so the opportunity for these materials to come into contact with water is minimized.
- The applicant must conduct extensive water sampling to establish the pre-mining baseline condition for surface and ground water quality and quantity in the area of the proposed mine. The number of samples taken must be sufficient to establish the seasonal variation in these baseline conditions.
- The applicant must perform a detailed analysis of the likely effects of its proposed mining operation. This analysis is called a "PHC" (prediction of Probable Hydrologic Consequences).
- The applicant must include a Hydrologic Reclamation Plan ("HRP") in its application. The HRP must contain measures the applicant will take to reduce the hydrologic impact of its proposed mining operation, comply with effluent limitations imposed under the CWA and a plan for replacement of the water supply of anyone whose water supply is unexpectedly contaminated or interrupted by the mining operation.
- The applicant must perform a Storm Water Runoff Assessment (SWROA). In the SWROA, the applicant must model storm water runoff from the proposed mining operation under pre-mining, worst case during mining, and post mining scenarios. The SWROA must demonstrate that the mine has been designed so as to not allow a net increase in peak runoff in comparison to the pre-mining condition. There is no federal counterpart to West Virginia's SWROA requirement.
- The application must contain detailed engineering design information for all drainage control or water retention structures.
- The applicant must demonstrate that it has minimized the amount of mine spoil it is not using in reclamation (excess spoil) and placing outside the mined area in a drainway or stream. West Virginia requires applicants to utilize a modeling tool called AOC+ (approximate original contour) in making this demonstration. This modeling tool has been in use for more than ten years and has been approved by USEPA, the Army Corps of Engineers and OSM as a legitimate means of demonstrating the amount of mine spoil returned to the mined-out area for use in reclamation has been optimized and the size of any fill placed in a stream outside the mined area has been minimized.
- The agency must perform a Cumulative Hydrologic Impact Assessment ("CHIA") for the proposed mine and all other existing or proposed mining in the cumulative impact area for the proposed operation. A permit will not be issued unless the agency can make a finding that the applicant has affirmatively demonstrated that its proposed operation has been designed to prevent "material damage to the hydrologic balance outside the permit area".
- West Virginia is one of a few states that have promulgated regulations defining "material damage to the hydrologic balance". There is no federal definition of this term.
- The agency performs a Buffer Zone Analysis ("BZA") for any permit which contemplates placement of spoil within one hundred feet of an intermittent or perennial stream. The BZA involves detailed environmental analyses of the environmental impacts of spoil placement in such areas and has been relied upon by the Army Corps of Engineers in its issuance of permits for mining-related fills in waters of the United States under section 404 of the Clean Water Act. There is no parallel to the BZA in federal surface mining regulations. The BZA is described in more detail in the attached letter from Thomas D. Shope of OSM to Joseph M. Lovett dated December 8, 2009. This letter also contains a detailed discussion of how the West Virginia regulatory pro-

gram complies with the State stream buffer zone rule, which the subcommittee may also find to be of interest.

- The permit must establish plans for monitoring surface and ground water quality and quantity during mining, so predictions in the applicant's PHC can be verified. It must also include a during-mining monitoring plan for verification of the predictions of the SWROA it has conducted.
- The State recently adopted permitting guidance for application of its narrative water quality standard for the protection of the biologic component of the aquatic ecosystem in NPDES permitting under the CWA. As a result, the Aquatic Ecosystem Protection Plans required under this guidance for the NPDES permitting program are now also being included in HRP's for mining operations. CHIA's the agency performs are also addressing protection of the aquatic ecosystem.

Beyond the permitting requirements outlined above, the West Virginia regulatory program includes a number of performance standards that apply to all aspects of hydrologic protection that are addressed in permitting. The West Virginia Department of Environmental Protection inspects all permits on a minimum frequency of once per month to assure that performance standards and permit conditions are being met. Enforcement action is taken, including notices of violation and cessation orders, as appropriate, for a mine operator's failure to comply. Civil penalties are assessed for non-compliance. Operators which fail to correct violations on a timely basis are blocked from receiving future permits. A pattern of violations can result in suspension or revocation of a mine operator's permit.

#### **Impacts of the Stream Protection Rule**

As discussed above, the negative economic impacts OSM projects for the Appalachian region are quite substantial. Because OSM has yet to lift the veil on the actual language of its proposed rule, a concise assessment of the rule's regulatory burden on state agencies cannot be performed. However, some observations can be made, based on the actions OSM has otherwise taken since the Interior Department signed on to the June 11, 2009 MOU and the concepts of the Stream Protection Measures Rule that state agencies have been able to glean from portions of the draft EIS and briefings OSM has provided.

If the general direction OSM has taken since the June 11, 2009 MOU is any indication, the regulatory burden the Stream Protection Measures Rule will impose on state regulatory programs can be expected to be quite substantial. Nearly every action OSM has taken since the June 11, 2009 MOU has increased the burden on the states. Consider that OSM:

- Has unlawfully terminated the Abandoned Mine Lands emergency program and indicated that it will transfer the personnel OSM had previously dedicated to this program to oversight of state programs;
- Proposed a draft budget that cuts funding of state regulatory programs by 15%; and,
- Promulgated, without formal rulemaking, three new policies governing oversight of state regulatory programs, REG-8, REG-23 and INE-35, which each alter the federal-state relationship that previously existed and impose substantial new bureaucratic regulatory burdens on the states.

At the same time OSM is adding more sets of eyes to watch state regulators and increase the number of federal inquiries to which states must respond, it is proposing to reduce the amount of money available to the states to operate their programs and has aggressively increased the bureaucratic burden it imposes on the states. With a total re-write of all of the rules on how coal mining is conducted, the changes states must undergo to implement the Stream Protection Measures Rule may represent the most significant of any of the new burdens the current OSM has thrust upon the states.

Another fundamental shift in the federal-state relationship under SMCRA that will come from the Stream Protection Measures Rule is in the ability of states to craft their regulatory programs as necessary to address local state issues. In the thirty four years since SMCRA was adopted, OSM has left two of the Act's most fundamental concepts "approximate original contour" and "material damage to the hydrologic balance", to the states to apply. This was done with good reason. Application of "approximate original contour" in the rugged Appalachian terrain of eastern Kentucky, southwest Virginia and southern West Virginia raises far different issues than in the flatter farmland of Indiana or the western plains. Application of the term, "material damage to the hydrologic balance" necessarily involves vastly different issues in the arid west than in the more humid east. The Stream Protection Measures Rule will end the authority to deal with state-specific issues at the state level that states currently enjoy. It will impose national one-size-fits-all standards

from Washington. This approach runs contrary to one of the express findings Congress made in adopting SMCRA:

[B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States[.]

30 U.S.C. § 1201(f).

There are many other specific issues with concepts that are expected to be embodied in the Stream Protection Measures Rule that are troublesome to the West Virginia Department of Environmental Protection. Some of them are:

- SMCRA provides that it is not to be applied in a manner that will supersede, amend or repeal the federal Clean Water Act. 30 U.S.C. § 1292(a). This provision of SMCRA has been applied by the courts to reject a past attempt by OSM to establish what amounted to water quality standards. At the present time, several of the Appalachian states, including West Virginia, are in the process of establishing how narrative state water quality standards for the protection of biologic components of the aquatic ecosystem are to be applied in the context of the regulation of coal mining. This process involves great potential for conflict between USEPA and the states over the application of the Clean Water Act in this area. OSM intends to interject itself in the middle of the debate between USEPA and the states over this issue by including a biologic component in its material damage definition. There is great potential for this element of OSM's rules to conflict with the Clean Water Act. The biologic component of the material damage definition may be another unlawful attempt by OSM to establish what amounts to a water quality standard.
- A proposed performance standard that would prohibit adverse impacts to a stream's biologic community. This proposal suffers from the same defects that affect OSM's proposal to include a biologic component in its material damage definition, as discussed in the paragraph above.
- The material damage definition is also expected to include "quantification methods" to define what constitutes material damage. Again, OSM appears to be at risk of interfering with the Clean Water Act where these quantification methods amount to de facto numeric water quality standards.
- The material damage definition will also include "corrective action thresholds" to identify trends and require correction before the level of material damage is reached. This, too, presents great potential for conflict with the Clean Water Act. The NPDES permitting program under the Clean Water Act has a process to establish effluent limitations for protection of water resources. Discharges from mines or other facilities that comply with these limitations are lawful and discharges that exceed these limitations are unlawful. OSM's corrective action thresholds would appear to be attaching regulatory consequences to what would otherwise be lawful discharges under the Clean Water Act's NPDES program, in conflict with the Clean Water Act.
- The material damage definition is expected to codify OSM's Acid Mine Drainage Policy. Without getting into an in-depth discussion of the AMD policy, this probably is a sufficient enough departure from the statutory language of SMCRA to require it to be adopted through Congressional action rather than agency rulemaking.
- OSM will propose that approval to mine through natural drainage ways or streams be "sequenced". By this, OSM means that a mine must completely reclaim a drainway it has mined through, including restoration of the pre-mining biologic community in the drainway, before the mine will be allowed to mine through any subsequent drainway. In as much as drainways across Appalachian mountain sides may be separated by only a couple hundred feet, this proposal is entirely unrealistic.
- The portion of the Stream Protection Measures Rule that deals with disposal of excess spoil proposes to require constructed aquatards within excess spoil fills. Historically, nearly all of the construction standards that have applied to excess spoil fills have been oriented toward assuring their stability. One element of the design has been to assure that these structures drain freely. An aquatard is a layer of decreased permeability where water will be forced to drain laterally through the interior of a fill. This has the potential to seriously compromise the structural integrity of these fills. Our engineers refer to the aquatard as a "failure plane." The failure of such a structure would be a threat to public safety.
- The excess spoil disposal rules will also require the tops of fills to be sloped to cause drainage to run off instead of infiltrating the fill. Achieving the goal

of promoting runoff will cause peak flow to increase during rain events, contributing to offsite flooding.

- OSM proposes to place additional restrictions on the granting of variances from the existing requirement for restoration of the approximate original contour of mined lands. This proposal has great potential to conflict with West Virginia land use planning laws. The coal mining areas of southern West Virginia have had little economic development because the terrain is too rugged. The State Legislature has recognized that mining presents a unique opportunity to provide a resource that these areas lack, flat land. This is essential to the future, post-mining economic viability of these areas. The State has adopted legislation which requires county level economic development authorities to develop county-wide master land use plans. These plans are required to be approved by state government and to meet certain minimum state requirements. Each plan must be updated and re-approved by the State at three year intervals so as assure that it remains current. Under these plans, land that is proximal to supporting infrastructure, such as four lane highways or other transportation corridors, is targeted for development while forestry and comparable land uses are planned for more remote lands. New mining operations are required to attain a post mine land use that comports with the county master land use plan. OSM's proposal to further restrict variances from the approximate original contour requirement conflicts with these State land use laws and may foreclose the opportunity to provide flat land through the mining process, so there can be economic development of these historically coal dependent areas after the coal is gone.

**Conclusion**

I sincerely hope this written statement, the attachment submitted herewith and the oral testimony presented before the subcommittee are useful to it. If I can be of further assistance to the subcommittee, please contact me.

Attachment



## United States Department of the Interior

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENTAppalachian Region  
Three Parkway Center  
Pittsburgh, Pennsylvania 15220

DEC 08 2009

Joseph M. Lovett  
Executive Director  
Appalachian Center for the  
Economy and the Environment  
P.O. Box 507  
Lewisburg, WV 24901

Re: Response to petition requesting Federal enforcement of West Virginia's surface mining program pursuant to 30 C.F.R. Part 733.

Dear Mr. Lovett:

This letter responds to your August 10, 2009, petition requesting Federal enforcement, pursuant to 30 C.F.R. Part 733, of West Virginia's stream buffer zone (SBZ) regulation. In reviewing the allegations raised in your letter, we have found no indication that West Virginia does not apply its SBZ rules consistent with its historic application of the SBZ requirements, as approved by OSM. Therefore, and for the further reasons outlined below, I am denying your request for an evaluation of the State program at this time. Neither your allegations nor other available information supports the conclusion that the State is failing to administer its approved SBZ provisions.

However, it is a high priority of OSM to improve stream protection in Appalachia, and OSM is in the process of reviewing and revising our stream protection requirements through an expedited SBZ rulemaking. On November 30, 2009, OSM published for a thirty-day public comment period an advance notice of proposed rulemaking for its SBZ and related regulations. Further, to provide increased protection for streams pending the final outcome of the pending rulemaking, we are currently seeking comment on a series of state oversight measures, and we are implementing immediate stream protection measures under existing program requirements.

In your petition, you made the following allegations:

- "... WVDEP's decision to exempt valley fills and huge stream elimination projects from the scope of the rule's protections renders the regulation meaningless."

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- "...West Virginia does not apply the buffer zone rule to the footprints of fills, neither does it consider the buffer zone rule in regard to permanently eliminating intermittent and perennial stream segments."
- "...we believe that the State has never denied a request for a variance from the buffer zone rule."

Your petition also advances numerous legal arguments supporting your position that West Virginia must construe its rule in a manner consistent with your interpretation of the 1983 Federal regulation.

We have reviewed the relevant aspects of West Virginia's program and have found that the factual allegations in your petition are not supported by the record. However, I encourage you to submit your views as comments on the current rulemaking.

West Virginia does not interpret its SBZ rule in a manner that serves as an absolute prohibition of fills and all other coal mining activities (such as mining through, crossing, relocating or other activities) within 100 feet of an intermittent or perennial stream. West Virginia is applying its rule in a manner consistent with OSM's historical interpretation of the 1983 Federal SBZ rule upon which the State rule is based. The State program applies the SBZ rule in a manner that allows the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams. However as explained below, the State uses procedures and processes to reduce, minimize and in some cases eliminate the placement of fill in streams in order to reduce the environmental impacts.

West Virginia has previously implemented measures to minimize the adverse environmental impact of the placement of excess spoil in streams. As a result of a consent decree in *Bragg v. Robertson*, Civil Action No. 2:98-0636 (S.D. W. Va. 1998), which was approved by U.S. District Court Judge Charles Haden, on February 17, 2000, the West Virginia Department of Environmental Protection (WVDEP) agreed to do the following, *inter alia*:

- Enforce its SBZ rule and make site-specific written findings before granting SBZ variances;
- Make site-specific written findings showing that ponds are to be placed as close as practicable to the toes of fills; and
- Develop a plan to meet approximate original contour (AOC) and to optimize spoil placement. The plan does not cover contour operations. Furthermore, the plan shall only be implemented pursuant to a memorandum of understanding (MOU) or agreement among the affected Federal and State agencies.

In response to the consent decree, WVDEP, in cooperation with OSM, developed procedures for optimizing spoil placement. The guidance documents were approved by three Federal agencies

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(USEPA, USACE, OSMRE) and were implemented by WVDEP in June of 2000. This guidance, known as "AOC+", was developed to achieve the following stated objectives:

- Provide an objective process for achieving AOC while ensuring stability of backfill material and minimization of sedimentation to streams;
- Provide an objective process for determining the quantity of excess spoil that may be disposed of in excess spoil disposal sites such as valley fills; and
- Optimize the placement of spoil to reduce watershed impacts.

The AOC+ method is a reasonable procedure to ensure that an adequate amount of spoil will be returned to the mine excavation so that the AOC requirements of configuration, stability, and drainage will be achieved. This volumetric model (defined backfill template) expands the in-place overburden and then reduces the total expanded volume to ensure backfill stability, drainage, access and safety during the mining and reclamation process. The calculated backfill volume is placed in the mine excavation. All spoil material in excess of the backfill volume is placed in excess spoil fills, usually in adjacent valleys. Minor variations from the model are allowed for the final grading to blend with surrounding contours and drainage patterns.

West Virginia also incorporates a site-specific "Buffer Zone Analysis" (BZA) into its permitting process whenever an applicant proposes to conduct mining activities (including fills and mining through) within 100 feet of an intermittent or perennial stream. This analysis, which is conducted by WVDEP prior to the issuance of a permit, addresses the following issues:

1. Disposal Site Selection

- Does the site selection of the proposed fills and its associated drainage structures represent the least environmentally damaging practicable alternative?
- Can the activity operate without fills in an intermittent or perennial stream?
- Has the least adverse impact alternative on special aquatic sites been identified?
- Has the activity's fill volume been minimized?
- Has the fill been located and confined to impaired streams to minimize smothering of organisms?
- Are previously used disposal sites available?

2. Fill Material Evaluation

- An evaluation of the proposed fill for any indication of possible contaminants, considering the following physical characteristics:
  - Results from previous testing of the material or similar material in the vicinity of the project.
  - Protection practices for petroleum products or designated hazardous substances.

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- Known existence of substantial material deposits of substances, which could be released in harmful quantities to the aquatic environment by manmade discharge activities.

### 3. Environmental Analysis

- Are the physical and chemical characteristics of the aquatic ecosystem significantly affected in the following areas:
  - Substrate impacts, changes in physical, chemical and biological characteristics?
  - Suspended particulate/turbidity impacts?
  - Changes in chemistry and physical characteristics of the receiving stream?
  - Alteration of normal water flow which will result in changes in habitat, food supplies, and spawning areas?
- Do the proposed fills and associated drainage structures significantly affect the following:
  - Violate applicable State Water Quality Standards?
  - Violate applicable toxic effluent standard?
  - Jeopardize the continued existence of endangered or threatened species or their habitat?
  - Aquatic ecosystem diversity, productivity, and stability?
  - Other wildlife ecosystem diversity, productivity, and stability?
  - Wetlands?
  - Riffle and pool complexes?
  - Human health, municipal and private water supplies?
  - Recreational, aesthetic and economic values?
  - Parks, historical sites and wilderness areas?

The BZA also includes a table summarizing temporary and permanent impacts to intermittent and perennial streams within the proposed permit area. Finally, the BZA makes a specific recommendation, signed by the reviewing engineer, biologist, geologist and NPDES permit writer, to the WVDEP Director regarding approval.

In response to your allegations, we have verified that WVDEP is still using AOC+ and the BZA in its permitting process and conducts a BZA and corresponding authorization for all mining activities within 100 feet of an intermittent or perennial stream, including mining through and relocating streams. We have reviewed recently issued permits and selected four which our staff believe were large enough to require valley fills. Three of these permits proposed impacts within stream buffer zones: Alex Energy, Inc., S-3011-07, Raven Crest Contracting, LLC, S-5006-08, and Alex Energy, Inc., S-3009-07. WVDEP did prepare BZA's for the permits, and the permit files include AOC+ documentation. Two of the BZA's conducted concerned durable rock fills while one was for mining through and permanently relocating a stream.

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With respect to your last allegation that the WVDEP has never denied a stream buffer zone variance, neither OSM nor the State collects or tracks such statistics, and we were unable to verify or refute that allegation. However, State officials advised us that requests for the placement of spoil or the conduct of other activities in streams or stream buffer zones are often modified to reflect the least environmentally damaging practicable alternative through the normal permitting process. In addition, during the review process the applicant may revise the mining plan to avoid certain streams, and that may avoid the occasion for a denial. WVDEP provided a list of recently issued permits where proposed stream impacts had been eliminated or reduced through the permit review process. OSM conducted independent verification of two instances where proposed fills were in fact eliminated. The first is S5034-08 (Sandy Gap Surface Mine) in which an excess spoil fill was proposed, but was subsequently eliminated, with the excess spoil being placed on an adjacent permit backfill area. The second is U5013-03 (Jarrell Branch Mine, Portal A) in which authorization was requested for an existing haul road and a temporary excess spoil fill in a stream buffer zone. The temporary excess spoil fill was subsequently eliminated, with the material to be placed in two locations on existing pre-law benches, and ultimately to be used in reclaiming the pre-law benches and highwalls.

Previously, for the Environmental Impact Statement conducted for the Federal 2008 stream buffer zone rule, OSM had reviewed 110 separate versions of WVDEPs' BZAs. In response to your petition, we reviewed a sample of those analyses and noted that one BZA resulted in moving the toe of a durable rock fill upstream approximately 2,800 feet, which eliminated the need to permanently fill several hundred feet of stream (SMA # S-5007-01, Apogee Coal Company).

In summary, we found no evidence that West Virginia is implementing its SBZ rule in any way that substantively deviates from the approved State program. Therefore, we have no reason to conduct the program evaluation under 30 CFR 733.12(a)(2) that your petition requests.

In recent litigation, *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4<sup>th</sup> Cir. 2009), the United States Court of Appeals for the Fourth Circuit discussed requirements of SMCRA concerning coal mining impacts on streams. In that decision, the court stated:

Congress clearly contemplated that the regulation of the disposal of excess spoil and the creation of valley fills fall under the SMCRA rubric. *See* 30 U.S.C. § 1265(b)(22)(D) (2000) (requiring that lateral drains be constructed where a spoil disposal area contains "springs, natural water courses or wet weather seeps"); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4<sup>th</sup> Cir. 2003) ("[I]t is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States . . .").

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Thus, *Aracoma* and *Rivenburgh* recognize that under SMCRA it may be appropriate to allow placement of excess spoil in streams. In addition, the *Aracoma* court stated:

As part of its federally approved SMCRA regulatory program, the WVDEP surface mine permitting process examines “[e]very detail of the manner in which a coal mining operation is to be conducted . . . includ[ing] the plan for disposal of excess spoil for surface . . . mining operations . . .” \*\*\* As the Corps explains in its permits, “the social and environmental impacts associated with surface coal mining and reclamation operations are appropriately analyzed by WVDEP in this context before that agency decides whether to permit the mining operation under SMCRA.” \*\*\* A SMCRA permit applicant must provide detailed information about possible environmental consequences of the proposed operations, as well as assurances that damage to the site will be prevented or minimized during mining and substantially repaired after mining has come to an end. The WVDEP must ensure compliance with SMCRA’s environmental protection performance standards. *See* 30 U.S.C. §§ 1257, 1260, 1265 (2000).

*Aracoma*, 556 at 195-196. The *Aracoma* court’s opinion recognizes that the State provides a detailed review of stream and environmental impacts for mine permit applications, and requires the operator to meet SMCRA requirements to prevent or minimize damage and to reclaim.

I conclude that there is no requirement for OSM or the State to change the interpretation of the existing State SBZ rule. Further, as discussed above, I have reviewed the allegations you have made and I find that they are not verified by the information we have reviewed. I have no basis to conclude that the State is failing to effectively implement its approved stream buffer zone provisions, or that the State has changed its historic interpretation of those provisions. Therefore, I find that pursuant to 30 CFR Part 733, I have no basis to evaluate the State’s implementation of its stream buffer zone provision at this time.

Although I have decided not to evaluate West Virginia’s implementation of its provision, OSM believes it is important to improve protection of streams under SMCRA. Therefore, as mentioned above, we have started an expedited rulemaking to revise the Federal 2008 SBZ rule to provide better environmental protections from the impacts of Appalachian surface coal mining. Further, OSM is taking immediate protective measures for streams pending final action on the rulemaking.

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As you are aware, on December 12, 2008 (73 FR 75814-75885), OSM published a final rule modifying the circumstances under which mining activities may be conducted in or near perennial or intermittent streams. That rule (referred to as the 2008 rule) took effect January 12, 2009. In cases filed on December 22, 2008, and January 16, 2009, *Coal River Mountain Watch, et al. v. Salazar*, No. 08-2212 (D.D.C.) ("*Coal River*") and *National Parks Conservation Ass'n v. Salazar*, No. 09-115 (D.D.C.) ("*NPCA*"), a total of nine organizations challenged the validity of the rule.

In *NPCA*, on April 27, 2009, the Government filed a motion for voluntary remand and vacatur of the 2008 rule. Granting of the Government's motion likely would have had the effect of reinstating the 1983 version of the SBZ rule. In *Coal River*, on April 28, 2009, the Government filed a motion to dismiss the complaint as moot, which the Government argued should be granted if the court granted the motion in *NPCA*.

On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency, and the Acting Assistant Secretary of the Army (Civil Works) entered into a Memorandum of Understanding (MOU) implementing an interagency action plan to significantly reduce the harmful environmental consequences of surface coal mining operations in six states in central and northern Appalachia. Among other things, the MOU required that we develop guidance clarifying how the 1983 SBZ rule would be applied to reduce adverse impacts on streams if the court granted the Government's motion in *NPCA* for remand and vacatur of the 2008 SBZ rule.

On August 12, 2009, the court denied the Government's motion in *NPCA*, holding that, absent a ruling on the merits, significant new evidence, or consent of all the parties, a grant of vacatur would allow the government to improperly bypass the procedures set forth in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, for repealing an agency rule.

On November 30, 2009, OSM published an Advance Notice of Proposed Rulemaking in the *Federal Register* seeking comments on our intention to revise our regulations concerning the conduct of mining activities in or near streams (74 FR 62664-62668). Those revisions would implement, in part, the MOU. Accomplishing that goal will involve revision or repeal of certain elements of the Federal 2008 rule. The rulemaking process will comply with the requirements of the Administrative Procedure Act, including any applicable notice and comment requirements, consistent with the court's decision in *NPCA*. While the Federal 2008 rule remains in effect, OSM is implementing immediate steps to improve stream protection pending the final outcome of the SBZ rulemaking. A copy of those immediate protective measures is enclosed.

It is possible that concerns you have raised may be resolved through our new SBZ rulemaking initiative, which we plan to complete as expeditiously as possible. If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,



Thomas D. Shope  
Regional Director, Appalachian Region

Enclosure

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Mr. LAMBORN. Thank you, Mr. Clarke. Mr. Lambert?

**STATEMENT OF BRADLEY C. LAMBERT, DEPUTY DIRECTOR,  
VIRGINIA DEPARTMENT OF MINES, MINERALS & ENERGY**

Mr. LAMBERT. Good morning, Mr Chairman and members of the Subcommittee. My name is Bradley Lambert and I serve as the Deputy Director of the Virginia Department of Mines, Minerals and Energy. Thank you for this opportunity to appear before you today.

The coalfields of Virginia are characterized by steep slopes and narrow valleys. The mines in Virginia predominantly consist of underground and contour surface operations. Without coal surface mining, land uses such as hospitals, schools, shopping centers, airports, residential development, commercial and industrial development would not exist.

Virginia obtained primacy from OSM as a regulatory authority for coal surface mining in December of 1981. OSM's annual oversight reports for Virginia have not identified any problems that would necessitate such a drastic rule change as we're here today to testify about. OSM stated in a 2010 report that they did not identify any systemic failures within the Virginia state program.

Mr. Chairman, I'd like to submit for the record a copy of the 2010 Annual Report from OSM on Virginia.

Mr. LAMBORN. If there is no objection, that will be included in the record.

**[NOTE: The reports for Virginia and Wyoming can be found at <http://www.osmre.gov/Reports/EvalInfo/2010/VA10-aml-reg.pdf> and <http://www.osmre.gov/Reports/EvalInfo/2010/WY10-reg.pdf>]**

Mr. LAMBERT. After implementing years of stellar regulatory programs, OSM appears to be determined to impose a drastic change in how states administer our programs. In 2009, three Federal agencies including OSM, EPA and the Army Corps of Engineers, signed a MOU that appears to be the basis for the effort by OSM to change or revise the long-standing stream buffer zone rule. Early in the development of the draft EIS of the rule, OSM invited several states to participate as cooperating agencies. OSM hired a contractor from outside the coal mining regions who had no coal mining background. State cooperating agencies voiced their concern about the contractor and its ability to complete the draft EIS.

OSM set an unreasonable time schedule for the review of each chapter of the draft and provide comments. In most cases, only five days were allowed for the review. The cooperating agencies expressed concerns regarding the timeframes under which they had to provide comments and many times requested an extension for the submission of comments. OSM never granted these requests.

This proposed rulemaking will almost completely revise and undo 30 years of progress in the developing of regulatory framework in which primacy states, such as Virginia, administer their program. It has been learned that OSM dedicated \$7 million to completing the draft EIS. After the state cooperating agencies and other organizations outlined grave deficiencies in the draft of the EIS from the contractor, OSM removed the contractor as the lead and stopped their work. However, the contractor was paid \$3.5 million for their deficient, inaccurate work. Now, it's been learned that OSM has hired another contractor for an additional \$1 million for

work on the draft EIS. To date, \$4.5 million has been spent on the draft with nothing completed.

On March 8, 2011, Virginia Governor Robert F. McDonnell wrote a letter to the Interior Secretary, Ken Salazar, expressing deep concerns about the draft EIS and other regulatory actions taken by OSM. Among those concerns were the potential significant and negative impacts of these actions on Virginia's coal industry and the economy. OSM director Joseph Pizarchik responded on behalf of Secretary Salazar. Mr. Chairman, I'd like to submit for the record both the letter from Governor McDonnell and a response letter from OSM Director Pizarchik.

Mr. LAMBORN. If there is no objection, that will be entered into the record.

[The letters submitted for the record follow:]

**COMMONWEALTH of VIRGINIA**

Office of the Governor

Robert F. McDonnell  
Governor

March 8, 2011

The Honorable Ken Salazar  
Secretary of Interior  
Department of Interior  
1849 C Street, N.W.  
Mail Stop 7060  
Washington, DC 20240

Dear Secretary Salazar:

I am writing to you to express my deep concern that recent regulatory actions taken by the Office of Surface Mining have the potential to cause significant and negative impacts on Virginia's coal industry and economy. It has been my policy to promote the development of Virginia's energy resources in balance with the need to protect and enhance our land and water resources. Virginia and other states across our nation are seeking to strike that delicate balance as we strive to meet the growing demand for energy while preserving environmental quality.

Coal and other minerals are a vital resource in Virginia. Coal has long played an important role in the industrialization of our state since it was first discovered here in 1699. Coal is used to produce approximately 48 % of the electricity consumed in Virginia, and much of Virginia's coals are of high quality metallurgical grade. Coal production in the southwestern Virginia coalfields is the primary economic engine for that region, with coal mining jobs being among the highest paying in the area. In addition, many small businesses depend upon the coal industry for the bulk of their business.

OSM's proposed rule-making on "stream protection measures" in its Draft Environmental Impact Statement (DEIS) threatens to jeopardize coal mining in Virginia. In part, the federal Surface Mining Control and Reclamation Act (SMCRA) promotes re-mining to correct environmental problems on lands mined before the effective date of Virginia receiving primacy in 1981. These sites, which are classified as "low priority" will likely never be reclaimed under the Abandoned Mined Land (AML) program and it is therefore imperative that re-mining, which can correct serious environmental and other related problems, not be hindered by this rule making. Nearly all surface coal mining in Virginia involves some re-mining, including the use of no-cost AML projects where mining companies reclaim AML features adjacent to permitted active coal mining sites.

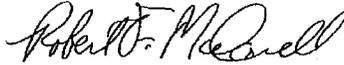
OSM's annual oversight reports for Virginia have not identified any problems that would necessitate the effects of such a drastic rule making and its adverse consequences for the ability to reclaim mined lands. The requirement that the quality of a stream affected by previous mining would not be accepted as the standard of measurement of success after mining flies in the face of the Clean Water Act (CWA) Rahall Amendment. This amendment authorizes the discharge of waters from reclaimed remaining operations as long as it is of equal or better quality than the premining baseline water quality. OSM does not have the statutory authority to over-ride CWA requirements. Yet its proposed rule making contains numerous sections that state OSM does not intend to apply CWA provisions. This approach will create regulatory confusion and is likely to result in litigation.

We are also concerned that OSM is failing to follow the Administrative Procedures Act and the National Environmental Policy Act requirements in this rulemaking process. OSM is writing the rule prior to completing a valid Environmental Impact Statement, stating what the "answer" is without defining the "problem". Further, the Commonwealth of Virginia has agreed to participate as a cooperating agency in the development of the OSM DEIS. However, OSM's timeframe for review and comment has made meaningful participation by cooperating states almost impossible.

We share the goal of protecting Virginia's land and water resources. But, we must strike a proper balance between the need for coal mining that supplies our state and nation's energy needs and the implementation of reasonable and prudent environmental protections. Department of Interior must be mindful of the importance of coal to our local and state economies and to our nation as a reliable and abundant domestic supply of energy.

Thank you for the opportunity to express my concerns with the DEIS and the process. Please contact Conrad Spangler, Director of the Virginia Department of Mines, Minerals and Energy, if you have any questions. He may be reached at 804-692-3206.

Sincerely,



Robert F. McDonnell



**United States Department of the Interior**

**OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT**  
Washington, D.C. 20240



MAY -6 2011

The Honorable Robert F. McDonnell  
Governor of Virginia  
Richmond, Virginia 23219

Dear Governor McDonnell:

Thank you for your letter of March 8, 2011, to Secretary of the Interior, Ken Salazar, concerning the development of proposed stream protection regulations and the supporting Draft Environmental Impact Statement (EIS) by the Office of Surface Mining Reclamation and Enforcement (OSM). The Secretary has asked me to respond on his behalf.

I share your goal of protecting the environment while ensuring the coal supply necessary for our Nation's energy security, and I appreciate your concern about the potential impact of this future proposed rulemaking that is under development. Thank you for the Commonwealth's contributions in reviewing the contractor's first early working drafts of the Draft EIS chapters; the comments from cooperating states will strengthen the Draft EIS and the proposed rule as they are further refined.

I assure you that OSM has not proposed a new Stream Protection Rule, nor have we completed a Draft EIS that is necessary to inform a proposed rule. Although we shared the early, contractor-generated chapters of the Draft EIS with the cooperating states as part of our effort to be more open and transparent in the rulemaking process, these early drafts are not official OSM documents and do not reflect the views of OSM or the Department of the Interior. OSM has reviewed the Preliminary Draft EIS and Regulatory Impact Analysis and is evaluating changes to the documents to address all required elements under the National Environmental Policy Act (NEPA). OSM also is reviewing all comments to ensure they have been appropriately addressed.

The Draft EIS, which will be based on reliable and accurate information and contain a set of alternatives that have been fully analyzed, will be made available for public review and comment through the normal EIS process. In addition, all cooperating agencies will have an opportunity to review and comment on a Preliminary Draft EIS before it is published for public review. The preamble to the proposed rule will identify and explain the scientific and policy bases for proposed regulatory changes. Comments received on these documents will be considered, consistent with the requirements of the Administrative Procedure Act (APA) and NEPA before OSM or the Department makes any final rulemaking decisions.

In your letter, you suggest that OSM is failing to follow NEPA and APA requirements by writing the rule before completing a valid EIS. OSM has taken great care to follow APA requirements as well as those in the Council on Environmental Quality's regulations implementing NEPA. Under NEPA regulations, an agency must identify and discuss all reasonable alternatives, including its preferred alternative, in a Draft EIS in sufficient detail for reviewers to evaluate the

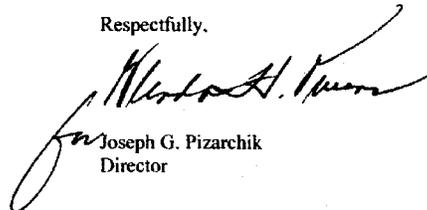
merits of each option. Provided no final decision is made prior to completing all of the required steps in the EIS process, presenting preliminary rule language in a Draft EIS is an effective and appropriate way to generate specific and useful comments on the preferred alternative.

OSM has afforded extensive opportunities for stakeholder participation throughout the rulemaking and EIS development processes, including publishing an advance notice of proposed rulemaking, conducting 15 outreach sessions with a broad cross-section of stakeholders, publishing two scoping notices to obtain public input for the development of a Draft EIS, hosting nine public scoping meetings on options to be considered in the EIS, and consulting with nine states serving as EIS cooperating agencies. Not only have these actions gone far beyond what the APA and NEPA require, they clearly demonstrate OSM's commitment to developing reasonable, fair, and effective stream protection rule revisions through an open and inclusive process.

In your letter, you also raise the issue of how the stream protection rulemaking would affect re-mining operations and no-cost reclamation of abandoned mine lands. OSM shares your concern for and support of responsible re-mining of abandoned mine lands. For many years, OSM has encouraged the re-mining of recoverable coal at abandoned mines as a practical way to achieve reclamation. Also, by creating regulatory incentives that authorize the sale of incidental coal to off-set reclamation costs, OSM promotes AML reclamation at little or no cost to the government. As it proceeds with rule changes to improve stream protections, OSM remains aware of the importance of preserving these incentives for reclaiming abandoned mines. You also express concerns that a proposed stream protection rule might attempt to override CWA requirements or refuse to apply CWA provisions. OSM does not contemplate such a change. Section 702 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires that "Nothing in the Act shall be construed as superseding, amending, modifying, or repealing" the CWA. 30 U.S.C. 1292. Any SMCRA rulemaking must be consistent with this statutory provision, and must not purport to change or override CWA requirements.

Thank you for sharing your views on OSM's stream protection rulemaking effort and the EIS development process. Input from the public, the states, and stakeholders has been crucial – and will continue to be crucial – to these efforts every step of the way. I look forward to the Commonwealth's continued involvement as an EIS cooperating agency in helping OSM to make the tough choices necessary to protect our Nation's streams.

Respectfully,



for Joseph G. Pizarchik  
Director

Mr. LAMBERT. Another major assumption in the draft EIS is that metallurgical coal production from the Appalachian Basin, including Virginia, would be offset with production from other sources. Virginia coal has a higher BTU and lower sulfur content than the national average. This quality makes Virginia coal more desirable for metallurgical coke production and export overseas for the export market.

Finally, in a July 9, 2010 OSM press release titled, "Reducing the Social Cost of Energy," the agency stated that the intent of their oversight role. The release points out that the role of OSM is to help states maintain high standards and maintain a level playing field so that the industry in any one state does not have an unfair advantage in interstate competition.

Mr. Chairman, clearly this is not the direction set out in the draft EIS. As pointed out by the contractor, coal production would

be shifted from the Appalachian Basin to the western region and, in most cases, metallurgical coal production would have to be provided from overseas sources.

Thank you for this opportunity this morning and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Lambert follows:]

**Statement of Bradley C. (Butch) Lambert, Deputy Director,  
Virginia Department of Mines, Minerals and Energy**

My name is Bradley C. Lambert and I serve as Deputy Director of the Virginia Department of Mines, Minerals and Energy (DMME). I appreciate the opportunity to present this statement to the Subcommittee regarding the views of the DMME on the rewrite on the Stream Buffer Zone Rule.

I would like to begin by providing you with some background information about the Virginia coal industry and DMME. Coal production has been important to Virginia's economic development since colonial days. The first commercial coal production in the United States occurred in 1748 from the Richmond Coal Basin just west of the State Capital in Richmond, Virginia. Coal production was important to Virginia until the Civil War during which much of the coal industry was destroyed. Commercial coal mining later rebounded in Virginia's southwestern-most counties in the 1880's and has been conducted continuously through to the present. Today, coal is produced in the seven extreme southwest Virginia counties.

Virginia first implemented rules to address coal mining and reclamation issues in 1966. The minimal requirements of the early law and regulations failed to keep pace with the rapid expansion of surface mining activities in the Appalachian region. Following the passage of the 1977 Federal Surface Mining Control and Reclamation Act, Virginia sought and obtained primacy from the U.S. Office of Surface Mining (OSM) as the primary regulatory authority for coal surface mining in December of 1981.

The coalfields of Virginia are characterized by steep slopes and narrow valleys. The mines in Virginia predominantly consist of underground and contour surface operations. Other operations include auger and highwall mining. Presently, Virginia has four mountaintop removal coal mines. These four operations have post mining land uses that include farm land, industrial, commercial or residential. Without mountaintop mining operations, land uses such as hospitals, schools, shopping centers, airports, and residential and commercial/industrial development would not exist.

Coal production in Virginia peaked at 47 million tons in 1990. Expected production for 2011 will reach approximately 23 million tons. Virginia coal is of a higher British Thermal Unit (BTU) and lower sulfur content than the national average. This quality has made Virginia coal more desirable for metallurgical coke production and for the export market.

Virginia's regulatory program is recognized across the nation as a leader and an innovator in many areas. Many states have benchmarked with Virginia on areas such as electronic permitting, underground mine mapping and the development of a GIS database that includes all surface mining areas as well as abandoned mined lands. Virginia continues to work on making this information available for public viewing through an outward facing web site. Through our electronic permitting system, other state and federal agencies can access coal mining permit data and applications and provide comments using the electronic application.

**OSM's Draft Environmental Impact Statement for the Proposed Stream Buffer Zone Rule**

The OSM's annual oversight reports for Virginia have not identified any problems that would necessitate such a drastic rule making. In fact, in the OSM Annual Evaluation Summary Report for the evaluation year of 2011, OSM writes "*Since the mid 1990's OSM has focused oversight on the "on ground" results that states are achieving. OSM is proposing that future oversight will likely include review of state permitting processes more closely. Yet, even when evaluated with a slightly different view on oversight, OSM finds that DMLR has successfully implemented both its regulatory and abandoned mine land program during the past year. OSM did not identify any systemic failures within the State program.*" We are submitting for the record a copy of the OSM's Annual Evaluation Summary Report for the Regulatory and Abandoned Mine Land Programs Administered by the Commonwealth of Virginia for 2010.

For years the states have been administering stellar regulatory programs. Now the OSM appears to be determined to impose a drastic change in how states administer their programs. The OSM has not provided any information to the states as to the reason for revising the Stream Buffer Zone Rule that they have now termed the Stream Protection Rule. Nothing in the states' Annual Evaluation Report indicates that the states are doing a poor job of enforcing the current surface mining laws. The U.S. Department of the Interior, U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) signed a Memorandum of Understanding (MOU) in 2009, that appears to be the basis for the effort by OSM to change/revise the long standing Stream Buffer Zone Rule. The states were not consulted about or invited to sign this MOU, which is aimed at altering state regulatory programs. Yet this MOU is having a direct impact on the implementation of state programs. One significant item resulting from the MOU was the proposed the Stream Buffer Zone Rule. Early in the development of the draft rule OSM invited several states; including Virginia to participate in the development of the draft Environmental Impact Statement (DEIS) as cooperating agencies. OSM hired a contractor from outside the coal mining regions who had no mining background. Cooperating agency states voiced their concern about the contractor and its ability to complete the DEIS; however OSM moved forward with the contract.

OSM set an unreasonable time schedule for cooperating agencies to review each chapter of the DEIS and provide comments back to OSM. In most cases only five days were allowed for the review. Due to such short timeframes for review and comment, meaningful input was made nearly impossible. In order to comply with these deadlines, states had to devote considerable staff time to the preparation of their comments which left less time for review of permit applications, answering citizen's complaints and completing required permit inspections. The cooperating agencies expressed concerns regarding the constrained timeframes under which they had to operate to provide comments and requested an extension for submission of comments on many occasions.

OSM never granted these requests, even though OSM allowed additional time for the contractor to complete their work. It was made clear that if comments were not provided, they would not be accepted. However, any conflicting or critical statements from the cooperating agencies were ignored and not addressed in the DEIS. Later it was learned that other federal agencies that were reviewing the DEIS were not under the same time constraints for providing comments as were the states.

The DEIS provided to cooperating agencies for their review and comments appears to be a document designed to support and rationalize OSM's decision to promulgate rules to diminish or eliminate Appalachian surface coal mining. All the action alternatives examined in the DEIS, other than taking no action, predict that the proposed stream protection rules would decrease Appalachian surface coal mining significantly. The predictions of decrease range from 10% to 100%—with OSM's preferred alternative (Alternative 5 in the DEIS) predicting a 30% decrease.

A major assumption is that metallurgical coal production from the Appalachian regions would need to be offset with production from other areas. The DEIS does not identify any other possible sources of metallurgical coal. This implies metallurgical coal would have to be obtained outside the United States. As metallurgical coal sale prices are usually three or four times higher than coal used for electricity generation, this would have a major economic impact (as inferred in the DEIS) since there will be a significant loss of coal needed for steel production.

The DEIS appears to have been developed by individuals who are unfamiliar with the ecological functions, geology, hydrology, and mining practices in individual states. The data and impacts identified are limited to specific states within the Appalachian Region; however, the requirements contained within this document will pertain to each state within the entire Region.

Instead of a document designed to support and rationalize a pre-determined outcome, the DEIS should be a statement of fact-based alternative environmental results. Furthermore, the alternative outcomes should seriously consider the single most significant factor influencing environmental conditions in Virginia's coalfields—old abandoned mined lands (AML). The DEIS does not address the existing impacts to watersheds from pre-law mining and other non-point sources of impairments which affect most streams in the mining areas in Virginia. Approximately 90 percent of the streams in the Virginia coalfields have been impacted by water quality degradation, stream function degradation, loss of riparian habitat, etc. Surface mining has been used effectively in conjunction with Total Maximum Daily Load (TMDL) requirements to correct AML features which would never be addressed with AML funding. In fact, the TMDL implementation plans rely almost exclusively on remaining, TMDL offsets and no-cost agreements to restore these streams to an unimpaired level.

Reduction/elimination of surface mining in Virginia will severely impact stream restoration efforts. There are no other resources available to the coalfield communities to restore impaired streams. The shift of coal mining to the western United States will also reduce the AML funding available to restore impacted eastern streams through the OSM Clean Streams Initiative.

The lack of attention to AML is one of several technical concerns that our agency has with the information in the DEIS. Other technical issues include OSM's efforts to define material damage, mandate post mining land uses, and misrepresent some of the scientific data.

OSM is proposing that material damage to the hydrologic balance be defined as a measurable adverse impact on water quality and quantity resulting from degraded biological conditions in the intermittent and perennial stream network within the watershed. The concept that any measurable adverse impact be considered "material damage" is contrary to the plain language of SMCRA which states in Section 515 (b): "General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation to minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated off-site areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation to the extent possible using the best technology currently available." As can be seen by this language the intent is to "minimize" adverse impacts to the hydrological balance—not to prevent any adverse impact. It is impossible to conduct surface disturbance operations such as coal mining or even underground mining operations, without temporarily leaving a footprint of some sort on the environment.

The DEIS proposes a mandated post-mining land use. This is contrary to the spirit of SMCRA. Even though Virginia encourages reforestation, we recognize the environmental and economical value in a range of post mining land uses and the landowner's rights to implement land uses that are approved and properly implemented. Mandatory post mining land use requirements appear to be designed as simply another general obstacle to surface mining, as opposed to the idea of improving conditions after mining in such a way that mined lands properly reclaimed.

Virginia has been a leader in promoting successful reclamation of mined lands. Working closely with Virginia Tech and other colleges and universities, Virginia and other Appalachian states and OSM developed a method for reclaiming mined lands to a reforestation land use. In 2011 in Virginia, 2226.75 acres were planted with a total of 1,475,293 trees. Of that total, 98.20% of the acres were reclaimed using the method developed. The reforestation method was accomplished in cooperation with the request of the landowner. The DEIS would not take into account the landowner's request for a post mining land use. The statement in the DEIS of post mining land uses going to hay/land pasture is not true in Virginia. The majority of coal mine reclamation returns land to an unmanaged forest post mining land use.

Many of the scientific studies referenced throughout this EIS have been misrepresented and taken out of context. Others were not extracted from peer reviewed journals and should not be included in a decision document. Studies involving the effects of total dissolved solids (TDS) on coalfield streams did not include data collected from Virginia, even though our agency has been effectively addressing TDS through the TMDL program since 2005. Yet findings of the cited studies are being broadly applied to Virginia.

OSM's proposed rulemaking on "stream protection measures" appears to be headed in a direction that will jeopardize the coal mining industry in Virginia. This proposed rulemaking will almost completely revise the Surface Mining Control and Reclamation Act (SMCRA) of 1977. This will undo over 30 years of progress in developing a regulatory framework in which primacy states, such as Virginia, administer a state-specific program, approved by the Secretary of the Interior, that is as effective as and no less stringent than the federal program.

Several proposals in the OSM DEIS regarding "preferred alternatives" (such as not allowing a mine-through of a stream or drain way) are troubling. The requirements that, before a stream or drain way could be mined through, there must be a demonstration made by the applicant that the stream "form and function" can be restored, and that a premining impaired condition of a stream would not be accepted as the standard for measurement of success fly in the face of the Clean Water Act Rahall Amendment. This amendment authorizes the discharge of impaired waters from reclaimed remaining operations as long as it is as good as or better than the premining baseline water quality.



Chaney Creek restored stream channel comparison: left, before restoration, spring 2005 (restoration was conducted June 2006); right, four years post-restoration, spring 2010. (Courtesy Alpha Natural Resources)

Virginia mining operations containing stream channel reconstructions, such as the one pictured above, have won numerous awards including the Appalachian Region Reforestation Initiative Award presented by OSM, the National Association of State Land Reclamationist Award and the Interstate Mining Compact Commission's Kenes C. Bowling Award.

OSM does not have the statutory authority to over ride Clean Water Act provisions such as the Rahall Amendment. The proposed rule contains numerous statements that OSM does not intend to utilize Clean Water Act provisions. For instance, in the preferred alternative for stream definition, OSM's DEIS preferred alternative states, "This Proposed Action does not follow. . . Alternative #4's reliance on the CWA definitions." As the Army Corps of Engineers (CORPS) is charged with designating jurisdictional waters for the purposes of Section 404 mining permits, OSM is establishing a separate stream designation process that it clearly intends to set up at its own discretion. This will most likely result in confusion and litigation, allowing second guessing of Corps' jurisdictional determinations.

Statements in the DEIS lead the readers to believe that underground mining methods such as longwall mining will not be impacted. Underground mining can and will in some cases cause subsidence which will impact surface structures including streams. One statement in the document says that longwall mining does not cause subsidence even at depth. Those familiar with this type of mining know that this statement is not true. In fact, these operations plan for subsidence well in advance of mining. Underground mining, especially longwall mining, would be significantly restricted not only in the Appalachian region but any area where this type of mining is used since streams would be impacted by subsidence.

Turning to the cost of the EIS, it has been determined that OSM had dedicated seven million dollars to completing the DEIS. These are funds that were originally identified for state regulatory programs. After the state cooperating agencies and other organizations outlined grave deficiencies in the DEIS from the contractor, OSM removed the contractor and stopped their work in developing the DEIS. However, the contractor was paid \$3.5 million for their substandard and inaccurate work. OSM never had any discussions with the cooperating agencies about the problem with the contractor and were never notified that the contractor had been removed until after the fact. Now it has been learned that OSM has hired another contractor for \$1 million for additional work on the DEIS. To date, \$4.5 million has been spent on this DEIS with nothing completed.

The impact of the DEIS alternatives on state regulatory programs has not been studied. The implications of these alternatives, such as increased permitting and monitoring requirements would be staggering. The changes proposed by the DEIS would create changes to the permitting process, which would mean increased staff for permit review, bonding review and most of all an increase in required funding for state programs. OSM's proposed funding for state programs has been decreasing over the last several years. In April of this year, states appeared before this subcommittee to express concerns about the potential federal budget reduction for state programs. At no time in the development of the DEIS has OSM consulted with states for input regarding the impact on additional resources and additional permit review times that the various alternatives would require.

On March 8, 2011, Virginia Governor Robert F. McDonnell wrote a letter to Interior Secretary Ken Salazar expressing deep concerns about the DEIS and other regulatory action taken by OSM. (Governor McDonnell's letter and a response from OSM Director Joseph Pizarchik on behalf of Secretary Salazar are submitted for the

record.) Among those concerns were the potential significant and negative impacts of these actions on Virginia's coal industry and economy. One of Virginia's vital resources, coal is used to produce 48% of the electricity consumed in the state, and much of Virginia's coals are of high grade metallurgical grade. Governor McDonnell also noted that coal production in the southwest region of the state is the primary economic engine for the region. Coal mining jobs are among the highest paying in the area, and many small businesses depend on the coal industry for their livelihood.

The authors of the DEIS did not consider the census data for population trends. There are continuing out-migrations of people from the Appalachian coalfields, and any loss of jobs from the coal industry will only hasten the exodus. The employment in Virginia's mining industry has continued to decline during the past decade, not grow as indicated in the DEIS. The authors did not consult with state agencies for any employment numbers; they only made assumptions. Throughout the DEIS, the loss of direct service jobs, local retail jobs, as well as other indirect employment appears not to have been considered. In fact, projected employment loss is sometimes noted in the DEIS as being minor. However, local planning agencies in Virginia estimate that the multiplier effect of one coal mining job is from 4-6 additional jobs.

In addition to the impacts of the stream protection measures on the industry and economy, Governor McDonnell noted that these requirements would have a detrimental effect on the re-mining of previously mined lands where lower priority abandoned mine land (AML) features continue to impact the environment. These impacts are not addressed in the DEIS. Nearly 80% of surface coal mining in Virginia involves some re-mining, including the use of no-cost AML projects where mining companies can reclaim AML features adjacent to permitted active coal mining sites. Re-mining has proven to be a viable method of correcting serious environmental and other problems that would not otherwise be funded under the Abandoned Mine Land Program.

Finally, Governor McDonnell voiced his concerns that OSM has failed to follow Administrative Procedures Act and National Environmental Policy Act requirements in their rulemaking process. This equated to OSM writing the rule without completing a valid EIS and stating what the "answer" is without defining the "problem." Contrary to OSM's assertion in OSM Director Pizarchik's response to Governor McDonnell that such failures did not take place, state agencies learned from information leaked on OSM's Share Point website that indeed OSM had developed a draft Stream Protection Rule.

In summary, although the DEIS regarding OSM's proposed Stream Protection Rule examines the effects of the rulemaking on the 25 coal producing states, during the review of the document, staff from Virginia's Department of Mines, Minerals and Energy discovered that the majority of the adverse impacts will be within the Appalachian Basin. The effects of this rulemaking would eliminate many jobs and millions of dollars of revenue in Virginia. Virginia does not agree with the proposed rulemaking and the findings of the DEIS. Much, if not most, of the data included in the DEIS are not supported by any actual facts or figures. The information provided in the DEIS is often and inexcusably biased against the Appalachian Basin especially, in Virginia. OSM has a predetermined outcome (elimination of surface coal mining in the Appalachian Basin) and has not analyzed data nor conducted any studies to support their conclusions.

Virginia believes that the state's environmental resources are protected by Virginia's current mining laws and regulations. We also believe that the economic impacts of the rulemaking are severely understated. Local level impacts would be intense and a global impact would be expected. A major assumption in the DEIS is that metallurgical coal production from the Appalachian Basin, including Virginia, would be offset with production from other sources. However, high value metallurgical coal would have to be obtained from outside the United States which is another example of industries moving overseas to the detriment of domestic production.

In a July 9, 2002, OSM press release titled, "Reducing the Social Cost of Energy," the agency stated the intent of their oversight role. The release points out that the role of OSM is to help states maintain high standards and maintain a level playing field so the industry in any one state does not have an unfair advantage in interstate competition. Clearly, this is not the direction of the DEIS. As pointed out by the contractor, coal production would be shifted for the Appalachian Basin to the western region, and in the case of metallurgical coal, that production may be moved overseas.

One impact that has not been fully explored is the impacts to the AML program that may see human and health and safety problems go unabated with the loss of AML taxes on coal production. Employment opportunities in the Appalachian Basin

are very limited and the loss of over seven thousand jobs as predicted in the DEIS would only increase the poverty level in the area. Mining provides some of the highest paying jobs in Southwest Virginia, and many small businesses depend upon coal companies for the bulk if not all of their income. Coal mining plays a major role in the opening up of areas for development. The Virginia Coalfield Economic Development Authority works closely with the respective county Industrial Development Authorities and coal companies to locate and acquire reclaimed level land for industrial development.

It is also of note that the OSM DEIS does not include any changes to mining and permitting due to EPA's reinterpretation of the Clean Water Act. The combined impacts of these agencies' actions are devastating to the nation's economic and energy future. OSM's rulemaking proposes to shift coal mining production from the eastern United States to the western region to the detriment of the Appalachian Basin's economy.

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Mr. LAMBORN. Thank you for your testimony and now to help us get a national perspective, the gentleman from Wyoming, Mr. Corra.

**STATEMENT OF JOHN CORRA, DIRECTOR,  
WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY**

Mr. CORRA. Thank you, Mr. Chairman. My name is John Corra. I'm the Director of the Wyoming Department of Environmental Quality. And I thank the Subcommittee for inviting us to testify today.

The OSM has used a court order and an agreement with other Federal agencies aimed at tackling a problem in Appalachia as an excuse to impose unnecessary and costly over-regulation across all coal mining states. OSM's rush for completing the rulemaking is limited to the thoughtful and reasonable "hard look" as required under NEPA.

The memorandum of understanding between the U.S. EPA, the Army Corps of Engineers and the Department of the Interior was specifically targeted at Appalachian coal mining, yet OSM has launched a nationwide overhaul of its program. As noted in a Western Governors' Association letter to Secretary Salazar in February of this year, a copy of which I submit for the record, we are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA.

Mr. LAMBORN. And if there is no objection, we will enter that into the record, as well.

[The letter from the Western Governors' Association follows:]



**WESTERN  
GOVERNORS'  
ASSOCIATION**

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Christine O. Gregoire  
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February 27, 2011

The Honorable Ken Salazar  
Secretary of the Interior  
Department of the Interior  
1849 C. Street, N.W.  
Mail Stop 7060  
Washington, D.C. 20240

Dear Secretary Salazar:

On behalf of the Western Governors' Association (WGA), we are writing to express concerns over recent actions by the Office of Surface Mining, Reclamation and Enforcement (OSMRE) to comprehensively revise regulations regarding stream protection under the Surface Mining Control and Reclamation Act (SMCRA). These proposed changes, called the "stream protection rule," will apply nationwide and in the agency's own words are "much broader in scope than the 2008 stream buffer zone rule." WGA is an independent, nonpartisan organization of Governors representing 19 Western states and three U.S.-flag Pacific islands. The states in our territory produce 599 million tons of coal annually, representing 56% of the total U.S. coal production.

Several of our member states who are "cooperating agencies" have delivered a letter (see attached letter dated November 23, 2010) to your Director of OSMRE expressing serious concerns about the need and justification for both the proposed rule and accompanying environmental impact statement (EIS), as well as the quality, completeness and accuracy of the chapters of the EIS that they had the opportunity to review. WGA is also concerned by the procedures used by your agency in developing the EIS to support this rule. Members who are "cooperating agencies" on the EIS feel that they have not had a meaningful opportunity to comment on its contents, given the constrained time periods for reviewing and submitting comments.

WGA feels that the OSMRE has not provided a sufficient basis to support the need for sweeping regulatory changes. In fact, one of the primary justifications put forward by the agency in its Federal Register notice is a June 11, 2009 memorandum of understanding (MOU) between the Administrator of the U.S. Environmental Protection Agency, the Acting Assistant Secretary of the Army, and you. However, the MOU was specifically targeted at "Appalachian Surface Coal Mining," which expressly refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia." (See MOU at p. 1

The Honorable Ken Salazar  
 February 27, 2011  
 Page 2

and fn 1). Despite this limitation in the MOU, the OSMRE rules will be applied to coal mines throughout the United States, including coal-producing Western states that we represent.

Likewise, the agency has not provided objective data to support such comprehensive regulatory changes. OSMRE's most recent annual evaluation reports for Western states for 2010 strongly suggest otherwise. For example, the report for Wyoming, which produces more coal than any other state in the U.S. (almost 40% of the nation's total), says that: "...the Wyoming program is being carried out in an effective manner." The report also demonstrates significant and steady progress in reclamation, showing that the ratio of reclaimed to disturbed acres has steadily increased from 10% in 1988 to 45% in 2010. The report also stated that the state ensured that backfilled and graded areas will be returned to approximate original contour, that there have not been any public complaints about bonding, and that Wyoming has not had any bond forfeitures in recent years. Finally, despite OSMRE's insistence on a 78% increase in inspections, no enforcement actions were taken by OSMRE during 2009 or 2010. In OSMRE's own words, "this lack of additional enforcement actions, despite increased inspection frequency, helps to illustrate the effectiveness of the Wyoming's regulatory program."

Similar statements can be found in OSMRE evaluation reports on other WGA-member states. Here is a sampling of what OSMRE said about some of the other major coal producing states in the West:

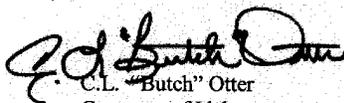
- North Dakota: "Overall, North Dakota has an excellent coal regulatory program."
- Montana: "...an off-site impact is defined as anything resulting from a surface coal mining and reclamation activity or operation that causes a negative effect on people, land, water, or structures outside the permit area...Off-site impacts were not identified during the reporting period."
- Utah: "...site conditions indicated that the state is effectively implementing and enforcing its program."
- Texas: "...the Office of Surface Mining finds that Texas is properly administering its regulatory and abandoned mine lands programs."
- Alaska: the "DMLW [Division of Mining, Land, and Water] is effectively maintaining and administering the coal regulatory program in accordance with the Alaska Surface Coal Mining and Reclamation Act."

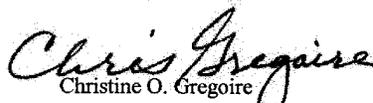
WGA urges you to consider these reports on Western state coal programs, evaluate the proposed regulatory changes, and consider suspending further work on their implementation so that OSMRE can re-examine the purpose and need for these rules, and provide appropriate scientific and factual information to support rule changes of this magnitude. If after such evaluation and consideration the agency determines that rule changes are necessary, we request

The Honorable Ken Salazar  
 February 27, 2011  
 Page 3

that OSMRE engage our member states and members of the public in a meaningful and substantial way.

Sincerely,

  
 C.L. "Butch" Otter  
 Governor of Idaho  
 Chairman

  
 Christine O. Gregoire  
 Governor of Washington  
 Vice Chair

Enclosure

Mr. CORRA. In fact, there is significant evidence from OSM's own evaluation reports for Wyoming and other western states that current regulatory programs are working well. I would urge the OSM to reexamine the purpose and need for these rules. Now, if OSM proceeds with this rulemaking, it should be reminded not only of the MOU but also its own recognition of differences between east and west, and thereby apply the proposed regulations only east of the 100th meridian. This approach would parallel SMCRA's current legal framework and guidance documents.

For example, alluvial valley floor protection is only west of the 100th meridian and, likewise, a bond release clock is only five years east of that line, ten years west of that line.

Also, recognizing differences in water uses, quality and availability, Clean Water Act regulations have also treated area of the country west of the 98th meridian differently than the east. We can't help but think that both the Corps and EPA had this historical perspective about the nation's waters outside of Appalachia in mind when they signed the MOU.

This rulemaking may also conflict with state authorities under the Clean Water Act. OSM does not have the authority to attempt to broaden a state's water quality standards by adopting new stream definitions, criteria and other restrictions. OSM's actions consistently appear to avoid or limit public and state comment. They have done so throughout the process. Scoping meetings were a sham because the public was not even allowed to speak at the agency's public meetings. The open house meeting in Gillette, Wyoming, for example, which is the center of 40 percent of the coal production in the United States, was held on the evening of July 29, 2010. The comment period ended the next day.

The proposed rules will result in massive increases of information and data collection that may not even be useful or practical in improving environmental performance. To elaborate on just one aspect of those changes, the use of climax communities as a vegetation standard, it is widely recognized that periodic drought conditions, grazing impacts, and other pre-mining land uses make it nearly impossible to determine what the climax state of vegetation

was or might be, let alone how accurately to measure it in the west.

OSM also appears to be ignoring the substantial resource implications for these proposed rules. We find this particularly disturbing in light of the fact that OSM has a goal of significantly reducing their share of funding for our regulatory programs, while simultaneously considering adding significant staff for oversight activities, as well as significant staff to implement the stream protection rule.

We're hopeful that OSM will comply with its obligations under NEPA and conduct a genuine EIS process where states are engaged in meaningful discussions. It must also make the effort to conduct a thorough economic analysis. What we have seen so far is inadequate, given the complex decision making process end users use when they make fuel-switching decisions. Just the myriad air and water rules that are either published or pending regarding the utility industry alone is enough to throw into question any simple assumptions that coal production will simply shift around the country as a result of OSM's proposal.

Mr. Chairman, in my written testimony I presented some photographs of how we do it in Wyoming and I'll quickly refer to those.

On page seven of my written testimony, if you have it in front of you, is a picture of North Tisdale Creek. It was mined in the 1990s. It's been restored. That mine received an OSM Director Award in 2003 and again in 2009 for successful reclamation and creation of wildlife habitat.

On page eight, you'll see Exhibits 2A and 2B. This is the Tongue River Stream Restoration Project, which won this year's OSM Director's Excellence in Surface Coal Mining Award. The mining operation passed through Goose Creek and the Tongue River, which are fisheries in that part of Wyoming. Note how the stream had to be relocated during mining and how it took care of some post— or pre-mining underground subsidence features as well.

Last, Exhibits 3A and 3B on page nine show another restoration project at Caballo Creek, which won the 2007 OSM Director's Award. Note the preservation of the stream gradient. Lots of things were done that you can't see below the surface.

Mr. Chairman, we think that the State of Wyoming knows how to do this. We understand the previous stream buffer zone rules. We think we did it right and we do not understand the need for us to have this new rule.

Thank you.

[The prepared statement of Mr. Corra follows:]

**Statement of John Corra, Director,  
Wyoming Department of Environmental Quality**

My name is John Corra. I am the Director of the Wyoming Department of Environmental Quality. I wish to thank the Subcommittee for inviting the State of Wyoming to testify at this hearing today. Wyoming coal mines produced 442 million tons of coal in 2010, over 40% of the nation's total production. This was accomplished by 6,800 miners operating some of the most advanced equipment at 18 mines across the state. Production generates over \$1.8 billion in taxes, royalties and fees for use by federal, state and local governments. The economic impact to the state is much greater. The industry has been recognized many times for both its superior safety programs and its innovative reclamation efforts. We have primacy for the administration of the Surface Mining Control and Reclamation Act (SMCRA) in Wyoming,

and year over year receive high marks from the Office of Surface Mining (OSM) for our regulatory programs.

I would like to talk with you today about how Wyoming protects its waters and why this rule has little value for us. I will also speak to the disappointing process that has been followed to date relative to the Environmental Impact Statement (EIS) for this rule.

The OSM has used a court order and an agreement with other federal agencies that were aimed at tackling a problem in Appalachia as an excuse to impose unnecessary and costly over regulation across all coal mining states. The action OSM is undertaking is a comprehensive rewrite of regulations under SMCRA, not just a stream protection rule. The packaging of this major revision to a law that has served the country well for over 40 years as a "stream protection rule" is misleading. Some of the changes being contemplated have broad implications and deserve thoughtful re-evaluation.

We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA. The agency has not provided any objective data to support such comprehensive regulatory changes. In fact, OSM's most recent evaluation reports for 2010 strongly suggest otherwise. For example, the report for our state says that: ". . .the Wyoming program is being carried out in an effective manner." The report also shows that we have gained much ground in increasing the ratio of acres reclaimed to disturbed acres over the past 12 years. The report also mentions no issues with regard to restoring mined land to approximate original contour or reclamation bonding. The report goes on to say that: "this lack of additional enforcement actions, despite increased inspection frequency, helps illustrate the effectiveness of Wyoming's regulatory program." And, inspections increased during the reporting period by a very significant 78%! While we are not perfect, and OSM does at times ask us to correct deficiencies, there is significant evidence from the OSM's own evaluation reports for Wyoming and other western states that current regulatory programs are working. Wyoming sees no justification for these significant rule changes or for the necessity of applying them nationwide.

OSM's rush for completing the rulemaking is at the expense of thoughtful discourse as required by National Environmental Policy Act (NEPA). This undue haste is limiting the thoughtful and reasonable "hard look" as required under NEPA. Although OSM had earlier identified an option to apply the regulations only to mountaintop removal and steep slope operations in Appalachia, that alternative seems to have been dropped. One of the primary justifications put forward by the agency in its Federal Register notice is a June 11, 2009 memorandum of understanding (MOU) between the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers and the Department of Interior. The MOU was specifically targeted at "Appalachian Surface Coal Mining", and Section 404 of the Clean Water Act (CWA) in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia. Despite this clear limitation in the MOU, the OSM rules are written to apply everywhere, including Wyoming.

NEPA requires an EIS to examine all reasonable alternatives to the proposal. If OSM proceeds with this rulemaking, it should be reminded not only of the MOU, but also its own recognition of differences between east and west and thereby apply the proposed regulations only east of the 100th Meridian. This approach would parallel SMCRA's (30 CFR Chapter VII 785.19) current legal framework and guidance documents reflecting recognition of hydrologic and reclamation changes at the 100th Meridian. For example, alluvial valley floor protection is only applied west of the 100th meridian. Likewise, the bond release clock is 5 years east of this line and 10 years for the west, which is a recognition of the arid and semi-arid environment in the western U.S.

The Clean Water Act also recognizes the unique differences between the arid west and the eastern part of the U.S. as noted in the National Pollutant Discharge Elimination System (NPDES) surface discharge regulatory program. This rulemaking may also conflict with state authorities under both the state SMCRA programs and under the Clean Water Act (CWA). OSM does not have the authority to attempt to broaden a state's water quality standards by adding new stream definitions, criteria, and restrictions such as "material damage to the hydrologic balance." There are no federal water quality standards in Wyoming and OSM lacks the authority to establish any. OSM must work through the State rulemaking process since the authority to establish water quality standards rests solely with the state. OSM cannot do an end run around the prohibition against setting water quality standards by requiring state regulatory authorities to establish more stringent "corrective action thresholds" at the direction of OSM. In addition, "enhancement" concepts are likely to conflict with mitigation requirements under the Corps' § 404 program. OSM's proposals

have serious potential to directly conflict with and/or duplicate CWA requirements of the state and/or the Corps.

There are good reasons to make a distinction between the management and regulation of water in the western U.S. as compared to the east. Recognizing differences in water uses, quality and availability, Clean Water Act regulations have historically treated the area of the country west of the 98th meridian (arid west) differently than the eastern portions. We can't help but think that both the Corps and EPA had this historical perspective about the nation's waters outside of Appalachia in mind when they signed the MOU. If OSM insists upon a national approach, we hope that the parties re-open the MOU and make it available for public comment.

The resource requirements and associated costs of implementing the proposed rules are of particular concern to the states. Proposed concepts regarding stream definitions, expanded biologic criteria, definition of material damage to the hydrologic balance and the replacement of Post Mining Land Uses with "climax communities" as a reclamation requirement all trample on effective and time-proven mining and reclamation efforts by the states. To elaborate on just one of these changes, the use of climax communities as a standard, it is widely recognized that the periodic drought conditions, grazing impacts, and other pre-mining land uses and climatic variables make it nearly impossible to determine what the state of vegetation was, or might be, let alone how to accurately measure it given the scale of variability that exists in the west.

Wyoming has the necessary regulations in place to assure stream protection and when necessary, stream diversion and reclamation, as evidenced by successful efforts that have been recognized by OSM over the years. I would like to review just a few examples.

**North Tisdale Creek Stream Restoration, Caballo Coal Mine, Caballo Mining Company.** This area was mined in the 1990's. The mine was required to record the pre-mining conditions, preserve topsoil, and reclaim the mining area to an approved post mining land use. As can be seen by the photo, restoration of a wetlands area has been successful. In fact the mine received awards in 2003 and again in 2009 for the successful reclamation of the North Tisdale Creek Wetlands, and the creation of wildlife habitat. Please see Exhibit 1.

**Tongue River Stream Restoration, Big Horn Coal Mine, Big Horn Coal Company (subsidiary of Kiewit Mining).** This project won the OSM 2011 Excellence in Surface Coal Mining Award. The Tongue River in northern Wyoming is a trout fishery at this location. As can be seen in the following photos, the mining operation progressed through the intersection of Goose Creek and the Tongue River. Note that the stream had to be relocated to accommodate mining. Stream function was modestly impaired for a period of time until restoration. It is unclear if this would be allowed under OSM's proposed rules concerning material damage and biologic thresholds for action. Note the reclaimed grasslands on both sides of the stream, and how it is beginning to blend in with the pre-mining vegetation shown in the background. Please see Exhibits 2a and 2b.

**Caballo Creek Restoration, Belle Ayr Mine, Alpha Resources.** This project won the 2007 OSM Reclamation and Enforcement Director's Award. Note the preservation of the stream gradient to ensure against excess erosion. Additionally, rock weirs were incorporated in the reclaimed channel to mimic the pre-mine riffle/pool structure of this intermittent prairie stream. Please see Exhibits 3a and 3b.

Other projects worth noting, but with no exhibits are:

**Wyodak Mine:** ~ 1.7 miles of Donkey Creek reclaimed with water flows returned to reclaimed channel in 2005.

**Cordero-Rojo Mine:** ~ 3.9 miles of Belle Fourche River reclaimed with water flows scheduled to be returned to reclaimed channel in December, 2012. Cordero-Rojo Mine received 2006 Excellence in Surface Mining and Reclamation Award from the WDEQ for design of this river channel reconstruction.

**Eagle Butte Mine:** ~ 2.0 miles of Little Rawhide Creek reclaimed.

**Buckskin Mine:** ~0.90 mile of Rawhide Creek; received the 1997 OSM Reclamation and Enforcement Director's Award for successful reclamation.

**North Antelope Rochelle Mine:** ~ 2.1 miles of Porcupine Creek reclaimed with water flows returned to two of the three reaches.

There are also cases where we refuse mining through important areas that, in our belief have key hydrologic issues or would not be capable of restoration. For example, Wyoming affords a high level of protection to alluvial valley floors, or stream valleys underlain by unconsolidated stream-laid deposits which have sufficient water availability to be important to agriculture.

Each mine application is reviewed carefully and the applicants are required to accurately describe the pre-mining conditions and land uses. An approvable mine permit application must contain a reclamation plan that assures achievement of post

mining land uses, and a return of the land to a use equal to or better than before. We are proud of our regulatory efforts, and have had a long history of mine regulation and restoration, even prior to the enactment of SMCRA. We don't believe we would be the nation's largest coal supplier, as well as one of its most beautiful places, without the commitment of both our regulators and our industry. We are perplexed that the EIS process to date has been so distant from Wyoming.

OSM actions consistently appear to avoid or limit public and state comment throughout this rulemaking. Initially the agency tried to avoid rulemaking altogether by asking a federal court to allow it to revise the stream buffer zone rule through a guidance document. This request was denied. Next, OSM denied multiple requests for additional time to comment on their advanced notice of proposed rulemaking on this issue in December, 2009, providing the bare bones minimum period of time required by law for one of the most complicated rulemaking efforts in OSM's history. The agency's initial scoping notice was so deficient that OSM had to issue a second notice providing more information in June 2010. Scoping meetings were a sham, because the public was not even allowed to speak publicly at the agency's public meetings. The public open house meeting in Gillette, Wyoming, which is the center of 40 percent of the coal production in the US, was held the evening of July 29, 2010. The comment period ended July 30, 2010. This hardly represents time for thoughtful discourse.

The EIS documents provided by OSM have been poorly written, unclear and sometimes internally inconsistent. The unreasonably complex process of 5 alternatives with 11 items for each alternative results in 55 options to evaluate. It has been difficult to follow.

Wyoming is a "cooperating agency" in preparation of the EIS. Yet, we do not believe we have been given meaningful opportunity to comment and participate. Sections of the EIS with 25, 50, and even 100's of pages were distributed to the States with only a few days to read, review, and provide comment back to the agency. States were forced to withdraw staff from permitting and other critical areas in order to have any opportunity to provide feedback to OSM within the required timeframe. Even when states take such measures, meaningful comments could not be provided in an appropriate manner.

OSM appears to be ignoring the resource implications for these proposed rules. We find this particularly disturbing in light of the fact that OSM has a goal of significantly reducing their share of funding for our regulatory program.

The proposed rules will result in massive increases of information and data collection that may not even be useful or practical in improving environmental performance. This is a significant resource burden and suggests that OSM pay close attention to the cost/benefits of forcing a solution to an eastern problem upon western states, such as Wyoming. We are hopeful, now that OSM has retained a new contractor and pressed the pause button on the EIS process, that it will comply with its obligations under NEPA and conduct a genuine EIS process where States are engaged in real discussions of the regulatory options and EIS alternatives. They have committed to do so, and I hope we get the chance to share Wyoming's expertise.

I also suggest that OSM extend its deadline so that it can re-examine the "purpose and need" for these rules, provide appropriate scientific and factual information to support a rule change of this magnitude on a national scale, and engage Wyoming and other states in a more meaningful way. An extension would also allow enough time to thoroughly evaluate the economic impacts of the rule. The analysis that we have seen so far is inadequate especially given the complex decision making process that a customer using a given type of coal uses in fuel-switching decisions. The myriad air and water rules that are either published or pending regarding just the utility industry alone is enough to throw into question any simple assumptions that coal production will simply shift around the country as a result of OSM's proposal.

**EXHIBITS**

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**NORTH TISDALE CREEK STREAM RESTORATION**  
*2003 and 2009 OSM Reclamation and Enforcement Director's Awards*  
Caballo Coal Mine,  
Caballo Mining Company

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- 2003 award for successful reclamation and creation of wildlife habitat along the Tisdale Creek Drainage.
- 2009 award for successful reclamation of the North Tisdale Creek Wetlands

Exhibit 1  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV

**TONGUE RIVER STREAM RESTORATION**  
*OSM 2011 Excellence in Surface Coal Mining Award*  
**Big Horn Coal Mine,**  
 Big Horn Coal Company (subsidiary of Kiewit Mining)



- Photo illustrating mine conditions during mining operations
- Approximate date of photo - 1970

Exhibit 2a  
 Congressional Hearing on OSM Stream Protection Rule  
 September 26, 2011, Charleston, WV

**TONGUE RIVER STREAM RESTORATION**  
*OSM 2011 Excellence in Surface Coal Mining Award*  
**Big Horn Coal Mine,**  
 Big Horn Coal Company (subsidiary of Kiewit Mining)



- Photo illustrating reclaimed area of Goose Creek and Tongue River confluence, with reclaimed grasslands on both sides.
- Reclamation began in the mid-1980's
- Approximate date of photo - 2010

Exhibit 2b  
 Congressional Hearing on OSM Stream Protection Rule  
 September 26, 2011, Charleston, WV

**CABALLO CREEK RESTORATION**  
*2007 OSM Reclamation and Enforcement Director's Award*  
Belle Ayr Coal Mine,  
Alpha Natural Resources



**WYOMING**



- Photos illustrating pre-mine conditions

Exhibit 3a  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV

**CABALLO CREEK RESTORATION**  
*2007 OSM Reclamation and Enforcement Director's Award*  
Belle Ayr Coal Mine,  
Alpha Natural Resources



**WYOMING**



- Photos illustrating reclaimed Caballo Creek

Exhibit 3b  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV

Mr. LAMBORN. Thank each of you for being here. Thank you for your statements and we will now begin questioning. Members are limited to five minutes, but we may have additional rounds on this

important subject and I recognize myself for five minutes for questions.

Each one of you have referred to the compressed time schedule that you were given to respond. Can a state even give an adequate response in five or ten days? I find that when I send something to a state, or even worse, maybe a Federal bureaucracy, it takes them that long to open the envelope and get it to the right desk. Could any of you care to respond to that, please? And does this reach the level of making it hard to respond that creates possible legal challenges to the process?

Mr. CLARKE. I think I'm on. I'm not sure. The light is not on. But I'll take that, Mr. Chairman. Absolutely, we didn't have enough—

Mr. LAMBORN. Just speak into the microphone. I think it's on.

Mr. CLARKE. Absolutely, we didn't have enough time to review that. We had to pull in all of our staff for those short periods of time, three, five and nine days. Even our field staff we had working on this effort, which took away time from permit reviews that we couldn't address. We couldn't address citizen's complaints because we were in such a short time constraints. Every state was told, if you didn't submit your comment within this time allowed, your comments would not be received. So we had a special effort to try to do that with in mind that we weren't going to be able to fully address hundreds of pages of documents within such a short timeframe. So to answer your question—No, we could not.

Mr. LAMBORN. Mr. Corra?

Mr. CORRA. Mr. Chairman, thank you. I would echo those remarks, but also note that the State of Wyoming is a cooperating agency with many Federal partners on many different EIS's and this one was absolutely different from anything else. And being a cooperating agency carries with it some access to both the people that are writing these documents, as well as people inside the Federal agency that are reviewing them. We never had that opportunity either.

Mr. LAMBORN. What is the normal process for a cooperating agency, as far as timeframe for making comments on an environmental impact statement, in your experience?

Mr. CLARKE. Mr. Chairman—

Mr. LAMBORN. Mr. Clarke.

Mr. CLARKE.—I would think that would have to vary with the complexity of the issues being examined. Here we were confronted with each of these chapters with many, many pages of what should have been technically oriented material, and with that kind of material to be examined, some reasoned amount of time to respond, which we were not given, should be allowed.

Mr. LAMBORN. What would you have preferred?

Mr. CLARKE. I think when I saw it, probably applies to other states, but in West Virginia each person who was involved in responding with comments on the EIS has a real job aside from doing that. People were taken away from their real jobs. Here—three weeks to a month. You know, I don't want to make it take forever. I don't want to create additional bureaucratic mechanisms, but that would have been a much fairer amount of time to really dig into

something that is involved in such a sweeping change as what OSM is proposing to make.

Mr. LAMBORN. And how much time were you given?

Mr. CLARKE. We had five business days on Chapter 2, four business days on Chapter 3, and nine business days on Chapter 4.

Mr. LAMBORN. OK. Now, changing subjects slightly, do you believe that the proposed rule may violate SMCRA or the Clean Water Act? And I know, Mr. Corra, you made a quick reference to that. Could you elaborate a little bit and then if either one of you could add to that, I'd appreciate it?

Mr. CORRA. Yeah. Mr. Chairman, the Clean Water Act gives—if the states seek primacy, gives the states the authority and responsibility for setting water quality standards and setting—and establishing uses for various streams—well, all the streams, for that matter. And so we see this as sort of an end-around to our responsibilities and authorities where they set them through another Federal statute and come in and set those standards instead of the state. And we're very unclear as to whether that would end up being the result from this rulemaking.

Mr. LAMBORN. Either one of you gentlemen?

Mr. LAMBERT. Yes, Mr. Chairman. In the draft rule, OSM is proposing to eliminate the Rahall amendment to the Clean Water Act but not allowing discharges from pre-mining sites to be as good as or better than what the pre-mining discharge was. That's specifically what the Rahall amendment to the Clean Water Act was about. And this proposal by OSM, they would have eliminated that totally.

Mr. CLARKE. I think I'd point to at least three areas at SMCRA to say that there's significant tension, if not just a violation of the enabling act that OSM is operating under. First, as I suggested in both my written and oral statement, SMCRA envisioned an increase in coal production in the country after its adoption to meet the nation's energy needs, which was a significant concern at the time in light of the energy crisis that was prevalent in the development of social and economic policy for the country. This aims to reduce coal production significantly in Appalachia, the number one coal producing region in the country at the time of SMCRA's adoption. That could not have been the policy envisioned by the people who voted for this law in 1977.

Also, SMCRA envisioned that because of the diversity in climate and terrain, that states would be the primary regulators and would have some freedom to tailor their state programs individually to state specific concerns. What we have now is a one-size-fits-all approach that's going to be imposed in the stream protection measures rule on things like approximate original contour and material damage. The issues that John faces on material damage to hydrologic balance in Wyoming are vastly different than what Mr. Lambert and I face in a more humid east. Approximate original contour, I believe the area of eastern Wyoming is pretty flat, plain type area, Indiana and Illinois much the same way. What Mr. Lambert and I face in southern West Virginia and southwest Virginia are very steep, very rugged topography, and so for those reasons—and they were good reasons—the states were given the au-

thority to define and apply terms like these, and OSM wants to take that away.

But the third area, and one you touched on in your question, is potential violation of the Clean Water Act. And as I suggested before, the states particularly in the Appalachian region are in the midst of deciding how to go about implementing state narrative water quality standards for protection of the aquatic ecosystem.

EPA has its own idea how to do that. The states, I think it's fair to say, we differ on that. OSM intends to jump right in the middle of the fray by adding a biologic component to this material damage standard.

While the states and EPA are working out what these water quality standards mean, I think that OSM is treading the same ground that the courts rejected its rulemaking on in the early eighties, where it attempted to establish what amounted to water quality standards. OSM can't do that under SMCRA. That's a Clean Water Act function.

So again, SMCRA can't supersede or amend, repeal the Clean Water Act, and we believe that the path they're on is fraught with peril in that area.

Mr. LAMBORN. OK. Thank you all for the answers. I now recognize Representative Johnson for five minutes.

Mr. JOHNSON. Mr. Chairman, in listening to this, before I ask my question, it's interesting to me and it's astounding to me that this Administration thinks that it's acceptable that it takes four to six months, in some cases longer, to process a claim for America's veterans returning from the war zone to get the benefits and the care that's needed to them, and yet when they want to reach out with these over regulated, over burdensome rules like this one, they give the states mere days to respond. I don't understand the logic there.

Director Clarke, and really any of the three of you, can you briefly describe the role that, in this case West Virginia, but your other states, as well, played in general in what became the 2008 stream buffer zone rule, the one that was finished back in 2008?

Mr. CLARKE. Yes, sir, we in West Virginia probably were in compliance with most of the 2008 buffer zone rule through state-specific adjustments we made to our regulatory program prior to the adoption of that rule. Many of the aspects of what that rule would require were the same things we were already doing in our state program, and we were involved in the EIS that was conducted. I can't tell you how long we were given for comment, although I'd be glad to check on that and get back to the Subcommittee with a response if you would be interested in the number of days, for example, for comparison that we were allowed for response on that.

Mr. JOHNSON. I'm mostly curious as to how, in your assessment, the 2008 version that took five years to do, how that rulemaking process has differed, from your perspective, to this current process.

Mr. CLARKE. As I suggested, OSM wants, or appears to want, to conduct this rulemaking and EIS at a world-record pace, which is unrealistic, given that the earlier rulemaking, as you observed, took five years to conclude, and this one is much more sweeping, a broader in scope rulemaking that intends to not only replace the buffer zone rule but rewrite the rules for almost every aspect of the way mining is conducted.

Mr. JOHNSON. Has OSM provided any documentation or evidence suggesting widespread problems with the current regulations on surface mining operations? And, in fact, aren't most of your state evaluation reports from OSM generally positive?

Mr. CLARKE. We, as always, have a number of issues to address with OSM. We believe that, generally, we are in full compliance and taking every effort to improve our program. But to answer your question briefly, we don't believe there is any basis in the regulatory record developed on oversight of the West Virginia program to support the need for a huge rewrite of all the rules on how mining is conducted.

Mr. JOHNSON. Just in general, do you feel that OSM has respected the states during this current rulemaking process and has the agency conducted a fair rulemaking process?

Mr. CLARKE. No, sir, I do not. I think that in hearkening back to one of Mr. Lamborn's questions, it's almost as if the process that they have established for this EIS is designed to prevent any meaningful input from the states and the states are the primary regulators under SMCRA and do have probably the most valid experience that ought to be taken into account.

Mr. LAMBERT. Mr. Johnson, Virginia would probably not use the word "respected." I would like to use the word "ignored." We were invited but comments weren't received, weren't included in the other drafts that came out.

Mr. JOHNSON. OK.

Mr. CORRA. Mr. Chairman, Wyoming would echo the sentiments there and if I may, could I go back one and just read a quote from one of OSM's annual reports that talks about Wyoming this year. And, quote, "The lack of additional enforcement actions, despite increased inspection frequency, helps illustrate the effectiveness of Wyoming's regulatory programs." And these Federal inspections increased by 78 percent during the period of time reviewed. They noted, "We have no issues with the proximate original contour" and they have no issues with our reclamation bonding program either.

Mr. JOHNSON. One final question. If OSM were to proceed with this version, the draft rule that's now being proposed that we've seen, what would be the impact on your state, on state agency resources to both amend the approved state program and then implement the new rule? Any idea?

Mr. CORRA. Since we haven't seen the complete text of the rule, it's hard to give you a really precise answer. If everything else, the current version of OSM has done in the context of State/Federal relationship is borne out in the rule that's ultimately adopted, I can predict that it would be a quite significant increase in the burden on states.

Mr. JOHNSON. That's what I was going to say. Isn't it safe to say with it being very much more restrictive, it's going to be onerous on the states to put in the people and the processes and the planning to implement?

Mr. CORRA. Well, necessarily, radical change in all the regulations is going to require significant effort on the states' part to adjust. In addition to that, we have the issue of OSM adopting three new regulatory policies called Reg 8, Reg 23 and INE 35, which also have significantly increased the burden on the state, and at

the same time, they're doing that, they have proposed to cut grants to the state by 15 percent. So they are putting more eyes on the state. They are adding more bureaucratic requirements to respond to state, or to Federal authorities on, and so when you have a new set of rules that are completely new, with a new set of procedures governing the Federal/State relationship, it gets into more than just the rule, the stream protection measures rule, itself. It's a whole new way of dealing with the Federal Government that is much more burdensome than what has existed in the past.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. LAMBORN. OK. Thank you, Representative Johnson. We'll have our second round of questions. You have some very valuable information to give us on this important subject. I'm going to step back a step and although you've done a really good job of talking about the impacts on your regulatory process as a state and your ability or inability to comply with the requests of OSM, I want to talk about the impact to your state on a community level because the subject of our hearing today is the community impacts of the efforts to rewrite the stream buffer zone.

So if this rule were to take effect as it's currently written, despite the problems that we've looked at so far in our hearing, what would be the impact on employment in your state or the economy in your state or coal production or the cost of electricity? And I just want to step back and look at a little broader perspective on what this rule could do.

So if either one of you could comment on that, I would appreciate it. And I understand that we always have to strike a balance between protecting the environment and being responsible there, as well as not having a hit on our economy that destroys jobs and adds to the cost of living when people's dollars are already stretched too thin as it is. So we always have to strike that balance and I understand that. Mr. Lambert, would you care to respond to that?

Mr. LAMBERT. Thank you, Mr. Chairman, for the question. Just using the numbers in the draft that we have seen to date, we understand that OSM is continuing to work on revising those numbers and we don't know what those are because they haven't involved the cooperating agencies any further after the contractor was let go.

But just using their numbers, the impact to the economy in Virginia would be devastating. As I mentioned in my oral statement, metallurgical coal production in Virginia is, at this point in time, given the process of metallurgical coal on the market, would probably take away 60 percent of our coal production, and with the exodus out of Virginia right now, just because of the poverty level, the mining industry is the only thing that's supporting that economy in southwest Virginia. So just using OSM's numbers, I think it would be devastated to the economy in Virginia.

Mr. LAMBORN. Thank you. Mr. Clarke or Mr. Corra?

Mr. LAMBERT. May I add, Mr. Lamborn, before we go on, using our planning districts in southwest Virginia, using their numbers, for every one coal job, that equates to four to six additional jobs that are ancillary to the mining industry. So, you know, that's just a multiplier that I'm not sure how we could survive.

Mr. LAMBORN. Thank you.

Mr. LAMBERT. OSM's own numbers were a decrease in surface coal production in Appalachia by 30 percent. They didn't address the potential decrease in underground coal production. The new material damage regulation will have an impact negatively on the ability to permit underground mining operations as well. OSM's own numbers predict job loss of 10,749 jobs in Appalachia. That doesn't take into account what they're going to do, I don't think, to underground mining production. Thirty thousand people below the poverty line, those are real economic impacts to our state. I believe that it's contrary to what Congress envisioned in 1977.

There's a constituency out there that would like to see mining severely restricted or eliminated. That results in a much higher degree of environment protection, but those policy calls are calls I think for Congress to make and not for OSM. Congress hasn't put OSM in charge of economic policy for the Appalachian region and it's something that OSM should not be allowed to get into, I don't think.

Mr. LAMBORN. And Mr. Clarke, do you agree with what Mr. Lambert just said, that when you lose direct mining jobs that there are indirect job losses, as well, in your state?

Mr. CLARKE. Absolutely. I've heard, you know, multipliers anywhere, three indirect jobs for every one direct job, some multipliers I've heard higher than that. But that would have a devastating effect on the West Virginia economy.

Mr. LAMBORN. Mr. Corra?

Mr. CORRA. Mr. Chairman, we have not conducted a detailed analysis at that level to be able to answer your question directly. We've quite honestly been waiting to see how the smorgasbord of 55 different options that they teed up in the original draft shakes out. It has been said at one point that Wyoming coal production could actually go up and I'm not totally convinced that that's the case. I do want to repeat what I said earlier, that the customers of Appalachian coal, if something changes there with regard to their fuel supply, it is not an automatic to assume that they will just go buy coal from somewhere else. Simply for no other reason just because of the additional regulations that are coming down the road with regards to the utility industry. And I think the abundance of natural gas now in the eastern part of the United States will also play a factor in that. So, for us, it's too early to tell.

Mr. LAMBORN. All right. Thank you. Representative Johnson, you are recognized for five minutes.

Mr. JOHNSON. Gentlemen, is it true that several states have actually considered withdrawing from the process as a cooperating agency? Are you aware of this and have either of your states considered doing so on this rewrite?

Mr. CLARKE. I think it was November or thereabouts of last year, West Virginia and, I believe, Virginia and Wyoming signed onto a joint letter of concern to OSM which, I believe, suggested that that was a possibility. Where we find ourselves is we have to put forth a lot of effort to provide meaningful comments and to review the documents. It doesn't appear like they're paying any attention to the input we provide. The process, as far as we can see what has happened, is a sham, and it's like a box they need to check to do

an EIS. Yes, we had cooperating agencies. Yes, we gave them an opportunity to comment. We checked the box. And with the result that they're working toward, we don't want to necessarily be seen as having contributed or endorsed the result.

Mr. LAMBERT. I would agree with Mr. Clarke's statement. Virginia did consider in the letter that was sent to OSM of withdrawing from the process.

Mr. LAMBORN. Mr. Corra?

Mr. CORRA. Mr. Chairman, I also agree. I mean, it's similar. I couldn't add anything more to what's already been said.

Mr. JOHNSON. OK. Do your states implement an NPDES program under the authority of the CWA that requires the protection of streams potentially impacted by mining, and is that program implemented by the same agency that enforces the SMCRA program?

Mr. CLARKE. Yes, sir. In West Virginia we do. The Division of Mining and Reclamation within the State Department of Environmental Protection issues both the SMCRA permit and the NPDES permit for mining operations.

Mr. JOHNSON. OK.

Mr. LAMBERT. And that is true in Virginia, as well. We have the regulatory authority or delegated authority for the NPDES process within the SMCRA permit.

Mr. CORRA. Mr. Chairman, the Department of Environmental Quality for the State of Wyoming has both jurisdictions.

Mr. JOHNSON. So if OSM implements its proposed rule, we would have, in addition to the EPA, the state CWA authority and in many cases, the COE, two additional agencies, OSM and the State Mining Authority, implementing programs to protect streams using different criteria and imposing different and possibly conflicting requirements. Do you see it the same way?

Mr. CLARKE. Yes, sir, I do.

Mr. LAMBERT. Yes, sir, we see that as the same issue, as conflicting agencies.

Mr. CORRA. Mr. Chairman, yes.

Mr. JOHNSON. OK. Would you then expect this rule, if it is implemented, to lead to more litigation, more confusion and uncertainty?

Mr. CLARKE. Yes. Yes, we do.

Mr. LAMBERT. Yes, sir, we do.

Mr. CORRA. Mr. Chairman, yes, we do.

Mr. JOHNSON. I think we know the answers. So it doesn't sound like a real good deal for the American tax payer and for the industry, the coal industry, and certainly the people of West Virginia and Ohio and Virginia and Wyoming.

Mr. Chairman, I think I've exhausted my questions.

Mr. LAMBORN. All right. Thank you all for being here. I want to thank you for your testimony. Members of the Committee may have additional questions for the record, and I would ask that you respond to those in writing. Thank you. We will now hear from our third panel of witnesses. And we're going to have a diversity of views on this panel.

I'd like to invite forward Mr. Roger Horton, the West Virginia Co-Chair of the Mountaintop Mining Coalition; Mr. Michael Carey, President of Ohio Coal Association; Mr. Jason Bostic, West Virginia Coal Association; Ms. Katharine Fredriksen, Senior Vice President

of Environmental & Regulatory Affairs for CONSOL Energy, Inc.; Mr. Bo Webb, former President and current member of Coal River Mountain Watch; and Ms. Maria Gunnoe, community organizer. I hope I pronounced the names correctly.

Please come forward. Like all of our witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to five minutes, as outlined in our invitation letter to you. The microphones are not automatic, so you need to turn them on when you're ready to begin. And I'll explain how the timing lights work. When you begin to speak, the timer will start and a green light will appear. After four minutes a yellow light comes on, and at five minutes, the red light comes on and we would ask that you conclude at that time. We will have one or more rounds of questions for all of you afterwards.

So Mr. Horton, you may begin.

**STATEMENT OF ROGER HORTON, WEST VIRGINIA CO-CHAIR,  
MOUNTAINTOP MINING COALITION**

Mr. HORTON. Thank you. Mr. Lamborn, first of all I want to thank you for recognizing a very valuable point, one that I've discussed with a lot of the people prior to coming here today. The money that's generated from the levies placed upon coal that is mined that's diverted to the surface mine reclamation, the abandoned mine reclamation does, in fact, provide healthcare for many thousands of United Mine Workers recipients, whose businesses have gone out of business. And for that reason, I thank you for that recognition. And I will begin.

My name is Roger Horton. I am the founder of Citizens for Coal, a co-founder of the Mountaintop Mining Coalition, and a member of Local Union 5958 of the United Mine Workers of America. I have spent over 30 years in the West Virginia mining industry beginning in 1974, as an underground coal miner. During my career, I have also been active in union activities, serving as various official capacities for my UMWA local union. I am proud to say that I am still a coal miner and a local union officer on a surface coal mine in West Virginia.

A native West Virginian, I have lived virtually all my life in the coalfields of the Mountain State, spending most of that time in Logan, West Virginia, where I live today in the community of Holden. I built a home, raised two children, participated and enriched my community all because of my employment in the coal industry.

Because of my rewarding experiences in and around the coal industry and its communities, that in 2008 I founded Citizens for Coal, a group open to everyone, no matter their employment or affiliation, dedicated only to preserving the future of coal mining jobs, to actively participate in the debate surrounding coal mining in West Virginia and Appalachia. It is in this capacity that I appear before you today, as well.

I am deeply concerned and troubled by the rulemaking currently being conducted by the Federal Office of Surface Mining. By virtue of regulatory revisions, OSM would rewrite the Surface Mining Control and Reclamation Act, otherwise known as SMCRA, and drastically alter the role of coal in the nation's energy mix envisioned by Congress when it passed in 1977.

This proposal from OSM is but one part of an open war on American coal being waged by bureaucrats in Washington, Pittsburgh and Philadelphia. The assault begins with the permit application process and continues through the mining process and finally to the end use of coal, where EPA announced sweeping regulatory changes as it relates to air emissions from coal fired power plants and the placement of coal combustion residuals, such as boiler ash.

These end use initiatives coupled with the EPA's obstruction of mining permits and now this outrageous rule from the Office of Surface Mining threatens to cripple the viability of West Virginia and other coal producing states as sources of domestic energy.

In its proposed rewrite of the stream buffer zone rule, OSM would drastically reduce coal production in West Virginia and across the Nation by applying new standards that have no basis in law and serve only to satisfy a very warped political agenda.

OSM is unable to identify any rational basis for revising these regulations and potentially eliminating 90 percent of the coal production in this country. All forms of mining across the country, surface and underground, are at risk. Amazingly, the rule changes appear poised to dramatically impact underground mining and perhaps more than surface mining. If finalized, the rule will throw the Nation into an energy crisis, the likes of which has never been seen.

Unless restrained by Congress, OSM will destroy the economies of states that produce coal and propel thousands of coal miners on the jobless roles. OSM appears to have advanced these positions without regard to jobs and communities that depend on those occupations for their very survival. If left unchecked, OSM threatens to strip our citizens, our communities and the very social fabric of West Virginia and other coal producing areas of their most important source of existence, and that is coal.

These are not just idle observations. I have personally witnessed the social and economic disruptions that occur when unelected bureaucrats make arbitrary decisions about what is best for my fellow coal miners, my friends and my community.

About eleven years ago, through a combination of government interference and frivolous legal challenge, a large-scale surface mine in Logan County, West Virginia, was forced to close because it could not obtain the permits necessary to continue mining the operation. The results were devastating. Some 400 members of Local Union 2935 were out of a job, not because there was no demand for the coal or because the coal reserve had been exhausted, but because of pure legal and regulatory interference. The workforce and Local were obviously devastated, but the county was also damaged. The school system and social welfare programs lost revenue that was vital to their existence and operation. Entire communities were devastated. With nowhere to work and no prospect of the mine reopening any time soon, residents packed up and moved to other states to find lower paying jobs.

Businesses that relied on the mine for their income, gas stations, restaurants, repairs shops and equipment vendors, vanished. Families suffered and disintegrated. Substance abuse and divorces skyrocketed and these folks struggled to come to terms with the loss of good paying jobs that were forecast to last decades. In fact, it

is fair to say that our communities and certain families have never recovered from the loss of these jobs. That experience and those troubling, painful memories motivated me to start Citizens for Coal, and I hope this Committee and the entire Congress is mindful that Washington, D.C.'s assault on the coal industry has real, often dramatic effects on our workplace, our people, our schools, our churches and our communities.

Mr. LAMBORN. Mr. Horton, if you would wrap up.

Mr. HORTON. Pardon me?

Mr. LAMBORN. You need to conclude now.

Mr. HORTON. Yes. Finally, as a life-long citizen of the coalfields of Logan, West Virginia, I would like the Committee to carefully consider the excuse for these rule changes offered by OSM. Whether they are from the OSM or the EPA or some other agency, we don't need their help. We can do just fine on our own, mine our own coal.

[The prepared statement of Mr. Horton follows:]

**Statement of Roger D. Horton, Co-Founder, Mountaintop Mining Coalition**

Good afternoon and thank you for the opportunity to testify today on this very important subject. My name is Roger Horton. I am the founder of Citizens for Coal, a co-founder of the Mountaintop Mining Coalition and a member of Local 5958 of the United Mine Workers of America (UMWA). I have spent over 30 years in the West Virginia mining industry beginning in 1974 as an underground coal miner. During my career I have also been active in union activities, serving in various official capacities for my UMWA local. I am proud to say that I am still a coal miner and a local union officer on a surface coal mine in West Virginia.

A native West Virginian, I have lived virtually all my life in the coalfields of the Mountain State, spending most of that time in Logan County West Virginia, where I live today in the community of Holden. I built a home, raised two children, participated and enriched my community all because of my employment in the coal industry.

Because of my rewarding experiences in and around the coal industry and its communities that in 2008 I founded Citizens for Coal, a group open to everyone no matter their employment or other affiliation, dedicated only to preserving the future of coal mining jobs, to actively participate in the debate surrounding coal mining in West Virginia and Appalachia. It is in this capacity that I appear before you today. I am deeply concerned and troubled by the rulemaking currently being conducted by the federal Office of Surface Mining (OSM). By virtue of regulatory revisions, OSM would re-write the Surface Mining Control and Reclamation Act (SMCRA) and drastically alter the role of coal in the nation's energy mix envisioned by Congress when it passed that law in 1977.

This proposal from OSM is but one part of an "open war" on American coal being waged by bureaucrats in Washington, Pittsburgh and Philadelphia. This assault begins with the permit application process and continues throughout the mining process and finally to the end use of the coal, where EPA announced sweeping regulatory changes as it relates to air emissions from coal fired power plants and the placement of coal combustion residuals such as boiler ash. These end use initiatives, coupled with EPA's obstruction of mining permits and now this outrageous rule from OSM threatens to cripple the viability of West Virginia and other coal producing states as sources of domestic energy.

In its proposed re-write of the Stream Buffer Zone rule, OSM would drastically reduce coal production in West Virginia and across the nation by applying new standards that have no basis in the law and serve only to satisfy a warped political agenda. OSM is unable to identify any rational basis for revising these regulations and potentially eliminating 90 percent of the coal production in this country. All forms of mining across the country, surface and underground are at risk. Amazingly, the rule changes appear poised to dramatically impact underground mining perhaps more than surface mining. If finalized, the rule will throw the nation into an energy crisis the likes of which it has never seen. Unless restrained by this Congress, OSM will destroy the economies of state that produce coal and propel thousands of coal miners on the jobless roles. OSM appears to have advanced these positions without regard to jobs and communities that depend on those occupations for

their very survival. If left unchecked, OSM threatens to strip our citizens, our communities and the very social fabric of West Virginia and other coal producing areas of their most important source of existence- coal.

These are not just idle observations. I have personally witnessed the social and economic disruptions that occur when unelected bureaucrats make arbitrary decisions about what is best for my fellow coal miners, my friends and community.

About 11 years ago, through a combination of government interference and frivolous legal challenges, a large scale surface mine in Logan County West Virginia was forced to close because it could not obtain the permits necessary to continue the mining operation. The results were devastating. Some 400 members of Local Union 2935 were out of a job. . .not because there was no demand for the coal or because the coal reserve had been exhausted but because of pure legal and regulatory interference. The workforce and local were obviously devastated but the county was damaged. The school system and social welfare programs lost revenue that was vital to their existence and operation.

Entire communities were devastated. With nowhere to work and no prospect of the mine reopening any time soon, residents packed up and moved to other states to find lower paying jobs.

Businesses that relied on the mine for their income- gas stations, restaurants, repair shops and equipment vendors vanished.

Families suffered and disintegrated. . .substance abuse and divorces skyrocketed as these folks struggled to come to terms with the loss of good-paying jobs that were forecast to last decades. In fact, it fair to say that our communities and certain families have never recovered from the loss of those jobs. That experience and those troubling, painful memories motivated me to start the Citizens for Coal organization, and I hope this Committee and the entire Congress is mindful that Washington D.C.'s assault on the coal industry has real, often dramatic effects on our workforce, our people, our schools, our churches and our communities. OSM has chosen to conveniently ignore these effects. OSM has also disregarded the charge given to it by Congress when it created the agency 34 years ago- to balance environmental and community protection with the increased production of coal. Unfortunately, OSM has joined the ranks of other federal agencies intent on ignoring Congress by regulating what it cannot legislate. This dangerous attitude must be changed and, given the behavior of OSM and EPA in Appalachia and West Virginia, needs to be changed quickly.

OSM's proposed rules cast a long shadow of uncertainly over our coal miners and communities by placing our entire economic livelihood in jeopardy. People are not buying cars or homes or vacationing. . .we are not spending money. . .we are not contributing to the economy.

I have been fortunate to be able to spend the majority of my life living and working in my native West Virginia. Every day I enjoy the benefits of our rural way of life. . .I hope that my children could live and work in West Virginia and enjoy that same lifestyle and experience but everyday that OSM continues its reckless disregard for the rule of law those chances decline.

Finally, as I life-long citizen of the coalfields of Logan County West Virginia, I would like the Committee to carefully consider the excuses for these rule changes offered by OSM. They will come before you as false prophets, claiming to represent the people of the coalfields and our environment and offering to "help" us survive or transition to other forms of employment when they destroy our coal industry. Whether they are from OSM or EPA or some other agency, we don't need their help or assistance. We can do just fine on our own.

Thank you.

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Department of the Interior  
 Office of Surface Mining Reclamation and Enforcement

Comments on:

As proposed in 74 FR No. 228/11-30-2009/Proposed Rules; 30 CFR Parts 780, 784,816, and 817

[Docket ID OSM-2009-0009]

RIN: 1029-AC63

### Stream Buffer Zone and Related Rules

The United Mine Workers of America, International Union (UMWA) offers the following comments on the above-captioned notice. Our comments are focused on the implications of revisions to regulations concerning the conduct of mining activities in or near streams. We have concerns that revision of the stream buffer zone (SBZ) rule published on December 12, 2008, as part of the interagency action plan that the Administration has developed to significantly reduce the harmful environmental consequences of surface coal mining operations in Appalachia, may negatively impact workers' economic security in Appalachia.

#### **The June 11, 2009 Memorandum of Understanding (MOU).**

The UMWA has long supported responsible enforcement of rules and laws used to regulate surface mining. Per the June 11, 2009 Memorandum of Understanding, OSM is proposing Oversight Improvement Actions that will increase OSM's oversight of state surface mining programs. This action is taken as part of an agreement of the MOU's signatory agencies to create an interagency working group to coordinate the development of short-term actions, longer term regulatory actions, and coordination procedures for Appalachian surface coal mining. Unfortunately, these coordinating efforts have resulted in increased time frames, regulatory uncertainty, and a lack of private and public understanding with respect to the criteria that has been established for surface mine permit approval.

#### **Disclosure and Transparency**

The UMWA is a primary stakeholder of the Department of the Interior's Office of Surface Mining Reclamation (OSM). When OSM embarks on a rule making the Agency solicits written comments and it also holds public hearings. The process is carried out in full view of the interested parties: Miners, mine operators, equipment manufacturers, and others, as it should be.

We suggest that OSM procedures for evaluating additional rules in the process should be subject to the same level of public disclosure and scrutiny. This is necessary both to ensure public accountability, but also to ensure the necessary expertise be brought to bear in the highly technical nature of water quality subject matter. What to OSM may seem like a trivial "correction" could in fact have important consequences. One way to guard against this would be to have public review of OSM decisions about rules.

#### **Encouraging Public Participation in Agency Rulemaking Processes**

Public participation is essential for development of good and useful rules. Encouraging public participation will help ensure that broad based, first-hand knowledge will be considered in the rule-making process, and it helps lead to the creation of rules that will be understandable.

One way to encourage public participation is to require hearings to be held at times and places that are convenient for and accessible to the stakeholders. Sometimes more work is needed to promote active participation. Coal miners wanting to participate in OSM hearings generally must leave work, and may forfeit their income and pay their own travel expenses to participate. Those testifying for environmental groups or coal operators, on the other hand, generally suffer no such loss.

The real consequence of this economic inequality means that there are often fewer workers participating in a public hearing than are the numbers of workers who are interested in the particular subject. Likewise, blue-collar workers like those the UMWA represents sometimes tend to be less comfortable with the written word, so few submit written comments. While we support the holding of public hearings, we also urge changes so the hearings' system will better balance the access for workers.

#### **Regulatory Uncertainty**

Regulatory uncertainty has caused many operators to cease capital expenditures related to UMWA operations, thus negatively impacting our members who live and work in Appalachia. To illustrate this problem, we use an example pertinent to the mining industry. Over the last year the surface mining permitting system has been reduced to an extremely slow pace.

Currently many factors are considered when requiring the various permit applicants with respect to the protection of the health and safety of those living within the communities in which the mining occurs. It is important to first define the public health goals, and then to discuss them with the appropriate stakeholders in the states in which these rules are specifically targeted. As an alternative to unilateral rulemaking based on yet-to-be established procedures to best guarantee water quality, we suggest that it may be appropriate to effectively communicate the agencies' criteria to those operators who mine coal in a responsible manner and identify the

most reasonable and efficient way to reach goals without compromising the ability of these coal operators to employ our members.

Oversight is always welcome by the UMWA but any oversight which impedes the ability of a state to issue permits based on established permitting criteria has resulted in a “logjam” of applications. We represent workers who have considerable firsthand practical knowledge about how things get done—or not done—at work. In fact, they have knowledge that so-called experts sometimes lack. Incorporating the knowledge of miners and coal operators is essential when designing policy that will succeed. Different kinds of knowledge are needed to create effective policies and no single approach will ultimately be most successful.

#### **Methods of Ensuring That Regulatory Review Does Not Produce Undue Delay**

The principal aim of this process should be to address the need to issue regulations that protect public health and allow coal miners to continue to produce coal. One primary objective of this should be to clarify the regulatory review process, thus reducing the delay in the established permitting process. This is an important objective and, whatever else OSM may do it should not unnecessarily delay the current rules. There should be no additional delays while the current rule making process is underway.

There are no magic formulae for achieving this. It requires setting deadlines and allocating sufficient resources so that agencies can meet such deadlines. In this case, in which admittedly the scientific data has yet to be established in some areas or additional studies are clearly needed in others, the ability of mine operators to secure permits should not be delayed due to unproven theory or speculation.

#### **Scope of Proposed Changes**

In view of the complexity of this proposal and the fact that it extends beyond issues related to the stream buffer zone we believe that additional time should have been granted for public comment. The UMWA is disappointed that various requests for extensions were not granted.

Any proposed changes to return to some version of the 1983 rule should be entered into with clear guidance and an understanding that conducting surface coal mining activities in the stream buffer zone are not prohibited. Rules must be clear that the protections of the SBZ rule are meant to conduct surface coal mining operations so as to prevent, to the extent possible using best technology currently available, additional contributions of suspended solids to stream flow or runoff outside the permit area.

#### **Conclusion**

In the past, regulatory reform has generally proceeded with the assumption that federal regulations create better compliance in areas where there is a clear need.

The rules OSM promulgates generally promote the requirements of the Surface Mining Control and Reclamation Act (SMCRA) in cooperation with States and Tribes. The primary objectives are to ensure that coal mines are operated in a manner that protects citizens and the environment during mining and assures that the land is restored to beneficial use following mining, and to mitigate the effects of past mining by aggressively pursuing reclamation of abandoned coal mines.

Indeed, the history of regulation in the coal mining industry demonstrates the effectiveness of direct regulation, i.e., creating rules and a means for enforcing them. However, the UMWA vigorously opposes any unnecessary regulation that results in a loss of employment for the members of our union. Such unnecessary rules would likely deter future capital investment in UMWA represented operations and will prohibit expansion of existing mining operations. This lack of investment will prematurely cause the displacement of UMWA members working at these facilities.

The Surface Mining Control and Reclamation Act of 1977 clearly allows for the extraction of coal using surface mining methods and one of the express 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 to strike a balance between protection of the environment and the Nation’s need for coal as an essential source of energy.

In proposing changes to the SBZ and related rules, the agency must also guard against unintended regulatory consequences of its actions. We have concerns that actions that the agency takes that are aimed at surface mining in Appalachia could have a significant impact on mining in other areas, or even on underground operations in the same region. Rules that could potentially impede an operator’s ability to store and treat coal mine waste causes serious concerns. The preamble discussion to the 2008 rule (73 FR 75815) makes clear Congress recognized that coal mine

waste had been and would continue to be placed in streams. Congress found and declared, in Section 101(b) of SMCRA:

the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

The vast majority of coal produced by underground mining in the states targeted by the proposed rules must be processed through preparation plants to remove impurities. The waste byproduct lacks the stability of excess spoil and must be placed in disposal areas that extend further down into valleys than excess spoil fills. To prohibit coal mine waste disposal sites in areas that extend into perennial streams in the states targeted by the proposed rules could result in the elimination of the underground coal mine industry throughout Appalachia. There are no provisions in the Act that support or authorize these types of restrictions on coal mine waste placement. Specifically, it would seem that such restrictions would be in conflict with the provisions of SMCRA.

The original intent of the SBZ rule is to ensure compliance with SMCRA's requirements to use caution when mining near streams and to use the best technology currently available to avoid, to the extent possible, the contributions of suspended solids to streamflow or runoff outside the permit area. The rule was never meant as a ban on surface mining activities in streams. As part of the process the Agency should carefully consider past litigation, similar to which caused the elimination of hundreds of UMWA member's jobs at the Ach Coal's Daltex operation, as well as other surface mining complexes over the past decade. If the intent of OSM is to repeal the current version of the SBZ rule then OSM has a duty to clarify what this means for valley fills, coal refuse pile, and impoundments. OSM has applied the 1983 version of the SBZ rule in the past and coal companies have always had the ability to secure permits required to maintain their operations. However, due to litigation and various rulings from the courts the 2008 rule was put into place by OSM. In repealing such rule OSM should have provisions in place to ensure the ability of surface mining to continue while scientific data is gathered and reviewed by experts from the various stakeholders.

Would future research and analysis accurately reflect the positions held by the stakeholders on either side of the surface mining issue? We do not know. But we do know that premature rulemaking absent creditable studies can cause job loss and financial hardships to communities already suffering from the effects of a worldwide recession. Many of the measures proposed in this notice could affect large numbers of miners working today and many miners' families that rely on these good-paying jobs.

We support the promulgation by OSM of protective rules that allow UMWA members to continue to mine coal in a responsible manner, but let us not venture down a path of potential hardship for those who rely on this vital component of the Appalachian economy. Let us not restrain the regulations necessary to address real problems but let us do so with a clear and decisive plan that will preserve this vital part of our nation's energy needs.

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Mr. LAMBORN. Thank you. Mr. Carey?

**STATEMENT OF MICHAEL CAREY, PRESIDENT,  
OHIO COAL ASSOCIATION**

Mr. CAREY. Chairman Lamborn, members of the Subcommittee, I appreciate the opportunity to testify at this very important Subcommittee hearing today on the Office of Surface Mining.

My name is Mike Carey. I am President of the Ohio Coal Association, a trade organization that represents Ohio's coal producing companies. I also serve on the National Coal Council and I serve as the Chairman of the Ohio Coal Technical Advisory Committee, and serving as Chair for the last seven years.

In our country today, coal is mined in 27 states across this country and provides affordable, reliable energy in 48 of them. Coal is not only America's most abundant energy resource, but it is by far our lowest cost domestic energy resource. Now, today it will be difficult for me to confine my remarks only to the stream buffer zone

rule because nationwide, our industry is facing an unprecedented onslaught of new regulations that are, simply put, designed to eliminate the American coal industry and the thousands of jobs associated with it.

The Obama Administration and its allies have declared a de facto war on coal across this country. The Department of the Interior's OSM stream buffer zone rule, the EPA's various rules, including the greenhouse gas rule, the Cross-State Air Pollution Rule, the Utility MACT, have one purpose—to force coal out of business.

Mr. Chairman, the Obama Administration's attempts to rewrite the stream buffer zone rule is nothing but a blatant attempt, again, to kill coal in Appalachia. The last rewrite undertaken in 2008, only three years ago, was a thoughtful process involving all of the stakeholders and examining all of the major issues. The Administration's efforts were a rush job done solely to placate their environmental allies. When the environmental impact statement was criticized for its bluntness of the potential job losses, instead of admitting that there was a problem, they fired the contractor who made those observations.

Now, there's a right way to conduct rulemaking, as Congressman Johnson pointed out in his opening remarks. When OSM revised the stream buffer zone rule in December of 2008, it was the product of over five years, millions of taxpayers' dollars in research, two environmental impact statements and over 43,000 public comments. The wrong way, that contrasted directly with the Obama Administration's closed and rushed efforts to ram a new rule through the process to placate environmentalist allies.

Fire the messenger. The Administration had hired the outside contractor, as previously mentioned, to prepare the EIS without the benefit of any new Federal studies. After the EIS draft was completed, the press seized upon the study, which predicted that at least, at least, 20,000 jobs would be lost, and the elimination of up to 20 to 30 percent of all surface mines in the east.

Two months later, instead of changing direction on the regulation and announcing that they were wrong to eliminate the jobs or that they would change their approach, they instead blamed the contractor and they fired him and announced that they would hire a new contractor to start the EIS all over again. This is a classic example of shooting the messenger, but not changing the message.

Now, what's at stake? OSM's stream buffer zone rule is the most comprehensive, far-reaching revision of SMCRA rule in over 30 years. Rather than providing regulatory clarity as the 2008 rule did, the new rule replaces decades of interpretation of law, prohibits standard mining practices and has nationwide application. In light that it took five years to come up with the OSM 2008 rule, they could not possibly responsibly rewrite such a rule in such a short period of time.

Rural regions of West Virginia, Ohio, Pennsylvania, Illinois, Indiana, Kentucky, Tennessee, would all be economically devastated by losing major employers such as the coal industry. The number, in fact, could be 20,000, might be low, but 70,000 coal-related jobs could also be affected.

Mr. Chairman, when an agency ignores the previous open rule-making process of its past, i.e. The 2008 stream buffer zone rule-

making process, rushes its replacement through after meeting in secret with environmental organizations and ignoring the stakeholders and the states themselves and shoots their own messenger when the work is was derided in the press, then one can only conclude that this proposal was intentional and they knew exactly what they were doing.

Thank you, Mr. Chairman, for the opportunity to testify and I look forward to any questions.

[The prepared statement of Mr. Carey follows:]

**Statement of Mike Carey, President, Ohio Coal Association**

Chairman Lamborn, Ranking Member Holt, Members of the Subcommittee, good morning.

Thank you for inviting me to testify at this very important hearing on Office of Surface Mining, Reclamation, and Enforcement's (OSM) Stream Buffer Zone Rule and its impact on American jobs. My name is Mike Carey and I serve as President of the Ohio Coal Association (OCA). I am also a member of The National Coal Council, which serves as an advisory committee for the Secretary of Energy on energy resource issues.

In our country today, coal is mined in 27 states and produces affordable electricity for 48 states. Coal provides 86 percent of the electricity needs for powering Ohio's business and residential sectors. The OCA provides a voice for the many thousands of our citizens working in Ohio's coal sector. The companies we represent are proud to directly employ over 3,000 individuals in Ohio alone and the over 30,000 additional jobs dependent on our industry.

The OCA seeks to continually educate state and federal lawmakers on the effects that policies have on American jobs, the economy, the reliability of electric power production and our global energy manufacturing competitiveness. This is why I am here today. Coal provides our country with a strong international competitive advantage, as we have more coal than Saudi Arabia has oil and gas. Energy Information Administration data shows that at least 261.5 billion tons of coal reserves are available in America, making our recoverable coal reserves almost 1/3 of the world's total supply.

Coal is not only America's most abundant energy resource, but it is, by far, our lowest cost domestic energy resource. Cheap, affordable coal is what powers the nation's manufacturing base and keeps the lights on for millions of America families. The low cost electricity that coal provides is a staple of American life and is essential to many Americans' standard of living.

It is difficult for me to confine my remarks today to only the Stream Buffer rule, because nationwide our industry is facing an unprecedented onslaught of new regulations that are, simply put, designed to eliminate America's coal industry and the thousands of jobs associated with coal. The Obama Administration and its allies have declared a de facto war on coal across Appalachia and America. The Department of Interior's (DOI) OSM Stream Buffer rule and EPA's various rules, including greenhouse gas rule, the Cross-State Air Pollution Rule (CSAPR) and Utility MACT, have one purpose: to force coal out of business. These regulations, coupled with the permit delays across the entire Obama Administration, will be economically devastating and will have an inevitable adverse effect on our nation. Hard-working Americans will lose their jobs, businesses will shutter, families will be forced to pay more to keep warm in the upcoming winter months as we are forced to supplant our nation's most abundant and affordable energy resource.

Mr. Chairman, the Obama Administration's attempts to rewrite the Stream Buffer Zone Rule is nothing but a blatant attempt to kill coal in Appalachia, which will destroy jobs across the industrial Midwest. Why do I say this?

- 1) The last rewrite undertaken in 2008—only three years ago—was a thoughtful process involving all of the stakeholders and examining all of the major issues.
- 2) The Obama Administration's efforts were a rushed job done solely to placate their environmental allies, ignoring stakeholders and the impacted States themselves.
- 3) When the Obama Environmental Impact Statement (EIS) was criticized for the bluntness of the potential job losses, instead of admitting the problem, they fired the contractor who made the informed observations.

### **The Right Way to Conduct a Rulemaking**

When OSM revised the Stream Buffer Zone rule in December 2008 it was the product of over five years of studies, millions of taxpayers' money spent on research, two environmental impact statements, over 43,000 public comments, and 30 economic and scientific studies.

OSM began the process in 2003, releasing a discussion draft of methods to clarify the older 1983 rule. Later that year OSM, working with the EPA, Army Corps of Engineers, Fish and Wildlife Service, and importantly the State of West Virginia completed a 5,000-page programmatic EIS on mountaintop mining. This EIS contained 30 separate federal studies on all aspects of Mountaintop Mining. They later proposed additional changes to the rule based upon public comments. Then in 2007 they completed another EIS which examined more specifically the stream buffer zone rule, addressed further comments and involved all stakeholders. The final regulation was issued in 2008.

### **The Wrong Way to Conduct a Rulemaking**

This is contrasted directly with the Obama Administration's closed and rushed efforts to ram a new rule through the process to placate their environmentalist allies.

In 2009, at the beginning of the Obama Administration Secretary Salazar signed an memorandum of understanding (MOU) vowing to revisit the stream buffer zone rule and then attempted to vacate the 2008 rule by guidance document. It took a federal court telling them they had to use the APA rulemaking process.

They later published an advanced notice of proposed rulemaking, making 10 significant changes to the stream buffer zone rule. They only allowed 30 days comment and ran the clock between Thanksgiving and just after Christmas.

In 2010, they entered into secret negotiations with several environmental organizations, emerging with a signed settlement agreement and also agreeing to pay their legal fees. They then started a new EIS and decided to expand the scope of the Stream Buffer Zone rules to include major changes to the underlying Surface Mining Control and Reclamation Act regulations.

As opposed to the 2008 efforts, eight States and the Western Governors Association wrote the Agency objecting to the draft EIS conclusions and the lack of opportunity to participate in the process.

### **Fire the Messenger**

The Administration hired an outside contractor to prepare the EIS, without the benefit of any new federal studies. After the EIS draft was completed, the press seized upon the study which predicted at least 20,000 jobs would be lost including the elimination of 20–30 percent of all surface mining in the East.

Two months later, instead of changing direction on the regulation, announcing they were wrong to eliminate jobs, or that they would change their approach, they instead blamed the contractor, fired them, and announced they would hire a new contractor to start the EIS over again. This is a classic example of shooting the messenger, but not changing the message. If this example wasn't so real and troubling, I would swear that they took their strategy from watching the movie Casablanca. Just like Captain Renault was shocked that gambling was going on, OSM Director Pizarchik was shocked that his regulation would lead to job losses. It's not very credible. One can only surmise that the new contractor has either explicitly or at least implicitly been told to steer clear of any job loss projections.

### **What's at Stake?**

OSM's Stream Buffer Rule is the most comprehensive and far-reaching revision of a SMCRA rule in more than 30 years. Rather than providing regulatory clarity as the 2008 rule did, the new rule replaces decades of interpretation of the law, prohibits standard mining practices and has nationwide application. In light of the five years it took to come up with the 2008 rule, OSM could not properly and responsibly rewrite this rule in such a short period. OSM's rulemaking process and the new rule have been widely criticized by states and state agencies responsible for implementing the rule. Moreover, this rule will have damaging effects throughout the states where the mining industry operates and will destroy tens of thousands of coal related jobs.

It is imperative that this Subcommittee and Congress carefully review OSM's rules in order to protect American jobs. We are always concerned when regulatory overreaching negatively impacts job security and growth in our region. We are in difficult economic times when many Ohioans and Americans find themselves out of work. Unemployment in Ohio is 9.1 percent, the same as the overall unemployment rate in the U.S.

Rural regions in West Virginia, Ohio, Pennsylvania, Illinois, Indiana, Kentucky and Tennessee would be economically devastated from losing a major employer such as the coal industry due to the OSM rule. By OSM's own admission, more than 7,000 jobs in Appalachia would be lost. This is an optimistic, underestimated assessment; we believe Appalachia will lose more than 20,000 jobs and nearly 70,000 coal related jobs would also be lost nationwide. This would mean the unemployment rate rising in these states and a loss of more than \$650 million of earnings and state revenue.

According to the agency's draft ESI, the Stream Buffer rule would annihilate approximately 1/3 of surface mines in the East and up to 50 percent of underground mines nationwide. In addition to closures of Eastern mines, the OSM rule would cause closures in coal production of 20 percent of Illinois' Basin mines, over 25 percent of the Gulf region and 84 percent of Alaska's mines.

This rule will be economically devastating to many states and communities in the East, but its impacts will be far-reaching effecting the nation's economy, employment rate and energy affordability. Decreases in Eastern coal production will increase electric prices, a fact which OSM did not take into consideration while rule-making. Twenty-two of the 25 states with lowest electricity costs rely on coal for at least 40 percent of their electricity needs.

Mr. Chairman, when an agency:

- 1) Ignores the previous open rulemaking processes of its past, ie the 2008 Stream Buffer rulemaking process, and
- 2) Rushes its replacement through after meeting in secret with environmental organizations and ignoring the stakeholders and the States in the process, and
- 3) Shoots their own messenger, only after the work is derided by the press,

Then one can only conclude that their proposal was intentional and that they knew exactly what they were doing to the coal industry.

I ask that you help reign in OSM and do all that you can to stop this rulemaking. Americans have lost enough jobs; don't allow tens of thousands of additional families to suffer for OSM's misguided and unjustified rule.

Thank you for this opportunity to testify, Mr. Chairman, and stand ready to answer any questions the subcommittee may have about this attack on coal jobs, power providers and businesses throughout the United States.

Mr. LAMBORN. Thank you. Mr. Bostic?

**STATEMENT OF JASON D. BOSTIC, VICE-PRESIDENT,  
WEST VIRGINIA COAL ASSOCIATION**

Mr. BOSTIC. Good morning and thank you for the opportunity to address this Committee. I am Jason Bostic with the West Virginia Coal Association.

Mr. LAMBORN. If you can get just a little closer.

Mr. BOSTIC. Is that better?

Mr. LAMBORN. A little bit more.

Mr. BOSTIC. OK. Sorry about that. On behalf of our membership, which accounts for 98 percent of West Virginia's underground and surface coal production, we are grateful for the opportunity to address this Subcommittee and we welcome your interest in these rule changes.

West Virginia is the nation's second largest coal producing state, averaging about 155 million tons of annual production, 60 percent of which comes from underground coal mining operations. West Virginia is the nation's leading underground coal producer.

As you've heard from others this morning, coal is the broad-shouldered atlas of West Virginia's economy. In addition to the 21,000 miners directly employed in the industry, coal production supports another 42,000 jobs throughout our economy. Coal is also the backbone of West Virginia's government and social program structure, providing almost \$500 million in severance taxes to support vital county and state, local services.

The thousands of coal miners in West Virginia, Appalachia and across this nation desperately need your help. While the President speaks of stimulating the economy, at every turn his regulatory agencies are erecting substantial barriers to the expansion of the coal industry. While he pleads the case for more jobs, the agencies under his authority seem determined to drastically increase unemployment and outright poverty.

All of the benefits provided by the coal industry have been placed in jeopardy by the actions of the current Administration. With this current initiative, OSM has joined EPA in advancing an anti-coal agenda that targets all coal production. To implement this agenda, these agencies rely on policy, guidance and secretive revisions that are developed behind closed doors, wrapped in bureaucratic intrigue.

As the mining industry and our employees struggle to decipher and cope with this assault, we cannot help but marvel how this Administration's commitment to transparency stops at Appalachia and with the coal industry.

At the very outset of the new Administration, the White House Council on Environmental Quality engineered a blueprint that committed the entire Federal regulatory structure to target Appalachian coal miners. Following its orders from CEQ, for example, the EPA embarked on an unprecedented campaign to twist the Federal/State relationship under the Clean Water Act to nullify the rights of individual states. So bad are the actions of the EPA that individual states, including West Virginia, have sued in Federal court to preserve their sovereign authority.

The rulemaking from OSM that is the subject of the hearing today is particularly offensive. The agency has set out to radically change the mining regulatory program with absolutely no justification. The path to revise the stream buffer zone rule began by way of a settlement agreement between OSM and certain anti-mining factions. From there, OSM established a rulemaking schedule that you've heard from others that would astonish most of the world. Under this record-breaking schedule, OSM would quash a prior effort that took four years to complete.

Far from being the midnight regulation as accused by the Administration, the 2008 revisions were actually comprehensive changes that remained faithful to the Surface Mine Law. According to OSM's own estimates, these changes stand to potentially reduce coal production in Appalachia by as much as 30 percent and throw thousands out of work. Further, despite the efforts of some to mask the impact of these revisions as confined to surface mining, and we cannot emphasize this point enough, the changes that OSM is currently contemplating could dramatically impact the underground production of coal in West Virginia and across this country.

The coal industry is not alone in its observation that OSM is attempting to change an act of Congress by way of a regulation. Individual mining states have been openly critically of this process, as you've already heard this morning, with one state agency properly characterizing the rulemaking as junk and with the remainder of those agencies alleging the rule will violate the surface mining law.

It is against this backdrop of a Federal assault, waged by the EPA and OSM on coal, that we welcome your interest in these rule

changes. The strong demand for West Virginia coal should be reassuring to our mining families and encouraging investment and expansion that puts even more people to work, but unfortunately, that is not the case. The politically motivated actions of OSM and EPA have cast a long shadow of uncertainty over the coal industry. For our mining families and their communities, these mysterious rule changes hang over their heads like an ominous cloud.

Coal cannot only sustain current jobs but could add even more if these arbitrary actions from Washington are restrained through effective oversight from Congress. We seek not a subsidy or a hand-out. We just need the permission to work. To continue to do for this country what we've done for years, providing it with energy and industrial fuel that so many others in the developing world crave as they aspire to economic greatness, we urge you and we applaud your efforts to pull OSM and the other regulatory agencies from the shadows of their secretive routines and to demand real, hard answers.

Thank you again.

[The prepared statement of Mr. Bostic follows:]

**Statement of Jason D. Bostic, Vice-President,  
West Virginia Coal Association**

Good morning and thank you for the opportunity to address this Committee. I am Jason Bostic with the West Virginia Coal Association. On behalf of our membership, which accounts for 98 percent of West Virginia's underground and surface coal production, we are grateful for the opportunity to address this Subcommittee.

West Virginia is the nation's second largest coal producing state, averaging 155 million tons of annual coal production, 60 percent of which comes from underground mining operations.

West Virginia is the nation's leading underground coal producer and 21,000 men and women show up every day at mines in West Virginia to produce one of the most valuable energy resources found anywhere in the world. For electrical generation, West Virginia coal offers a fuel source that is both high in BTU content and low in emissions. For domestic and international steel producers, coal from West Virginia and Appalachia is irreplaceable as a feedstock for the production of iron and steel. Our coal is also used in a variety of manufacturing processes that produce everything from plastics, to medication to cosmetics.

In short, West Virginia coal does everything from charging your iphone to forging the steel for our nation's infrastructure to making the plastic bottle for your soda. Our coal is shipped to 33 states and 23 countries. Energy produced in West Virginia fuels 40 percent of all electrical consumption on the east coast.

Coal is also the broad-shouldered Atlas of West Virginia's economy. In addition to the 21,000 coal miners directly employed by the mining industry, coal production supports another 42,000 jobs throughout the economy. These are jobs that pay twice the average annual state wage and represent \$3.4 billion in direct wages annually. Coal is also the backbone of West Virginia's government and social program structure, providing almost \$500 million in severance taxes to support vital state, county and local services. Together with the electric utility industry, coal provides upwards of 60 percent of all business taxes collected in West Virginia.

The thousands of coal miners in West Virginia, Appalachia and across the nation need your help.

While the President speaks of stimulating the economy, at every turn his regulatory agencies are erecting substantial barriers to the expansion of the mining industry. While he pleads the case for more jobs the agencies under his authority seem determined to drastically increase unemployment and increase those living below the poverty level. As the President calls for review of administrative actions, one of his executive agencies appears determined to push through a regulation with little public participation.

All of the benefits provided by the coal industry, and all that results from having a domestic source of energy that is so versatile in the economy, has been placed in jeopardy by the actions of the current administration. With its current initiative to re-write the Stream Buffer Zone Rule, the federal Office of Surface Mining (OSM)

has joined the Environmental Protection Agency (EPA) in advancing an anti-coal agenda that targets all coal production but seems to focus specifically on the Appalachian coal basin. To implement this agenda, these agencies rely on policy, guidance and, in the case of OSM, secretive regulatory revisions that are developed behind closed doors, wrapped in bureaucratic intrigue. As the mining industry and our employees struggle to decipher and cope with this assault, we cannot help but marvel how this administration's stated commitment to transparency stops at Appalachia and the coal industry.

At the very outset of the new administration, the White House Council on Environmental Quality engineered a "blueprint" that committed the entire federal regulatory structure to restricting coal production and unfairly targeting Appalachian coal miners. The ideology expressed in this June 11, 2009 Memo (copy provided as an attachment) has been used by EPA to halt the legal and orderly processing of mining permit applications. Marching to its orders under the June 11 memo, EPA embarked on an unprecedented campaign to twist the federal-state relationship under the Clean Water Act (CWA) to nullify the rights of individual states with respect to water quality standards. So bad are the actions of EPA that individual states, including West Virginia, have sued in federal court to preserve their sovereign authority.

The rulemaking from OSM that is the subject of the hearing today is particularly offensive. The agency has set out to radically change the mining regulatory program with no justification. As the agency itself admitted in the Federal Register, ". . . we had already decided to change the rule following the change of administrations on January 20, 2009" (75 Fed. Reg. 34667, June 18, 2010)

The path to revise the Stream Buffer Zone rule began by way of settlement agreement between OSM and anti-mining factions that have consistently, yet unsuccessfully, legally harassed the orderly regulation of coal mining. From there, came the June 11 memo and an OSM established rulemaking schedule that will astonish most observers- the agency committed to rewrite its regulations and complete an Environmental Impact Statement by February 2012—perhaps the fastest rulemaking exercise ever undertaken by a federal agency.

Under this record-breaking rulemaking schedule, OSM would quash a prior effort that took four years to complete and certainly included more public comment opportunities than the current initiative.

Far from being the "midnight regulation" as accused by OSM and this administration, the 2008 revisions were a thoughtful and inclusive change to federal mining regulations that remained faithful to the federal Surface Mining Control and Reclamation Act (SMCRA) and reflected several federal court decisions. Under this current regime, OSM has embarked on the most sweeping changes to the mining regulatory program since its creation in 1977 by Congress.

OSM's political leadership would have you believe these changes are but mere clarifications. Changes that, by OSM's own conservative estimates, stand to potentially reduce coal production in Appalachia by as much 30 percent and throw 20,000 people out of work are not minor. Further, and we can't stress this important fact enough, despite the efforts of some to mask the impact of these revisions as confined to surface mining, the changes being contemplated by OSM could dramatically impact underground coal mines. They are in fact changes that betray the very will and intent of Congress as expressed in SMCRA.

Just as we have seen from EPA and its actions under the CWA, unelected bureaucrats within OSM are set to radically alter the place of coal in our nation's energy mix. They will do so with a stroke of the regulatory pen, ignoring public scrutiny and debate before Congress. Even the regulatory process associated with these changes has become secretive. Individual states, which SMCRA envisioned as the primary regulators of mining activity, have been locked out of the process by OSM.

The coal industry is not alone in its observation that OSM is attempting to change an act of Congress by way of regulation. Individual mining states have been openly critical of this process, with one state agency properly characterizing the rulemaking as "junk" and many others alleging the rule will clearly violate SMCRA.

It is against this backdrop of a federal assault, waged by EPA and OSM on coal that we welcome the Subcommittee's interest in this rule change. The strong demand for West Virginia coal should be reassuring to our mining families and encouraging investment and expansion that puts even more people to work. But that is not the case.

The politically-motivated actions of OSM and EPA have cast a long shadow of uncertainty over the coal industry. For our mining families and their communities these mysterious rule changes hang over their heads like an ominous cloud. They worry about their jobs, their children, paying their bills and the fabric of their com-

munities. We are left to ponder why, if Washington is so concerned about creating good jobs, that it seems so determined to take away those that already exist.

Coal has allowed West Virginia and other mining states to survive recent economic disruptions relatively unscathed without massive budget deficits and drastic reductions in social services. Coal production in West Virginia and elsewhere in this nation has a potentially bright future as the country struggles to regain its economic footing. We will need coal to power factories and forge steel. We will need coal to provide reliable, affordable electricity to our citizens. Coal cannot only sustain current jobs but could add even more if these arbitrary actions from Washington are contained through effective oversight from Congress.

We seek not a subsidy or handout. We just need the permission to work. To continue doing for this country what we've done for years—providing it with the energy and industrial fuel that so many in the developing world crave as they aspire to economic greatness and providing the wages and taxes that support our states and communities.

We ask that you pull OSM and the other regulatory agencies from the shadows of their secretive routines and demand real answers.

Thank You.

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MEMORANDUM OF UNDERSTANDING AMONG THE  
U.S. DEPARTMENT OF THE ARMY,  
U.S. DEPARTMENT OF THE INTERIOR,  
AND U.S. ENVIRONMENTAL PROTECTION AGENCY  
IMPLEMENTING THE INTERAGENCY ACTION PLAN ON  
APPALACHIAN SURFACE COAL MINING<sup>1</sup>

JUNE 11, 2009

PREAMBLE

The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities. These mountains also contain some of the nation's richest deposits of coal, which have been mined by generations of Americans to provide heat and electricity to millions in the U.S. and around the world. After generations of mining, however, the region's most readily available coal resources have diminished, and the remaining coal seams are less accessible to non-surface mining methods.

In response, a surface mining technique commonly referred to as "mountaintop mining"<sup>2</sup> has become increasingly prevalent in the Appalachian region. Although its scale and efficiency has enabled the mining of once-inaccessible coal seams, this mining practice often stresses the natural environment and impacts the health and welfare of surrounding human communities. Streams once used for swimming, fishing, and drinking water have been adversely impacted, and groundwater resources used for drinking water have been contaminated. Some forest lands that sustain water quality and habitat and contribute to the Appalachian way of life have been fragmented or lost. These negative impacts are likely to further increase as mines transition to less accessible coal resources within already affected watersheds and communities.

With this Memorandum of Understanding (MOU), the Department of the Interior (DOI), U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps) are announcing this Interagency Action Plan (IAP) designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law. This IAP includes a set of short-term actions to be implemented in 2009 to existing policy and guidance, and a longer term process for gathering public input, assessing the effectiveness of current policy, and developing regulatory actions.

The Federal government has made a commitment to move America toward a 21st-century clean energy economy based on the recognition that a sustainable economy

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<sup>1</sup>For purposes of this MOU, "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

<sup>2</sup>The term "mountaintop mining" may also be referred to as "mountaintop removal" or "valley fill mining."

and environment must work hand in hand. Federal Agencies will work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities. This interagency effort will have a special focus on stimulating clean enterprise and green jobs development, encouraging better coordination among existing federal efforts, and supporting innovative new ideas and initiatives.

### **Interagency Action Plan**

#### **I. COORDINATION ON REGULATORY PROGRAMS**

This MOU formalizes the agencies' IAP for coordinating the regulation of Appalachian surface coal mining. The elements of the plan are:

- A series of interim actions under existing authorities to minimize the adverse environmental consequences of Appalachian surface coal mining;
- A commitment by the agencies to investigate and, if appropriate, undertake longer term regulatory actions related to Appalachian surface coal mining;
- Coordinated environmental reviews of pending permit applications under the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act (SMCRA); and
- A commitment to engage in robust public participation, through public comment mechanisms and Appalachian public outreach events, helping to inform Federal, State, and local decisions.

In addition to the steps taken above, the Federal government will help diversify and strengthen the Appalachian regional economy. This effort will include the agencies to this MOU, and other Federal agencies, as appropriate, and will work to focus clean energy investments and create green jobs in Appalachia.

Coordination of interagency policy discussions and assessment of policy effectiveness will be achieved in consultation with the Council on Environmental Quality.

#### **II. SHORT-TERM ACTIONS TO MINIMIZE ENVIRONMENTAL HARM**

The signatory agencies will take the following short-term actions under existing laws, regulations, and other authorities to reduce the harmful environmental consequences of Appalachian surface coal mining.

Before the end of 2009, the Corps and EPA will take the following steps:

- Within 30 days of the date of this MOU, the Corps will issue a public notice pursuant to 33 C.F.R. § 330.5 proposing to modify Nationwide Permit (NWP) 21 to preclude its use to authorize the discharge of fill material into streams for surface coal mining activities in the Appalachian region, and will seek public comment on the proposed action.
- EPA and the Corps, in coordination with DOI's Fish and Wildlife Service (FWS), will jointly develop guidance to strengthen the environmental review of proposed surface coal mining projects in Appalachia under the CWA Section 404(b)(1) Guidelines.
- Recognizing that the regulation of surface coal mining extends beyond CWA Section 404, EPA will improve and strengthen oversight and review of water pollution permits for discharges from valley fills under CWA Section 402, and of state water quality certifications under CWA Section 401, by taking appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting of surface mining operations under these programs.
- The Corps and EPA, in coordination with FWS and consistent with the agencies' regulations governing compensatory mitigation, will jointly issue guidance clarifying how impacts to streams should be evaluated and how to evaluate proposed mitigation projects to improve the ecological performance of such mitigation implemented to compensate for losses of waters of the United States authorized by Section 404 permits.
- EPA, in coordination with the Corps, will clarify the applicability of the CWA waste treatment exemption for treatment facilities constructed in waters of the United States in order to minimize the temporary impacts of mining operations on streams.

Before the end of 2009, DOI will take the following steps:

- If the 2008 Stream Buffer Zone Rule is vacated by the U.S. District Court for the District of Columbia in *Coal River Mountain Watch et al v. Kempthorne*, 1:08-cv-02212-HHK C, as requested by the Secretary of the Interior on April 27, 2009, the Office of Surface Mining Reclamation and Enforcement (OSM) will issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts.

- OSM will reevaluate and determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA.
- OSM will remove impediments to its ability to require correction of permit defects in SMCRA primacy states.

### III. DEVELOPMENT OF LONGER TERM REGULATORY ACTIONS TO BETTER MANAGE APPALACHIAN SURFACE COAL MINING

#### A. OBJECTIVES

The signatory agencies will review their existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining. At a minimum, the agencies will consider:

- Revisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone Rule and Approximate Original Contour (AOC) requirements;
- Eliminating use of Nationwide Permit 21 in connection with surface coal mining in the Appalachian region when the Nationwide Permit Program is reauthorized in 2012; and
- Revisions to how surface coal mining activities are evaluated, authorized, and regulated under the CWA.

#### B. PROCESS

The signatory agencies will create an interagency working group to coordinate the development of short-term actions, longer term regulatory actions, and coordination procedures for Appalachian surface coal mining. The group will ensure robust public involvement in the development of any proposed actions or regulatory reforms.

For any proposed regulatory revision or other action under this MOU that is a major federal action significantly affecting the quality of the human environment (and is an action subject to NEPA), an Environmental Impact Statement (EIS) will be prepared to inform the decision-making process. At an early stage in the interagency coordination process, the working group will determine whether coordinating these NEPA processes programmatically would more effectively guide regulatory development and decision-making. The interagency group will coordinate with CEQ regarding the implementation of the National Environmental Policy Act (NEPA) in the development of regulatory reforms.

### IV. INTERIM INTERAGENCY COORDINATION PROCEDURES

#### A. Clean Water Act

EPA and the Corps will begin immediately to implement enhanced coordination procedures applicable to the Clean Water Act review of Section 404 permit applications for Appalachian surface coal mining activities that have been submitted prior to execution of this MOU. The goal of these procedures is to ensure more timely, consistent, transparent, and environmentally effective review of permit applications under existing law and regulations. The agencies are issuing these enhanced joint procedures concurrently with this MOU. Also concurrently, EPA is clarifying the factual considerations it is using to evaluate pending CWA permit applications under the 404(b)(1) Guidelines.

Pending Clean Water Act Section 404 permit applications for Appalachian surface coal mining activities will continue to be evaluated by the Corps and EPA on a case-by-case basis. The agencies will focus their reviews of Appalachian surface coal mining permit applications based on likely environmental impacts with the goal of avoiding, minimizing, and mitigating such impacts to the extent practicable under the CWA Section 404(b)(1) Guidelines and consistent with NEPA. This approach will enable the continued permitting of environmentally responsible projects.

#### B. Surface Mining Control and Reclamation Act

During 2009, OSM will issue guidance concerning appropriate application of the Stream Buffer Zone rule and other related rules and will ensure that states are implementing their counterpart provisions and SMCRA regulatory programs consistent with the guidance.

### V. PUBLIC INVOLVEMENT

This IAP will be accompanied by robust public comment on its short- and longer term actions. The agencies will hold public meetings in Appalachia during 2009 to gather on-the-ground input and encourage ongoing local engagement in the environmental assessment and decision-making process. Additional public participation will occur as agency actions move forward.

## VI. GENERAL

A. The policy and procedures contained within this MOU are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This MOU does not constitute final agency action on any issue, and any actions contemplated by this MOU will be carried out in an appropriate administrative process by the action agency in accordance with all applicable laws and regulations.

B. This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.

C. Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. All formal guidance interpreting this MOU and background materials upon which this MOU is based will be issued jointly by the appropriate agencies.

D. Nothing in this MOU will be construed as indicating a financial commitment by DOI, the Corps, EPA, or any cooperating State agency for the expenditure of funds except as authorized in specific appropriations.

E. This MOU will take effect on the date shown above and will continue in effect until permanent procedures are established, or unless earlier modified or revoked by agreement of all signatory agencies. Modifications to this MOU may be made by mutual agreement of all the signatory agencies. Modifications to the MOU must be made in writing.

Signed,

Lisa P. Jacks  
Administrator  
U.S. Environmental Protection Agency

Ken Salazar  
Secretary  
U.S. Department of the Interior

Terrence "Rock" Salt  
Acting Assistant Secretary of the Army (Civil Works)  
U.S. Department of the Army

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Mr. LAMBORN. All right. Thank you. Ms. Fredriksen?

**STATEMENT OF KATHARINE A. FREDRIKSEN, SENIOR VICE  
PRESIDENT, ENVIRONMENTAL STRATEGY & REGULATORY  
AFFAIRS, CONSOL ENERGY**

Ms. FREDRIKSEN. Good morning, Mr. Chairman, and distinguished Subcommittee members. My name is Katharine Fredriksen and I am the Senior Vice President of Environmental Strategy & Regulatory Affairs for CONSOL Energy. I'd like to thank you for inviting me to participate today in this very important hearing.

CONSOL Energy holds the largest proven reserves of minable bituminous coal of 4.4 billion tons. We are the nation's largest underground producer of coal and will produce 62 million tons this year alone.

My comments today are based on the draft Office of Surface Mining stream buffer zone rule that is available in the public forum. Based on our analysis of this draft rule, CONSOL has very serious concerns about the jobs at risk and the significant impact on coal mining if this rule were to go forward as drafted.

Eighty-eight percent of our coal is produced using the longwall method of mining. Longwall mines are the safest method of underground mining and at CONSOL, safety is absolutely our number one core value. Currently, we operate active mining complexes across five states. Eight of our mining complexes are longwall

mines, with five of those eight located right here in northern West Virginia. We also have surface and underground mining operations in central and southern West Virginia.

As the Subcommittee knows, SMCRA not only regulates surface coal mines, but it also regulates the surface effects of underground coal mines. Thus, all of CONSOL Energy's longwall mining operations operate pursuant to and in accordance with a SMCRA permit.

OSM's revised SBZ rule appears to include, among other things, a prohibition of mining in, near or through intermittent and perennial streams and within 100 feet of such streams, very restrictive provisions for excess spoil fills and new and expansive standards for what constitutes a material damage to the hydrologic balance.

These standards could make longwall mines impossible to permit or operate. In the locations where we operate, it is impossible for longwall mining to avoid impacts to intermittent and perennial streams because such streams are ubiquitous atop our operations. The proposed definition of material damage could further prohibit subsidence of streams and thus eliminate our ability to extract coal via longwall mining.

Using a moderate interpretation, and I stress moderate, instead of extreme or worse case, CONSOL conducted a preliminary engineering analysis of the impacts of this rule in its current draft form. If you'll indulge me, I have a graphic to represent this because they always say a picture is worth a thousand words.

Mr. LAMBORN. Ms. Fredriksen, is this in your testimony or do we need to have it added to the record?

Ms. FREDRIKSEN. Yes, it's included. I can include this as a part of the written, if you would like. I have it as an exhibit.

Mr. LAMBORN. OK. If there's no objection, that will be added to the record.

Ms. FREDRIKSEN. Thank you. Our analysis indicated that the rule would result in a 40 percent loss of eastern longwall minable reserves to CONSOL. That is over one billion tons CONSOL would be prohibited from mining. At current market prices, this translates to a reduction in future revenues of over \$66 billion.

Additionally, the increased quantity and frequency of longwall moves to avoid protected streams could further reduce the mine's annual production by 25 to 30 percent and potentially increase production costs by 20 to 35 percent. For CONSOL alone, this would mean many of our longwall mines would be unprofitable at today's coal prices.

Please note that streams typical of the streams that are to be protected by this proposed rule have been undermined by longwall operations for over 35 years. To date, over 172 square miles in Pennsylvania and West Virginia have been undermined by CONSOL's longwall operations with no material damage to the hydrologic balance.

CONSOL believes that coal production, safety of personnel and environmental stewardship are not mutually exclusive goals. Impacts to the environment as a result of longwall mining are regulated by the state environmental agencies through NPDES permits and by the Army Corps of Engineers through 404 permits. These permits account for the hydrological, stream baseline, ecological

and geologic impacts. A complete listing of all of the permits we are subject to is included in my written testimony.

But this hearing is entitled "Jobs at Risk," so if you'll indulge me, I'd like to take a few moments to discuss the impacts this rule will have on our communities in which we operate and on our employees.

By way of example, and attached as Exhibit D to my written testimony, we analyzed the 2010 year end economic impacts of our Pennsylvania mining complex called Bailey-Enlow, two of our larger mines that would be significantly impacted by this rule. There are a total of 1,348 CONSOL employees at this complex, as well as an average of 412 contractor employees onsite every day. The total direct expenditures from the complex in the local economy is \$763 million, with an additional \$98 million in Federal, state and local taxes. Using a five to one multiplier effect, the estimated local economy impact is \$1.7 billion, creating 6,740 jobs, bringing the total economic impact to \$2.6 billion for 2010 alone.

But we've got five longwall mining complexes in West Virginia and they provide similar high-paying jobs and economic benefits. We directly employ 3,035 employees at these mines and approximately 264 contractors. The total direct expenditures from these five complexes in the local economies in West Virginia are \$872 million, with an additional \$146 million in Federal, state and local taxes. The local economy multiplier effect for northern West Virginia mines brings the local impact to \$1,017 billion for 2010, with an estimated 15,175 jobs. We've additionally provided \$2.4 million in philanthropic donations to the communities where we operate in 2010 alone.

In conclusion, Mr. Chairman, please allow me to say that at a time when our nation's economy is still struggling to regain its former balance, and with unemployment remaining stubbornly high, one of the few relatively robust sectors is the coal mining industry. In this regard, we are particularly pleased and proud of our longwall operations and of all the men and women who work so tirelessly toward the safe, environmentally protective and economically successful operation of these mines.

The stream buffer zone rule, if promulgated in its current form, would mean the loss of billions of dollars to the economy and literally thousands of jobs. On behalf of CONSOL, I fervently hope that the Administration will proceed in a different direction. Thank you.

[The prepared statement of Ms. Fredriksen follows:]

**Statement of Katharine A. Fredriksen, Senior Vice President,  
Environmental Strategy & Regulatory Affairs, CONSOL Energy**

**Introduction**

Good Morning Mr. Chairman and distinguished Subcommittee Members and guests. My name is Katharine Fredriksen and I am the Senior Vice President, Environmental Strategy & Regulatory Affairs for CONSOL Energy. Thank you for inviting me to participate in this very important Subcommittee oversight hearing. CONSOL Energy holds the largest proven reserves of minable bituminous coal of 4.4 billion tons. We are the nation's largest underground miner of coal, and will produce some 62 million tons of coal this year alone. My comments today are based on the draft Office of Surface Mining ("OSM") Stream Buffer Zone rule available in the public forum. Based on our analysis of that draft rule, CONSOL has serious con-

cerns about the jobs at risk and the significant impacts on coal mining if this rule were to go forward as any of the proposed alternatives other than “no action”.

Eighty-eight percent of our coal is produced using the longwall method of mining. As Members of this Subcommittee may know, longwall systems have their own hydraulic roof supports called shields for overlying rock that move with the machine as mining progresses into the coal seam. Rock that is no longer supported by the coal that has been removed is allowed to fall behind the operation in a controlled manner, always keeping the miners under the shields. Longwall mines are the safest method of underground mining, and at CONSOL, safety is absolutely our number one core value.

Currently, we operate active mining complexes across five states. Eight of our mining complexes are longwall mines, as follows; (1) Buchanan in Southwest Virginia; (2) Shoemaker in Northern West Virginia near Wheeling; (3) McElroy in Northern West Virginia near Moundsville; (4) Blacksville in Northern West Virginia near the Pennsylvania border; (5) Loveridge in Northern West Virginia near Fairmont; (6) Robinson Run, also near Fairmont in Northern West Virginia; (7) Bailey Mine in Pennsylvania; and 8) Enlow Fork Mine, also in Pennsylvania. We also have surface and underground mine operations in central and southern West Virginia, namely our Fola and Miller Creek mines.

#### **SMCRA Regulates the Surface Effects of Underground Coal Mines**

As the Subcommittee knows, SMCRA not only regulates surface coal mines, but also, as specified in SMCRA §516, the surface effects of underground coal mining operations. Importantly, however, SMCRA §516 mandates that in adopting any rules and regulations for the surface effects of underground coal mines, OSM “shall consider the distinct difference between surface coal mining and underground coal mining.” Thus, all of CONSOL Energy’s longwall mining operations operate pursuant to and in accordance with SMCRA permits issued by the state regulatory authorities in the states where we operate. The programs of these state regulatory authorities have been approved by OSM as being as stringent as federal SMCRA and they are subject to strict oversight by OSM. In addition, Congress in SMCRA specifically encouraged the use of planned subsidence such as that which occurs with longwall mining.

Consequently, CONSOL Energy will be directly affected by any changes OSM makes to its stream buffer zone rule. As I describe in more detail below, everything we have learned to date about these changes causes us to be gravely concerned about the economic viability of our longwall mines, and the adverse impacts on employment at the mines, as well as the effects on the local communities that depend on these operations.

#### **What is the Stream Buffer Zone Rule?**

Rules and policies on stream buffer zones have been in existence from almost the very beginning of the implementation of SMCRA by OSM and the regulatory authorities of the coal mining states. The current stream buffer zone rule was published in the Federal Register on December 12, 2008 in a document entitled “Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams.” 73 Fed. Reg. 75,814. A copy of the first page of the preamble to the stream buffer zone rule and the rule itself is attached as Exhibit A to my prepared statement. As you heard in earlier testimony, the existing rule is a very comprehensive and detailed rule.

This 2008 rule resulted from a careful and well-executed public process completed over more than a five-year period. It included public hearings and consideration of over 45,000 public comments. The 2008 rule was also supported by an October 2005 programmatic environmental impact statement (“EIS”), which was sponsored by four federal agencies: OSM; EPA; the Corps of Engineers; and the Fish and Wildlife Service. This EIS included 30 scientific and economic studies. OSM also completed another separate EIS to support the final rule. The 2008 rule clarified existing agency policy on stream buffer zones that had been consistently used and applied by both OSM and state regulatory authorities for over 25 years. However, it also added and strengthened significant new environmental requirements for the placement of excess spoil. These new requirements included provisions for:

- minimizing excess spoil, avoiding mining activities in or near perennial and intermittent streams, if reasonably possible;
- requiring an analysis of alternatives; and
- selection of the option for placement of spoil with the least environmental impact on fish, wildlife, and related environmental values, to the extent possible.

The 2008 rule was challenged in court, but instead of remanding or vacating the rule, the court instructed OSM that any changes the agency wanted to make would have to be done through notice and comment rulemaking, with full public participation. In the meantime, the 2008 stream buffer zone rule would remain in effect. A copy of the court's August 2009 decision in this case is attached to my prepared statement as Exhibit B.

#### **Impacts Resulting from Revisions to the SBZ rule**

OSM's revised SBZ rule appears to include, among other things:

- prohibition of mining in, near, or through intermittent and perennial streams and within 100 feet of such streams;
- very restrictive provisions for excess spoil fills; and
- new and expansive standards for what constitutes material damage to the hydrologic balance.

These standards could make longwall mines impossible to permit or operate. In the locations where we operate, it is impossible for longwall mining to avoid impacts to intermittent and perennial streams because such streams are ubiquitous atop our operations and we cannot avoid mining beneath them. The proposed definition of material damage could prohibit subsidence of streams, thus eliminating our ability to extract the coal via longwall mining.

Using a moderate interpretation of a protected stream, CONSOL conducted a preliminary engineering analysis of the impacts this rule, in its current draft form, could have if finalized. Our analysis indicates that the rule would result in a 40% loss of eastern longwall minable reserves to CONSOL—that is over 1 billion tons CONSOL would be prohibited from mining. At current market prices, this translates to a reduction in future revenues by over \$66 billion. Additionally, the increased quantity and frequency of longwall moves due to avoidance of protected streams could further reduce the mine's annual production by 25 to 30 percent, and potentially increases production costs by 20 to 35 percent. For CONSOL alone, this would mean many of CONSOL's longwall mines would be unprofitable at today's coal prices.

Please note that streams typical of the streams “to be protected” by this proposed rule have been undermined by longwall operations for 35 years. This mining has been conducted consistent with the Congressional intent that underground mining cause “subsidence to occur at a predictable time and in a relatively uniform and predictable manner” (Report of the House Committee on Interior and Insular Affairs to Accompany H.R. 2; April 22, 1977). To date, over 172 square miles in PA and WV have been undermined by CONSOL's longwall operations with no material damage to the hydrologic balance. And in those infrequent circumstances where subsidence does impact streams, states require those impacts to be addressed. We suggest that it would be educational for the committee members to take the time to drive through these areas that have been undermined to see for themselves that environmental normalcy exists in those areas.

#### **Existing Environmental Regulations Already Address the SBZ Issues**

CONSOL believes that coal production, safety of personnel and environmental stewardship are not mutually exclusive goals. Impacts to the environment as a result of longwall mining can be, and have been, addressed in a manner that complies with the existing laws and regulations of the states in which CONSOL operates these mines.

The following environmental permits must be obtained for our mining operations. These permits incorporate ALL the provisions of the federal Clean Water Act, Clean Air Act, NEPA and SMCRA.

##### *United States Army Corps of Engineers (USACE) 404*

Permit to impact jurisdictional waters and wetlands. The permit includes mitigation to offset the stream and wetland impacts from the project, a cumulative impact statement or environmental impact statement, a jurisdictional determination for the streams and wetlands, long term maintenance plan for mitigation sites, long term monitoring plan and a description of the project and direct impacts.

PA Department of Environmental Protection (PA DEP) 401/NPDES Coal Mining Activity permit application—The permit includes the design, purpose and details of the project, hydrological, stream baseline, ecological and geological evaluations, construction specifications, and bonding.

PA DEP Chapter 105—Permit for water obstructions and encroachments. The permit includes mitigation to offset the stream and wetland impacts from the project, a long term maintenance plan for mitigation sites, long term monitoring plan and a description of the project and direct impacts. As part of the Chapter 105 approval

an erosion and sedimentation/NPDES plan approval is obtained by either the Conservation District or DEP.

PA DEP Chapter 105 and Mine Safety and Health Administration (MSHA)—Permit for Dam construction and maintenance. The permit includes design, construction specifications, and bonding, Emergency Action Plan and Operation and Maintenance Plan.

*VA Department of Mines, Minerals and Energy Surface Mine Control and Reclamation Act Permit (SMCRA)*

The permit includes the design, purpose and details of the project, hydrological, stream baseline, ecological and geological evaluations, construction specifications, and bonding. This permit is issued as a combined SMCRA/NPDES Permit.

*WV DEP 401/NPDES Coal Mining Activity permit application.*

The permit includes the design, purpose and details of the project, hydrological, stream baseline, ecological and geological evaluations, construction specifications, and bonding.

#### **Jobs at Risk and Impacts on Our Communities**

By way of example, we wish to provide the Subcommittee with our analysis (attached as Exhibit D to my statement) of the year-end 2010 economic impacts of our Bailey-Enlow Fork complex in Southwestern Pennsylvania. To briefly summarize this analysis, there are a total of 1,348 CONSOL employees at this complex, as well as an average of 412 contractor employees on-site every day. The total direct expenditures from the complex in the local economy is almost \$763 million, not including almost \$98 million in federal, state, and local taxes. This results in a total direct economic impact from the mining complex on the local economy of almost \$861 million. In addition, the estimated local economy multiplier effect is about \$1.7 billion, with the estimated “spin-off” effect of jobs resulting from the Bailey-Enlow Complex at 5 to 1—creating 6,740 jobs. Thus, the total economic impact of the Bailey-Enlow Fork Complex on the local community is almost \$2.6 billion for 2010.

Our other five longwall mining complexes in WV provide similar high-paying jobs and economic benefits to the communities in which they operate. We directly employ 3,035 employees at those mines, and approximately 264 contractors. At a 5 to 1 spin-off that equals about 15,175 jobs. The total direct expenditures from these five complexes in the local economies in WV is almost \$871 million, not including almost \$146 million in federal, state, and local taxes. This resulted in a total direct economic impact from the mining complex on the economy of almost \$1,017 billion for 2010 to the communities of northern West Virginia.

Also please note that CONSOL provided approximately \$2,363,000 in philanthropic donations to the communities in which we operated in PA, VA and WV in 2010. Should our longwall mines be forced to close or curtail business as a result of OSM’s SBZ rule, then those donations would be substantially reduced.

We would be happy to provide the Subcommittee with analyses for each of these operations.

#### **Conclusion**

Mr. Chairman, and Members of the Subcommittee, please allow me to conclude by saying that at a time when our Nation’s economy is still struggling to regain its former balance, and with unemployment remaining stubbornly high, one of the few relatively robust sectors is the coal mining industry. In this regard, we are particularly pleased and proud of our longwall operations and all of the men and women who work so tirelessly toward the safe, environmentally protective, and economically successful operation of these mines. The coal we produce is “America’s on Switch.”™ The SBZ rule, if promulgated in its current form, would mean the loss of billions of dollars to the economy, and literally thousands of jobs. On behalf of CONSOL, I fervently hope that the Administration will proceed in a different direction.

Thank you.

[NOTE: Attachments have been retained in the Committee’s official files.]

Mr. LAMBORN. Thank you. Mr. Webb?

#### **STATEMENT OF BO WEBB, FORMER PRESIDENT/CURRENT MEMBER, COAL RIVER MOUNTAIN WATCH**

Mr. WEBB. Good morning. For the record, let’s just be clear, that as of right now, at this moment, there is no rewrite and what we’re

hearing here this morning is a lot of speculation. I won't be speculating about anything I'm talking about.

The title of this hearing, "Jobs at Risk, Community Impacts of the Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule," is offensive to me. It's offensive to anyone that is living and dying in mountaintop removal communities, and that's what I'm here to talk about. I am not opposed to underground mining.

I don't believe any rewrite of the SBZ rule in any way, shape or form is going to curtail jobs or lose jobs. I have some evidence that I have submitted to this Committee in writing that reference sources from the Mine Safety and Health Administration and the Bureau of Labor Statistics that say that won't happen.

The SBZ rule must be corrected in order to protect the people's health. It was rewritten by George W. Bush as a parting gift to the coal industry at the cost of people's health and it needs to be fixed.

Let us not forget, President Ronald Reagan, your President, my President, in 1983 created the stream buffer zone rule because he realized the responsibility he had to protect America's water supply in the face of a coal industry that was moving more rapidly toward a method of mining that would turn entire mountains into ruin and destroy head water source streams that carry drinking water to millions of Americans. That responsibility now sits on your shoulders, on current President's shoulder, on every Member of Congress' shoulders. No one gets a free pass, not you and certainly not those that seek the subvert protection of our water.

Protecting our water is far more important than money, power and politics. To date, there are 19 peer-reviewed science papers addressing human health in mountaintop removal communities. A few of the titles are, "The association between mountaintop mining and birth defects among live births in central Appalachia;" "Self-Reported Cancer Rates in Two Rural Areas of West Virginia With and Without Mountaintop Coal Mining;" "Cardiovascular Disease Mortality in Mountaintop Mining Areas of Central Appalachian States." It goes on and on, there's nineteen of these. And yet, not one of these have been refuted, scientifically refuted, not one. Yet no one in Congress, nor the coal industry will acknowledge these papers, these science papers, exist. Now, you either believe in science or you choose to put your head in the sand and revert back to the dark ages.

With some of the rhetoric that's coming from the coal industry these days, one must wonder about their acceptance of modern science and living in the 21st century. The coal industry's latest comment on the recent alarming birth defects research in mountaintop removal communities is that the research did not take into account that those of us living in mountaintop removal communities are a bunch of inbreeds. I think that perhaps they need to look inside their own gene pool. It's a scientific fact that inbreeding can't account for ignorance and low IQs.

Mountaintop removal is an unprecedented form of coal extraction. Nearly a million acres of forested mountains have been obliterated. Two thousand miles or more of headwater source streams have been contaminated and countless water wells have been rendered unsafe for human consumption. Entire ecosystems have been wiped out. Mountaintop removal has been in full stride now for

about 15 to 20 years and already we are witnessing health effects of human exposure to the fallout of this insane method of mining, and it is insane. What will be the long-term effects?

Statistical research on Appalachian birth defects that I mentioned a moment ago has found that a woman pregnant living near mountaintop removal has a 42 percent greater chance of a baby born with birth defects than a pregnant woman living in a non-mountaintop removal community. You equate that to cigarette smoking. A baby born in mountaintop removal community has a 181 percent greater chance of heart or lung birth defects while the risk related to the mother's smoking was only 17 percent higher. That, Committee Members, that's staggering. If that doesn't get your attention, it doesn't spur you to some sort of action, then you've sold your very heart and soul. And your pro-life stamps that you claim you have is not credible. It's phony. It's transparent. You stand on a soapbox and claim to be pro-life yet allow our babies to be poisoned, disregarded like yesterday's garbage, ignored. I think a dog probably has more rights and protection than an unborn baby in a mountaintop removal community. I'm beginning to wonder if Congress has any decency left.

I ask each of you, in the name of our great nation, to put your politics aside, stand for what's right, protect our citizens and do not oppose change to the current SBZ's rule that will help protect American lives. At the very least, support it being rolled back to the Reagan Rule, with enforcement.

Let us be reminded that regulatory agencies are created to protect the people from industries that may cause harm to the people. When these agencies or legislators, for that matter, become ill-influenced by those they oversee or their power to regulate is circumvented by acts such as the Bush trashing of the SBZ rule, the people are not well served. America is not well served.

Please remember this each and every waking moment of your service to our country. Our future, our children's future, your children's future and our lives depend on it. And I would simply ask, and I'll request here right now, that there should be an immediate moratorium placed on all mountaintop removal operations until the Federal Government can take a look and see what is happening in southern West Virginia and eastern Kentucky with this type of mining. Thank you.

[The prepared statement of Mr. Webb follows:]

**Statement of Bo Webb, President, Coal River Mountain Watch**

The very title of this hearing indicates a bias against those of us who are living (and dying) in mountaintop removal mining communities. The title suggests that jobs are at risk if the SBZ rule is corrected. The SBZ rule must be corrected in order to protect The People's health. It's been broken and it needs fixed.

Let us not forget, President Ronald Reagan, your president, my president, in 1983 created the Stream Buffer Zone Rule because he realized the responsibility he had to protect America's water supply in the face of an industry that was moving more rapidly toward a method of mining that would turn entire mountains into ruin and destroy head water source streams that carry drinking water to millions of American citizens. This committee now shares that responsibility because President George W. Bush, with the stroke of a pen, trashed the Reagan SBZ rule just before leaving office as a present to a coal industry that wills itself to increase profit at all cost, even at the cost of human health.

I will first address the fallacy of job loss with factual data providing referenced resources. This committee would serve The People well if its actions are based upon fact and not coal industry deception and often outright deceit.

**Fallacy:** Stopping the destruction of Appalachian mountains and streams would cost jobs.

**Fact 1: Underground mines create over 50% more jobs than mountaintop removal mines.** Underground mines create 52% more jobs than mountaintop removal mines for every ton they produce—they employ nearly two thirds of the miners in Central Appalachia while producing just over half of the coal<sup>1</sup>.

**Fact 2: Unemployment in counties where a high proportion of coal is mined by mountaintop removal is higher than in counties where coal is mined mostly underground.** According to data from the Bureau of Labor Statistics from 2000 through 2010, the average annual unemployment rate was 8.6% in Central Appalachian counties where more than 75% of coal production was by mountaintop removal, compared to 6.7% in counties where mountaintop removal accounted for less than 25% of production<sup>2</sup>.

See: <http://www.flickr.com/photos/appvoices/5938215752/>

**Fact 3: Historically, the total number of mining jobs has fallen in places where the proportion of coal mined by mountaintop removal has increased.** According to the West Virginia Geologic and Economic Survey, the proportion of coal production in West Virginia that came from mountaintop removal mines increased from 19% to 42% of production between 1982 and 2006<sup>3</sup>. Even though overall production increased, the number of mining jobs was cut in half over the same period<sup>4</sup>.

See: <http://www.flickr.com/photos/appvoices/6167625000/>

**Fallacy:** More stringent enforcement of the Clean Water Act by the EPA and other federal agencies is creating an economic crisis in Central Appalachia.

**Fact: The number of mining jobs in Appalachia has increased since the start of the recession, since the EPA began enhanced review of mountaintop removal permits, and since the EPA released its interim guidance in April, 2010.** Since 2007, as production in Central Appalachia has shifted away from mountaintop removal in favor of underground mining techniques, the increase in employment at underground mines has more than offset declines at other types of mines. Employment is up 11.5% since the start of the recession (December, 2007), up 2.5% since Enhanced Coordination Procedures on mountaintop removal permitting were announced among three federal agencies (June, 2009), and up almost 6% since the EPA announced a new guidance on Appalachian mine permitting (April, 2010).

See: <http://www.flickr.com/photos/appvoices/6130794844/>

**Fallacy:** Ending mountaintop removal would put US energy supply at risk.

**Fact: U.S. coal production is limited by demand for coal, not by the ability of companies to obtain permits for mountaintop removal mines.** According to energy analysts<sup>8</sup> as well as executives from Arch Coal<sup>9</sup>, Peabody Energy<sup>10</sup> and Southern Company<sup>11</sup>, declining Central Appalachian coal production is the result of competition from lower cost natural gas. Mines across the country are producing at just 75% of their capacity<sup>12</sup>—down from 85% in 2008—and the Energy Information Administration projects that coal demand won't recover to 2008 levels for another 15 years<sup>13</sup>. Coal from mountaintop removal mines could easily be replaced if other US mines were operating at just 81% of their capacity.

See: <http://www.flickr.com/photos/appvoices/5937661551/>

**Fact: Coal from mountaintop removal mines accounts for less than 5% of US electricity generation.** While coal accounts for nearly 45% of US electricity generation<sup>14</sup>, only 15% of that is mined in Central Appalachia<sup>15</sup>. Coal from all of Appalachia accounts for less than 9% of US electricity generation, and coal from mountaintop removal less than 5%.

See: <http://www.flickr.com/photos/appvoices/5818441741/>

**Fallacy:** Prohibiting valley fills would prevent all forms of coal mining in Appalachia.

**Fact: The majority of recently approved permits for new mines in Central Appalachia do not use valley fills.** A survey of all applications for new mine permits in Central Appalachia that were approved by state agencies in 2009 revealed that just 44% used valley fills to dispose of mine waste<sup>16</sup>.

See: <http://www.flickr.com/photos/appvoices/5938219772/>

#### References and Notes

1. Calculated from MSHA Part 50 data files <<http://www.msha.gov/stats/part50/p50y2k/p50y2k.htm>>; Mountaintop removal production and employment calculated from "strip" mines, as defined by MSHA for mines in Central Appalachian counties.

2. Ibid; Unemployment data from the Bureau of Labor Statistics <<http://www.bls.gov/ces/>>
3. Hendryx, 2008. "Mortality Rates in Appalachian Coal Mining Counties: 24 Years Behind the Nation." *Environmental Justice*; Volume 1, Number 1
4. MSHA op. cit. 2000–2010
5. MSHA op. cit. 2007–2010; Bureau of Labor Statistics op. cit.
6. EIA/DOE "EIA-923" Database <[http://eia.doe.gov/cneaf/electricity/page/eia906\\_920.html](http://eia.doe.gov/cneaf/electricity/page/eia906_920.html)>
7. DOE/EIA Cost and Quality of Fuels for Electric Plants, Table 3.2 for 2007-2009; Adjusted to 2009 \$ based on Budget of the United States Government: Gross Domestic Product and Implicit Outlay Deflators;
8. Bernstein Commodities & Power Report, 2/18/2011: "No Light for Dark Spreads: How the Ruinous Economics of Coal-Fired Power Plants Affect the Markets for Coal and Gas"
9. Steve Leer, Chairman and CEO, Arch Coal, Inc. presentation to Barclays 2010 CEO Energy-Power Conference on 9/15/2010;
10. Rick Navarre, President and Chief Commercial Officer, Peabody Energy, "Expanding Markets and Peabody Growth Opportunities," a presentation to the 2010 Analyst and Investor Forum on 6/17/2010
11. Chad Hewitt, Southern Company, "Utility Perspective on the Future of Coal" presented at American Coal Council's Spring Forum on February 3, 2011;
12. DOE/EIA *Annual Coal Report* for 2009. Analysis by Appalachian Voices.
13. DOE/EIA *Annual Energy Outlook*, 2011 Early Release edition
14. EIA/DOE Electric Power Monthly with data for December 2010, Table 1.1: "Net Generation by Energy Source: Total (All Sectors) "; <[http://eia.doe.gov/cneaf/electricity/epm/table1\\_1.html](http://eia.doe.gov/cneaf/electricity/epm/table1_1.html)>
15. EIA/DOE "EIA-923" Database op. cit.
16. Applications for new mine permits approved in 2009 obtained from: Kentucky Department of Natural Resources; West Virginia Department of Environmental Protection; Virginia Department of Mines, Minerals and Energy; US Office of Surface Mining Reclamation and Enforcement, Knoxville Office

I doubt very much if the coal industry has provided any factual evidence whatsoever of jobs loss risk if the SBZ rule is fixed. If so, please provide that evidence to The People.

It would be shameful and woefully incompetent if a United States Congressional committee would take action based upon misleading and false coal industry information. A question of ethics and suspicion would be ever glaring with a hearing that in reality was nothing more than political grandstanding, organized as a "stacked deck" against those who are simply asking for our most basic human needs, clean water and a safe environment. This hearing should desire a just outcome for The People. The outcome of this hearing should not be one that supports those who are benefitting from an endeavor that is killing people in mountain communities. To do so will be a shameful affront to American Democracy. People, American citizens, are dying at the hands of an insatiable coal industry profit machine, and this committee has the nerve to label this hearing with a title that is clearly an attempt to mislead the American people.

#### **Mountaintop Removal and Human Health**

Now, I will address the issue that we should be here for, and that is the human health crisis we are facing in mountaintop removal communities.

To date there are 19 peer-reviewed science papers addressing human health in mountaintop removal communities. Just to name a few: *Environmental Research Journal* "The association between mountaintop mining and birth defects among live births in central Appalachia". *The Journal of Rural Health*, 2011 "Chronic Cardiovascular Disease Mortality in Mountaintop Mining Areas of Central Appalachian States". *Community Health* July 2011 "Self Reported Cancer Rates in Two Rural Areas of West Virginia with and without Mountaintop Coal Mining". And it goes on. To place the matter in a national perspective that members of Congress might appreciate, the three congressional districts with the most mountaintop removal consistently rank at or near the three with the worst well-being, according to the annual Gallup-Healthways survey. In 2009 and 2010, the states of West Virginia and Kentucky ranked as the states with the worst and next worst well-being in the country (<http://www.gallup.com/poll/125066/State-States.aspx?wbTabOnly=true>). In 2010, the 3rd Congressional District of West Virginia, where I live, ranked 435th for both physical and emotional health ([http://www.well-beingindex.com/files/2011WBIRankings/LowRes/WV\\_StateReport.pdf](http://www.well-beingindex.com/files/2011WBIRankings/LowRes/WV_StateReport.pdf)). The 5th Congressional District of Kentucky ranks 435th overall in well-being, ([http://www.well-beingindex.com/files/2011WBIRankings/LowRes/KY\\_State](http://www.well-beingindex.com/files/2011WBIRankings/LowRes/KY_State)

Report.pdf), and the 9th District of Virginia ranks 434th in both physical and emotional health ([http://www.well-beingindex.com/files/2011WBIRankings/LowRes/VA\\_StateReport.pdf](http://www.well-beingindex.com/files/2011WBIRankings/LowRes/VA_StateReport.pdf)). Clearly, the prevalence of mountaintop removal has not brought about the happy, healthy, prosperous communities that the coal industry has promised. This committee should be alarmed, yet remains silent. The silence has become deafening.

Science does not allow a choice or preference of what to believe and what not to believe. You either believe in science or choose to put your head in the sand and revert to the dark ages. With some of the rhetoric coming from the coal industry today, one must wonder about their acceptance of modern science and living in the 21st century. One of their more recent comments on the alarming birth defects research in mountaintop removal communities is that the research did not take into account that those of us living in mountaintop removal communities are a bunch of inbreds. And while the researchers consistently account for other factors that affect the health of an impoverished community, the coal industry and its political apologists consistently deny the conclusions without offering any credible science as refutation.

Mountaintop removal is an unprecedented form of coal extraction. Nearly a million acres of forested mountains have been obliterated. 2000 miles or more of headwater source streams have been buried or contaminated and countless water wells have been rendered unsafe for human consumption. Mountaintop removal has been in full stride now for only 15–20 years, and already we are witnessing the short term effects of human exposure to this mad method of mining. What are the long term effects? Statistical research on Appalachian birth defects found that a woman pregnant with child has a 42% greater chance of a baby born with birth defects than a pregnant woman living in a non-mountaintop removal community. Equate that to cigarette smoking: a baby born in a mountaintop removal community has a 181% greater chance of a circulatory or respiratory birth defect, while the risk related to mother's smoking was only 17% higher. That, committee members, is staggering. If that does not get your attention, then you simply don't care. Your pro-life claim is no longer credible; it's tossed out the window.

For those of us living beneath mountaintop removal sites, the cold statistics do not compare to the real flesh-and-blood loved ones, the friends and family, that we see perishing from cancer all around us. The industry claims that we cannot prove that they are responsible, yet our common sense tells us that the clouds of silica dust, ammonium nitrate, fuel oil, and blasting residue that smother our communities are a likely culprit. When we raise the issue with the state Department of Environmental Protection, they take no action, either refusing to investigate, showing up after the dust has cleared, or offering a lame excuse. At best, after citizens doggedly pursue follow-up to the complaints, the agency may issue a fine so low that it serves as no deterrent whatsoever to continued bad behavior. When a federal agency takes even the smallest of baby steps to reign in the worst offenders and protect the citizens, Congress responds by shackling that agency. Our own representatives not only ignore our pleas, but lead the charge to enable further poisoning of our communities. We are consistently told that we must accept what the industry calls "balance." What this really means is that we must sacrifice everything we have—our homes, our health, our lives, and the lives of our children—so that wealthy coal executives and their Wall Street funders can continue their unfettered extraction of wealth.

While I offer these documents and my statements in the spirit of truth and justice, I have no illusions that they will be seriously considered by this Committee. After all, I have made no campaign contribution. I do not operate a company or media outlet that can deliver votes through an endorsement. The citizens of communities most directly impacted by mountaintop removal lack access to the wealth and power that may sway congressional opinion. Instead, our lives and health suffer from the actions of the companies that do hold that wealth and power.

I ask each of you in the name of our great American democracy to protect our citizens and do not oppose any change to the Bush stream buffer zone rule that will help protect American lives. At the very least, support it being rolled back to the Reagan rule with real and total enforcement.

Let us be reminded that regulatory agencies are created to protect The People from industries that may cause harm to The People. When these agencies, or legislators for that matter, become captured by those they oversee, or their power to regulate is circumvented by acts such as the Bush trashing of the SBZ rule, The People are not well served; America is not well served. Please remember this each and every waking moment of your service to our country. Our future, our children's future, and our lives depend on it.

Bo Webb

Referenced peer reviewed science research publications associating mountain top removal with negative human health:

American Journal of Public Health Mar. 2011 "Health-Related Quality of Life Among Central Appalachian Residents in Mountaintop Mining Communities"

Journal of Health Disparities Research and Practice Volume 4, number 3, Spring 2011 pp. 44–53 "Poverty and Mortality Disparities in Central Appalachia: Mountaintop Mining and Environmental Justice"

Environmental Research Journal "The association between mountaintop mining and birth defects among live births in central Appalachia, 1996–2003"

Community Health July 2011 "Self Reported Cancer Rates in Two Rural Areas of West Virginia with and without Mountaintop Coal Mining"

The Journal of Rural Health, 2011 "Chronic Cardiovascular Disease Mortality in Mountaintop Mining Areas of Central Appalachian States"

Science Mag. Jan. 8 2010 volume 327 "Mountaintop Mining Consequences"

Eco Health April 02, 2010: *Ecological Integrity of Streams Related to Human Cancer Mortality Rates*

Geospatial Health 4 (2), 2010, pp 243–256 "A geographical information system-based analysis of cancer mortality and population exposure to coal mining activities in West Virginia, United States of America"

Matern Child Health Journal, Jan. 2010 "Residence in Coal-Mining Areas Low-Birth- Weight Outcomes"

Preventative Medicine 49 (2009) 355–359 "Higher coronary heart disease and heart attack morbidity in Appalachian coal mining regions"

Public Health Reports/July-August 2009 volume 124 "Mortality in Appalachian Coal Mining Regions: The value of statistical life lost" 24 years behind the nation."

American Journal of Public Health Vol 98 No 4 "Relations between health and residential proximity to coal mining in West Virginia"

Journal of Toxicology and Environmental Health Part A, 70: 2064–2070, 2007 "Hospitalization patterns associated with Appalachian coal mining"

Annals of the New York Academy of Sciences Issue: Ecological Economics Reviews "Full cost accounting for the life cycle of coal"

Public Health Reports/July-August 2010 volume 125 "A comparative analysis of health-related quality of life for residents of U.S. counties with and without coal mining"

Environmental Justice volume 3, number 2, 2010 "Learning outcomes among students relation to West Virginia coal mining: an environmental riskscape approach"

Mr. LAMBORN. OK. Ms. Gunnoe?

**STATEMENT OF MARIA GUNNOE, COMMUNITY ORGANIZER**

Ms. GUNNOE. Hello. My name is Maria Gunnoe. I'm a native West Virginian and I and my family before me have lived the history that this coal industry has left in its path. We settled this area before coal was discovered. I am a Daughter of the American Revolutionary War.

Throughout all the boom and bust, manmade catastrophes and massive death and sickness, some members of my family tell their generational part of coal's history in Southern Appalachia. All my life, every political move has always been directed at propping up the coal industry in West Virginia. This industry and our politicians have held jobs over our heads for 150 years. We know only too well what it's like to do without.

The fear that we as Appalachians have experienced throughout time of being without jobs is nothing compared to the fear of living without healthy, clean water in our streams and homes and fresh mountain air to breathe.

We, as a family, for many generations have survived some of the most historically horrible poverty in this country by sustaining our lives from these mountains and streams. Now rules changes such as the buffer zone rule threaten to permanently annihilate all that

supports the real mountaineer's culture. Jobs in surface mining are dependent on blowing up the next mountain and burying the next stream. When will we say enough is enough?

The buffer zone rule from the Reagan era was historically intended to be a good thing for the people who live in the valleys where these intermittent and perennial streams flow. Over the years, it's been crooked politics and coal money influence that has gutted the intent of this law. In my lifetime, I do not know of this law ever being fully enforced. The coal industry in West Virginia states politicians have manipulated and twisted this law in order to legally break this law. Surface mining has demolished our quality of life and life expectancy in our native homes. Our communities are now war zones with constant blasting, pollution and death. All area surface mining has stolen our ability to recreate our mountains and do what we culturally always have. We are being shut out of areas that we have always enjoyed. Even our historic cemeteries are left inaccessible to the public.

We, like the Obama Administration, know what it's like to go up against impossible odds created by the coal and energy industries that have a stranglehold on our Congressional Members. We suffer these very real consequences daily and we, too, have drawn a line and dug our heels in. We refuse to tolerate inhumane treatment of our people and their homes, communities and jobs. We, too, have taken a stand and it's been one without the basic of protections. We refuse to tolerate this industry in our schools, attempting to brainwash our kids into being the next generation of slaves by influencing the curriculum with their big money.

My children's history book says that surface mining, in some instances, leaves the land in better than before condition. This, alone, is outrageous. Our children are not subjects. Leave them alone in their schools. We will not tolerate violence because of our open opposition to our mountains blowing up over our homes and our streams, wells and air to be poisoned.

This industry is pitting their workers against the community members in violent attacks because we won't die quietly. We refuse to continue to tolerate the terror of the flooding from these stream fill experiments and sludge dams. We have, throughout the years of manipulations of this law governing surface mining, been traumatized by what has happened in our communities. Studies have shown 40 to 200 percent increase in peak flow caused by surface mining runoff during rainfall periods. FEMA and we, as individuals, pick up this cost. The coal industry continues mining our mountains, destroying our very existence for these jobs.

A majority of voters in West Virginia, Kentucky and Virginia and Tennessee reject mountaintop removal mining. The number of voters who oppose mountaintop removal dwarfs the number who supports it. Fifty-seven percent opposed mountaintop removal and with a noticeable intensity; 42 percent strongly opposed it, compared to 20 percent who support it. Voters who strongly support mountaintop removal in these states are a very small minority, only 10 percent.

"Jobs at Risk" is also insulting as anything I have ever read. We have worked consistently in Washington, D.C., and southern Appalachia to get our political leaders to enact a moratorium on any fur-

ther surface mining permits because studies have proved that this type of mining is killing the people who live in our communities. It's about our lives and our livelihoods. These jobs are for mostly outsiders from other states. Our people tend to not want to blow up their mountains and homes and communities.

In Twilight, West Virginia there's imported workers coming in by the busloads. The driver of this—of the busload convoy, a non-English speaking gentleman, asked me for directions to Progress Coal, which is the Twilight surface mine now owned by Alpha and Massey. There was an incident where a drunk imported worker from A Elk Run mines in Sylvester killed a child while racing on our roads as school was being dismissed. This is what kind of jobs we're talking about, and this is what they're doing to our communities. This shows that this hearing is about the company's bottom line and not about jobs for poor people or at least not poor people from this country.

The southern mountains people are fully expected to give up everything that sustains life, enforce the buffer zone rule and protect the water and very existence of the culture of people known as Appalachians. This history is unimaginable to most people in this country. Mountaineers will never be free until this madness ends.

Reinstate the stream buffer zone rule to at least the Reagan era and for the first time in history enforce it, to protect American lives from this criminal industry. We will continue to demand better for our children. We will continue to demand better for our children's future and in all that we do. The impacts of coal are not acceptable losses for our children's future. It would benefit all of our children if we take this very seriously and fix this problem right away. We can no longer excuse the fact that coal is a finite resource and we are running out. Not to mention the fact that we are poisoning our water and our air for electricity.

My seven year old nephew reminds me of what——

Mr. LAMBORN. Ms. Gunnoe, I'd ask that you——

Ms. GUNNOE. I'm wrapping up. I'm wrapping up. Thank you. My seven-year-old nephew reminds me of what surface mining looks like from a child's eyes. As we were driving through our community, he looks up and says, "Aunt Sissy, what's wrong with these people? Don't they know we're down here?" I had to honestly look at him and say, "Yes, they know, they just don't care."

[The prepared statement of Ms. Gunnoe follows:]

**Statement of Maria Gunnoe, Community Organizer, Van, West Virginia**

My name is Maria Gunnoe I am a native West Virginian. I and my family before me have lived the history that the coal industry has left in its path. We settled this area before coal was discovered. I am a Daughter of the American Revolution. Throughout all the "boom and bust", manmade catastrophes, and massive deaths and sicknesses some members of my family tell their generational part of coal's history in Southern Appalachia. This history is one of the many lessons of life we learned at a young age growing up in these communities. We learned from our hard schooled fathers and grandfathers that coal is mean and one thing you simply could not do was to trust this industry. No matter what the subject the conversation always come down to the coal company's bottom line. All my life every political move has always been directed at propping up the coal industry in WV. The fear that we as Appalachians have experienced throughout time of being without jobs is nothing compared to the fear of living without healthy, clean water in our streams and homes. We as families for many generations have survived some of the most historically horrible poverty in this country by sustaining our lives from these mountains

and streams. The biodiversity in S WV is what created the culture of the real mountaineers that we grew up being. Now rule changes such as Stream Buffer Zone threaten to permanently annihilate all that supports the real mountaineer's culture. The coal industry obviously wants to bury and pollute all of our water and all of who we are for temporary jobs. Jobs in surface mining are dependent on blowing up the next mountain and burying the next stream. When are we going to say enough is enough?

The Buffer Zone Rule from the Regan era was historically was intended as a good thing for people who lived in the valleys where these intermittent and perennial streams flow. Over the years it has been crooked politics and coal money influence that has gutted the intent of this law. In my lifetime I do not know of this law ever being fully enforced. The coal industry and the politicians have for most of my life manipulated and twisted the law in order to legally break this law by destroying our valuable headwater streams.. Surface mining has demolished our quality of life and life expectancy in our native homes. Our communities are now war zones with constant blasting, pollution and all area surface mining has stolen our ability to recreate in the mountains and do what we culturally always have. We are being shut out of areas that we have always enjoyed. Even our historic cemeteries are left in accessible to the public.



This photo shows Jarrell Cemetery and the town of Lindytown in Boone County WV. This is one of my many family mountain cemeteries. We as family members must go through training and guards to visit our loved ones in these now active destruction sites.

The town in this photo is nearly gone. One family is all that remains in this town. The homes that you see are now gone now. The people that were bought out signed contracts that clearly violated their rights to contact state or federal regulatory agencies to complain about blasting dust, water pollution, or health and safety concerns.

Here is a link to those contracts.

Our regulatory agencies are allowing this to happen. I have been told that the WV state DEP is a PERMITTING AGENCY by one of their agents. The DEP is allowing these companies to destroy our mountains and our waters and in turn this destroys our towns and runs away all the people. The WVDEP treats us less than human. The WV DEP is permitting the destruction of our homes and we are not even supposed to get upset. See this and this.

Below is a text copy of the NY Times article that Dan Barry wrote about Lindytown. In reading this article please recognize that Lindytown is only one of the recent towns that this has disappeared. There are many of our rural communities depopulated to expand surface mining and stream fills. How could anyone say that these temporary jobs is worth the permanent displacement of our people and the destruction of their waters, mountains and culture.

*The New York Times*

April 12, 2011

**As the Mountaintops Fall, a Coal Town Vanishes**

[http://www.nytimes.com/2011/04/13/us/13lindytown.html?\\_r=2](http://www.nytimes.com/2011/04/13/us/13lindytown.html?_r=2)

By DAN BARRY

LINDYTOWN, W.Va.

To reach a lost American place, here just a moment ago, follow a thin country road as it unspools across an Appalachian valley's grimy floor, past a coal operation or two, a church or two, a village called Twilight. Beware of the truck traffic. Watch out for that car-chasing dog.

After passing an abandoned union hall with its front door agape, look to the right for a solitary house, tidy, yellow and tucked into the stillness. This is nearly all that remains of a West Virginia community called Lindytown.

In the small living room, five generations of family portraits gaze upon Quinnie Richmond, 85, who has trouble summoning the memories, and her son, Roger, 62, who cannot forget them: the many children all about, enough to fill Mr. Cook's school bus every morning; the Sunday services at the simple church; the white laundry strung on clotheslines; the echoing clatter of evening horseshoes; the sense of home.

But the coal that helped to create Lindytown also destroyed it. Here was the church; here was its steeple; now it's all gone, along with its people. Gone, too, are the surrounding mountaintops. To mine the soft rock that we burn to help power our light bulbs, our laptops, our way of life, heavy equipment has stripped away the trees, the soil, the rock—what coal companies call the “overburden.”

Now, the faint, mechanical beeps and grinds from above are all that disturb the Lindytown quiet, save for the occasional, seam-splintering blast.

A couple of years ago, a subsidiary of Massey Energy, which owns a sprawling mine operation behind and above the Richmond home, bought up Lindytown. Many of its residents signed Massey-proffered documents in which they also agreed not to sue, testify against, seek inspection of or “make adverse comment” about coal-mining operations in the vicinity.

You might say that both parties were motivated. Massey preferred not to have people living so close to its mountaintop mining operations. And the residents, some with area roots deep into the 19th century, preferred not to live amid a dusty industrial operation that was altering the natural world about them. So the Greens sold, as did the Cooks, and the Workmans, and the Webbs ...

But Quinnie Richmond's husband, Lawrence—who died a few months ago, at 85—feared that leaving the home they built in 1947 might upset his wife, who has Alzheimer's. He and his son Roger, a retired coal miner who lives next door, chose instead to sign easements granting the coal company certain rights over their properties. In exchange for also agreeing not to make adverse comment, the two Richmond households received \$25,000 each, Roger Richmond recalls.

“Hush money,” he says, half-smiling.

As Mr. Richmond speaks, the mining on the mountain behind him continues to transform, if not erase, the woodsy stretches he explored in boyhood. It has also exposed a massive rock that almost seems to be teetering above the Richmond home. Some days, an anxious Mrs. Richmond will check on the rock from her small kitchen window, step away, then come back to check again.

And again.

**A Dictator of Destiny**

Here in Boone County, coal rules. The rich seams of bituminous black have dictated the region's destiny for many generations: through the advent of railroads; the company-controlled coal camps; the bloody mine wars; the increased use of mechanization and surface mining, including mountaintop removal; the related decrease in jobs.

The county has the largest surface-mining project (the Massey operation) in the state and the largest number of coal-company employees (more than 3,600). Every year it receives several million dollars in tax severance payments from the coal industry, and every June it plays host to the West Virginia Coal Festival, with fireworks, a beauty pageant, a memorial service for dead miners, and displays of the latest mining equipment. Without coal, says Larry V. Lodato, the director of the county's Community and Economic Development Corporation, “You might as well turn out the lights and leave.”

In recent years, surface mining has eclipsed underground mining as the county's most productive method. This includes mountaintop removal—or, as the industry

prefers to call it, mountaintop mining—a now-commonplace technique that remains startling in its capacity to change things.

Various government regulations require that coal companies return the stripped area to its “approximate original contour,” or “reclaim” the land for development in a state whose undulating topography can thwart plans for even a simple parking lot. As a result, the companies often dump the removed earth into a nearby valley to create a plateau, and then spray this topsy-turvy land with seed, fertilizer and mulch.

The coal industry maintains that by removing some mountaintops from the “Mountain State,” it is creating developable land that makes the state more economically viable. State and coal officials point to successful developments on land reclaimed by surface mining, developments that they say have led to the creation of some 13,000 jobs.

But Ken Ward Jr., a reporter for *The Charleston Gazette*, has pointed out that two-fifths of these jobs are seasonal or temporary; a third of the full-time jobs are at one project, in the northern part of the state; and the majority of the jobs are far from southern West Virginia, where most of the mountaintop removal is occurring, and where unemployment is most dire. In Boone County, development on reclaimed land has basically meant the building of the regional headquarters for the county’s dominant employer—Massey Energy.

And with reclamation, there is also loss.

“I’m not familiar at all with Lindytown,” says Mr. Lodato, the county’s economic development director. “I know it used to be a community, and it’s close to Twilight.”

#### **A Fighter**

About 10 miles from Lindytown, outside a drab convenience store in the unincorporated town of Van, a rake-thin woman named Maria Gunnoe climbs into a maroon Ford pickup that is adorned with a bumper sticker reading: “Mountains Matter—Organize.” The daughter, granddaughter and sister of union coal miners, Ms. Gunnoe is 42, with sorrowful dark eyes, long black hair and a desire to be on the road only between shift changes at the local mining operations—and only with her German shepherd and her gun.

Less than a decade ago, Ms. Gunnoe was working as a waitress, just trying to get along, when a mountaintop removal operation in the small map dot of Bob White disrupted her “home place.” It filled the valley behind her house, flooded her property, contaminated her well and transformed her into a fierce opponent of mountaintop removal. Through her work with the Ohio Valley Environmental Coalition, she has become such an effective environmental advocate that in 2009 she received the prestigious Goldman Environmental Prize. But no one threw a parade for her in Boone County, where some deride her as anti-coal; that is, anti-job.

Ms. Gunnoe turns onto the two-lane road, Route 26, and heads toward the remains of Lindytown. On her right stands Van High School, her alma mater, where D. Ray White, the gifted and doomed Appalachian dancer, used to kick up his heels at homecomings. On her left, the community center where dozens of coal-company workers disrupted a meeting of environmentalists back in 2007.

“There was a gentleman who pushed me backward, over my daughter, who was about 12 or 13, and crying,” Ms. Gunnoe later recalls. “I pushed him back, and he filed charges against me for battery. He was 250 pounds, and I had a broken arm.”

A jury acquitted her within minutes.

Ms. Gunnoe drives on. Past the long-closed Grill bar, its facade marred by graffiti. Past an out-of-context clot of land that rises hundreds of feet in the air—“a valley fill,” she says, that has been “hydroseeded” with fast-growing, non-native plants to replace the area’s lost natural growth: its ginseng root, its goldenseal, its hickory and oak, maple and poplar, black cherry and sassafras.

“And it will never be back,” she says.

Ms. Gunnoe has a point. James Burger, a professor emeritus of forestry and soil science at Virginia Tech University, said the valley fill process often sends the original topsoil to the bottom and crushed rock from deeper in the ground to the top. With the topography and soil properties altered, Dr. Burger says, native plants and trees do not grow as well.

“You have hundreds of species of flora and fauna that have acclimated to the native, undisturbed conditions over the millennia,” he says. “And now you’re inverting the geologic profile.”

Dr. Burger says that he and other scientists have developed a reclamation approach that uses native seeds, trees, topsoil and selected rock material to help restore an area’s natural diversity, at no additional expense. Unfortunately, he says, these methods have not been adopted in most Appalachian states, including West Virginia.

Past a coal operation called a loadout, an oversized Tinker Toy structure where coal is crushed and loaded on trucks and rail cars. Past the house cluster called Bandytown, home of Leo Cook, 75, the former school bus driver who once collected Roger Richmond and the other kids from Lindytown, where he often spent evenings at a horseshoe pit, now overgrown.

"We got to have coal," says Mr. Cook, a retired miner. "What's going to keep the power on? But I believe with all my heart that there's a better way to get that coal."

Ms. Gunnoe continues deeper into the mud-brown landscape, where the fleeting appearance of trucks animates the flattened mountaintops. On her right, a dark, winding stream damaged by mining; on her left, several sediment-control ponds that filter out pollutants from the runoff of mining operations. Past the place called Twilight, a jumble of homes and trailers, where the faded sign of the old Twilight Super Market still promises Royal Crown Cola for sale.

Soon she passes the abandoned hall for Local 8377 of the United Mine Workers of America, empty since some underground mining operations shut down a couple of decades ago. Its open door beckons you to examine the papers piled on the floor: a Wages, Lost Time, and Expense Voucher booklet from 1987; the burial fund's by-laws; canceled checks bearing familiar surnames.

On, finally, to Lindytown.

### **The Company Line**

According to a statement from Shane Harvey, the general counsel for Massey, this is what happened: Many of Lindytown's residents were either retired miners or their widows and descendants who welcomed the opportunity to move to places more metropolitan or with easier access to medical facilities. Interested in selling their properties, they contacted Massey, which began making offers in December 2008—offers that for the most part were accepted.

"It is important to note that none of these properties had to be bought," Mr. Harvey said. "The entire mine plan could have been legally mined without the purchase of these homes. We agreed to purchase the properties as an additional precaution."

When asked to elaborate, Mr. Harvey responded, in writing, that Massey voluntarily bought the properties "as an additional backup to the state and federal regulations" that protect people who live near mining operations.

James Smith, 68, a retired coal miner from Lindytown, says the company's statement is true, as far as it goes. Yes, Lindytown had become home mostly to retired union miners and their families; when the Robin Hood No. 8 mine shut down, for example, his three sons had to leave the state to work. And yes, some people approached Massey about selling their homes.

But, Mr. Smith says, many residents wanted to leave Lindytown only because the mountaintop operations above had ruined the quality of life below.

His family went back generations here. He married a local woman, raised kids, became widowed and married again. A brother lived in one house, a sister lived in another, and nieces, nephews and cousins were all around. And there was this God-given setting, where he could wander for days, hunting raccoon or searching for ginseng.

But when the explosions began, dust filled the air. "You could wash your car today, and tomorrow you could write your name on it in the dust," he says. "It was just unpleasant to live in that town. Period."

Massey was a motivated buyer, he argues, given that it was probably cheaper to buy out a small community than to deal with all the complaint-generated inspections, or the possible lawsuits over silica dust and "fly rock."

"Hell, what they paid for that wasn't a drop in the bucket," he says.

Massey did not elaborate on why it bought out Lindytown, though general concerns about public health have been mounting. In blocking another West Virginia mountaintop-removal project earlier this year, the Environmental Protection Agency cited research suggesting that health disparities in the Appalachian region are "concentrated where surface coal mining activity takes place."

In the end, Mr. Smith says, he would not be living 150 miles away, far from relations and old neighbors, if mountaintop removal hadn't ruined Lindytown. "You might as well take the money and get rid of your torment," he says, adding that he received more than \$300,000 for his property. "After they destroyed our place, they done us a favor and bought it."

### **Memories, What's Left**

Ms. Gunnoe pulls up to one of the last houses in Lindytown, the tidy yellow one, and visits with Quinnie and Roger Richmond. He uses his words to re-animate the community he knew.

For many years, his grandfather was the preacher at the small church down the road, where the ringing of a bell gave fair warning that Sunday service was about to begin. And his grandmother lived in the house still standing next door; she toiled in her garden well past 100, growing the kale, spinach and mustard greens that she loved so much.

His father, Lawrence, joined the military in World War II after his older brother, Carson, was killed in Sicily. He returned, married Quinnie, and built this house. Before long, he became a section foreman in the mines, beloved by his men in part because of Quinnie's fried-apple pies.

After graduating from Van High School—that's his senior photograph, there on the wall—Roger Richmond followed his father into the mines. He married, had children, divorced, made do when the local mine shut down, eventually retired and, in 2001, set up his mobile home beside his parents' house.

By now, things had changed. With the local underground mine shut down, there were nowhere near as many jobs, or kids. And this powder from the mountaintops was settling on everything, turning to brown paste in the rain. People no long hung their whites on the clotheslines.

Soon, rumors of buyouts from Massey became fact, as neighbors began selling and moving away. "Some of them were tired of fighting it," Mr. Richmond says. "Of having to put up with all the dust. Plus, you couldn't get out into the hills the way you used to."

One example. Mr. Richmond's Uncle Carson, killed in World War II, is buried in one of the small cemeteries scattered about the mountains. If he wanted to pay his respects, in accordance with government regulations for active surface-mining areas, he would have to make an appointment with a coal company, be certified in work site safety, don a construction helmet and be escorted by a coal-company representative.

In the end, the Richmonds decided to sell various land rights to Massey, but remain in Lindytown, as the homes of longtime neighbors were boarded up and knocked down late last year, and as looters arrived at all hours of the day to steal the windows, the wiring, the pillars from Elmer Smith's front porch—even the peaches, every one of them, growing from trees on the Richmond property.

"They was good peaches, too," says Mr. Richmond.

"I like peaches," says his mother.

Would Lindytown have died anyway? Would it have died even without the removal of its surrounding mountaintops? These are the questions that Bill Raney, the president of the West Virginia Coal Association, raises. Sometimes, he says, depopulation is part of the natural order of things. People move to be closer to hospitals, or restaurants, or the Wal-Mart. There is also that West Virginia truism, he adds:

"When the coal's gone, you go to where the next coal seam is."

Of course, in the case of Lindytown, the coal is still here; it's the people who are mostly gone. Now, when darkness comes to this particular hollow, you can see a small light shining from the kitchen window of a solitary, yellow house—and, sometimes, a face, peering out.

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We as community members have been forced to reach out to the state and national environmental and social justice organization and foundations across the country to help us end the Appalachian Apocalypse that this committee dismisses as being benign simply by changing words of laws and buying time before they are reviewed again. The people who have lived and died with these impacts are the people who have helped to form a national movement to end all surface mining in Appalachia. <http://appalachiarising.org/>We have had no choice but to take these measures to protect our own lives and the future existence of who we are from this out of control industry and their big money backing in DC. We like the Obama Administration know what it is like to go up against impossible odds created by the coal and energy industries that have control of our Congress.

We suffer these very real consequences daily and we to have drawn a line and dug in our heels. We refuse to tolerate inhumane treatment of our people in their homes, communities and jobs. We too have taken a stand and it has been a tough one with basically no protection and still we refuse to back down.

*The New York Times*

July 14, 2010

<http://www.nytimes.com/2010/07/15/us/15mining.html?scp=1&sq=Jimmy+Weekley&st=nyt>

### **Project's Fate May Predict the Future of Mining**

By ERIK ECKHOLM

BLAIR, W.Va.—Federal officials are considering whether to veto mountaintop mining above a little Appalachian valley called Pigeonroost Hollow, a step that could be a turning point for one of the country's most contentious environmental disputes.

The Army Corps of Engineers approved a permit in 2007 to blast 400 feet off the hilltops here to expose the rich coal seams, disposing of the debris in the upper reaches of six valleys, including Pigeonroost Hollow.

But the Environmental Protection Agency under the Obama administration, in a break with President George W. Bush's more coal-friendly approach, has threatened to halt or sharply scale back the project known as Spruce 1. The agency asserts that the project would irrevocably damage streams and wildlife and violate the Clean Water Act.

Because it is one of the largest mountaintop mining projects ever and because it has been hotly disputed for a dozen years, Spruce 1 is seen as a bellwether by conservation groups and the coal industry.

The fate of the project could also have national reverberations, affecting Democratic Party prospects in coal states. While extensive research and public hearings on the plan have been completed, federal officials said that their final decision would not be announced until late this year—perhaps, conveniently, after the mid-term elections.

Environmental groups say that approval of the project in anything like its current form would be a betrayal.

"Spruce 1 is a test of whether the E.P.A. is going to follow through with its promises," said Bill Price, director of environmental justice with the Sierra Club in West Virginia.

"If the administration sticks to its guns," Mr. Price predicted, "mountaintop removal is going to be severely curtailed."

Coal companies say politics, not science, is threatening a practice vital to local economies and energy independence. "After years of study, with the company doing everything any agency asked, and three years after a permit was issued, the E.P.A. now wants to stop Spruce 1," said Bill Raney, president of the West Virginia Coal Association. "It's political; the only thing that has changed is the administration."

While the government does not collect statistics on mountaintop mining, data suggest that it may account for about 10 percent of American coal output, yielding 5 percent of the nation's electricity. The method plays a bigger economic role in the two states where it is concentrated, Kentucky and West Virginia.

The proposal to strip a large area above the home of 70-year-old Jimmy Weekley, Pigeonroost Hollow's last remaining inhabitant, was first made in 1997 by Arch Coal, Inc., of St. Louis. The legal ups and downs of Spruce 1 have come to symbolize the broader battle over a method that produces inexpensive coal while drastically altering the landscape.

Spruce 1 started as the largest single proposal ever for hilltop mining, in which mountains are carved off to expose coal seams and much of the debris, often leaking toxic substances, is placed in adjacent valleys.

After years of negotiations and a scaling back of the mining area to 2,278 acres, from its original 3,113 acres, the Spruce 1 permit was approved by the Army Corps of Engineers in 2007 and limited construction began. But this spring, the E.P.A. proposed halting the project.

The announcement caused an uproar in West Virginia. The E.P.A. held an emotional public hearing in May and stopped accepting written comments in June. Arch Coal has objected publicly, but did not respond to requests to comment for this article.

The Obama administration's E.P.A. has already riled the coal companies by tightening procedures for issuing new mining permits and imposing stronger stream protections. But environmental groups were worried in June, when the agency approved a curtailed mountaintop plan in another site in Logan County, W.Va. Now, as negotiations between the E.P.A. and Arch Coal continue, the Spruce 1 battle is being closely watched as a sign of mountaintop mining's future.

Feelings run high in the counties right around the project area.

"Spruce 1 is extremely important to all of southern West Virginia because if this permit is pulled back, every mine site is going to be vulnerable to having its permits pulled," said James Milan, manager of Walker Machinery in Logan, which sells gargantuan Caterpillar equipment.

The loss of jobs, Mr. Milan said, would have devastating effects on struggling communities.

Maria Gunnoe, an organizer for the Ohio Valley Environmental Coalition and a director of SouthWings, which organizes flights to document environmental damages, said that if Spruce 1 went forward, “it’s going to mean the permanent erasure of part of our land and our legacy.”

“We can’t keep blowing up mountains to keep the lights on,” said Ms. Gunnoe, a resident of nearby Boone County who has received death threats and travels with a 9 millimeter pistol.

Mr. Weekley, whose house is in sight of the project boundary, remembers the day in 1997 when he decided to fight it. Nearby mining under previous permits had filled his wooded valley with dust and noise.

“You couldn’t see out of this hollow,” he recalled. “I said, Something’s got to be done or we’re not going to have a community left.”

He and his late wife became plaintiffs in a 1998 suit claiming that the project violated environmental laws. A ruling in their favor was overturned, setting off litigation that continues.

Mr. Weekley said that he had rejected offers of close to \$2 million for his eight acres and that he had seen the population of the nearby town of Blair dwindle to 60 from 600, with most residents bought out by Arch Coal.

A rail-thin man who enjoys sitting on his porch with a dog on his lap, Mr. Weekley uttered an expletive when told that coal industry representatives, including Mr. Raney in an interview, referred to the upper tributaries filled in by mining as “ditches” that can be rebuilt. In fact, some of the streams to be filled by Spruce 1 are intermittent, while others, including Pigeonroost Creek, flow year-round.

“I caught fish in that stream as a child, using a safety pin for a hook,” Mr. Weekley said. “If they get that permit, there won’t be a stream here.”

In documents issued in March, the E.P.A. said the project as approved would still smother seven miles of streambed.

Filling in headwaters damages the web of life downstream, from aquatic insects to salamanders to fish, and temporary channels and rebuilt streams are no substitute, the agency said. The pulverized rock can release toxic levels of selenium and other pollutants, it noted.

The effects of Spruce 1 would be added to those of 34 other past and present projects that together account for more than one-third of the area of the Spruce Fork watershed, the agency said.

The debate over Spruce 1 and other mountaintop mine permits has been a source of division and anguish among local residents.

Michael Fox, 39, of Gilbert, is a mine worker who like many other miners here thinks the objections are overblown. “I have three kids I want to send to college,” Mr. Fox said.

One former mountaintop miner who says he now regrets his involvement is Charles Bella, 60. He is one of the remaining residents on Blair’s main street, along the Spruce Fork, which is fed in turn by Pigeonroost Creek.

“I know it put bread on my table, but I hate destroying the mountains like that,” Mr. Bella said.

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We refuse to tolerate this industry in our schools attempting to brain wash our kids into being their next generation of slaves by influencing the curriculum with big money. Below is a scanned copy of my children’s history book. Notice it says that “surface mining in some instances leaves the land in better than before condition”. In reality no one is stupid enough to believe this, not even impressionable kids. We all know that no one can improve on God’s work. This alone is outrageous behavior.

More links to what is going on in schools. “It’s predatory marketing. By selling its privileged access to children to the coal industry, Scholastic is commercializing classrooms and undermining education.”

<http://www.cedarinc.org/>

[http://www.nytimes.com/2011/05/12/education/12coal.html?\\_r=1](http://www.nytimes.com/2011/05/12/education/12coal.html?_r=1)

*The New York Times*

May 11, 2011

### **Coal Curriculum Called Unfit for 4th Graders**

By TAMAR LEWIN

Three advocacy groups have started a letter-writing campaign asking Scholastic Inc. to stop distributing the fourth-grade curriculum materials that the American Coal Foundation paid the company to develop.

The three groups—Rethinking Schools, the Campaign for a Commercial-Free Childhood and Friends of the Earth—say that Scholastic’s “United States of Energy”

package gives children a one-sided view of coal, failing to mention its negative effects on the environment and human health.

Kyle Good, Scholastic's vice president for corporate communications, was traveling for much of Wednesday and said she could not comment until she had all the "United States of Energy" materials in hand.

Others at the company said Ms. Good was the only one who could discuss the matter. The company would not comment on how much it was paid for its partnership with the coal foundation.

Scholastic's InSchool Marketing division, which produced the coal curriculum in partnership with the coal foundation, often works with groups like the American Society of Hematology, the Federal Trade Commission and the Census Bureau to create curriculum materials.

The division's programs are "designed to promote client objectives and meet the needs of target teachers, students, and parents" and "make a difference by influencing attitudes and behaviors," according to the company Web site.

"Promoting 'client objectives' to a captive student audience isn't education," Susan Linn, director of the Campaign for a Commercial-Free Childhood, said in a statement. "It's predatory marketing. By selling its privileged access to children to the coal industry, Scholastic is commercializing classrooms and undermining education."

The Campaign for Commercial-Free Childhood, a tiny group in Boston, has often been at odds with Scholastic, a \$2 billion company whose books and other educational materials are in 9 of 10 American classrooms. Last year, the group criticized the company for its "SunnyD Book Spree," featured in Scholastic's Parent and Child magazine, in which teachers were encouraged to have classroom parties with, and collect labels from, Sunny Delight, a sugary juice beverage, to win free books. The campaign has also objected to Scholastic's promotion of Children's Claritin in materials it distributed on spring allergies.

And in 2005, the campaign tangled with the company over its "Tickle U" curriculum for the Cartoon Network, in which posters of cartoon characters were sent to preschools and promoted as helping young children develop a sense of humor.

None of the previous episodes led to any specific action.

The coal controversy seems to be the first time the campaign and its allies have challenged Scholastic lesson plans.

"The United States of Energy" is designed to paste a smiley face on the dirtiest form of energy in the world," said Bill Bigelow, an editor of Rethinking Schools magazine. "These materials teach children only the story the coal industry has paid Scholastic to tell."

The Scholastic materials say that coal is produced in half of the 50 states, that America has 27 percent of the world's coal resources, and that it is the source of half the electricity produced in the nation, with about 600 coal-powered plants operating around the clock to provide electricity.

What they do not mention are the negative effects of mining and burning coal: the removal of Appalachian mountaintops; the release of sulfur dioxide, mercury and arsenic; the toxic wastes; the mining accidents; the lung disease.

"The curriculum pretends that it's going to talk about the advantages and disadvantages of different energy choices, to align with national learning standards, but it doesn't," Mr. Bigelow said.

"The fact that coal is the major source of greenhouse gases in the United States is entirely left out," he said. "There's no hint that coal has any disadvantages."

In a statement, Ben Schreiber, a climate and energy tax analyst at Friends of the Earth, called the curriculum "the worst kind of corporate brainwashing."

According to an article by Alma Hale Paty, the executive director of the American Coal Foundation, and posted on Coalblog, "The United States of Energy" went to 66,000 fourth-grade teachers in 2009.

There was no answer at the foundation Wednesday, and Ms. Paty did not return calls.

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We refuse to tolerate violent attacks on ourselves and our family members because of our open opposition to our mountains blowing up over our homes and our streams, wells, and air being poisoned.

This link is where we were attacked by men on Larry Gibson's property on Kayford Mountain. These men were out to defend their jobs at all cost. One went as far as to threaten to cut a child's throat. This is what is happening to us as our politicians turn a blind eye and pretends as if it didn't happen. There is no "balance" when people are dying. This industry is pitting their workers against the community members in violent attacks.

[http://www.youtube.com/watch?v=Gjc7Jg\\_gMy0&feature=related](http://www.youtube.com/watch?v=Gjc7Jg_gMy0&feature=related)

<http://www.youtube.com/watch?v=7XSTrXX7hbo>

Judy Bonds being smacked at a peaceful protest.

<http://www.youtube.com/watch?v=8dP27PKnCG0&feature=related>

We have even been brutalized by our local law enforcement while attempting to protect a school full of children from a leaking sludge dam and coal load out facility. The officers actually carried one protestor out by the cuffs. <http://www.youtube.com/watch?v=3jqENyow0cQ>

Even our elders have been attacked at federal hearing while the officials pretended as if they had no control. <http://www.youtube.com/watch?v=EtwceseZz4w>

I too have been personally attacked while attempting to speak at a permit hearing in Charleston WV. I was nearly assaulted as I left this federal hearing. The officers told us that “we got what we deserved”. No one should have to be subjected to this treatment to defend their home. <http://www.youtube.com/watch?v=5WeJgX7vmgE>  
Because of my out spoken opposition I currently live on high alert 24/7.

In 2007 there was an occasion where myself and other participants was attacked during a media training at the local community building by 60 men that were told that we were going to shut down their operation. When in reality we were organizing to stop an ILLEGAL permit.

<http://noacentral.org/page.php?id=191>

I was charged with battery because I defended myself from a 250 pound man who was pushing me over my daughter to defend his job. This individual filed battery charges against me. ME an individual that had already been put through everything imaginable by this coal company was being arrested for battery. I was found not guilty of these charges. After nearly 2 years of litigation the jury vote was unanimously not guilty.

Our industry controlled Government continued their violent rhetoric even today as they up hold the practice of blowing up mountain over our homes and filling our streams for jobs. After meetings with Joe Manchin and all our state leaders we still face these attacks in our communities and homes. Only because we don't agree that blowing up our mountains and putting them into our valleys and calling it jobs is a good thing. Here is one article about this meeting. After all the discussion about death and sickness caused by surface mining and water pollution Then Governor now Senator Manchin words were “every job in the state of WV is a precious one”. Shame on all of our state and federal politicians! Not one will stand up to the industry that is responsible for demise of southern Appalachia. They are all responsible putting temporary jobs above the importance of human health, lives, communities and long term livelihoods.

Here a good insight. . . <http://www.youtube.com/watch?v=g24tpXtJ540> They try to make us look like extremist by saying we only care about mayflies..

#### **Manchin calls for calm in the coalfields**

<http://blogs.wvgazette.com/coaltattoo/2010/01/25/manchin-calls-for-calm-in-the-coalfields/>

Ken Ward, January 25, 2010

Well, here's the answer to the question posed on my previous post, “What's Gov. Manchin going to say?” For starters, Manchin emerged from a long meeting with coalfield citizens and issued a call for an end to threats and intimidation against West Virginians who are fighting to stop mountaintop removal:

We will not in any way, shape or form in this state of West Virginia tolerate any violence against anyone on any side. If you're going to have the dialogue, have respect for each other.

Manchin also promised he would look into citizen complaints about lax enforcement of strip-mining rules by the West Virginia Department of Environmental Protection, but he certainly wasn't persuaded to drop his strong support for mountaintop removal. He said he told the citizens they would have to agree to disagree about that one.

*Singer and West Virginia native Kathy Mattea was among those who met with Gov. Manchin.*

This meeting was slightly different in format than the one Manchin held back in early November with coal executives. For one thing, the citizen groups offered to have a couple of coal industry lobbyists sit in, and they did. Reps. Rahall and Capito of West Virginia both attended, but Sen. Jay Rockefeller (who did have time to meet with the industry executives) didn't show up. Rockefeller sent a staffer. (Senate records indicate there was just one floor vote yesterday in Washington, D.C.)

And more importantly, the citizen groups brought some experts with them—including WVU's Michael Hendryx, who told me he tried to explain to the governor his research about coal's harsh impacts on public health and a study that showed

the industry costs the Appalachian region more than it provides in economic benefits.

I'm not sure Manchin heard that, given his comment about how "every job in West Virginia is a precious job." I got the idea that Manchin is still focused on just trying to preserve existing jobs, not finding ways to "embrace the future," as the Central Appalachian coal industry continues its inevitable decline.

Bo Webb, the Raleigh County resident and activist who asked Manchin for the meeting, seemed pretty pleased, but he also emphasized "there is an urgency to address some serious issues, and hopefully some of those concerns will begin to be addressed very soon."

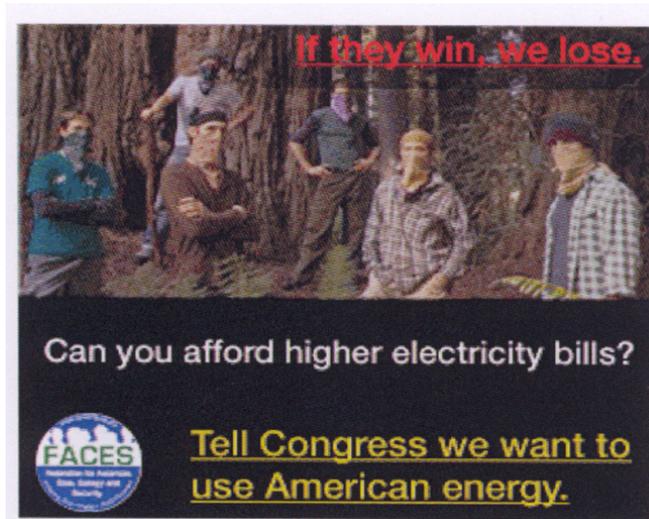
And while Rep. Shelley Moore Capito, R-W.Va., was busy filing for re-election and also forming a "coal caucus" in Washington, D.C., even she was talking about trying to find ways to "bridge that gap" between the coal industry and folks who want to stop mountaintop removal.

Activist Maria Gunnoe—not really one to settle for just talk when it comes to mountaintop removal—assessed the meeting by saying it needs to be just the start of such talks:

It's very important that this not be a one-time thing. We live in these communities, and we're not going anywhere. This can't be where it ends. This is the beginning of a long process

It is important to know that this was the end of these discussions about the violent attacks and violent rhetoric that we refuse to tolerate.

If you will notice that there are members of the group that formed in support of surface mining our homes present at this hearing today. They call themselves FACES of coal. <http://www.facesofcoal.org/> Here is a photo of a screen shot that I saved from their website. This is only one example of "what we get" for opposing them blowing up the mountains over our homes and dumping them into the valleys where we live polluting our headwater streams and destroying everything that support our lives.



I believe the "They" above would be people that live here and oppose what is happening to them.

We refuse to continue to tolerate the terror of the flooding from these stream fill experiments and sludge dams. Throughout the years of the manipulations of the laws governing the impacts on our streams we have always been the ones at risk. We live daily hoping that they don't fail yet knowing that someday they will. As a child I experience the loss of family members in the Buffalo creek flood that brought about the Surface Mining and Reclamation Act Laws. Then in 2001 our neighbors in KY suffered the Martin County Coal Spill. These laws didn't help us sleep at night knowing that these very operations were being permitted all over southern Appalachia. To us this was no more than words on paper. Living here you know that these laws were not being enforced then and they are not being enforced now. The present day generations of children and their families live terrified of the

rains. It nearly always brings flooding when you have surface mining and plugged valleys nearby. Studies have shown 40% to 200% increase in peak flows caused by surface mining runoff during rainfall periods. FEMA and we as individuals pick up this cost while companies go on with business as usual keeping their men working destroying our very existence. At what cost do we excuse these illegal jobs?

Surveys show that most voters in 4 regional states dislike mountaintop removal. <http://earthjustice.org/features/campaigns/poll-strong-opposition-to-mtr> A majority of voters in WV, KY, VA, and TN reject mountaintop removal mining: The number of voters who oppose mountaintop removal dwarfs the number who support it: 57% oppose mountaintop removal, and with noticeable intensity (42% strongly oppose), compared to just 20% who support it. Voters who strongly support mountaintop removal mining in these states are a very small minority (at 10%).

“Jobs at risk” is as insulting as anything I have ever read. We have worked consistently in DC and in Southern Appalachia to get our political leaders to enact a moratorium on any further surface mining permits because studies prove that this type of mining is killing the people who live in our communities. All of our politicians continue to ignore our plea for help. This blatantly says that none of you care about the Appalachians who are paying the real cost of this so called “cheap energy” with their very existence. **IT IS LIVES AND LIVLIHOODS AT RISK.** This industry is willing to take this risk for their bottom line. The National Mining Association attorney called us inbreeds. This again shows the total and complete disrespect for our people. This hearing really isn’t about jobs. This hearing is about the coal bosses bottom line. This hearing was staged as a political platform to get out their message that “jobs are at risk in the already impoverished WV”. Let’s talk about those jobs, why we are still one of the poorest states with the richest resources and what is really at risk.

These jobs are people from the outside. Very few of our local people work these jobs. This is mostly outsiders from other states here doing this work. In Twilight, WV there is imported workers coming in by the busloads. Some of which are not legal to be in the US. Here is a photo taken from my vehicle along RT 26 where this non-English speaking gentleman ask me for directions to Progress Coal which is the Twilight surface mines. The buses were packed with imported workers and marked as school buses with PA plates. These same people show up drunk at our community church outings so they can eat. There was also an incident where a drunk imported worker from the Elk Run mines in Sylvester killed a child while racing on our roads as school was letting out. This is what kind of jobs we are talking about.



This again shows that this is all about the company’s bottom line and not about jobs for poor people.

### **Fallacy and Facts About Jobs in Appalachia**

*Fallacy: Stopping the destruction of Appalachian mountains and streams would cost jobs*

#### **Fact 1:**

Underground mines create 50% more jobs than mountaintop removal mines.

Underground mines create 52% more jobs than mountaintop removal mines for every ton they produce—they employ nearly two thirds of the miners in Central Appalachia while producing just over half of the coal.

#### **Fact 2:**

Unemployment in counties where a high proportion of coal is mined by mountaintop removal is higher than in counties where coal is mined mostly underground. Ac-

ording to data from the Bureau of Labor Statistics from 2000 through 2010, the average annual unemployment rate was 8.6% in Central Appalachian counties where more than 75% of coal production was by mountaintop removal, compared to 6.7% in counties where mountaintop removal accounted for less than 25% of production<sup>2</sup>.

See: <http://www.flickr.com/photos/appvoices/5938215752/>

**Fact 3:**

Historically, the total number of mining jobs has fallen in places where the proportion of coal mined by mountaintop removal has increased. According to the West Virginia Geologic and Economic Survey, the proportion of coal production in West Virginia that came from mountaintop removal mines increased from 19% to 42% of production between 1982 and 2006<sup>3</sup>. Even though overall production increased, the number of mining jobs was cut in half over the same period<sup>4</sup>.

See: <http://www.flickr.com/photos/appvoices/6167625000/>

**Fallacy: More stringent enforcement of the Clean Water Act by the EPA and other federal agencies is creating an economic crisis in Central Appalachia**

Fact: The number of mining jobs in Appalachia has increased since the start of the recession, since the EPA began enhanced review of mountaintop removal permits, and since the EPA released its interim guidance in April, 2010. Since 2007, as production in Central Appalachia has shifted away from mountaintop removal in favor of underground mining techniques, the increase in employment at underground mines has more than offset declines at other types of mines. Employment is up 11.5% since the start of the recession (December, 2007), up 2.5% since Enhanced Coordination Procedures on mountaintop removal permitting were announced between 3 federal agencies (June, 2009), and up almost 6% since the EPA announced a new guidance on Appalachian mine permitting (April, 2010).

See: <http://www.flickr.com/photos/appvoices/6130794844/>

**Fallacy: Ending mountaintop removal would put US energy supply at risk**

Fact: U.S. coal production is limited by demand for coal, not by the ability of companies to obtain permits for mountaintop removal mines. According to energy analysts<sup>8</sup> as well as executives from Arch Coal<sup>9</sup>, Peabody Energy<sup>10</sup> and Southern Company<sup>11</sup>, declining Central Appalachian coal production is the result of competition from lower cost natural gas. Mines across the country are producing at just 75% of their capacity<sup>12</sup>—down from 85% in 2008—and the Energy Information Administration projects that coal demand won't recover to 2008 levels for another 15 years<sup>13</sup>. Coal from mountaintop removal mines could easily be replaced if other US mines were operating at just 81% of their capacity.

See: <http://www.flickr.com/photos/appvoices/5937661551/>

Fact: Coal from mountaintop removal mines accounts for less than 5% of US electricity generation. While coal accounts for nearly 45% of US electricity generation<sup>14</sup>, only 15% of that is mined in Central Appalachia<sup>15</sup>. Coal from all of Appalachia accounts for less than 9% of US electricity generation, and coal from mountaintop removal less than 5%.

See: <http://www.flickr.com/photos/appvoices/5818441741/>

**Fallacy: Prohibiting valley fills would prevent all forms of coal mining in Appalachia**

Fact: The majority of recently approved permits for new mines in Central Appalachia do not use valley fills. A survey of all applications for new mine permits in Central Appalachia that were approved by state agencies in 2009 revealed that just 44% used valley fills to dispose of mine waste<sup>16</sup>. See: <http://www.flickr.com/photos/appvoices/5938219772/>

**References and Notes**

1. Calculated from MSHA Part 50 data files < <http://www.msha.gov/stats/part50/p50y2k/p50y2k.htm>>; Mountaintop removal production and employment calculated from "strip" mines, as defined by MSHA for mines in Central Appalachian counties.
2. Ibid; Unemployment data from the Bureau of Labor Statistics < <http://www.bls.gov/ces/>>
3. Hendryx, 2008. "Mortality Rates in Appalachian Coal Mining Counties: 24 Years Behind the Nation." Environmental Justice; Volume 1, Number 1
4. MSHA op. cit. 2000–2010
5. MSHA op. cit. 2007–2010; Bureau of Labor Statistics op. cit.

6. EIA/DOE "EIA-923" Database <[http://eia.doe.gov/cneaf/electricity/page/eia906\\_920.html](http://eia.doe.gov/cneaf/electricity/page/eia906_920.html)>
7. DOE/EIA Cost and Quality of Fuels for Electric Plants, Table 3.2 for 2007-2009; Adjusted to 2009 \$ based on Budget of the United States Government: Gross Domestic Product and Implicit Outlay Deflators;
8. Bernstein Commodities & Power Report, 2/18/2011: "No Light for Dark Spreads: How the Ruinous Economics of Coal-Fired Power Plants Affect the Markets for Coal and Gas"
9. Steve Leer, Chairman and CEO, Arch Coal, Inc. presentation to Barclays 2010 CEO Energy-Power Conference on 9/15/2010;
10. Rick Navarre, President and Chief Commercial Officer, Peabody Energy, "Expanding Markets and Peabody Growth Opportunities," a presentation to the 2010 Analyst and Investor Forum on 6/17/2010
11. Chad Hewitt, Southern Company, "Utility Perspective on the Future of Coal" presented at American Coal Council's Spring Forum on February 3, 2011;
12. DOE/EIA Annual Coal Report for 2009. Analysis by Appalachian Voices.
13. DOE/EIA Annual Energy Outlook, 2011 Early Release edition
14. EIA/DOE Electric Power Monthly with data for December 2010, Table 1.1: "Net Generation by Energy Source: Total (All Sectors)"; <[http://eia.doe.gov/cneaf/electricity/epm/table1\\_1.html](http://eia.doe.gov/cneaf/electricity/epm/table1_1.html)>
15. EIA/DOE "EIA-923" Database op. cit.
16. Applications for new mine permits approved in 2009 obtained from: Kentucky Department of Natural Resources; West Virginia Department of Environmental Protection; Virginia Department of Mines, Minerals and Energy; US Office of Surface Mining Reclamation and Enforcement, Knoxville Office Produced by Appalachian Voices on behalf of the Alliance for Appalachia Spreadsheets and details of all analyses available at: [www.apvoices.org/resources/mtr\\_facts.zip](http://www.apvoices.org/resources/mtr_facts.zip)

The Obama administration has stated that they would follow the science. That is what I see that this administration is doing SLOWLY. Simple fact is science doesn't favor jobs over human health so this administration is being attacked by the extractive industries who now call themselves "job creators". It's true that we all need jobs. However we cannot depend on jobs that destroy other's lives and livelihoods. Frasure Creek Mining is owned by an INDIAN Company and they are blowing up my homeland. I feel the vibrations of the core driller in the floors of my home and impacts of the blasting near my home are horrendous. This is absolutely against everything that America stands for. When someone destroys water in a foreign country it is called an act of war. When the coal industry destroys Appalachia's water it's said to be in the best interest of our homeland security.

Here is what the Scientist says. . .What are we waiting on? People are dying!  
<http://blogs.wvgazette.com/coalatattoo/2010/01/07/bombshell-study-mtr-impacts-pervasive-and-irreversible/>

#### *Mountaintop Mining Impacts Serious and Irreversible*

Led by Chesapeake Biological Laboratory Director Margaret Palmer, a team of the nation's leading environmental scientists completed a comprehensive analysis of the latest scientific findings and emerging data related to the controversial practice of mountaintop mining. In this practice massive amounts of rock are removed to expose coal seams, valleys and streams are filled with the rock debris. Dr. Palmer's team concluded that peer-reviewed research unequivocally documents irreversible environmental impacts from this form of mining and also exposes local residents to a higher risk of serious health problems.

At one time even Jay Rockefeller support banning surface mining. He openly admitted that strip mining was not a good economic future. Here is a few quotes from him.

December 20, 1970—"I will fight for the abolition of strip mining completely and forever." John D. Rockefeller IV while running for governor of WV as a stripmine abolitionist.

After getting beat by republican Arch Moore with the help of concerned corrupt democrat politicians and huge contributions from coal companies, Rockefeller followed the advice of his advisors and changed his mind on strip mining and on attacking corrupt politicians in southern WV. He won the following election for Governor as an advocate of strip mining and shut up about corruption.

"We know that strip mining is tearing up the beauty of our state. We know that strip mining is not a good economic future for West Virginia and not a good economic future for our children. And we know that, whatever advantage it has now, the damage that it leave is a permanent damage."—Jay Rockefeller, 1972

March 2, 1977—"...mountaintop removal should certainly be encouraged, if not specifically dictated." Gov. Rockefeller's testimony to the U. S. Senate Subcommittee on Energy and Natural Resources, March 12, 1977.

Southern Mountains Community members speak out against the atrocities of surface mining in Appalachia.

<http://www.wvphotovoice.org/>  
[www.plunderingappalachia.org](http://www.plunderingappalachia.org)  
[www.burningthefuture.com](http://www.burningthefuture.com)  
[www.oncoalrivermovie.com](http://www.oncoalrivermovie.com)  
<http://lowcoalexplcit.org/>  
[www.coalcountrythemovie.com](http://www.coalcountrythemovie.com)

We know we have options and that we do not have to blow up our mountains and poison our water to create energy. This was our idea. Hopefully it will catch on. [www.thelastmountainmovie.com](http://www.thelastmountainmovie.com) We will continue to demand better for our children's future in all that we do. Here is a short list of the impacts of coal on our lives nationally. It would benefit all our children if we take this very serious and fix this problem right away. We can no longer excuse the fact that coal is a finite resource and we are running out. Enforce the stream buffer zone rule and protect the very existence of a culture of people known as Appalachians. We have witnessed the history that the coal industry has left in its path. Let me say that this history is unimaginable by most people in this country. Mountaineers will never be free until this madness ends. Reinstate the stream buffer zone rule to at least the Regan Era Rule and (for the first time in history) enforce it to protect American lives from this criminal industry. My nephew reminds me of what surface mining looks like from a child's eyes. As we were driving through our community he looks up and says "Aunt Sissy what is wrong with these people don't they know we live down here?" I had to be honest with him and say "yes they know they just simply don't care."

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Mr. LAMBORN. All right. Thank you. OK. Thank you all for your statements. We will now begin our questions. Members are limited to five minutes. We may have additional rounds. I'll begin the first round of questions.

Mr. Bostic, your organization was involved in the 1999 lawsuit that began this process of mountaintop mining EIS with the affiliated rule. Some of this was driven by settlements between the Administration and environmental groups. In your view, were those settlements prior to the 2008 rule appropriate?

Mr. BOSTIC. Thank you for that question, Mr. Chairman. I think that's a very appropriate one to ask. The litigation you refer to we call that brag here in West Virginia. And as a result of that initial litigation, the Federal Government negotiated a settlement agreement with the environmental plaintiffs that committed the first environmental impact statement on mountaintop mining and this stream buffer zone. As part of that settlement agreement the government agreed to name as government contractors pre-picked certain experts selected by the environmental community. We had a great deal of concern by that inclusion of those outside parties in an EIS, as you can imagine. But as the EIS progressed and the studies progressed and the programmatic EIS was a much more complicated and more intense effort than the 2008 or even the rule changes now, and it ultimately found that surface mining was not having an inordinate amount of impact on the resources of the area.

Mr. LAMBORN. OK. Thank you. Ms. Fredriksen, I have a question for you. The original focus of the rule is on mountaintop mining and streams. In fact, one of the witnesses just a moment ago stated that he had no objection to restrictions on underground mining, if I understood what he said correctly. However, after listening to

your testimony, it seems that the rule could have or even would have a large impact on underground mining operations. Could you elaborate on that, please?

Ms. FREDRIKSEN. Yes. As the graphic demonstrated, if you take the new standards that they've put in place, which is go to the middle of the stream, go out 50 feet and go down a 15-degree angle of draw until you hit the coal. So you have to protect that buffer around the stream. So that's how we looked at the rule, and when you do that, even our deepest mines, for example, in southern Virginia, where we mine a lot of met coal, loses almost have of its reserves based on this rule.

In addition, what we did not include in that calculation, while the stream buffer zone rule currently, that's in the public forum for the draft, states that coal refuse disposal areas on the surface are not impacted, since they are very similar to a valley fill and are permitted similarly, if that coal refuse disposal area were to be not allowed either, then that wipes out all ability to even room and pillar, much less longwall mine underground.

So it's the nuances of those sweeping changes that they propose to make that really impact the longwall mines, particularly for CONSOL, but if we stretch that across the nation, there's probably roughly 200 million tons that are longwalled per year in the U.S., so you're talking about a fifth of that being subject to potentially restricted mining.

Mr. LAMBORN. Well, I find that really ironic because SMCRA is the Surface Mining Control and Reclamation Act. Surface mining control, so ostensibly, it's not supposed to dictate underground mining, if I heard you correctly?

Ms. FREDRIKSEN. We have SMCRA permits for every one of our mines. Every one of our longwall mines has a SMCRA permit. And then as you heard from the previous panel, we also have combined NPDES permits with those SMCRA permits.

Mr. LAMBORN. OK. Well, thank you for your clarifying that. And for any of you, would the effect of this, especially if it includes the underground impacts that we've just discussed, have a tendency to push coal production away from private lands owned in the east to the Federal lands that are predominantly where coal comes from in the west? Mr. Carey?

Mr. CAREY. Mr. Chairman, I think the idea that those coals would have to be replaced from someplace, but I think also the panel prior to our panel also outlined the fact that what you would see is power producers ultimately switch to another fuel source, which would not be cost effective to the average consumer or to the manufacturing base in the Midwest. In the short term, it would actually probably be replaced by western coal.

Mr. LAMBORN. OK. But ultimately to natural gas, if that's still allowed to be produced?

Mr. CAREY. That's correct, Mr. Chairman.

Mr. LAMBORN. OK. Thank you. I'd like to recognize Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Carey, first of all, it's good to see a fellow buckeye here today as we talk about this very, very important topic.

In your testimony, you spoke about the jobs that could be lost nationwide if this rewrite as proposed by OSM goes into effect. Could

you elaborate and shed some light on the number of direct and indirect jobs that are at stake in our home state of Ohio?

Mr. CAREY. Mr. Chairman, Congressman Johnson, certainly. The effect just looking at the numbers we've calculated that about 30 percent of the surface mining would be affected immediately. That roughly makes up 45 percent of Ohio's coal production. So if you look at the spin-off jobs to whatever number you want, six to ten jobs—up to ten jobs, according to Penn State, we would be looking in the thousands in southeastern, and primarily in your district, Congressman.

Mr. JOHNSON. That's exactly why I have been fighting so hard against this rule rewrite because most of those jobs, as you and I know, come from Ohio's sixth congressional district and the people that I represent. Mr. Carey and Mr. Bostic, much of the press has been on potential impacts on surface mining. We've talked a little bit about the effects on longwall mining. How many longwall mines could be affected in the rewrite, if it goes through?

Mr. BOSTIC. Well, sir, based on the information that we have that's in the public domain from OSM now, virtually every underground mine, whether it's longwall or otherwise, could be impacted. And it's over this concept of fill construction. And, again, the detractors, the Administration wants you to believe this is about surface mining. It's not true. When you underground mine coal, you're going to impact streams, whether it's through the longwall subsidence that was mentioned earlier or through the construction of refuse areas.

Coal seams are not all coal. There are certain splits of shale and clay that lie within the coal seam, and when you extract that coal underground, it's brought to the surface. Those impurities have to be removed from the coal so that it will burn, and meet air emission properties or meet coking properties for the metallurgical industry. And you have to have a place to put that material and that's typically in a refuse fill. About 98 percent of all of West Virginia's underground coal production has to be cleaned, so there's a potential impact on all underground mines, longwall or otherwise.

Mr. JOHNSON. Ms. Fredriksen, can you talk about the planning preparation and caution that CONSOL undertakes before they begin surface mining?

Ms. FREDRIKSEN. Yes. As the SMCRA requirements, the NPDES requirements, we also have the various state laws and regulations that we apply, the 404 permits. So everything—your entire mine plan, your impacts—you have to do an environmental impact assessment, you have to do hydrologic balance. You have to look at geology and the impacts of that. And so every bit of that is incorporated, and it's about a five-year process to go through and obtain your mining permit. And like I said before, they have a combined SMCRA/NPDES permit in all of our states where we operate. And so that process is a very lengthy one, it's a very thoughtful one and it's also a public process. Those are put up for public comments when our limits are assessed on us for what we can do and we have to operate according to that plan.

Mr. JOHNSON. And can you also briefly talk about the reclamation efforts that CONSOL engages in after the surface mining is completed?

Ms. FREDRIKSEN. Yes. In fact, in the State of Ohio, closed mine operations are also in my department, and I'm very proud that we have received numerous awards on our reclamation efforts on those mines. We have bonding. Those are financial obligations that we carry through the SEC process and annual 10K filings that we are required to meet. And until we meet those obligations and get full bond release on our reclaimed sites, that's the financial obligation that CONSOL must state for its shareholders. So it is in our interest to get those reclaimed and to get those bonds released.

Mr. JOHNSON. OK. Thank you very much. Mr. Chairman, I don't have any further questions and I yield back the balance of my time.

Mr. LAMBORN. OK. Thank you. We'll begin our last round of questioning.

Mr. Bostic, do you have any thoughts or suggestions on what might have been the origin of the current proposed stream buffer zone rule as opposed to the 2008 settlement?

Mr. BOSTIC. Yes, sir. I have a couple speculations to make there. I think if you look, attached to my written testimony submission there is a June 11, what's referred to as the MOU, Memorandum of Understanding between the primary agencies that regulate coal mining under the Federal Government. It was written by and with the influence of the White House Counsel on Environmental Quality. Those actions, which began in 2009, followed a Federal court decision that we received here in West Virginia. That somewhat, we think, landmark decision that clarified the proper role of all of these agencies, whether it be the Corps of Engineers, EPA, our own Department of Environmental Protection. With that landmark decision, we had some degree of hope that now we'll have certainty and predictability in the permitting process. I think there are those within the Administration, within EPA, that disagreed with that decision, and then set out to promulgate this MOU and to force these rule changes through to restrict mining. Now that the Federal courts had found it to be proper, the balance of separation of power between those agencies to be appropriate, they set out to change all that by way of regulation.

And Congressman, I use the term "regulations" very loosely. For the most part, the agencies set out to do this by policy or by reinterpretation. Only by way of a lawsuit from the National Mining Association was OSM forced to undertake the proper rulemaking process with this stream buffer zone rule. What we've seen from EPA, what we've seen from the other agencies within the Federal Government has been policy and it's going to trample, we think, congressional intent, whether it's under the Surface Mining Act or under the Clean Water Act.

Mr. LAMBORN. All right. Thank you. Now, some people have said that they don't like the 2008 rule, they think that the earlier Reagan rule was better. Do you think that that rule was stronger or is the 2008 rule actually stronger?

Mr. BOSTIC. Well, Congressman, to be honest with you, if you look at the history of the 1983 version of the rule, the Reagan era stream buffer zone rule, in a history that's very well articulated through the programmatic environmental impact statement or through the 2008 EIS, the 1983 rule wasn't never, ever interpreted

nor intended to ban or prohibit mining in and around streams. That was made consistently clear through its entire rulemaking history leading up to its final inclusion in the program in '83.

Having said that, going to the 2008 rule, if you look through the administrative record, you'll find some concern expressed on behalf of the mining industry, including West Virginia, that it increased certain requirements, certain analysis, certain things that the companies had to do with respect to the SMCRA permit. And we at several steps opposed those changes.

So if you peel back the rhetoric presented by the current OSM and the current Administration, that the 2008 rule was a give-away or a midnight regulation. It actually made mining and permitting of these operations tougher.

Mr. LAMBORN. OK. Thank you. And Mr. Horton, if I could turn to you, you spoke very movingly on the impacts of the loss of jobs. Now we've also heard some very passionate testimony on negative impacts of mountaintop mining. How would you respond to someone who says it only does bad things, or the bad things outweigh the good things? How do you respond to that on a human level?

Mr. HORTON. There have been bad operators that have done negative things to the coal industry, just as there has been bad automobile manufacturers who have built bad cars and killed people, and there have been bad steel mills who do things that are not right in the sight of the public. Not every coal operator should be considered in that light. Mountaintop mining can be done in an environmentally safe manner and it can be done and is done by a lot of coal operations and provides good employment for a lot of people and it can be done even better, and we strive to do that each and every day.

In fact, if rewritten, this rule will affect, as Jason has said, the underground industry because mountaintop mining today is used in a lot of advancements of the underground sector. We'll come in and develop an area through the mountaintop mining method for the underground mining method to proceed. And it's a much more cost effective way of doing so. And that's done in both West Virginia and Virginia and I'm sure in parts of Ohio, as well.

Any time anyone has an issue with anything that we're doing in our operation, we'll talk to them, and if we're doing something that's not right, we'll try to make it right.

Mr. LAMBORN. And finally, Mr. Carey, is there a contradiction between responsible stewardship of the environment and keeping jobs available and the economy strong?

Mr. CAREY. Mr. Chairman, I don't believe there's a contradiction. I believe that if you're operating under the letter of the law and you're doing what you need to be doing, these companies are responsible and I think that there is a balance and we are meeting that.

Mr. WEBB. May I comment, please, on that question?

Mr. LAMBORN. I'm afraid our time is up. Let's talk afterward.

Mr. WEBB. I would like to comment for the record about what he's talking about.

Mr. LAMBORN. I want to thank the members of the panel for their testimony. I want to ask unanimous consent—

Ms. GUNNOE. Mountaintop removal jobs are killing people.

Mr. LAMBORN. I would ask for civility, please. I would like to ask unanimous consent that Representative Nick Rahall's press statement be put into the hearing record and I'm going to ask each member of the panel that if anyone submits questions to you in writing, that you would respond to those as well.

[The press release follows:]

**Rahall Welcomes Monday Hearing on Stream Buffer Zone Rule**

**Washington, D.C.**—U.S. Representative Nick J. Rahall, D-WV, Friday, welcomed a hearing in Charleston to examine the proposed "stream buffer zone" rule, scheduled for Monday, September 26th, by the Subcommittee on Energy and Mineral Resources of the House Natural Resources Committee.

"I am glad that the Subcommittee has chosen to get to the heart of the matter and conduct a hearing in West Virginia, where Members can hear first-hand about the negative effects a revised stream buffer zone rule would have on our coal miners," said Rahall. "It is always a good thing for Members of Congress to get out of Washington and spend time in the communities that are being affected by the laws we write and the regulations being handed down by agencies."

Rahall is a former Member of the Natural Resources Committee, serving on that Committee for 34 years until taking over the top Democratic spot on the Transportation and Infrastructure Committee earlier this year. While Chairman of the Natural Resources Committee, Rahall pressed EPA and the Corps of Engineers for expeditious consideration of coal mining permits and continually urged federal agencies to work together with the State of West Virginia to ensure that coal mining jobs were not put at risk by unfair and inequitable regulations.

Rahall's work on that front has continued in his new post. Earlier this year, the House passed H.R. 2018, the "Clean Water Cooperative Federalism Act of 2011," authored by Rahall. Rahall's legislation, which has been sent to the Senate for consideration, would rein in EPA's overreach in the Clean Water Act permitting process that is threatening the future of coal mining jobs and communities throughout Appalachia.

Although previously scheduled commitments, including an oversight tour of the Coalfields Expressway—a road needed for the efficient transport of West Virginia coal and other products—prevented Rahall from attending the Monday hearing, he sent an unequivocal message to participants.

"Without a doubt, the new stream buffer zone rule under consideration by the Office of Surface Mining Reclamation and Enforcement is unworkable; it would, unquestionably, adversely affect coal mining and eliminate mining jobs so important to our West Virginia economy. The message I send to the agency is this: 'Go back to the drawing board' said Rahall.

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Mr. LAMBORN. Thank you for being here. If there's no further business, the Subcommittee stands adjourned.

[Whereupon, the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[A Letter from the Alabama Surface Mining Commission; Indiana Department of Natural Resources; Kentucky Department of Natural Resources; Railroad Commission of Texas; Utah Division of Oil, Gas and Mining; Virginia Department of Mines, Minerals and Energy; and Wyoming Department of Environmental Quality, to The Honorable Joseph Pizarchik dated November 23, 2010, submitted for the record follows:]

November 23, 2010

The Honorable Joseph G. Pizarchik  
Director  
Office of Surface Mining, Reclamation and Enforcement  
U.S. Department of the Interior  
1951 Constitution Avenue, N.W.  
Washington, DC 20240

Dear Director Pizarchik:

We are writing to you as cooperating agencies that are participating in the Office of Surface Mining's development of a draft Environmental Impact Statement (EIS) to accompany a soon-to-be-proposed rule on stream protection. Our role as cooperating agencies, as defined by the memoranda of understanding that each of us entered into with your agency, is to review and comment on those Chapters of the draft EIS that are made available to us (at present, Chapters 2 and 3). Based on our participation to date, we have several serious concerns that we feel compelled to bring to your attention for resolution.

Without rehashing our previously articulated concerns about the need and justification for both the proposed rule and the accompanying EIS, we must object to the quality, completeness and accuracy of those portions of the draft EIS that we have had the opportunity to review and comment on so far. As indicated in the detailed comments we have submitted to date, there are sections of the draft EIS that are often nonsensical and difficult to follow. Given that the draft EIS and proposed rule are intended to be national in scope, we are also mystified by the paucity of information and analysis for those areas of the country beyond central Appalachia and the related tendency to simply expand the latter regional experience to the rest of the country in an effort to appear complete and comprehensive. In many respects, the draft EIS appears very much like a cut-and-paste exercise utilizing sometimes unrelated pieces from existing documents in an attempt to create a novel approach to the subject matter. The result so far has been a disjointed, unhelpful exercise that will do little to support OSM's rulemaking or survive legal challenges to the rule or the EIS.

We also have serious concerns regarding the constrained timeframes under which we have been operating to provide comments on these flawed documents. As we have stated from the outset, and as members of Congress have also recently noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with only five working days to review the material, some of which is fairly technical in nature. In order to comply with these deadlines, we have had to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business such as permit reviews. While we were prepared to reallocate resources to review and comment on the draft EIS Chapters, additional time would have allowed for a more efficient use of those resources and for the development of more in depth comments.

There is also the matter of completeness of the draft Chapters that we have reviewed. In the case of both Chapters 2 and 3, there are several attachments, exhibits and studies that were not provided to us as part of that review. Some of these are critical to a full and complete analysis of OSM's discussion in the chapters. OSM has developed a SharePoint site that will supposedly include many of the draft materials, but to date the site is either inoperable or incomplete.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. The first of those reconciliations (which was focused on Chapter 2) occurred via conference call on October 14. The call involved little in the way of actual reconciliation but amounted to more of an update on progress concerning the draft EIS. There was talk about another reconciliation session, but to date this has not occurred. There were also several agreements by OSM during the call to provide additional documents to the states for their review, including a document indicating which comments on Chapter 2 from cooperating agencies were accepted and passed on to the contractor, as well as comments provided by OSM. OSM also agreed to consider providing us a copy of a document indicating those comments that were not accepted. To date, neither of these documents has been provided to us. And even though a draft of Chapter 3 has now been distributed and comments have been provided to OSM, we are still awaiting a reconciliation session on this chapter.<sup>1</sup>

Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately. We are therefore requesting that these revised Chapters be provided to us as soon as practicable.

We understand that OSM is considering further adjustments to the time table for review of additional Chapters of the draft EIS. We are hopeful that in doing so, the agency will incorporate additional time for review by the cooperating agencies, especially given the size and complexity of Chapter 4 and the full draft EIS. Pushing back the time for the completion of these drafts by OSM without additional time being provided for review by the cooperating agencies would be wholly inappropriate. We request that you please provide us with these new time tables as soon as possible so that we can begin our own internal planning.

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<sup>1</sup> We also understand that OSM had planned to contact the states to provide estimates of the additional time and resources that would be required to review/process a permit under the proposed rule. This information would be used by OSM to prepare at least one of the burden analyses that are required by various executive orders as part of federal rulemakings. We now understand that OSM plans to generate these estimates on its own. We are somewhat mystified about how OSM intends to accomplish this without direct state input and urge the agency to reconsider the methodology under which they are currently operating.

You should know that, as we continue our work with OSM on the development of the draft EIS, some of us may find it necessary to reconsider our continued participation as cooperating agencies pursuant to the 30-day renegotiation/termination provision in our MOUs. Under the NEPA guidance concerning the status of cooperating agencies, some of the identified reasons for terminating that status include the inability to participate throughout the preparation of the analysis and documentation as necessary to meet process milestones; the inability to assist in preparing portions of the review and analysis and help resolve significant environmental issues in a timely manner; or the inability to provide resources to support scheduling and critical milestones. As is evident from much of the discussion above, these are some of the very issues with which many of the cooperating agencies are struggling given OSM's time schedule for the EIS and the content of the documents distributed to date. We continue to do our best to meet our commitments under the MOUs but based on our experience to date, this has become exceedingly difficult.

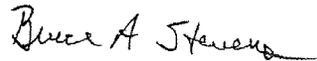
Finally, as you have likely noted throughout the submission of comments by many of the cooperating agencies, there is great concern about how our comments (limited as some of them are due to time constraints for review) will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", given what we have seen so far of the draft EIS we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are wrestling with the consequences of their names appearing on the EIS, as it would assume tacit approval independent of the comments that have/have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore request an opportunity to jointly draft a statement with you that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

Sincerely,



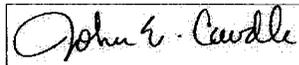
Randall C. Johnson  
Director  
Alabama Surface Mining Commission



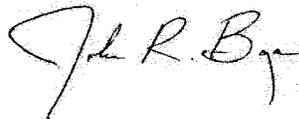
Bruce Stevens  
Director  
Division of Reclamation  
Indiana Department of Natural Resources



Carl E. Campbell  
Commissioner  
Kentucky Department for Natural Resources

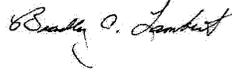


John Caudle  
Director  
Surface Mining and Reclamation Division  
Railroad Commission of Texas



John Baza  
Director

Utah Division of Oil, Gas and Mining



Bradley C. Lambert  
Deputy Director  
Virginia Department of Mines Minerals and Energy



Thomas L. Clarke  
Director  
Division of Mining & Reclamation  
West Virginia Department of Environmental Protection



John Corra  
Director  
Wyoming Department of Environmental Quality

[A statement submitted for the record by the Interstate Mining Compact Commission (IMCC) follows:]

**Statement submitted for the record by the  
Interstate Mining Compact Commission**

The Interstate Mining Compact Commission (IMCC) appreciates the opportunity to submit this statement regarding an oversight hearing on "Jobs at Risk: Community Impacts of the Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule" held on September 26, 2011 in Charleston, West Virginia. IMCC is a multi-state governmental organization representing 24 coal and mineral producing states throughout the U.S., several of whom implement regulatory programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The current effort by the Office of Surface Mining (OSM) to rewrite the stream buffer zone rule is in response to two decisions by the Obama Administration: a settlement agreement with environmental groups challenging a final rule promulgated by the previous Administration in December of 2008 and a Memorandum of Understanding (MOU) signed by the Interior Department, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers in June of 2009. Both of these decisions committed the agency to develop a new rule for the protection of streams, with a projected completion date of June 2012. However, unlike prior rulemakings in this area, OSM appears to be expanding the scope of the rule well beyond stream buffer zone requirements, taking on topics such as the definition of material damage to the hydrologic balance, baseline data collection and analysis, monitoring requirements, corrective action thresholds, and fish and wildlife protection and enhancement.

As IMCC has noted in comments that we have submitted to the agency concerning this rule and the underlying environmental impact statement (EIS), OSM is faced with the challenge of attempting to address and resolve issues that are much broader than the rule itself. With each successive reiteration of the stream buffer zone rule since 1979, more and more pressure has come to bear on the agency to define the rule in such a way as to completely ban the disposal of excess spoil in any type of stream that may be impacted by surface coal mining operations. However, as the U.S. Court of Appeals for the Fourth Circuit clearly articulated in its 2003 opinion in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003), "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." Accord *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, 556 F.3d 177, 195 (4th Cir. 2009). OSM's rule, therefore, should not be about banning the practice of disposal of excess spoil in

streams, but defining how it can be done in a manner that comports with the law. And while OSM can prescribe a national standard for accomplishing this task, it remains the responsibility of the states, as exclusive regulatory authorities where primary programs have been approved, to apply the standard through the permitting process, in which OSM plays no role other than through appropriate federal oversight.

In its draft EIS (and in early drafts of the new rule), OSM appears to be searching for the ultimate answer to the appropriate protection of streams that has somehow eluded them. From where we sit, it is not OSM that has failed to articulate the solution to this matter. The agency, on more than one occasion, has engaged in comprehensive analyses through both rulemakings and environmental impact statements (EIS's) that address the complexity of the issue and provide solutions that are consistent with SMCRA, protective of the environment and respectful of state primacy. There is little left to offer. OSM has examined every possible combination of alternatives and analyses that attend this issue. The real dilemma lies not with OSM's rule, but with the practice of excess spoil disposal itself, which the courts have authorized and found to be consistent with the way SMCRA is currently written. Any significant change in direction would therefore require an amendment to SMCRA.

The problem also does not lie at the footstep of the states as primary regulators in this area. Over the course of the past 30 years since states first began to receive primacy, OSM has seldom found concerns with our implementation of the applicable stream buffer zone requirement. In fact, as OSM recently found with respect to West Virginia's regulatory program, there has been no indication that the states do not apply their respective SBZ rules consistent with the historic application of the SBZ requirements, as approved by OSM over the years. See letter to Joseph Lovett from OSM Regional Director Thomas Shope dated December 8, 2009. Consequently, as OSM continues to search for new alternatives to address this matter, two things must be kept in mind: 1) the states' implementation of this rule and its many iterations over the years has not been the stumbling block; and 2) as OSM attempts to move forward once again with a new variation on a common theme, it is critical to bring the states into the final solution given our role as sole issuers of permits that incorporate and implement these standards.

As the states consider their regulatory role in the context of this potential rule-making, they are particularly concerned about a propensity on OSM's part to insert itself into the state permitting process in inappropriate ways. In OSM's "Immediate Stream Protection Measures," which were released in November of 2009, for instance, OSM indicates that it intends to "coordinate the SMCRA and Clean Water Act (CWA) permitting processes to ensure effective and coordinated compliance with provisions of the Clean Water Act." While the states are fully supportive of coordinated approaches to meeting the objectives of both SMCRA and the CWA, and have in fact advocated this in the past, they are uncertain of where OSM intends to go with this initiative. Time and again in the recent past, states have received conflicting or incomplete responses from EPA concerning what they believe the applicable CWA standards are for state-issued surface coal mining and reclamation permits, especially in Appalachia. Our attempts to obtain more clarity have been met with either silence or uncertainty.

Furthermore, there are specific administrative procedures specified under SMCRA for concurrence by EPA regarding the approval of state programs or any amendments thereto. EPA and the Corps are involved with the issuance of NPDES permits by states under the CWA, which are often coordinated with the issuance of SMCRA permits. OSM's role is relegated to one of oversight. Any attempts by the federal government to convert their statutorily designated roles into something more intrusive in the name of "coordination" will be met with suspicion, if not outright opposition. As the U.S. Court of Appeals for the District of Columbia has noted, the state, as the sole issuer of permits, decides "who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. The state . . . inspects the mine to determine compliance; [and] [w]hen permit conditions are violated, the states is charged with imposing appropriate penalties." *In re: Permanent Surface Mining Regulation Litigation* (en banc), 653 F.2d 514, 519 (D.C. Cir. 1981) (citations omitted).

It is obvious from a review the June 2009 MOU, as well as OSM's rulemaking documents to date, that while there may be some merit in designing a set of regulatory requirements that applies specifically to mountaintop removal operations in steep slope areas, the stream buffer zone rule has always had, and will likely continue to have, broad implications for all regions of the country. In fact, OSM's pro-

posal to adjust the definitions of “material damage to the hydrologic balance” and “approximate original contour” confirms the national scope of the rulemaking. As a result, OSM must consider how any reformulation of the rule will impact each state’s program in terms of both implementation and resources. As we noted in our comments on the 2007 proposed rule, the incorporation of approaches such as the “alternatives analysis” contained in that proposal (and ultimately embodied in the 2008 final rule) will require the investment of considerable time and effort by state permitting personnel that could prove to be overwhelming. Given the current fiscal constraints under which the states are operating, attempting to accommodate these types of permitting analyses could seriously jeopardize primacy programs.

There is also the question of how OSM’s intentions with regard to this new rule-making comport with SMCRA’s goal of creating a level playing field across the 24 state coal regulatory programs. For instance, the term “material damage to the hydrologic balance” is contained in every state’s regulatory program and any effort by OSM to define that term for the Appalachian region will have consequences for all other state programs, regardless of how OSM attempts to narrow its scope or applicability. In fact, given the significant differences in geology, hydrology and terrain among the various regions of the country where surface coal mining operations occur, regulatory terms such as “material damage” have necessarily been left to each state to define based on their unique circumstances. This is the very essence of SMCRA’s design, whereby Congress vested primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations with the states so as to accommodate the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations.

OSM has set forth in the draft EIS chapters upwards of 55 different options for proceeding forward with a new SBZ rule. Most of these are variations on themes that have already been explored in previous rulemakings or EIS’s, as noted above. Some alternatives suggest the use of concepts that have proven elusive or difficult to implement in the past, such as quantitative or qualitative thresholds. However, reading between the lines of the draft EIS, what we sense is an attempt by OSM to reconcile not just its own regulatory requirements under SMCRA, but a larger, undefined set of standards for water quality protection being advocated by EPA and the Corps. This rulemaking simply cannot be taken out of context from all the other activity that has attended the development of the EPA/DOI/Corps MOU referenced above. While much of that activity has been focused in central Appalachia at this time, the overarching concerns regarding conductivity, total dissolved solids, and numerical and narrative biologic water quality standards have implications nationwide. Furthermore, there is simply no agreement among the affected federal agencies on what those standards should be. In some circumstances, such as the setting of narrative water quality standards, the federal agencies play no role whatsoever. These determinations are left solely to the states under the Clean Water Act.

As OSM moves forward with this rule and the EIS, the states believe that it is important for both state and federal agencies to agree upon several key issues: 1) who is taking the lead on the issues; 2) what specific regulatory standards are in play under both SMCRA and the CWA; 3) how and where these standards should be incorporated into existing regulatory programs, especially at the state level; and 4) what the expectations are for both implementation of and compliance with those standards. These types of discussions are long overdue and without some resolution with all parties at the table, rulemakings such as that regarding SBZ and related issues are likely to fail.

An overarching concern that should also be addressed is why OSM feels compelled to move forward with this rulemaking. We are still uncertain, even after all the debate over the past several months concerning the June 11 MOU and OSM’s stream protection rule, about the basis for the proposed rulemaking or the problem the agency is attempting to fix. We certainly understand the high levels of angst associated with mountaintop mining operations in Central Appalachia, but what OSM is attempting to do with this national rulemaking cannot be justified by that public debate. As we have noted in comments to OSM and testimony to the Subcommittee, the appropriate forum for that debate is before Congress, not OSM. Nor can the pending litigation associated with OSM’s 2008 stream buffer zone rule serve as an adequate basis for a new rule. There are other options available to the agency for the resolution of this litigation short of a new rulemaking on the matter. And even though we have requested this information in the past, we are still unaware of any data that supports the need for this rulemaking. Quite to the contrary, the data and information we are familiar with (including OSM oversight reports) indicates that the states have been implementing stream protection requirements in a fair, balanced and appropriate manner that comports with the requirements of SMCRA and

our approved regulatory programs. It would therefore be helpful if OSM would finally clarify its goals and the problems it hopes to address in the rulemaking process.

As we peruse the various “principal elements” of the proposed action spelled out in OSM’s draft EIS, one of our primary concerns relates to resource implications for the states. While much remains to be seen in terms of details about the rule, what little we do know signals a major impact on the states in terms of permit reviews, monitoring requirements, various new technical analyses, and intergovernmental coordination. In this regard, we believe that it is critical, as part of the EIS, for OSM to undertake an assessment of the rule’s impact on both state resources and federalism implications. We assert that this is required by both the National Environmental Policy Act (NEPA) and Executive Orders that specifically address federalism impacts.

We also recommend that, before moving forward with the EIS and proposed rule, OSM seriously consider the other alternatives available to the agency for addressing stream protection. We believe that there are opportunities for the states and the affected federal agencies (OSM, EPA, the Corps and the U.S. Fish and Wildlife Service) to work cooperatively together to address stream protection concerns. However, to date our requests for arranging such meetings have been ignored. We believe that there are a variety of tools, protocols, policies and other measures available to us as state and federal agencies that, with some coordination, could lead to a comprehensive and effective approach to protecting streams.

As OSM develops the various alternatives that it will consider during the EIS process, we suggest that the agency include an alternative that recognizes the inherent regional differences, especially between the East and the West, related to stream protection. We believe that OSM likely gained an appreciation for these differences during its stakeholder meetings in June and July of 2010. SMCRA itself recognizes the importance of regional differences, both in its findings (Section 101(f)) and in its designation of special treatment for mining practices associated with alluvial valley floors west of the 100th meridian, prime farmland in the Mid-continent and steep slopes in the East. Failure to recognize these regional differences could result in the expenditure of considerable resources to address issues that are of marginal significance in a particular region of the country.

Before delving into some of the very practical implications and impacts associated with implementation of the elements listed in OSM’s draft EIS, we want to note our concern about whether the science supports some of OSM’s proposed concepts. In particular, it seems to us that there are several technical issues associated with the concepts that require further thought and research, such as sequencing of stream disturbance, bottom up fill construction, diverting water around fills to avoid retention and percolation, and compliance points off the permit area. We also believe that more can be done in the way of developing tools or methods for prevention and prediction. By advancing a rule that embodies some of these concepts without more in the way of scientific support will complicate the ability of the states to issue and enforce permits that are sound and defensible.

The balance of our statement will focus on some of the practical implications associated with implementation of the various “principal elements” of OSM’s proposed action.

- New Permit Application Requirements—the states have several questions with regard to these new requirements, as follows: what is a “new permit” for purposes of prospective application of the new rule? Will states be required to reassess discharge monitoring reports at permit mid-term review? Will this serve as a potential re-opener? When will we see definitions of “preferred watersheds” and “hydrologic equilibrium”? These are new terms and could have significant implications for program implementation. How will some of the new permit application requirements impact us as regulatory authorities, e.g. 12 months of baseline monitoring data (instead of six) and requiring alternative analyses to include depositions within one mile of the mining operation?
- Definition of “material damage”—OSM’s new definition appears to be based on a stream classification and use concept pursuant to which OSM seems to be moving toward establishing a narrative water quality standard based on aquatic life. As noted previously, those standards are solely within the province of the states. Additionally, OSM’s approach could result in much duplication with EPA and Corps requirements. OSM’s concept of “enhancement” sounds very much like mitigation under Section 404 of the Clean Water Act, again raising concerns about potential conflicts. With respect to mining operations in the western states, a broad, national definition of material damage

could prove problematic due to the unique issues associated with water rights and interstate compacts.

- Mining through streams—the states have concerns about whether sequencing of streams is feasible. If an assessment of the success of stream restoration must include the hydrologic regime and benthics, this could take well over six months to accomplish. How many hydrologic cycles will be needed to prove restoration? If we have to require full cost bonding for these stream restoration projects, how will this be effectuated? How will we track these bonds in conjunction with other reclamation bonds? How do we avoid duplication with bonds required by the Corps under Section 404? How will sequencing impact the permit revision process? For instance, even if mine throughs are focused on form and function, if there are multiple cuts that impact the same stream over and over (as is often the case with multiple contour cuts in the Appalachian coalfields and multiple dragline pits in the Midwest and West), how will this impact the mining operation and permitting? Does OSM envision the states using CHIA monitoring/networking stations to measure off-site damage? How can we predict the probability that the stream will be fully restored—are there interim benchmarks anticipated?
- Monitoring requirements—there are potential right of entry/access concerns for gathering some of this data off the permit area that will need to be addressed. For biologic monitoring—what system/standard of scoring do we use? Is there an expectation of consistency among the states? For instance, it has been suggested that biological monitoring would not be required for ephemeral streams in the West. However, there is some uncertainty associated with this issue given the fact that the monitoring of biota in ephemeral streams is an emerging area of science. The U.S. Geological Survey, under the sponsorship of EPA, has been examining biological information on ephemeral drainages and recent research at Pennsylvania State University is focused on the biological component of “dry streams”, which may be analogous to ephemeral streams in the West. How do we accurately attribute changes in stream quality to mining, as opposed to some other activity—especially as the applicable watershed is expanded under the rule? How far up and down the stream must we monitor—where is the compliance point? It should be kept in mind that limiting the percentage of a watershed has the potential for significant implications, depending on how the watershed is defined. Watersheds can vary in size from less than one square mile to over a hundred square miles, especially in the West. Small watersheds are sometimes completely disturbed by a single mine and are reclaimed at a later time depending on pit advancement and configuration. A constraint on the percentage of disturbance would greatly limit operations that are dependent upon large pits and large equipment. Finally, if the intent is to address all impacts in a watershed, such a change would likely overlap into land use planning, which would be outside the authority of OSM and the states under SMCRA. It would also require extensive program resources to undertake such planning.
- Backfilling and grading and approximate original contour requirements—is OSM attempting to limit postmining land uses, regardless of what a landowner may desire—especially where reforestation is concerned? What about situations, as in West Virginia, where there is a mandate to comply with county land development and master plans? We have serious concerns about the impacts of bottom up fills and the use of aquitards which can result in failure planes being created in the fills, the overall stability of fills and flooding potential.
- Coordination of permitting processes—if we attempt to coordinate SMCRA and Clean Water Act permits, can we expect to see mandated time frames for final action by EPA and the Corps? We also have a concern that the more permitting activity that is undertaken by the state mining agencies under the SMCRA umbrella, the more these agencies will be expected to assume duties that are currently those of state water quality divisions. It will important to avoid duplication of effort and have clear lines of authority.

Without rehashing our previously articulated concerns about the need and justification for both the proposed rule and the accompanying EIS, we must object to the quality, completeness and accuracy of those portions of the draft EIS that we have had the opportunity to review and comment on so far. As indicated in the detailed comments the cooperating agency states have submitted to date, there are sections of the draft EIS that are often nonsensical and difficult to follow. Given that the draft EIS and proposed rule are intended to be national in scope, the states are also mystified by the paucity of information and analysis for those areas of the country beyond central Appalachia and the related tendency to simply expand the

latter regional experience to the rest of the country in an effort to appear complete and comprehensive. In many respects, the draft EIS appears very much like a cut-and-paste exercise utilizing sometimes unrelated pieces from existing documents in an attempt to create a novel approach to the subject matter. The result so far has been a disjointed, unhelpful exercise that will do little to support OSM's rulemaking or survive legal challenges to the rule or the EIS.

The states also have serious concerns regarding the constrained timeframes under which they have been operating to provide comments on these flawed documents. As the states have noted from the outset, and as members of Congress have also noted in letters to Secretary Salazar, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with only five working days to review the material, some of which is fairly technical in nature. In order to comply with these deadlines, the states have had to devote considerable staff time to the preparation of their comments, generally to the exclusion of other pressing business such as permit reviews. While the states were prepared to reallocate resources to review and comment on the draft EIS Chapters, additional time would have allowed for a more efficient use of those resources and for the development of more in depth comments.

The states understand that OSM is considering further adjustments to the time table for review of additional parts of the draft EIS. The states are hopeful that in doing so, the agency will incorporate additional time for review by the cooperating agencies, especially given the size and complexity of the full draft EIS. The states have requested OSM to provide these new time tables as soon as possible so that the states can begin their own internal planning.

As you know, several cooperating agency states testified before the Subcommittee's oversight hearing on September 26 regarding their concerns with both OSM's rulemaking and the EIS development process. Those comments are incorporated here by reference. The state of Ohio was also a participant in the EIS development process, although not as a formal cooperating agency. As noted above, Ohio also found the EIS process to be flawed and unworkable. Insufficient time was provided to review and comment on the various draft chapters and there was no meaningful feedback from OSM to the state comments that were provided. The rulemaking appears to be based on two relatively small research studies in the states of West Virginia and Kentucky with differing geology, stream morphology and aquatic resources than is found in Ohio. For this reason, Ohio is conducting its own study of the potential long-term impacts to stream resources following final reclamation on mine sites in various geographic regions of the state and that analysis should be completed by June of 2013.

As part of its approved regulatory program, Ohio has undertaken efforts to limit impacts from mining to not only intermittent and perennial streams, but also in valuable headwater streams and habitat. Prohibition of permanent impoundments in streams and reconstruction of natural stream channels are an integral part of the program. Improved coordination with other state and federal agencies also insures protection and restoration of stream resources both during and after mining and reclamation. Ohio is concerned that if OSM were to move forward with the stream protection rule as drafted, it would result in a steep learning curve for current state program staff in both the permitting, technical review and enforcement areas. Additional specialized staff would be needed, including field biologists and hydrologists.

In terms of the impacts to the Ohio coal mining industry, the state anticipates that it will be difficult to permit most surface and underground mining operations given the requirements of the proposed rule, especially when combined with EPA's proposed numeric effluent criteria for specific conductance and sulfates. This is particularly true with respect to treating the water using conventional active or passive treatment methods. Additionally, the proposed requirement to "hold bond until the hydrologic balance reaches equilibrium (including biological resources)" would require an extension of the current maintenance period following final reclamation that could extend well beyond the current five years, thereby adding considerable costs.

We appreciate the opportunity to provide these comments to the Subcommittee concerning OSM's proposed stream protection rule and associated EIS. We urge the Subcommittee to continue its investigation and oversight of the process with the goal of motivating OSM to reconsider the need for this rulemaking and the significant impacts it will have on state regulatory authorities and the communities we protect, as well as the industry we regulate.