

H.R. 2824, PREVENTING GOVERNMENT WASTE AND PROTECTING COAL MINING JOBS IN AMERICA

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND
MINERAL RESOURCES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

Friday, August 2, 2013

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**LEGISLATIVE HEARING ON H.R. 2824, TO
AMEND THE SURFACE MINING CONTROL
AND RECLAMATION ACT OF 1977 TO STOP
THE ONGOING WASTE BY THE DEPART-
MENT OF THE INTERIOR OF TAXPAYER
RESOURCES AND IMPLEMENT THE FINAL
RULE ON EXCESS SPOIL, MINING WASTE,
AND BUFFERS FOR PERENNIAL AND
INTERMITTENT STREAMS, AND FOR OTHER
PURPOSES. PREVENTING GOVERNMENT
WASTE AND PROTECTING COAL MINING
JOBS IN AMERICA**

**Friday, August 2, 2013
U.S. House of Representatives
Subcommittee on Energy and Mineral Resources
Committee on Natural Resources
Washington, D.C.**

The Subcommittee met, pursuant to call, at 9:07 a.m., in room 1324, Longworth House Office Building, Hon. Doug Lamborn [Chairman of the Subcommittee] presiding.

Present: Representatives Lamborn, Lummis, Daines, Cramer, Huffman, and Garcia.

Also present: Mr. Johnson of Ohio.

Mr. LAMBORN. The Committee will come to order. The Committee 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 on H.R. 2824, introduced by Representative Bill Johnson of Ohio and myself, to amend the Surface Mining Control and Reclamation Act, SMCRA, to stop the ongoing waste by the Department of the Interior of taxpayer resources and implement the final rule on excess spoil, mining waste, and buffers for perennial and intermittent streams, and for other purposes. It is called the Preventing Government Waste and Protecting Coal Mining Jobs in America Act.

Under Committee rule 4(f), opening statements are limited to the Chairman and Ranking Member of the Committee. However, I ask unanimous consent to include any other Members' opening statements in the hearing record if submitted to the clerk by close of business today.

Hearing no objection, so ordered.

I now recognize myself for 5 minutes.

And by the way, we are going to try to get our opening statements in. Then I will ask the indulgence of the witnesses. We may have a series of votes called around 9:15, 9:20. We will make as

much progress as we can. We will ask your patience while we go over and vote and then come back and then try to conclude the hearing at that point.

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

Mr. LAMBORN. OK. Today the Subcommittee is considering H.R. 2824, the Preventing Government Waste and Protecting Coal Mining Jobs in America Act, which along with Representative Johnson, we have introduced. This legislation is designed to save taxpayer dollars and protect jobs by putting the Office of Surface Mining on a responsible path forward with regard to the management and regulation of coal mining in America.

As I said last week, we need to be clear about this Administration's legacy on their effort to rewrite the Stream Buffer Zone Rule. So far, the Administration has spent nearly \$9 million of taxpayer money rewriting a rule that was never fully implemented in the first place, without ever providing sound justification for the need for a new rule. This does not include the amount spent on attorney's fees and costly litigation or the internal costs borne by the agency, nor, most of all, the cost to the families of the thousands of workers who have been displaced or seen work delayed by the regulatory inaction on the part of the Department.

In fact, we learned just recently that even though the courts told the Administration in 2009 that they would have to follow APA and allow for public input to revoke the 2008 rule, the Administration went back to the court and asked again for the judicial branch to toss aside a validly promulgated rule rather than follow the rule-making process. That is an important point because since the 2008 rule was never enacted throughout the country, the Administration has actually no idea if there are any problems with the rule, that would have to be addressed with the new rule.

Furthermore, the ongoing inability to actually conduct a responsible rulemaking process means the draft of the rewrite isn't anticipated until late in 2014. And as we have heard from Director Pizarchik, they have no idea how much money it is going to take to finish the new rule.

This legislation requires the Office of Surface Mining to implement the 2008 Stream Buffer Zone Rule, a rule developed over a half a decade through an open, public, and multimillion-dollar process. Upon implementation, it provides the primacy States 2 years to admit their State regulations to incorporate the rule and submit them for approval by the Office of Surface Mining.

Once all the plans have been approved, the effects of the new regulations will be analyzed for a period of 5 years. On completion of the analysis, the Office of Surface Mining is required to report back to the House and Senate Committees with jurisdiction over SMCRA on the effectiveness of the rule, impact on energy production, and identify and justify anything that should be addressed through a new rulemaking process.

The legislation will stop the massive ongoing waste currently taking place at the Department and save taxpayer money. It responsibly updates the 1983 regulation by improving environmental safeguards and provides regulatory certainty for an important do-

mestic industry, an industry that not only provides many family wage jobs with good benefits, but also provides affordable energy for the American people and the Nation's manufacturing base. I believe roughly 40 percent of the Nation's electricity is provided by coal.

The States and tribes participating as cooperating agencies with the Office of Surface Mining in 2010 raised serious concerns about the way the Administration was managing the rulemaking process and the direction the Department was proceeding with its new rulemaking. If we review the transcripts and audio tapes of the meetings between OSM and their original contractors, it should raise concerns across the board about the way the Administration conducts its business.

Here are a few of the more egregious comments. An OSM official worrying about how to "sell," quote/unquote, the proposed rule to the public because it will only save 15 miles of stream of the many thousands of miles affected while costing taxpayers millions of dollars and thousands of jobs. It appears the proposed rule would only save 15 miles of stream upstream because coal production would be moved to other regions outside of Appalachia, meaning the rule would have minimal national environmental benefit but would succeed in causing extreme economic dislocation and devastation in communities all across the Appalachian region.

Also, OSM officials told contractors to "pretend" that the 2008 Stream Buffer Zone Rule was implemented and applied across the country when it was not and explaining that this is "not the real world, this is rulemaking" as justifications for using analysis that does not actually consider conditions on the ground.

Also, an OSM official admitted that the contractors "did exactly what I told them to do" when completing the draft environmental impact statement. This conflicts with OSM Director Pizarchik's sworn testimony to the Committee and others who have criticized the work performed by the contractors when completing the draft environmental impact statement.

The 23 States that have primacy to enforce SMCRA feel very strongly that the current rulemaking is unnecessary and unwarranted, as OSM had just issued their final revised Stream Buffer Zone Rule in December of 2008. That rulemaking process took 5 years and is supported by 5,000 pages of environmental analysis, included 30 different studies, and was issued with the concurrence of the Environmental Protection Agency. OSM spent approximately \$5 million to develop the 2008 rule and never directed the primacy States to incorporate the rule into their regulatory program. OSM does use the 2008 rule in Tennessee, Washington, and for Crow, Navajo, and Hopi Nations.

To conclude, most importantly, the new rule, or what we know about it from the documents made public in early 2011, would be injurious and damaging to the domestic coal mining industry, coal miners and their families and communities, and local and State economies throughout the Appalachian Basin, the Illinois Basin, and coal-producing tribal nations. This legislation is crucial to remedying this sorry situation.

I look forward to hearing from our witnesses today.

I would now like to recognize the Ranking Member for his opening statement.

[The prepared statement of Mr. Lamborn follows:]

PREPARED STATEMENT OF THE HONORABLE DOUG LAMBORN, CHAIRMAN,
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

Today the Subcommittee is considering H.R. 2824, the “Preventing Government Waste and Protecting Coal Mining Jobs in America Act,” which I introduced along with Representative Johnson. This legislation is designed to save taxpayer dollars and protect jobs, by putting the Office of Surface Mining on a responsible path forward with regard to the management and regulation of coal mining in America.

As I said last week—we need to be clear about the Administration’s legacy on their effort to rewrite the Stream Buffer Zone Rule. So far, the Administration has spent nearly \$9 million taxpayer dollars re-writing a rule that was never fully implemented without ever providing sound justification for the need for a new rule. This does not include the amount spent on attorney fees and costly litigation or the internal costs borne by the agency. Nor the costs to the families of the thousands of workers who have been displaced or seen work delayed by the regulatory inaction of the Department.

In fact, we learned just recently that even though the Courts told the Administration in 2009 that they would have to follow APA and allow for public input to revoke the 2008 rule, the Administration went back to the Court and asked again for the Judicial Branch to toss aside a validly promulgated rule rather than follow the rule-making process. That is an important point because since the 2008 rule was never enacted throughout the country, the Administration actually has no idea if there are any problems with the rule that might need to be addressed with a new rule. Furthermore, the ongoing inability to actually conduct a responsible rulemaking process means the draft of the re-write isn’t anticipated until late in 2014. And as we heard from Director Pizarchik—they have no idea how much more money it’s going to take to finish the new rule.

The legislation requires the Office of Surface Mining to implement the 2008 Stream Buffer Zone Rule, a rule developed over half a decade through an open public multimillion dollar process. Upon implementation it provides the primary States 2 years to amend their State regulations to incorporate the rule and submit them for approval by the Office of Surface Mining. Once all of the plans have been approved—the effects of the new regulations will be analyzed for a period of 5 years. On completion of the analysis, the Office of Surface Mining is required to report back to the House and Senate Committees with jurisdiction over SMCRA on the effectiveness of the rule, impact on energy production, and identify and justify anything that should be addressed through a new rulemaking process.

The legislation will stop the massive ongoing waste currently taking place at the Department and save the taxpayer money. It responsibly updates the 1983 regulation by improving environmental safeguards and provides regulatory certainty for an important domestic industry; an industry that not only provides great family wage jobs with good benefits but also provides affordable energy for the American people and the Nation’s manufacturing base.

The States and tribes participating as cooperating agencies with the Office of Surface Mining in 2010 raised serious concerns about the way the administration was managing the rulemaking process and the direction the Department was proceeding with its new rulemaking. If we review the transcripts and audio tapes of the meetings between OSM and their original contractors it should raise concerns across the board about the way the Administration conducts its business—a few of the more egregious comments included:

- An OSM official worrying about how to “sell” the proposed rule to the public because it will only save 15 miles of stream, while costing millions in taxpayer dollars and thousands of American jobs. It appears the proposed rule would only save 15 miles of stream because coal production would be moved to other regions outside of the Appalachia—meaning the rule would have minimal national environmental benefit but would succeed in causing extreme economic dislocation and devastation in communities all across Appalachian region.

- OSM officials telling contractors to “pretend” that the 2008 Stream Buffer Zone Rule was implemented and applied across the country when it was not, and explaining that this is “not the real world, this is rulemaking” as justification for using analysis that does not actually consider “conditions on the ground.”

- An OSM official admitting that the contractors “did exactly what I told them to do” when completing the draft environmental impact statement. This conflicts with OSM Director Pizarchik’s testimony to the Committee and others who have criticized the work performed by the contractors when completing the draft environmental impact statement.

The 23 States that have primacy to enforce SMCRA feel very strongly that the current rulemaking is unnecessary and unwarranted as OSM had just issued their final revised Stream Buffer Zone Rule in December of 2008. That rulemaking process took 5-years and is supported by 5,000 pages of environmental analysis, included 30 different studies, and was issued with the concurrence of the Environmental Protection Agency. OSM spent approximately \$5 million dollars to develop the 2008 rule and never directed the primacy States to incorporate the rule into their regulatory program (OSM uses the 2008 rule in Tennessee, Washington and for the Crow, Navajo and Hopi nations).

More importantly the “new rule” or what we know about it from the documents made public in early 2011, would be injurious to the domestic coal mining industry, coal miners and their families, and, local and State economies throughout the Appalachian Basin, the Illinois Basin, and coal producing tribal nations.

This legislation is crucial to remedying this situation. I look forward to hearing from our witnesses today.

STATEMENT OF THE HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUFFMAN. Thank you, Mr. Chairman.

The bill we are discussing here today would stop the Interior Department’s Office of Surface Mining from adopting a new rule to protect the people of Appalachia from destructive mountaintop removal mining. That is the term that the majority doesn’t like to use, but that is what this practice and this bill are all about, mountaintop removal mining. It would also require States to implement the Bush Administration’s 2008 midnight regulation, which weakened the protections put in place 25 years earlier during the Reagan Administration.

This is a bill that has no chance of becoming law. And it is ironic that we are here 2 days after the full Natural Resources Committee was considering a bill to name much of our oceans after Ronald Reagan. Today we are here to try to roll back a very modest stream protection and public health protection rule that he put in place during his Presidency.

The 1983 Reagan rule stated “No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities.” Regulators could allow surface mining activities “closer to or through such a stream,” but only upon a finding that these activities “will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect water quantity and quality or other environmental resources of the stream.”

Now, the 2008 Bush rule exempts waste disposal practices associated with mountaintop removal mining from the scope of this rule, in contravention of the Surface Mining Control and Reclamation Act. The Bush rule also permits surface coal mining activities, even if such activities may cause or contribute to violations of water quality standards.

The majority’s legislation would require that we give this inadequate rule a chance, give it a try, see what happens. Well, we already know what will happen. Mountaintop removal mining buried or despoiled around 2,000 miles of stream under the Reagan rule.

The Bush rule weakens the Reagan rule and would make matters worse: more streams buried, more communities turned into ghost towns, more people suffering the health consequences of contaminated air and water.

Now, this Republican plan would be devastating. New studies link pollution from mountaintop removal mining with cancer, with birth defects, lung and heart disease. Multiple studies within the last 3 years found significantly higher rates of cancer and heart disease in West Virginia residents living near mountaintop removal mines compared to West Virginia residents living away from those mines. And the U.S. Geological Survey recently published preliminary research showing that areas near mountaintop removal mines have significantly higher concentrations of some metals in air particulates, which are known to be associated with cancer and lung disease.

The majority's legislation requires that we ignore all of these realities. It would lock in a woefully inadequate Bush rule for as long as 7 years, probably longer, and force OSM to start its years-long rulemaking process from scratch. In the name of saving taxpayer dollars, we are undoubtedly with this bill embarking on a path to spend a whole lot more taxpayer dollars.

A decade or more of inadequate protection from mountaintop removal mining would destroy more Appalachian streams and communities and damage public health. OSM must be allowed to assess the evolving science on this issue and to set standards that are based on best technology available in order to minimize the adverse effects of surface mining as called for by law.

As I said at our previous hearing on this issue just last week, we can have an informed debate about what a new stream protection rule should require. But we can have that debate only once a proposed rule is issued. And OSM will be required at that time to consider outside perspectives, including those of coal companies, Members of Congress, and others before adopting a final rule that has the force of law.

Unfortunately, the majority has used every imaginable ploy to disrupt, delay, and prejudice this deliberative process. They believe coal companies should be allowed to blow the tops off mountains and dump the waste into streams, no matter what the science says about the consequence for our environment and the public health. This legislation should be opposed.

I yield back the balance of my time.

[The prepared statement of Mr. Huffman follows:]

PREPARED STATEMENT OF THE HONORABLE JARED HUFFMAN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA

Thank you Mr. Chairman.

The bill we are discussing today would stop the Interior Department's Office of Surface Mining from adopting a new rule to protect the people of Appalachia from destructive mountaintop removal mining. It also would require States to implement the Bush Administration's 2008 midnight regulation, which weakened protections put in place 25 years earlier during the Reagan Administration.

The 1983 Reagan rule stated, and I quote, "No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities." Regulators could allow surface mining activities "closer to, or through, such a stream," but only upon finding that these activities, "will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not

adversely affect the water quantity and quality or other environmental resources of the stream.”

The 2008 Bush rule exempts waste disposal practices associated with mountaintop removal mining from the buffer zone requirement, in contravention of the Surface Mining Control and Reclamation Act. The Bush rule also permits surface coal mining activities even if such activities may cause or contribute to violations of water quality standards.

The Majority’s legislation would require that we give the Bush rule a try and see what happens. We already know what will happen.

Mountaintop removal mining buried or despoiled around 2,000 miles of streams under the Reagan rule. The Bush rule weakens the Reagan rule and would make matters worse: more streams buried, more communities turned into ghost towns, more people suffering the health consequences of contaminated air and water.

On Wednesday the Majority suggested naming our oceans after Ronald Reagan; today they propose rolling back the former President’s modest efforts to protect streams from surface mining.

This Republican plan would be devastating. New studies link pollution from mountaintop removal mining with cancer, birth defects, lung and heart disease. Multiple studies within the last 3 years found significantly higher rates of cancer and heart disease in West Virginia residents living near mountaintop removal mines, compared to West Virginia residents living away from those mines. And the U.S. Geological Survey recently published preliminary research showing that areas near mountaintop removal mines have significantly higher concentrations of some metals in air particulates, which are known to be associated with cancer and lung disease.

The Majority’s legislation requires that we ignore these realities. It would lock in the woefully inadequate Bush rule for as long as 7 years and force OSM to start its years-long rulemaking process over from scratch.

A decade or more of inadequate protection from mountaintop removal mining would destroy more Appalachian streams and communities, and damage public health. OSM must be allowed to assess the evolving science on this issue and set standards based on the best technology available to minimize the adverse effects of surface mining, as called for by the law.

As I said at our previous hearing on this issue just last week, we can have an informed debate about what a new stream protection rule should require, once a proposed rule is issued. And OSM will be required to consider outside perspectives, including those of coal companies and Members of Congress, before adopting a final rule that has the force of law.

Unfortunately, the Majority has used every imaginable ploy to disrupt, delay and prejudice this process. They believe coal companies should be able to blow the tops off mountains and dump waste into streams, no matter what the science says about the consequences for the environment and public health.

This legislation should be opposed.

Mr. LAMBORN. OK. And I also ask unanimous consent that the gentleman from Ohio, Mr. Johnson, the sponsor of the legislation and a Natural Resources Committee alumni, be allowed to sit on the dais and participate in the Committee today and make a brief opening statement.

Seeing no objection, so ordered.

Now I recognize the Member to make a brief opening statement. Then we will adjourn and go over to the Floor.

**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 today on the legislation that you and I introduced last week.

I have to start my comments, you know, it is almost laughable the comments by the Ranking Member referring to the Bush rule as a midnight rule. Five years of work to put that rule in place,

thousands and thousands and thousands of pages of public comments and documentation.

You want to talk about a midnight rule? Look at the time schedule that was originally proposed by OSM to destroy the coal industry in a matter of months. And it was only their own ineptness in the rulemaking process and the work of this Committee that stopped them from doing that. I am insulted by it. The people in Appalachia that harvest coal and depend on coal for their livelihoods, they are insulted by it.

I wish we weren't here today discussing the lackluster effort by the Office of Surface Mining and Reclamation to rewrite the Stream Buffer Zone Rule. However, over the last 5 years OSM has engaged in a comedy of errors that have led us to this point. It would be funny if it didn't include millions of dollars of taxpayers' money wasted and tens of thousands of jobs on the line.

OSM has been derelict in their duties since the start of this Administration because of their mismanagement of the rulemaking process and their clear desire to virtually shut down the coal mining industry in Appalachia. This dereliction of duty and failure of leadership was further confirmed last week when Director Pizarchik couldn't even answer the most basic questions about the status of the rule and what it would mean for jobs and the coal industry, and coal production in general.

So that is why we are here today, to relieve OSM of their duties that they have not and cannot meet. With this legislation, we will save taxpayers untold more millions of dollars and save thousands of direct and indirect jobs. And I would invite my colleagues on the left and anyone else that wants to come to Appalachia, Ohio, and meet the coal miners and meet the families that are dependent upon the coal industry. We are not just talking about surface mining here. We are talking about shutting down underground longwall coal mining in America. It is disastrous. And I certainly hope that my colleagues will support this legislation.

With that, I yield back.

Mr. LAMBORN. OK. Thank you.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE BILL JOHNSON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF OHIO

H.R. 2824—PREVENTING GOVERNMENT WASTE AND PROTECTING COAL MINING JOBS IN
AMERICA

Thank you Mr. Chairman for holding this important hearing today on the legislation that you and I introduced last week.

I have to start my comments . . . you know it is almost laughable, the comments by the Ranking Member, referring to the Bush rule as a midnight rule. Five years of work to put that rule in place, thousands, and thousands, and thousands of pages of public comments and documentation. You want to talk about a midnight rule? Look at the time schedule that was originally proposed by OSM to destroy the coal industry in a matter of months and it was only their only ineptness in the rule-making process and the work of this Committee that stopped them from doing that. I'm insulted by it, the people in Appalachia that harvest coal and depend on coal for their livelihoods, they're insulted by it.

I wish we weren't here today discussing the lackluster effort by the Office of Surface Mining and Reclamation to rewrite the Stream Buffer Zone Rule. However, over the last 5 years OSM has engaged in a comedy of errors that have led us to this point. It would be funny if it didn't include millions of dollars of taxpayer's money wasted, and tens of thousands of jobs on the line. OSM has been derelict in

their duties since the start of this Administration because of their mismanagement of the rulemaking process and their clear desire to virtually shut down the coal mining industry in Appalachia.

This dereliction of duty and failure of leadership was further confirmed last week when Director Pizarchik couldn't even answer the most basic questions about the status of the rule and what it would mean for jobs and the coal industry, and coal production, in general. So, that is why we are here today; to relieve OSM of their duties that they have not, and cannot meet. With this legislation we will save taxpayers untold more millions of dollars and save thousands of direct and indirect jobs. I would invite my colleagues on the left, and anyone else who wants to come to Appalachia Ohio and meet the coal miners, and meet the families that our dependent upon the coal industry. We are not just talking about surface mining here; we are talking about shutting down underground longwall coal mining in America. It' is disastrous and I certainly hope that my colleagues will support this legislation.

With that I yield back.

Mr. LAMBORN. We have roughly 9 minutes left on the vote, so we are going to take a recess in this Subcommittee to go over and vote. We will be back as soon as the vote series is over, and then we will resume our hearing. And I appreciate the indulgence of the witnesses.

The Committee will be in recess.

[Recess.]

Mr. LAMBORN. The Committee will come back to order. Thank you for your patience. We will now hear from our witnesses: Mr. Thomas Clarke, Director of the Division of Mining and Reclamation, the West Virginia Department of Environmental Protection; Mr. Bradley Lambert, Deputy Director of the Virginia Department of Mines, Minerals and Energy; and Mr. John Paul Jones, Director of Environmental Affairs for Alpha Natural Resources and a National Mining Association member.

Like all our witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to 5 minutes.

Our microphones are not automatic, so you need to turn them on when you are ready to begin. The timing lights work as the following: The green light starts up when you begin and start your 5 minutes. The yellow comes on after 4 minutes. The red light comes on after 5 minutes. And we ask to conclude at that time.

Thank you all for being here. We look forward to your testimony.

And, Mr. Clarke, you may begin.

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

Mr. CLARKE. Good morning, Mr. Chairman and members of the Committee. I am Tom Clarke. I am Director of the Division of Mining and Reclamation of the West Virginia Department of Environmental Protection. Thank you for the opportunity to address the Committee concerning H.R. 2824.

Mining fill placement in waters of the United States is regulated by the Corps of Engineers under section 404 of the Clean Water Act and by State regulatory programs under SMCRA. I would like to take the Committee through a brief timeline of the recent history of regulation of mining fill placement.

From and after 1998, there has been litigation over mining fill replacement under SMCRA's 1983 Buffer Zone Rule and the Clean

Water Act section 404. The 1983 Buffer Zone Rule prohibited mining within 100 feet of a perennial or intermittent stream unless a waiver could be granted. The requirements for a waiver could not be met in the stream segment that is filled. However, neither OSM nor States had ever applied the Buffer Zone Rule as a prohibition of mining fills. But in lawsuits, environmental groups claimed that the Buffer Zone Rule did just that.

In response, in January 2004, OSM published a notice of proposed rulemaking for what became the 2008 Buffer Zone Rule. In this notice, OSM said it was not aware of the 1983 rule ever being applied as a prohibition of mining in the buffer zone. It said it was seeking to clarify circumstances in which mining activities, including fills, are allowed in the buffer zone. It also said another purpose of this rulemaking was to align the rule more closely with its basis in SMCRA and OSM's history of interpreting it.

In December 2008, OSM finalized the 2008 rule. It added new requirements for avoidance of fill in waters, analysis of alternatives to fill in waters, and it was generally harmonious with the Corps of Engineers requirements under section 404 of the Clean Water Act. Environmental groups immediately challenged the 2008 rule in court. Subsequently, on June 11, 2009, the Interior Department, EPA, and the Corps entered into an MOU that committed OSM to developing the Stream Protection Measures rule. This MOU and OSM's March 2010 settlement of the lawsuit over the 2008 rule with environmental groups provided the impetus for OSM to pursue the Stream Protection Measures rule. In this settlement, OSM agreed to replace the 2008 rule by January 2011.

The new rule is not justified by the history of OSM oversight under SMCRA. OSM's settlement put it under unrealistically tight timeframes for producing a rule. OSM initiated the EIS for the new rule in the late summer of 2010. It was underway in earnest in the fall of 2010. State cooperating agencies, of which West Virginia is one, were given very little time to review voluminous chapters of the EIS. In a letter dated November 23, 2010, the States complained to OSM about inadequate time to review the EIS and its poor overall quality. Subsequently, OSM fired its EIS contractor.

Since then, the States have received little or no information about the EIS despite sending another letter to OSM on July 3 of this year seeking to reengage the process, and also despite what we have heard, that OSM employees are actively working on the EIS rule internally.

A leaked version of the new rule in 2010 shows serious potential conflicts with the Clean Water Act. It provides a biologic component of the material damage definition, biologic performance standards, and quantification methods for determining material damage. These have great potential to conflict with water quality standards in the Clean Water Act. The new rule would also provide corrective action thresholds of which operations that are otherwise in compliance with Clean Water Act requirements are subject to regulatory consequences under surface mining laws.

On the Surface Mining Act side, it also provides national definitions for Approximate Original Contour and material damage to the hydrologic balance, thus eliminating the flexibility that the States are supposed to have under SMCRA.

I understand that OSM has recently projected an August 2014 date for final promulgation of this rule. The timeframes for public comment on a draft rule in EIS and OSM's development of responses to these comments in a final rule would appear to make publication of a proposed rule and EIS imminent. The States and the public have been shut out of a process that is expected to bring radical change to surface mining regulation. This is bad policy. The 2008 rule, which was carefully considered over a 5-year period, has never been implemented and should be given a chance to work. If radical change in mining regulation is to occur, the impetus for that should come from Congress, not a backroom agreement of bureaucrats or a sue-and-settle court settlement. An approach like H.R. 2824's is appropriate.

Again, I would like to thank the Committee for the opportunity to appear today and would be glad to answer any questions.

Mr. LAMBORN. All right. Thank you.

[The prepared statement of Mr. Clarke follows:]

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

The West Virginia Department of Environmental Protection appreciates the opportunity to submit this testimony regarding a legislative hearing on H.R. 2824, the Preventing Government Waste and Protecting Coal Mining Jobs in America Act.

On the eve of the 36th anniversary of the adoption of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or the "Act"), the Office of Surface Mining Reclamation and Enforcement (OSM) is continuing its efforts to substantially re-write the regulations governing the way coal mining is conducted in America. Its most recent projection is that this effort, its Stream Protection Measures Rule-making, will be completed a year from now, in August of 2014. In doing this, OSM is casting aside revisions it made to its Stream Buffer Zone Rule in 2008, without ever attempting to implement them. The 2008 Stream Buffer Zone Rule was a logical evolution of the surface mining regulatory program. It was promulgated in an open, transparent manner accompanied by a multi-year Environmental Impact Statement (EIS) supporting it. In contrast, the Stream Protection Measures Rule finds its genesis in a backroom agreement of Federal regulators who sought not only to impose a regulatory stranglehold on a significant source of the Nation's energy supply but, also, to radically transform the economy of the Appalachian region in so doing.

OSM'S IMPETUS FOR THE STREAM PROTECTION MEASURES RULEMAKING

From where does OSM get the impetus for its attempt to re-write the details of a mature regulatory program? Not from thousands of inspections in its role of oversight over State regulatory agencies to whom SMCRA gives exclusive regulatory jurisdiction. Not from 30 plus years of annual evaluations of State regulatory programs. Not from any demands from Congressional overseers that OSM conform to Congressional intent. Not from any outcry from State regulators demanding fixes for broken regulatory programs. No, the impetus comes from two sources: (1) a June 11, 2009 MOU the Interior Department signed with the Environmental Protection Agency (EPA) and the Army Corps of Engineers which targeted Appalachian coal mining for stricter scrutiny; and (2) a "sue and settle" lawsuit settlement reached with environmental groups in their challenge of 2008 revisions to OSM's stream buffer zone rule.

In the June 11, 2009, MOU these agencies agreed to make significant changes in the way coal mining is regulated in Appalachia. These agencies made this agreement without advance notice or opportunity for comment. OSM explained its part under this MOU:

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 min-

ing operations in six Appalachian States, while ensuring that future mining remains consistent with Federal law.

Volume 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 basis of other efforts undertaken by both OSM and the U.S. 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.

Another impetus for OSM’s Stream Protection measures rulemaking was a court settlement. 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 timeframe, 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 8 months to complete a draft EIS for the Stream Protection Measures Rule.

THE STREAM PROTECTION MEASURES RULEMAKING PROCESS HAS BEEN FLAWED FROM THE START

OSM correctly realized that its planned Stream Protection Measures rulemaking was sufficient in scope to require the preparation of an EIS in accordance with the National Environmental Policy Act (NEPA). However, in contrast to the transparency and the hard look at environmental consequences NEPA envisions, OSM has conducted the EIS in such a manner as to foreclose meaningful participation by cooperating agencies, of which the West Virginia Department of Environmental Protection is one. It began the EIS with a “cram down” approach. Under the unrealistically ambitious schedule OSM had established, the eight cooperating State agencies were denied an opportunity to review the first chapter of the EIS and were given only a very few days to review and comment on hundreds of pages of material in chapters two, three and four. Complicating the process was the fact that the contractor OSM had hired to produce the EIS was apparently not up to the task. After having only a brief opportunity to see and comment on chapters two, three and four of the EIS, the States sent a joint letter to OSM on November 23, 2010 complaining about the lack of meaningful opportunity to comment on the EIS and the poor overall quality of the product. Subsequently, OSM fired its EIS contractor.

Since OSM fired its contractor on the EIS, its process has shifted to a nearly complete blackout on information about development of the Stream Protection Measures Rule. Instead of NEPA’s “hard look” at the consequences of Federal action, OSM has

shifted to a “no look” approach. The eight cooperating agency States sent another letter to OSM on July 3, 2013, inquiring about OSM’s intentions to further engage with the States on the EIS and expressing interest in continued participation in it. The States requested a reply from OSM by July 10, 2013. To date, no reply or other communication has been received. Apparently, OSM intends to simply publish a draft EIS and proposed rule someday without further engagement with the cooperating agency States or opportunity for them to review substantially re-written versions of chapters two, three and four and never-before-seen versions of subsequent chapters.

IMPACTS OF THE STREAM PROTECTION RULE

Figures that became public around the time that OSM fired its contractor for the EIS projected significant negative economic impacts for the Appalachian region from the Stream Protection Measures Rule in terms of job losses in the thousands, even greater population losses and reduction of the tax base. 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. From briefings OSM conducted when it first began to consider this rule, however, we are aware of many specific concepts that are expected to be embodied in the Stream Protection Measures Rule. Several of these concepts are troublesome to the West Virginia Department of Environmental Protection:

- 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 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 Appa-

lachian 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 3 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.

An overarching issue is the fundamental change in the Federal-State relationship under SMCRA that is expected to come from the Stream Protection Measures Rule. It is likely to result in elimination of the ability of States to craft their regulatory programs as necessary to address local State issues. In the 36 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).

THE 2008 STREAM BUFFER ZONE RULE

The 2008 Stream Buffer Zone Rule was meant to clarify the 1983 version of this rule. The 1983 Stream Buffer Zone rule was the target of litigation from and after the late 1990s that sought to re-interpret this rule in a way that was contrary to

both its existing interpretation, the provisions of SMCRA which govern excess spoil and fill placement and the authority of the Army Corps of Engineers under section 404 of the Federal Clean Water Act. The 2008 rule represents a rational approach to resolution of these potential conflicts. It clarifies the Stream Buffer Zone Rule in a manner that does not pose these conflicts and strengthens the previous rule by adding new requirements which further limit the impact on streams from disposal of excess spoil and other fill material from coal mining operations. New requirements of the 2008 rule include standards that require avoidance of fill in stream channels, analysis of alternatives to filling streams and standards that are harmonious with requirements of the Army Corps of Engineers in its permitting program for authorization of fill placement in waters of the United States under section 404 of the Clean Water Act.

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 10 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 100 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 program complies with its 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.

CONCLUSION

OSM and the other parties to the June 11, 2009 MOU have attempted to boldly make quantum shifts in regulatory policy that are the business of Congress and State legislatures to make. The courts have rejected actions EPA has taken to carry out its tasks under this MOU. OSM’s principal task under the MOU, its Stream Protection Measures rulemaking is also ill-conceived, is aimed at fixing problems that have not been demonstrated to exist, has great potential to conflict with the Clean Water Act and is being undertaken under a veil of secrecy. Congress should constrain OSM to its proper role under SMCRA and require it to interpret the law consistent with the congressional intent behind it.

The 2008 Stream Buffer Zone rule properly resolved issues that arose in the interpretation of its predecessor rule, did so in a manner that was harmonious with the Clean Water Act and the congressional intent behind SMCRA and provided enhanced protection of streams. OSM has not implemented this rule and has never given it a chance to work. Before OSM is allowed to complete a radical revision of its surface mining rules, it should take some time to evaluate the operation of its 2008 rule. The approach of H.R. 2824 is a reasonable way to accomplish this.

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.

LETTER SUBMITTED FOR THE RECORD FROM THOMAS D. SHOPE

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT,
PITTSBURGH, PA, DECEMBER 8, 2009.

JOSEPH M. LOVETT,
Executive Director,
Appalachian Center for the
Economy and the Environment,
Lewisburg, WV 24901.

Re: Response to petition requesting Federal enforcement of West Virginia's surface mining program pursuant to 30 CFR part 733.

DEAR MR. LOVETT:

This letter responds to your August 10, 2009, petition requesting Federal enforcement, pursuant to 30 CFR 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 30-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.”
- “. . . 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 (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.
 - 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.

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 (4th 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 (4th Cir. 2003) ("[I]t is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States . . .").

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.

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.

Mr. LAMBORN. Mr. Lambert.

STATEMENT OF BRADLEY C. "BUTCH" LAMBERT, DEPUTY DIRECTOR, VIRGINIA DEPARTMENT OF MINES, MINERALS AND ENERGY

Mr. LAMBERT. Good morning, Mr. Chairman and members of the Subcommittee. My name is Butch Lambert, and I serve as the Deputy Director of the Virginia Department of Mines, Minerals and Energy. Thank you for the opportunity to appear before you today to offer testimony on H.R. 2824.

On December 12, 2008, OSM issued a news release titled, "Office of Surface Mining Issues New Mining Rule Tightening the Restrictions on Excess Spoil, Coal Mine Waste, and Mining Activities Near Streams." OSM and State agencies felt as though the 2008 Buffer Zone Rule was a rule that would finally meet the goal of environmental protection while ensuring the coal production that would meet the energy needs of the Nation.

The development of the 2008 rule was a 5-year process. OSM solicited public input throughout the process. The agency received over 43,000 comments and held four public hearings that were attended by approximately 700 people. The rule was to take effect on January 12, 2009. However, before the rule was implemented, it was suspended. The States had no opportunity to amend our programs to adopt the rule.

We believe the 2008 rule contained provisions that would allow disposal of excess spoil in such a manner that would ensure stream protection. We are supportive of the approach contained in H.R. 2824 and believe the States should be provided an opportunity to implement the Stream Buffer Zone Rule following which OSM can prepare an assessment of why a different rule is needed.

We also would note that given the fact that the States are implementing a regulatory requirement of SMCRA, we do not see the adoption of the 2008 rule as an unfunded mandate. Whether that would hold true for OSM's current intention to move forward with an expanded stream protection rule remains to be seen.

For years, the States have been administering stellar regulatory programs, including the protection of streams. However, beginning in 2009, OSM moved to impose drastic change in how the States administer the programs. The OSM has not provided any information to the States as to the reason for revising the Stream Buffer Zone Rule that they now have termed the Stream Protection Rule.

Early in the development of the draft, OSM invited several States, including Virginia, to participate in the development of the environmental impact statement as cooperating agencies under the National Environmental Policy Act. In preparing the draft EIS, OSM hired a contractor outside of the coal mining regions who had no mining background. Cooperating agency States were cautious about the contractor and its ability to develop the draft EIS. We voiced a concern about developing a new EIS and a new rule. However, OSM moved forward with the contract for development of the draft EIS. Following a limited opportunity to provide comments on a few early chapters of the draft in 2010, State cooperating agencies have not been involved in the review of the comments of the draft or any other portion of the draft EIS.

On July 3, 2013, several cooperating agency States sent a letter to Director Pizarchik reminding him that the role of the cooperating agencies included the opportunity to review and comment on those chapters of the draft that are made available to us. I would like to submit a copy of that letter for this record.

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

[The letter submitted for the record by Mr. Lambert follows:]

LETTER SUBMITTED FOR THE RECORD FROM, RANDALL C. JOHNSON, BRUCE STEVENS, STEVE HOHMANN, JOHN CAUDLE, JOHN BAZA, BRADLEY C. LAMBERT, THOMAS L. CLARKE, AND TODD PARFITT

JULY 3, 2013.

The Honorable JOSEPH G. PIZARCHIK,
Director,
Office of Surface Mining, Reclamation and Enforcement,
U.S. Department of the Interior,
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 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. Since the initiation of the EIS process in 2010, the States have had the opportunity to comment on three initial draft chapters (numbers 2, 3 and 4).

Over the course of the past 2 years, OSM's draft EIS development process has seen several fits and starts, largely due to issues related to the work of various contractors OSM engaged to assist the agency with the draft EIS. Our understanding is that OSM has now addressed these issues and is once again moving forward with the development of the draft EIS. As a result, we would like to re-engage with the process and request an opportunity to review draft chapters and other related documents as they become available, pursuant to the MOU's we have in place with the agency. In doing so, we have a few requests.

In the past, we had serious concerns regarding the constrained timeframes under which we were operating to provide comments on draft documents. As we have stated from the outset, and as Members of Congress have also noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with limited working days to review the material, some of which can be fairly technical in nature. In order to comply with the deadlines, we have to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business. While we are prepared to reallocate resources to review and comment on the draft EIS Chapters, adequate time will allow 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 will review. In the case of chapters 2, 3 and 4, several attachments, exhibits and studies were

not provided to us as part of that review. Some of these were critical to a full and complete analysis of OSM's discussion in the chapters. It is important for us to receive all applicable documents that are referenced in draft chapters in order to conduct a meaningful review.

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. Our experience with the reconciliation process to date has not been particularly positive or meaningful. We are hopeful that as we reinitiate the EIS review and comment process, OSM will engage in a robust reconciliation process. Among other things, we believe it should include an explanation of which comments were accepted, which were not, and why. 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 the revised chapters be provided to us as soon as practicable after their completion.

As OSM considers re-initiation of the review process for cooperating State agencies, it would be helpful if the agency would provide us with new time tables as soon as possible so that we can begin our own internal planning.

Finally, as we noted during the submission of comments by many of the cooperating agencies in the early rounds of the EIS development process, there is great concern about how our comments will be used or referred to by OSM in the final draft EIS that is published for review. While the MOU s we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", 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 uncertain whether their names will appear on the draft EIS, which was originally anticipated. This of course would imply tacit approval independent of the State 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.

In order to move forward expeditiously, we would appreciate a response to our request to re-engage with the EIS process no later than July 10. If we have not heard from you by then, we will contact via phone to further discuss the matter.

Sincerely,

RANDALL C. JOHNSON,
Director, Alabama Surface Mining Commission.

BRUCE STEVENS,
*Director, Division of Reclamation,
Indiana Department of Natural Resources.*

STEVE HOHMANN,
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 and Reclamation,
West Virginia Department of Environmental Protection.*

TODD PARFITT,
Director, Wyoming Department of Environmental Quality.

Mr. LAMBERT. Thank you.

The States requested that Director Pizarchik responded to our request by July 10. To date, we have not received a response.

We should note here that during the Subcommittee oversight hearing on OSM's stream protection rulemaking on July 23 of this year, Director Pizarchik mentioned that one of the reasons that OSM had not reached out to the States with an opportunity to reengage in the EIS process and to review the revised chapters of the draft EIS is because the States expressed concern about being able to review those chapters given the limited time and resources available. This is not an accurate representation of our situation or our concerns. It was the constrained timeframes on which we were given to operate under to review those chapters. The agencies stand ready and prepared to reengage in the process and to fulfill our roles as cooperating agencies, assuming OSM provides a reasonable time period within which to review and to comment on the draft EIS.

Mr. Chairman, at this time, I also would like to ask that the statement from the IMCC be submitted for the record.

Mr. LAMBORN. Hearing no objection, so ordered.

[The prepared statement submitted for the record by Mr. Lambert follows:]

PREPARED STATEMENT OF THE INTERSTATE MINING COMPACT COMMISSION

H.R. 2824—PREVENTING GOVERNMENT WASTE AND PROTECTING COAL MINING JOBS IN AMERICA

The Interstate Mining Compact Commission (IMCC) appreciates the opportunity to submit this statement regarding a legislative hearing on H.R. 2824, the *Preventing Government Waste and Protecting Coal Mining Jobs in America Act*. IMCC is a multi-state governmental organization representing 25 coal and mineral producing States throughout the United States, several of whom implement regulatory programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

H.R. 2824 would amend section 503 of the Surface Mining Control and Reclamation Act (SMCRA) by requiring States with approved programs under the act to adopt as part of their programs a rule promulgated by the Office of Surface Mining (OSM) on December 12, 2008 at 73 Fed. Reg. 75813 concerning excess spoil, coal mine waste and buffers for perennial and intermittent streams. Pursuant to section 2(b) of H.R. 2824, States would be provided a 2 year period within which to submit a program amendment pursuant to 30 CFR part 732 that incorporates the 2008 rule. Once OSM has approved amendments from all primacy States, the agency will issue a notice to that effect and 5 years thereafter will submit a report to Congress concerning an evaluation of the rule's effectiveness, including its impacts on energy production, along with a description of any proposed changes that may be necessary and are justified.

We believe that H.R. 2824 is an appropriate way to proceed under the circumstances, especially given the scrutiny and review that attended the development of the 2008 rule. The States were prepared to adopt the final rule as a part of their programs through the State program amendment process. Since that time, some States have already incorporated some of the key concepts of the 2008 rule into their existing regulatory programs. While there are admittedly challenges for the States associated with the 2008 rule, particularly with regard to resource implications associated with the required "alternatives analyses", we recognize that the rule addressed and clarified many of the concerns associated with stream protection and that in many respects, was an improvement over the 1983 rule.

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 the 2008 final rule 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. How-

ever, 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 the anticipated new 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, which is exactly what the 2008 rulemaking accomplished. And while OSM can prescribe a national standard for accomplishing this task, it remains the responsibility of the States, as exclusive regulatory authorities where primacy 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, including the 2008 final rule. There is little left to offer. 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 found with respect to West Virginia’s regulatory program, there has been no indication that the States are applying their respective stream buffer zone rules inconsistently with the historic application of the buffer zone 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 any 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 these rulemakings, they are particularly concerned about a propensity on OSM’s part to insert itself into the State permitting process in inappropriate ways. For instance, in OSM’s “Immediate Stream Protection Measures” which were released in November of 2009, OSM indicated that it intended 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 such an 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 amend-

ments thereto. EPA is 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 State 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 of 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 proposal to adjust the definitions of "material damage to the hydrologic balance" and "approximate original contour" confirms the national scope of the newest 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. 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 rulemaking 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.

To date, OSM has set forth in the draft EIS chapters upwards of 55 different options for proceeding forward with a new stream buffer zone 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. Any stream buffer zone 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. And it must be kept in mind that the setting of narrative water quality standards is a quintessential State function in which the Federal agencies play a very limited, prescribed role. By and large, these determinations are left solely to the States under the Clean Water Act.

If and when OSM moves forward with any adjustments to the stream buffer zone 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 stream buffer zones and related issues are likely to fail.

One of the overarching concerns that is anticipated by H.R. 2824 and that should be addressed is why OSM feels compelled to move forward with a new rulemaking. We are still uncertain, even after all the debate over the past several years concerning the June 2009 MOU and OSM's new 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 new 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—one of which is to allow the 2008 rule to be effectuated. 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 any new rulemaking process.

As we peruse the various "principal elements" of the proposed action spelled out in OSM's draft EIS to date, 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 any 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, particularly in the context of the 2008 rule.

At the point when 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.

Another of our concerns is whether the science supports some of OSM's proposed concepts. In particular, it seems to us that there are several technical issues associated with these 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 2008 rule considered several of these concepts and settled on a resolution that was reasonable and workable. We are unaware of any peer reviewed science that would significantly change the approach contained in the 2008 rule, contrary to recent statements by OSM Director Pizarchik.

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 former Interior Secretary Salazar, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with only 5 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.

In this regard, we take issue with recent comments by OSM Director Pizarchik at a Subcommittee oversight hearing on July 23 that the States are unable or unwilling to participate in the continued review of the draft EIS chapters because of limited resources and staff. It was the constrained timeframes within which we were required to work that was the issue, not our commitment to fulfill our obligations as cooperating agencies. In fact, the cooperating agency States recently sent a letter to Director Pizarchik dated July 3 that reiterated their commitment and interest to re-engage with the draft EIS process now that it has apparently been re-initiated following several missteps with contractors. The States are hopeful that OSM will honor this request and abide by the memoranda of understanding that these States have signed with OSM regarding their role as cooperating agencies.

We appreciate the opportunity to provide these comments to the Subcommittee concerning H.R. 2824 and 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. We believe that H.R. 2824 would further that process and as such we strongly support the bill.

Mr. LAMBERT. Thank you for the opportunity to appear before you today. I will be happy to answer any questions you may have or to submit any further information.

Mr. LAMBORN. All right. Thank you.

[The prepared statement of Mr. Lambert follows:]

PREPARED 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 H.R. 2824, the "Preventing Government Waste and Protecting Coal Mining Jobs in America Act".

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 1880s 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. This resulted in a significant expansion and enhancement of the Virginia regulatory program.

Coal production in Virginia peaked at 47 million tons in 1990. Production for 2011 reached 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 data base 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.

For years the States have been administering stellar regulatory programs, including the protection of streams. However, beginning in 2009, OSM embarked on an effort 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, which appears to be the basis for the effort by OSM to change/revise the 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 intention to propose a new Stream Protection 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" under the National Environmental Policy Act (NEPA). In preparing the draft EIS, 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. We recommended 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.

However, OSM moved forward with the contract. Following a limited opportunity to provide comments on a few early chapters of the draft EIS in 2010, Virginia and the other State cooperating agencies have not been involved in the review of comments of the draft or any other portion of the DEIS.

On July 3, 2013, several of the cooperating agency States sent a letter to Director Pizarchik reminding him that the role of the cooperating agencies, as defined by the memoranda of understanding that each of us entered into with the agency, included an opportunity to review and comment on those chapters of the draft EIS that are made available to us. (A copy of the letter is being submitted for the record).

The cooperating State agencies have had several concerns regarding the constrained timeframes under which we were operating to provide comments on the draft documents that were provided to us in 2010. As we have stated from the outset, and as Members of Congress have also noted, the ability to provide meaningful comments on OSM's draft documents has been extremely difficult with limited working days to review the material, some of which can be fairly technical in nature. In order to comply with the deadlines, we have devoted considerable staff time to the preparation of our comments, generally to the exclusion of other pressing

business such as reviewing citizen's complaints, permit reviews and AML project design.

There is also the matter of completeness of the draft chapters that we have reviewed to date. In the case of chapters 2, 3 and 4, several attachments, exhibits and studies were not provided to us as part of that review. Some of these were critical to a full and complete analysis of OSM's discussion in the chapters. It is important for us to receive all applicable documents that are referenced in draft chapters in order to conduct a meaningful review.

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. Our experience with the reconciliation process to date has not been particularly positive or meaningful. We are hopeful that as we reinitiate the EIS review and comment process, OSM will engage in a robust reconciliation process. Among other things, we believe it should include an explanation of which comments were accepted, which were not, and why. 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.

As we noted during the submission of comments by many of the cooperating agencies in the early rounds of the EIS development process, there is great concern about how our comments 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", 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 uncertain whether their names will appear on the draft EIS, which was originally anticipated. This of course would imply tacit approval independent of the State comments that 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 requested an opportunity to jointly draft a statement 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.

The States requested that Director Pizarchik respond to our request by July 10, 2013 to re-engage in the EIS process. To date, we have not received a response.

We should note here that during the Subcommittee's oversight hearing on OSM's stream protection rulemaking on July 23, Director Pizarchik mentioned that one of the reasons that OSM has not reached out to the States with an opportunity to re-engage in the EIS process and to review revised chapters in the draft EIS is because States expressed concerns about being able to review these chapters given limited time and resources. This is not an accurate representation of our situation or our concerns. It was the constrained timeframes under which we were operating in 2010 that proved problematic for the cooperating agency States. The States stand prepared to re-engage in this process and to fulfill their roles as cooperating agencies assuming OSM provides reasonable time periods within which to review and comment on draft chapters of the EIS.

HISTORY AND BACKGROUND OF THE STREAM BUFFER ZONE RULE

On December 12, 2008, OSM issued a news release titled "Office of Surface Mining Issues New Mining Rule Tightening Restrictions on Excess Spoil, Coal Mine Waste, and Mining Activities in or Near Streams". In the words of OSM, the agency stated; "We believe that the new rule is consistent with a key purpose of the Surface Mining Law, which is to strike a balance between environmental protection and ensuring responsible production of coal essential to the Nation's energy supply". The statement from the release was from then Assistant Secretary of the Interior, Land and Minerals Management C. Stephen Allred. Mr. Allred is speaking of the 2008 Stream Buffer Zone Rule. He goes on to say that this new rule will clarify the Stream Buffer Zone rule and resolve any long-standing controversy over how the rule should be applied. He is referring to the issues raised with disturbances along

stream buffer zones as far back as 1983. There have been several challenges to the stream buffer zone rule over last decades. OSM and state agencies felt as though the 2008 buffer zone rule was a rule that would finally meet the goal of environmental protection while ensuring coal production that would meet the energy needs of the Nation.

The development of the 2008 rule was a 5 year process. OSM solicited public input throughout the process. The agency received over 43,000 comments and held 4 public hearings that were attended by approximately 700 people. The rule was to take effect on January 12, 2009. However, before the rule was implemented it was suspended. The States had no opportunity to amend our programs to adopt that rule. We believe the 2008 rule contained provisions that would allow disposal of excess spoil in such a manner that would ensure stream protection. Even though Virginia has not formally adopted the 2008 rule, some portions of the rule have been incorporated into coal surface permit review and approval. Alternative analysis and fill minimization are two items from the rule now incorporated into our permitting process. The number of fills has been reduced, as well as the number of cubic yards being placed in fills. VA tracks these numbers as part of overall performance measures on the success of our program.

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 rule-making process and provide information to States on why the 2008 rule would not be protective of streams. Until OSM is able to do so, we are supportive of the approach contained in H.R. 2824 and believe that the States should be provided an opportunity to implement the 2008 stream buffer zone rule, following which OSM can prepare an assessment of why a different rule is needed. We would also note that given the fact that States are implementing a statutory requirement under SMCRA, we do not see the adoption of the 2008 rule as an unfunded mandate. Whether that would hold true of OSM's current intention to move forward with an expanded stream protection rule remains to be seen.

In a press release dated 4/27/09, the Interior Secretary Ken Salazar announced that the mountaintop coal mining "stream buffer zone rule" issued by the Bush Administration is legally defective. Salazar directed the U.S. Department of Justice (DOJ) to file a pleading with the U.S. District Court in Washington, DC requesting that the rule be vacated due to this deficiency and remanded to the Department of the Interior for further action. This was done without any consideration of the 5 year process it took to develop the rule, and ignored the public participation process, including the number of comments received and the public meetings that were held. And of course the States were never given an opportunity to adopt the rule so that information could be gathered regarding the effectiveness of the rule to protect streams. Without any supporting information on why the 2008 rule was defective, we believe that the 2008 rule should have not been vacated but should have been allowed to move forward.

Thank you for the opportunity to testify today. I would be happy to answer any questions or provide additional information.

Mr. LAMBORN. Mr. Jones.

**STATEMENT OF JOHN PAUL JONES, VICE PRESIDENT,
ENVIRONMENTAL, ALPHA NATURAL RESOURCES, INC., ON
BEHALF OF THE NATIONAL MINING ASSOCIATION**

Mr. JONES. Good morning. Thank you for the opportunity to testify today. My name is John Paul Jones, and I am Vice President, Environmental, for Alpha Natural Resources. I have over 30 years experience in the mining industry. And I am testifying today on behalf of both Alpha and the National Mining Association, of which we are a member.

Alpha is America's third-largest coal supplier. Alpha and its affiliates employ nearly 12,000 people in Virginia, West Virginia, Kentucky, Pennsylvania, and Wyoming. We operate 91 mines and 25 preparation plants, and we produced over 108 million tons of

coal in 2012. Exports of our coal have reached customers in 27 countries, contributing significantly to America's balance of trade.

Alpha believes in mining coal the right way, which is embodied in our corporate philosophy we call Running Right. As a result of our commitment to environmental excellence, Alpha has been recognized with 17 environmental awards for outstanding conservation, mine restoration, and environmental enhancement projects in just the past 3 years. We have partnered with the U.S. Fish and Wildlife Service, Virginia Tech, the Nature Conservancy, and other like-minded groups on numerous environmental restoration and habitat protection projects, as referenced in my written submitted testimony.

Our operations are also run with a strong commitment to safety, regularly receiving achievement recognition from the Mine Safety and Health Administration. Alpha recently dedicated the Running Right Leadership Academy in June of this year, a 136,000-square foot state-of-the-art education and comprehensive training facility for mine safety and operational excellence. There is no other facility like it in the United States today and quite possibly in the whole world.

Alpha Natural Resources and the National Mining Association strongly urge this Committee and the Congress to pass H.R. 2824, the Preventing Government Waste and Protecting Coal Mining Jobs in America Act. The premise of the bill is simple: It would amend the Surface Mining Control and Reclamation Act to require States to incorporate the existing Federal Stream Buffer Zone regulation into their approved State programs. It would then require the Office of Surface Mining to evaluate the effectiveness of the existing rule before it issues a new one.

Contrary to what some critics claim, the commonsense requirements included in the 2008 rules were not at all midnight rules, nor did it roll back any environmental protections. The Stream Buffer Zone Rule clarified 30-year-old interpretations by 24 States. In addition, lawsuits challenging such interpretations were twice rejected by the Fourth Circuit Court of Appeals, in 2001 and again in 2003.

Midnight rules, as the name describes, are crafted at the 11th hour of an outgoing Administration with little to no public input. In contrast, the 2008 rule was promulgated over a thorough public process spanning over 5 years, including numerous public hearings and consideration of over 43,000 public comments. The 2008 rule was supported by two environmental impact statements sponsored by OSM, EPA, the Corps of Engineers, and the Fish and Wildlife Service, with over 30 federally funded studies and 5,000 pages of scientific analysis.

Likewise, the rule was anything but a rollback of current law. In addition to providing clarification and removing the threat of unwarranted litigation by those who oppose coal mining, the rule added significant protections to enhance environmental performance.

In contrast to the 2008 rule, OSM's ongoing rewrite of the Stream Buffer Zone Rule has been plagued with controversy that has been well documented by this Committee. Even a prominent environmental activist described the rulemaking in his written tes-

timony before this Committee on April 7, 2011, as an expensive fiasco.

We are gravely concerned about the impacts this rulemaking would have on the viability of our mines, our workforce, and the communities our operations support. Such concerns were validated by a subsequent analysis of the proposed rule's likely effects on 75 actual mines by ENVIRON International, predicting even larger impacts, including 133,000 jobs lost nationwide, a decrease in recovery of coal reserves by 30 to 41 percent, annual value of coal lost to production restrictions of \$14 billion to \$20 billion, and Federal and State tax revenue reductions of \$4 billion to \$5 billion.

The choice is clear. OSM's new proposal is unnecessary, unjustified, and dangerous, and certainly does not meet any cost-benefit standard. H.R. 2824 provides a reasonable framework and timetable for implementing the 2008 rule in primacy States and evaluating an actual record of its effectiveness before allowing OSM's expensive fiasco to move forward with a costly and unnecessary rewrite. For these reasons, we strongly urge this Committee to pass H.R. 2824 and bring some much-needed finality to this already exhaustive rulemaking process.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. LAMBORN. Thank you, and to all of you, for your testimony and for your statements.

[The prepared statement of Mr. Jones follows:]

PREPARE STATEMENT OF JOHN PAUL JONES, VICE PRESIDENT, ENVIRONMENTAL, ALPHA NATURAL RESOURCES, INC., ON BEHALF OF THE NATIONAL MINING ASSOCIATION

Good morning. Thank you for the opportunity to testify today. My name is John Paul Jones, and I am Vice President, Environmental for Alpha Natural Resources. I have over 30 years of environmental experience with the mining industry. I am testifying today on behalf of both Alpha and the National Mining Association, of which we are a member.

Alpha is America's third largest coal supplier. Alpha and its affiliates employ nearly 12,000 people in Virginia, West Virginia, Kentucky, Pennsylvania and Wyoming; operate 91 active surface and underground mines and 25 preparation plants; and produced over 108 million tons of coal in 2012. Over 80 percent of our coal is used to produce electricity, and over 20 million tons is high quality metallurgical, or "met", coal used in the production of steel. Exports of our coal have reached customers in 27 countries, contributing significantly to America's balance of trade.

Alpha believes in mining coal the right way, which is embodied in our corporate philosophy we call "Running Right." As a result of our commitment to environmental excellence, Alpha has been recognized with 17 environmental awards for outstanding conservation, mine restoration, and environmental enhancement projects in just the past 3 years. We have partnered with the U.S. Fish and Wildlife Service and Virginia Tech to study mining's impact on freshwater mussels and have partnered with the Nature Conservancy to prioritize abandoned mine land project restoration opportunities in the Clinch and Powell River watersheds—home to numerous endangered mussels. Alpha also supports the Appalachian Regional Reformation Initiative and the Powell River Project, both of which are geared toward improving reclamation of mined lands using native trees. We planted 1.7 million trees on reclaimed mine sites in 2012.

Our operations are also run with a strong commitment to safety. In 2012, eight of our mines and processing plants received certificates of achievement for their safety programs from the Mine Safety and Health Administration, as well as four Holmes Safety Association Awards. Alpha also recently dedicated the "Running Right Leadership Academy" in June of this year—a 136,000 square foot, state-of-the-art education and comprehensive training facility for mine safety and operational excellence. There is no other facility like it in the United States today, and quite possibly the world.

Alpha Natural Resources and the National Mining Association strongly urge this Committee and the Congress to pass H.R. 2824, the “Preventing Government Waste and Protecting Coal Mining Jobs in America Act.” The premise of the bill is simple—it would amend the Surface Mining Control and Reclamation Act (SMCRA) to require States to incorporate the existing Federal “stream buffer zone” (“SBZ”) regulation into their approved State programs. It would then require the Office of Surface Mining (OSM) to evaluate the effectiveness of the existing rule before it continues with the process of issuing a new one.

Contrary to what some critics claim, the common-sense requirements included in the 2008 rules were not at all “midnight rules,” nor did it “roll back” environmental protections. The SBZ rule clarified 30-year old interpretations by all 24 State programs (as well as OSM) regarding the permissibility of mining in and around streams. In addition, lawsuits challenging such interpretations were twice rejected by the 4th Circuit Court of Appeals in 2001 and 2003 (See *Bragg v. Robertson* and *Kentuckians for the Commonwealth v. Rivenburgh*). The 2008 SBZ rule was also approved by the then-Administrator of the Environmental Protection Agency.

Midnight rules, as the name describes, are crafted at the 11th hour of an outgoing administration, with little to no public input. In contrast, the 2008 rule was promulgated after a thorough public process spanning over 5 years (from 2003–2008), including numerous public hearings, and consideration of over 43,000 public comments. The 2008 rule was supported by two environmental impact statements sponsored by OSM, the Environmental Protection Agency, the U.S. Army Corps of Engineers and the Fish and Wildlife Service (FWS), with over 30 federally funded studies and 5,000 pages of scientific analysis. Following meetings between the Director of OSM and FWS, the agency decided that formal consultation with FWS on the rule was not necessary since OSM’s existing rules contain numerous provisions to protect endangered species and their critical habitat—and the 2008 rule did not amend those rules. The 2008 rule was approved by the Solicitor’s office and the Secretary of the Interior which oversees both FWS and OSM.

Likewise, the rule was anything but a “roll back” of current law. In addition to providing clarification and removing the threat of unwarranted litigation by those opposed to coal mining, *the rule added significant protections to enhance environmental performance* when mining in and around streams. Among other things, it requires mines to:

- Avoid mining activities in or near streams if reasonably possible;
- Use the best technology currently available to prevent the contribution of additional suspended solids (sediment) to stream flow or runoff outside the permit area to the extent possible;
- Minimize the creation of excess spoil (dirt and rock); and
- If avoidance of streams is not possible, identify a reasonable range of alternatives for placing fills, and select the alternative with the least overall adverse impacts on fish, wildlife, and related environmental values.

In contrast to the 2008 rule, OSM’s ongoing rewrite of the SBZ rule has been plagued with controversy that has been well documented by this Committee. A prominent environmental activist described the rulemaking in his written testimony on April 7, 2011 before this Committee as “an expensive fiasco.”

We are gravely concerned about the impacts this rulemaking would have on the viability of our mining operations, our workforce, and the communities our operations support. Such concerns were validated by a subsequent analysis of the proposed rule’s likely effects on 75 actual mines by Environ International predicting even larger impacts including:

- 133,000 jobs lost nationwide;
- A decrease in recovery of coal reserves by 30–41 percent;
- Annual value of coal lost to production restrictions of \$14–\$20 billion; and
- Federal and State tax revenue reductions of \$4–\$5 billion.

The choice is clear. OSM’s new proposal is unnecessary, unjustified, and dangerous, and certainly does not meet any cost-benefit standard. After 5 long years of delay by OSM in refusing to implement the current common-sense regulations, H.R. 2824 provides a reasonable framework and timetable for implementing the 2008 rule in primacy States and evaluating an actual record of its effectiveness before allowing OSM’s “expensive fiasco” to move forward with a costly and unnecessary rewrite of SMCRA regulations that will have devastating economic impacts. For these reasons, we strongly urge this Committee to pass H.R. 2824 and bring some much needed finality to this already exhaustive rulemaking process.

Thank you again for the opportunity to testify today. I look forward to answering any questions that you might have.

Mr. LAMBORN. We will now begin questioning. Members are limited to 5 minutes for their questions, but we may have additional rounds. And in any case, we will finish by noon or whenever the second set of votes is called over on the House Floor.

For any one of you, last week Director Pizarchik said here that a new rule was necessary because the 2008 rule did not take into consideration new science and technology when the rule was drafted. Can any of you tell me what new technology or science was made public between December 2008 when the rule was promulgated and early 2009 when the Administration announced that they were going to vacate the 2008 rule? Does anyone know of any new technology that came on-stream during that time?

Mr. CLARKE. None that I am aware of, Mr. Chairman.

Mr. LAMBORN. Mr. Chairman, I am not aware of any new studies.

Mr. LAMBORN. OK.

Mr. JONES. Likewise, Mr. Chairman. I am unaware of any new studies.

Mr. LAMBORN. OK. Thank you.

Now, for Mr. Clarke and Mr. Lambert, Director Pizarchik testified at a previous hearing that the reason that the 1983 rule was more protective, in his opinion, than the 2008 rule was because the 1983 rule prohibited the placement of fill material in streams. Is that a correct statement?

Mr. CLARKE. No, sir, Mr. Chairman. The 1983 rule has never been interpreted as a ban on fill placement in streams by our agency. In fact, such an interpretation would be contrary to section 515(b)(22) of SMCRA in which there are set forth performance standards for placing fill in waters of the United States under SMCRA.

A rule that would have the effect of banning fill would be contrary to that provision. It would also be contrary to section 702 of SMCRA, which prohibits SMCRA from superseding, amending, or repealing the Clean Water Act because such a rule would have the effect of negating authorizations granted by the Corps of Engineers under section 404 of the Clean Water Act.

You could also look to the notice of proposed rulemaking filed in January of 2004 for what became the 2008 Buffer Zone Rule to see OSM's explanation of the history of the 1983 rule and the fact that it had never been applied as a ban on fill placement. And as recently as December 8, 2009, in a letter from Tom Shope of OSM to Joe Lovett, which is among the written materials I submitted to the Committee, you will see an explanation that West Virginia's historic interpretation of the 1983 rule is consistent with OSM's understanding of that rule. And West Virginia had never applied it as a ban on fill placement in waters of the United States or, to use the SMCRA lingo, in intermittent or perennial streams.

Mr. LAMBORN. Thank you.

Mr. Lambert, do you have anything to add to that?

Mr. LAMBORN. I do not, Mr. Chairman. I think Mr. Clarke's statement was very accurate.

Mr. LAMBORN. OK. Thank you.

Now, am I correct in assuming, and you may have alluded to this, that the 1983 rule is still being implemented in both of your States? And in fact, in all of the primacy States?

Mr. CLARKE. That is correct for West Virginia.

Mr. LAMBERT. Also, Mr. Chairman, that is correct in Virginia. With a little bit of interpretation, we are now incorporating some of the 2008 rule into our permitting processes, which is fill minimization and avoidance. And also we are moving forward and trying to use some of the 2008 rule as well as the 1983 rule.

Mr. LAMBORN. OK. And has the Office of Surface Mining ever raised any objections to those two positions?

Mr. LAMBERT. No, sir, they have not in Virginia. As a matter of fact, OSM on their own is using the 2008 rule in Tennessee as we understand it.

Mr. CLARKE. Not to my knowledge in West Virginia. And I would add that we also have incorporated some of the concepts of the 2008 rule in our program as well.

Mr. LAMBORN. And I think you did talk about this. But how much work went into the 2008 rule? I mean, some have characterized it, because it was issued in the closing days, as a midnight rule, implying that it was done with very little work and that it was a shoddy product. Is that a correct characterization?

Mr. LAMBERT. Mr. Chairman, in our opinion, that is not a correct characterization because that rule took 5 years. And as I said in my testimony, 43,000 comments were reviewed, with four public meetings being held, and approximately 700 people attended those public meetings. So I don't think you could characterize that as a midnight rule.

Mr. LAMBORN. OK. Thank you for your testimony.

I now recognize the Ranking Member for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman. And I want to thank the witnesses for traveling to be with us today and for their testimony.

As I mentioned in my opening remarks, there have been multiple studies within the last 3 years that found significantly higher rates of cancer and heart disease in West Virginia residents who live near mountaintop removal mines compared to West Virginia residents who live further away from those mines. One study, by the University of West Virginia's Department of Community Medicine, concluded that based on cancer rates they found, there could be an additional 60,000 to 88,000 people with cancer in central Appalachia because of mountaintop removal mining. Another 2010 study used GIS analysis to assess whether proximity to mining activity was associated with cancer. And sure enough, the closer you live to mining activity like this, the greater your risk.

So, Mr. Clarke, I want to ask you, based on the science, isn't there a greater risk of cancer for West Virginia residents living near mountaintop removal mines?

Mr. CLARKE. Well, the studies you speak of, Mr. Congressman, I believe found a correlation between mining and various disease rates in the immediate area of the mining. They didn't address the issue of what is causing any health impacts.

Mr. HUFFMAN. So it is just a coincidence?

Mr. CLARKE. Well, let me add that when you look at potential impacts from mining and how they could affect residents in the area of the mining, there are two possible exposure pathways. One of which, and I think is what the Stream Protection Measures Rule

is concerned with, is the exposure pathway through the water. The other one would be through the air.

As to the exposure pathway through the water, we already have a complete regulatory program under the Clean Water Act that is devoted to placing limits to protect various uses of water resources, which include protection of human health. And we have a full set of water quality standards that are being implemented through the Clean Water Act's permitting program under the West Virginia Water Pollution Control Act, which imposed standards on all known pollutants that could impact human health. So in terms of what the Stream Protection Measures Rule could do to the water exposure pathway, that is already being addressed under the Clean Water Act completely.

Mr. HUFFMAN. Are you concerned about the health risks from mountaintop removal mining to folks who live close to those activities?

Mr. CLARKE. Yes, indeed, I am.

Mr. HUFFMAN. I want to continue on that note a little bit. A host of studies that were published after the Bush rule show that mountaintop removal mines not only damaged the environment, but also caused cardiovascular disease, cancer, birth defects, and poor overall health. And the USGS just published preliminary research along the same lines. The legislation we are discussing today, though, would lock us into the Bush rule no matter what new research like this tells us.

Doesn't this violate OSM's mandate under the Surface Mining Control and Reclamation Act, SMCRA, to set standards that are guided by science and based on best available technology? Wouldn't it be irresponsible not to adjust these standards if the science shows a bigger problem than previously thought? And I would submit that clearly the science is showing a bigger problem than previously thought.

Mr. CLARKE. Respectfully, Mr. Congressman, this bill would not impact the ability of the States and the EPA under the Clean Water Act to address pollutants that could reach local communities through the water exposure pathway. And that would not be impacted by this rule. In fact, this rule would allow OSM to establish standards that may conflict with the water quality standards that are intended to protect human health under the Clean Water Act.

Mr. HUFFMAN. Any other witnesses want to comment on that?

Mr. LAMBERT. Yes, sir. My comment would be that we feel that if we had an opportunity to fully implement the 2008 rule, some of these issues that are being raised through these reports could be addressed in the 2008 rule. That we don't know because we have had no chance to look at what the impacts and to put together the rule, when implemented, as States. That rule was subsequently vacated end of January, before we had an opportunity—

Mr. HUFFMAN. Let's talk about the 2008 rule. We know, according to a 2005 EPA environmental impact statement, that waste from mountaintop removal mining buried and despoiled nearly 2,000 miles of streams in Appalachia over the previous 30 years. We have all of these additional studies. SMCRA requires OSM to set standards, as we have discussed, based on best available technology and science in order to minimize disturbances and avoid ad-

verse impacts on fish, wildlife, environmental values, et cetera. What in that language would permit the Bush Administration to simply exempt mountaintop removal mining?

Mr. LAMBERT. I don't think that rule, the 2008 rule, exempts mountaintop mining. What the rule does is, the 2008 rule, has the provision to look at avoidance of streams.

Mr. HUFFMAN. It does, though, exempt excess spoil fills from the buffer requirement. So what, based on everything we have learned, based on the EPA findings, based on all the science, would justify exempting those excess spoil disposals and in the rule saying that this is good for the environment?

Mr. LAMBERT. It doesn't give a carte blanche ability to dump spoil in streams. It asks us to look at avoidance, and it asks us to look at other alternatives, which we haven't had the opportunity to do.

Mr. LAMBORN. OK. I would like to recognize Mr. Daines.

Mr. DAINES. Thank you, Mr. Chairman.

I represent the State of Montana, and we are proud of the fact that we have more recoverable coal deposits than any other State in the country. It is a huge issue for our State in terms of jobs, cheap sources of energy, and I am grateful that we have the coal in Montana. And I am very concerned about the tone that we are hearing from the Obama Administration. I think he really has declared war on the coal industry.

And this is not just war on an industry. This is affecting families. This is affecting jobs. And importantly, this is a low-cost source of energy for this country. I was speaking before a Boys State gathering in Helena about a month ago and we were talking about energy. And I asked them, where does electricity come from? And we had a little discussion about the fact that, in fact, 51 percent of the electricity supplied in Montana comes from coal. It is over 40 percent for the country. It is a reliable, clean, cheap source of energy. And I am very concerned—this is in terms of my opening remarks—about this Administration's desire to curtail coal production in this country, because I think that really is the agenda here and the objective of what is going on in the White House.

Having said that, let me ask our two State witnesses, how would you characterize the Obama Administration's rulemaking process? Would you characterize it as being deliberative?

Mr. Clarke, do you want to start.

Mr. CLARKE. Well, the OSM rulemaking on this particular rule that I think is of concern to the Committee, the one that the OSM is currently considering under the name of the Stream Protections Measures Rule has really not been a very transparent process. The States were denied an opportunity to see the first chapter of the EIS, the cooperating agency States that signed MOUs that is, entitling them to participate in the NEPA process, and were given just a matter of days to respond to hundreds of pages of material on chapters 2, 3, and 4 of that EIS.

At that point, the ineptitude of OSM's EIS contractor became abundantly apparent. OSM fired its contractor. And since then we have received little or no information about what OSM is doing on this rule, despite hearing rumors that OSM has been working on it internally.

So in terms of the States as cooperating agencies under NEPA and being involved in an ongoing EIS rule development, we have been left out of the process. And I think that it is important to note that in nearly all of the States that regulate surface coal mining, the State has primacy. So the States are the frontline regulators who have the experience that would better inform the rule than bureaucrats writing it from Washington.

Mr. DAINES. Thank you.

Mr. Lambert?

Mr. LAMBERT. I would agree with Mr. Clarke 100 percent. There was a very grave concern of ours that we all of a sudden were just left out of the process of helping development of this rule after we signed the MOU. And even given the timeframes that we were given to review the rule was just absurd. There was no way we could provide the information that was needed to move forward with this rule. However, OSM chose to do so anyway. And then as both of us have stated in our comments, that we even requested on July the 3rd of this year to be reengaged. And we have not even received a response from that request.

So to answer your question, especially on this rule, we feel it has not been a very transparent rule and involved all the groups and the agencies that need to be involved in the development of such a rule.

Mr. DAINES. Thanks for the comments.

Mr. Jones, as you know, safe and efficient coal development is very important to the State of Montana. In fact, our tribal nations are begging, and I tell you, they are begging right now for the freedom to develop their own natural resources that are placed on their reservations, to lift their reservations from high unemployment, we have north of 40 percent unemployment rates right now in the reservations in Montana, to take them out of high unemployment and poverty to prosperity for these families and for future generations.

In fact, one tribal chairman who especially shares this vision is Chairman Old Coyote of the Crow Nation. He came to Washington with his 8-year-old daughter Evelyn. She read me a little speech pleading with me to please get Washington, DC out of the way so we can develop these resources on our reservation and create jobs.

But one thing I have learned since I have been back in this job in Washington now for about 8 months is how the Obama Administration doesn't understand that one size does not fit all. We know the geology of Montana and the Powder River Basin is very different than West Virginia, Ohio, Virginia, Colorado, and other coal mining States. It is my understanding that a new Obama rule could impact longwall mining. Can you address this and what the impact might be to States that have longwall mines?

Mr. JONES. Yes, sir, Mr. Congressman. I would be glad to address that.

In testimony and in discussion today, the new stream protective rules have been painted as a mountaintop mining issue. It is anything but. Alpha has operations in all the coal basins. We don't have any active operations right now in the Illinois Basins. But in the Powder River Basin, we do have some operations. And so we had to look at what we saw of the proposed bill, what was leaked to the press, that we ultimately were able to get copies from the

coal associations and others. We did a very detailed analysis of the impact both to our longwall mines in the northern Appalachian region and our Powder River Basins, and those operations were significantly impacted as well. So the bill is not just a mountaintop removal, no valley fill bill. It is going to impact all mining in America.

Mr. DAINES. OK.

I know I am out of time, Mr. Chairman.

Mr. LAMBORN. OK. And if you want to follow up on that, we will have a second round of questions.

Mr. DAINES. Thank you.

Mr. LAMBORN. Representative Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Clarke and Mr. Lambert, in your opinion, was Director Pizarchik correct when he implied that OSM was doing the States a favor by not sharing revised drafts of the EIS due to limited State budgets?

Mr. CLARKE. I think what he was probably referring back to were our complaints to him in 2010 that he was giving us inadequate time to review hundreds of pages of technical material and that we had inadequate time and staff to do that.

Mr. JOHNSON. Which goes to the point that I made earlier in my opening comments earlier this morning. You are talking about a midnight rule. This thing was trying to be shoved down the States' throats, down the coal industry's throats at lightning speed without giving the States and the industry a chance to adequately review. Would you agree?

Mr. CLARKE. That is correct. The States' involvement began September to October of 2010 for a rule that OSM had agreed in the settlement with environmental groups to produce by the end of February of 2011 which gave a very compressed timeframe for the process to occur.

Mr. JOHNSON. Exactly.

Mr. Lambert.

Mr. LAMBERT. I would agree with that. Sometimes we were given only 7 to 10 days to review hundreds of pages of a chapter. And the timeframes that they set upon us were, some of those days included holidays and weekends. And our staff don't normally work holidays and weekends. But we did. We did our best to try to give back some substantive remarks on those chapters.

Mr. JOHNSON. It is interesting to me that Mr. Pizarchik, under his direction, OSM gives States and industry minimal time to review thousands of pages of documentation. And yet we have been waiting months, Mr. Chairman, to get information from OSM on exactly what they are trying to do with this rulemaking. It certainly is a double standard.

Let me ask you, Mr. Clarke and Mr. Lambert, did the Director ever discuss with the States how OSM plans to proceed with State involvement going forward? Did he ever articulate his plan?

Mr. LAMBERT. No, sir, not with Virginia. As I stated in my oral statement, we even sent a letter to him requesting that we re-engage, and today we have not had a response.

Mr. JOHNSON. OK.

Mr. CLARKE. Before they started the EIS process, OSM had a series of meetings, I think maybe four of them around the country, where we received very minimal information about their plans, and I believe we were told we would get more later. And of course we haven't.

Mr. JOHNSON. OK. And, gentlemen, are you aware of any States that support OSM's current efforts to rewrite the Stream Buffer Zone Rule?

Mr. LAMBERT. No, sir, I am not.

Mr. CLARKE. No, sir.

Mr. JOHNSON. OK. And now for all three of you, if this legislation, if H.R. 2824 passed Congress and the 2008 rule were implemented, would the result be more environmental protection for streams or less compared to the status quo?

Mr. CLARKE. The 2008 rule imposes requirements that go well beyond those that were in place under the existing interpretation of the 1983 rule. It requires avoidance measures, avoidance minimization measures, and analysis of alternatives. It doesn't completely exempt spoil from mountaintop mining. It subjects the placement of that spoil to planning processes which require avoidance minimization, alternative analysis, and requirements that are generally harmonious with those applied by the Corps of Engineers in determining whether to approve a permit under section 404 of the Clean Water Act.

Mr. JOHNSON. So it is more environmentally safe?

Mr. CLARKE. Yes, sir.

Mr. JOHNSON. Mr. Lambert?

Mr. LAMBERT. I would agree. Yes, sir.

Mr. JOHNSON. Mr. Jones?

Mr. JONES. Yes, I totally agree.

Mr. JOHNSON. Well, great.

Mr. Chairman, it has also been insinuated this morning that if the legislation that you and I have proposed were to be passed, that it would put OSM back at scratch, I think the term used, at scratch, in terms of rewriting the rule. Well, first of all, we don't want them to rewrite the rule. The industry doesn't want them to rewrite the rule. It doesn't make any sense to rewrite the rule.

But let's examine that idea of scratch. They are at scratch. They have been at scratch. They have never been able to emerge from scratch because of their own ineptness, because of their own dereliction of their responsibility and their inability and their unwillingness to work with States and industry in doing the right thing for the American people. This is an atrocity. And again, I encourage my colleagues to support our legislation.

Thank you, gentlemen, for your answers.

Mr. LAMBORN. Thank you.

Representative Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman.

And thank you, gentlemen, for being here today.

I would like to ask the Natural Resources Committee staff to put up a couple of pictures on the screen so we can talk about them. First of all, this is an award-winning stream reclamation project done in Wyoming by Cloud Peak Energy, one of our coal mines. And you can see the terrific rolling hills of northeastern Wyoming

in the background, and of course, that is just emblematic of our topography. These are done in a way that restores to the same elevations and contours the topography after my reclamation is completed. This is reclaimed land.

Then, could you put up the next one.

This is an award-winning stream reclamation project done in Virginia by Alpha Natural Resources.

And since we have a witness here from Alpha, please leave that up.

And I am going to ask the gentleman from Alpha, Mr. Jones. Can you describe the process Alpha and other coal companies take to reclaim streams first in the Powder River Basin and then moving onto more eastern topography?

Mr. JONES. Be glad to, Congressman, and there are major differences between the Powder River Basin stream reconstruction and the reconstruction we do in Appalachia, particularly in Virginia. We, in the Powder River Basin, since you don't have so many flowing streams as we do, you have a lot of subsurface flow of water. So, as you reconstruct a stream in the Powder River Basin, you also have to reconstruct and ensure there is connectivity there of the subsurface aquifer, and we have those ongoing at our operations.

Now, the picture here is from the very first reconstructed site stream section in the State of Virginia using natural stream methodology. In fact, the Office of Surface Mining had a conference on natural stream restoration and landform grading in the Hilton in Abingdon, Virginia, about 60 miles from this site. The OSM at that time thought what we were doing was perfect, I won't say perfect, but so good, that they picked several of our sites as spots to take a field trip and show the attendees of the conference that these folks are doing it right; this is how it should be done.

This one, this site is on our Black Bear operation. We won multiple national, regional, State, even two OSM awards for the particular mine site we have here.

But we have very well trained in-house staff and primarily consultants who oversee the design and the installation of these operations. They have been through proper training. They have several levels of the Rosgen, it is called, training, to make sure they get the natural streams built.

Mrs. LUMMIS. Let me ask you further. Would OSM's new work hinder or help your process of stream reclamation?

Mr. JONES. I am going to say it will severely hinder because—

Mrs. LUMMIS. Why is that?

Mr. JONES. Well, because presently, for every stream that we impact, we have to mitigate. And with the new rule, as I have seen, you are going to have zero impact, so you will not be doing this. So, I mean—

Mrs. LUMMIS. May I ask the gentleman from Virginia and West Virginia the same question? Would OSM's proposals help or hinder?

Mr. LAMBERT. Well, in Virginia, remining in Virginia affects about 88 percent of all mining that takes place. In other words, 80 percent of the land that our companies are mining, including

Alpha, are abandoned mine lands where streams have already been impacted.

Under the new rule, none of that would take place anymore. Those streams that have already been impacted that are contributing these metals to our environment would not be cleaned up.

Mrs. LUMMIS. Why not?

Mr. LAMBERT. Under the new rule, the companies would not be re-mining those areas again. They would avoid those areas.

Mrs. LUMMIS. May I ask the other gentleman to comment as well.

Mr. CLARKE. I believe the same would be true in West Virginia. And I would add that Mr. Jones' comment about Rosgen training, that we in West Virginia have, I think, 18 people on our staff that have some level of Rosgen training ranging from Level I to Level IV, so stream restoration has been something that we have invested heavily in because that training is very expensive. And it is something that we are already doing in the absence of a stream protection measures rule.

Mrs. LUMMIS. I thank you, gentlemen, for being here today. I yield back.

Mr. LAMBORN. OK. Let's have a second round of questions. And could staff put up that first slide again?

I recently visited the Powder River Basin myself in the lovely State of Wyoming, and what I learned is that it is not just restored to the way it was previously; It is better because you don't have the invasive species that have come along in recent years when the restoration is done.

OK. My first question is for any one of you and to put things in context, the EPA says that there are 3½ million miles of streams in the United States. In the Appalachian area, there is 60,000 miles of streams, and mining has impacted a total of 1,200 miles from 1992 to 2002. This is according to the EIS for the 2008 rule. So that was 2 percent of the streams of Appalachia were affected by coal mining in that 10-year period.

And then the comments that were leaked on the audiotapes that we subpoenaed or that were given to us said that 15 miles would be protected under the new rule. I have a hard time understanding why all of this is being done. I guess that is more of a comment than a question. I don't understand the agency doing this, how they are doing it.

Let me go on and move on, though, to a medical science question. A 2012 Yale study, called "Mortality Disparities in Appalachia: Re-assessment of Major Risk Factors," came up with the result, and I am going to read the results to you: Age-adjusted all-cause mortality was independent related to poverty rate, medium household income, percent high school graduates, rural-urban location, obesity, sex, and race/ethnicity, but not unemployment rate, percent uninsured, percent college graduates, physician supply, smoking, diabetes, or coal mining.

And I would like to ask unanimous consent that this Yale study be put into the record.

Seeing no objection, so ordered.

[The information follows:]

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MORTALITY DISPARITIES IN APPALACHIA—REASSESSMENT OF MAJOR RISK FACTORS

(By Jonathan Borak, MD, Catherine Salipante-Zaidel, MEM, Martin D. Slade, MPH,
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ABSTRACT

Objective: To determine the predictive value of coal mining and other risk factors for explaining disproportionately high mortality rates across Appalachia. **Method:** Mortality and covariate data were obtained from publicly available data bases for 2000 to 2004. Analysis employed ordinary least square multiple linear regression with age-adjusted mortality as the dependent variable. **Results:** Age-adjusted all-cause mortality was independently related to Poverty Rate, Median Household Income, Percent High School Graduates, Rural-Urban Location, Obesity, Sex, and Race/Ethnicity, but not Unemployment Rate, Percent Uninsured, Percent College Graduates, Physician Supply, Smoking, Diabetes, or Coal Mining. **Conclusions:** Coal mining is not per se an independent risk factor for increased mortality in Appalachia. Nevertheless, our results underscore the substantial economic and cultural disadvantages that adversely impact health in Appalachia, especially in the coal-mining areas of Central Appalachia.

The Appalachian region, as currently defined by the Appalachian Regional Commission (ARC), is comprised of 420 contiguous counties in 13 States stretching from New York to Mississippi.¹ (The numbers of ARC counties has increased from an initial 360 as a result of periodic acts of Congress. There were 399 counties in 1991, 406 counties in 1998, 410 counties in 2002, and 420 counties since 2008.) Encompassing an area of 205,000 square miles, the region overlaps and extends beyond the less sharply demarcated cultural region known as Appalachia. It is home to about 25 million people. For research and other purposes, the region is often divided into five geographic subregions of relatively homogeneous characteristics (eg, topography; demographics) as shown in Fig. 1. Appalachian Regional Commission, a regional economic development agency, was created in 1965 by Congress in recognition that Appalachia suffered disproportionately poor socioeconomic conditions.²

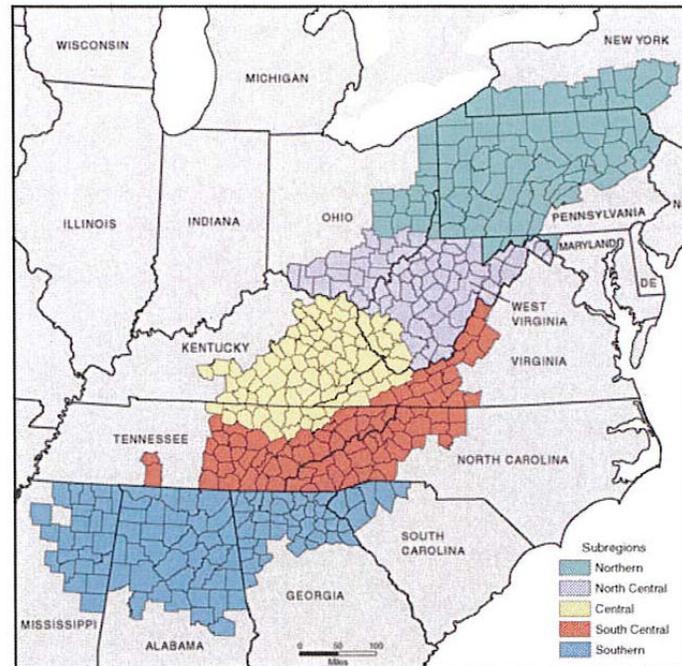


FIGURE 1. Geographic subregions in Appalachia. Appalachian counties divided into five geographic subregions of relatively homogeneous characteristics (eg, topography, demographics, economics). Reproduced, with permission, from the Appalachian Regional Commission, November 2009.

It is also well recognized that Appalachians suffer disproportionately poor health and increased risks of adverse health outcomes compared with the rest of the nation.^{3,4} For example, the Appalachian region suffers higher rates of total and premature mortality (mortality in persons aged 35 to 64 years),^{4,5} heart disease and cardiac mortality,⁶⁻⁸ cancer incidence⁹ and cancer mortality,¹⁰ stroke mortality,¹¹ chronic pulmonary disease,⁵ obesity,¹² and diabetes.¹²⁻¹⁴ In the view of many epidemiologists and public health researchers, Appalachia is characterized by “increased chronic disease burden, limited access to health care, and elevated rates of behavioral risks.”¹⁵

Significant health disparities have also been documented within the region, with deficits most consistently found in central and southern Appalachia. Figures 2 to 5 show the regional distributions of county-level premature mortality due to all causes, cancer, heart disease, and stroke. High rates of all-cause mortality are concentrated in eastern Kentucky, southern Ohio, western Virginia, southern West Virginia, northern Alabama, and Mississippi.⁴ Cardiac-related death rates are generally higher in rural areas,⁸ with highest rates of premature mortality in central and southern Appalachia, particularly eastern Kentucky.⁵ Premature cancer mortality is dominated by high rates in the Appalachian counties of Kentucky, Ohio, and West Virginia.⁵ In eastern Kentucky, mortality rates for total cancer, lung cancer, and cervical cancer are up to 36 percent greater than overall Appalachian rates and up to 50 percent greater than corresponding U.S. rates.¹⁰

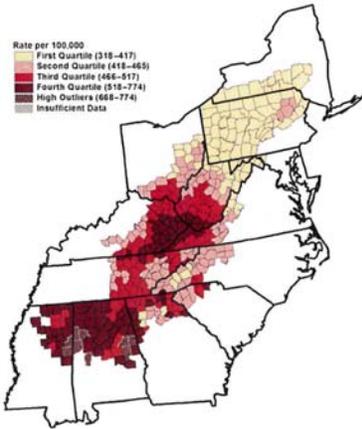


Figure 2. All-cause premature mortality (1995–2001).

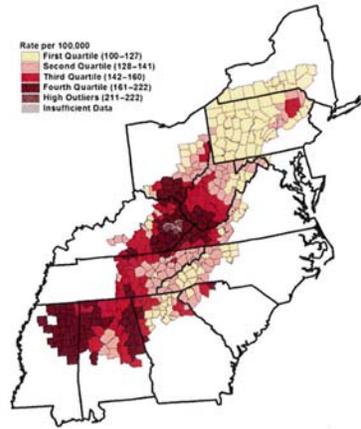


FIGURE 4. Heart disease premature mortality (1995–2001).

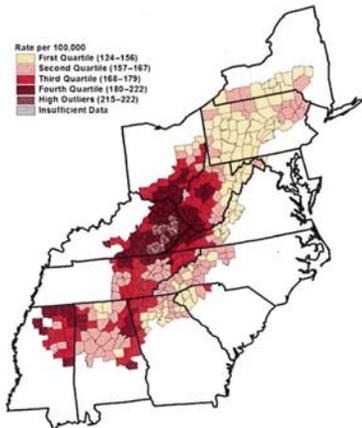


FIGURE 3. All-site cancer premature mortality (1995–2001).

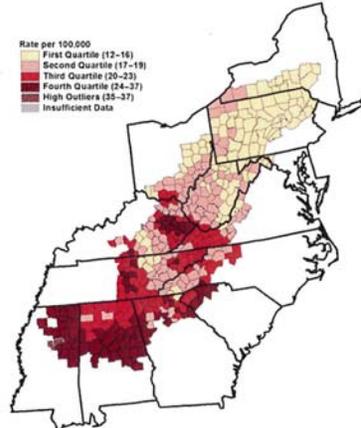


FIGURE 5. Stroke premature mortality (1995–2001).

FIGURES 2–5. Premature mortality in Appalachia (1995–2001). These four maps show the distribution of county-level premature mortality rates for 1995–2001, standardized to 2000 census. “High Outlier” identifies counties with death rates greater than the 75th percentile plus 1.5 times the interquartile range. Adapted from Halverson and Bischak²; reproduced, with permission, from the Appalachian Regional Commission.

Such disparities impose enormous burdens on the people of Appalachia and their health care and social service systems. As discussed later, a variety of risk factors (eg, age, sex, race, income, and education) have been associated with specific outcomes, but those factors do not fully explain the disparities. It has been proposed that health disparities in Appalachia are due to “highly localized” factors: “health disparities . . . result from a combination of factors that are unique to each local area.”⁴ The public health policy implications of such localized factors are potentially much different from those that apply to more systematic barriers to health.

A recent series of ecological studies by researchers at West Virginia University (WVU) has suggested that age-adjusted Appalachian county mortality rates are independently related to the presence of coal mining, but the nature of that relationship was uncertain.^{16–18} Increased mortality rates were apparently not due to occupational exposures and observed mortality patterns differed between Appalachian coal-mining counties and coal-mining counties outside Appalachia. For example, county-level lung cancer mortality was elevated in Appalachian, but not in non-App-

palachian coal-mining areas.¹⁸ The WVU authors proposed that observed health disparities in residents of Appalachian mining areas might be attributed to a “coal mining-dependent economy,”¹⁶ or to “pollution” and the “environmental impacts of Appalachian mining,”^{17 18} or to “additional behavioral or demographic characteristics not captured through other covariates.”¹⁸

To better understand these possibilities, particularly the role of coal mining as an independent risk factor for disparate mortality rates, we undertook a reanalysis of those published studies. Our objective was to determine the predictive value of coal mining and other potentially relevant risk factors for explaining differences in mortality rates across the Appalachian region.

BACKGROUND

A variety of economic measures illustrate how badly the Appalachian region lagged behind other parts of the United States in 1965, the year that ARC was founded, and how that status has improved. At that time, 1 in 3 Appalachians lived in poverty, 295 of 360 counties were categorized as “high poverty” (poverty rate >1.5 times U.S. average), and 223 of 360 counties were classified as “economically distressed.”^{11 a} By 2008, the poverty rate had declined to 18 percent, the number of “high poverty” counties had fallen to 116 of 410 counties, and 78 of 410 counties were classified as “distressed.” Despite such improvement, however, Appalachian per capita personal income remains about 20 percent lower than the U.S. average and the region has “fared far worse than the Nation” during the recent recession.¹⁹

Significant economic disparities occur within the region. For example, incomes are relatively high in northern and southern Appalachia, but relatively low in central Appalachia. In 2008, per capita market income for the region overall was 75 percent of the U.S. average, but only 51 percent in central Appalachia. Likewise, 57 of the 82 Appalachian counties classified as economically distressed in 2011 were located in the contiguous areas of three central Appalachian States: eastern Kentucky; northern Tennessee; and southern West Virginia.¹⁹ As summarized by ARC, “the central Appalachian region in particular still battles economic distress, with concentrated areas of high poverty, unemployment, poor health, and severe educational disparities.”¹⁹ Such economic disparities seem to parallel the characteristic Appalachian landscape: “counties classified by ARC as ‘distressed’ tend to be the mountainous and isolated counties that most people consider to be Appalachia.”¹⁴

As expected, poorer health status in Appalachia is associated with lower economic status. High rates of premature all-cause mortality, cardiac mortality, and cancer mortality have each been associated with low income, high poverty, high unemployment, and a high percentage of people without health insurance.⁵ Similar associations are found when counties are classified by economic status. As a group, economically distressed Appalachian counties had the highest mortality rates from heart disease and stroke.¹¹ Likewise, prevalence of diabetes increases as economic status declines. In 2007, the prevalence of diabetes was 13 percent in “economically distressed” Appalachian counties, more than twice the 6 percent rate in Appalachian “economic attainment” counties; the corresponding national and regional rates were 8 percent and 10 percent, respectively.¹⁴

Education is also strongly linked with health status; limited education is regarded as a “precursor to poor health.”^{7 3 20 21} The region has long been characterized by “severe educational disparities,” which persist in some areas.¹⁹ In 2000, the proportion of adults without high school diplomas or equivalents exceeded the U.S. average in 11 of the 13 Appalachian States, and the proportion of those with a college degree was substantially lower. While 24.4 percent of U.S. adults had college degrees, only 17.7 percent of Appalachian adults and only 10.2 percent of those residing in economically distressed Appalachian counties were college graduates.^{22–24} Only 18 of 410 Appalachian counties had a higher percentage of college graduates than the national average; most were the homes of large universities. In general, the counties with lowest educational attainment were “concentrated in central Appalachia, especially in the mining regions,” where health status is generally worst.²³

In addition, unhealthy behaviors are more common in the region than in the rest of the nation.^{15 25 26} For example, Appalachians have a higher prevalence of tobacco use than does the U.S. population.²⁵ Five Appalachian States rank among the eight highest for smoking prevalence,^{27 28} and smoking rates are higher in the Appalachian counties and Labor Market Areas than the non-Appalachian counties and Labor Market Areas of those five States.^{4 29 b} High rates of smoking cluster in central Appalachia, notably in eastern Kentucky and West Virginia where smoking rates are the Nation’s highest.^{4 9 27} In those areas, high smoking rates coincide with the Nation’s highest lung cancer rates, with similar patterns seen for other tobacco-related cancers.^{9 30 31}

Lack of physical exercise and poor eating habits are two other behaviors that adversely impact regional health. Compared with the U.S. population, residents of southern and central Appalachia are less likely to engage in recommended levels of physical activity and more likely to have no physical activity during leisure time.²⁵⁻³² Residents of rural Appalachia are also more likely to consume less nutritious, more energy-dense diets.¹⁴⁻²⁵ Because inactivity and poor diet are risk factors for obesity, and because inactivity, poor diet, and obesity are all risk factors for diabetes, it is not surprising that obesity and diabetes are more prevalent in Appalachia. Likewise, physical inactivity, poor diet, and obesity are risk factors likely to contribute to the increased incidence of cancer in rural Appalachia.²⁶⁻³³

In 1997, the prevalence of obesity (body mass index >30kg/m²) in Appalachian counties ranged from 10.2 percent to 27.6 percent among men and 7.8 percent to 25.3 percent among women. High rates of obesity clustered in eastern Kentucky, southern West Virginia, north-central Pennsylvania, and southeast Ohio.³⁴ In 2007, the highest prevalence rates of obesity and diabetes in the United States were mainly found in the Appalachian counties of West Virginia, eastern Kentucky, and northern Tennessee.¹²

Nevertheless, such risk factors, at least as measured by traditional epidemiologic variables, seem insufficient to fully explain the region's health disparities. For example, after accounting for a variety of covariates (eg, age, sex, race, education, income, smoking, obesity, and physical activity), residents of economically distressed counties in Appalachian had a statistically significant 33 percent greater risk of having diabetes than did residents of non-Appalachian counties; by contrast, risks did not differ between non-Appalachian counties and the Appalachian counties not classified as distressed.¹⁴

Some of the health disparities not accounted for by the traditional risk factors may be attributed to the geographic isolation that characterizes rural Appalachia. Such isolation adversely impacts regional health status by creating logistical barriers to health care access and by limiting employment opportunities, thus contributing to poverty and lack of health insurance.²⁵ For such reasons, residents of rural Appalachia generally utilize fewer preventive health services such as routine cancer screening.²⁶⁻³⁵⁻³⁸ Geographic isolation, which leads to fewer local medical and other support resources, is also a likely explanation for the increased mortality rates from coronary heart disease in rural versus metropolitan Appalachian communities.⁸ Other data suggest that rural Appalachians with cancer have less access to comprehensive diagnostic and treatment services.³⁹ And by limiting access to health care services and producing physician shortages, the rural geography has seemingly caused an adverse impact on Appalachia's "diabetes problem."⁴⁰

Cultural and social factors associated with residence in distressed areas are also likely to adversely impact health. Factors suggested as relevant include "Appalachian cultural beliefs such as fatalism," which reinforces poor health behaviors and discourages seeking of early health intervention and medical advice. In addition, high rates of smoking lead to increased exposure to second-hand smoke.¹⁴⁻¹⁸ Local social conditions also influence dietary habits, and thereby health. Rural Appalachia is distinguished by a relative lack of full-service grocery stores and fruit-and-vegetable markets; residents of such "food deserts" tend to shop in stores with fewer nutritional choices and have less nutritious diets.¹⁴⁻³⁴⁻⁴¹⁻⁴²

METHODS

Design

This study retrospectively investigated all-cause mortality rates for residents of Appalachia during the years 2000 to 2004. Mortality and covariate data were obtained from publicly available data bases. The time period considered and the data utilized were selected to allow for analyses that closely resembled those described in the WVU studies.¹⁶⁻¹⁸ Data were collected to represent the same time period (2000 to 2004) as much as possible given data availability, but the actual time periods corresponding to specific variables were not identical. Because the WVU analyses differed from study to study, we choose to incorporate the least complex of those alternative approaches for our basic model. The following discussions of Data and Analysis explain that process in detail.

Data

Mortality

Mortality data were obtained from the Centers for Disease Control and Prevention.⁴³ Reported data described county-level mortality rates age adjusted to the 2000 U.S. standard population. We utilized all-cause mortality for all age groups.

Demographic Data

We obtained county-level demographic data from the 2005 Area Resource File.⁴⁴ The percent men population was calculated as the arithmetic mean for the years 2000 to 2003. The percentages of the population who were white, African American, Native American, non-white Hispanic, and Asian American were determined for the year 2000.

Economic Status

Four measures of economic status have been associated with mortality rates in Appalachia: median household income; poverty rate; unemployment rate; and rate of health insurance.⁵ Each was considered in at least 1 of the 3 WVU analyses. We obtained county-level economic data from the Area Resource File.⁴⁴ Median Household Income and Poverty Rate were determined as the arithmetic means for the years 2000 to 2002. Unemployment Rate (persons aged ≥ 16 years) and Percent Uninsured were obtained for the year 2000.

Education

County-level rates of high school graduates and college graduates were calculated using ARC data for the year 2000.⁴⁵ The number of persons with a high school diploma or higher (Percent High School Graduates), and the number of persons with a college diploma or higher (Percent College Graduates) were each divided by the number of persons aged 25 years or older.

Location

The location type of each county was characterized using the U.S. Department of Agriculture (USDA) nine-point rural-urban classification scheme, which codes metropolitan and nonmetropolitan counties by degree of urbanization, adjacency to metro areas, and population size of urban areas.⁴⁶ (For example, "Code 1" = "counties in metro areas of 1 million population or more"; "Code 5" = counties with "urban population of 20,000 or more, not adjacent to a metro area", and "code 9" = counties that are "completely rural or <2,500 urban population, not adjacent to a metro area".) We obtained county-specific rural-urban continuum codes from the Area Resource File.⁴⁴ We divided the USDA rural-urban continuum codes into three categories: Metropolitan (codes 1 to 3), Micropolitan (codes 4 to 7), and Rural (codes 8 to 9).

Access to Health Care

County-specific physician supply was used as a measure of access to health care. Data for the number of active medical doctors (MDs) and osteopathic doctors (DOs) per 1,000 population were obtained from the Area Resource File.⁴⁴ Two of the WVU studies used "number of active MDs and DOs per 1,000 population,"^{17 18} whereas the third included "physician supply" not otherwise defined.¹⁶ In our analyses, Physician Supply indicates the number of active MDs and DOs per 1,000 population.

Smoking

Rates of current smokers were obtained from the Centers for Disease Control and Prevention Behavioral Risk Factor Surveillance System (BRFSS)²⁸ supplemented with smoking rates available from State public health department Web sites. County-level data were available for 54 Appalachian counties, of which 9 were reported at the level of metropolitan statistical areas. For the other 366 counties, smoking rates were available as the means for each of 84 subgroups of contiguous counties. When available, we used rates averaged for the years 2002 to 2004; otherwise, we used data for the year(s) closest to that time period. (Smoking data were available for the following years for each State: Alabama: 2009–10; Georgia: 2000–03; Kentucky: 2002–04; Maryland: 2000–02; Mississippi: 2004; New York: 2003; North Carolina: 2002–04; Ohio: 2002; Pennsylvania: 2002–04; South Carolina: 2002–04; Tennessee: 2005; Virginia: 2007; West Virginia: 2001–05.)

Obesity and Diabetes

We obtained county-level data for obesity and diabetes from the National Diabetes Surveillance System for the year 2004.⁴⁷ Obesity Rate indicates the proportion of adults aged 20 years or older with body mass index ≥ 30 kg/m² or more. Diabetes Rate indicates the proportion of adults aged 20 years or older with diagnosed diabetes.

Coal Mining

County-specific coal production data were obtained from the Energy Information Administration.⁴⁸ In our analyses, we divided Appalachian counties into two groups based on whether they produced coal during 2000 to 2004 and we also grouped coal-

producing counties into those above (High) and below (Low) the median coal production level for Appalachian counties during that time period.

Analysis

The data were analyzed using SAS 9.2 (SAS Institute, Cary, NC).⁴⁹ We conducted ordinary least square multiple linear regression with age-adjusted mortality as the dependent variable. Our basic regression model (“Basic Model”) paralleled the WVU analyses, but we considered only the 420 Appalachian counties, and we did not include coal mining-related variables or the “dichotomous Southern variable . . . created to capture regional effects that partially overlap with Appalachia.”¹⁸ The model included the following independent variables:

- Percent Men
- Race/Ethnicity Rates
- Poverty Rate
- Percent High School Graduates
- Percent College Graduates
- Rural-Urban Category
- Physician Supply
- Smoking Rate

Next, we added additional independent variables into the basic model and evaluated their explanatory power by means of partial F tests. Partial F tests are used to determine whether the addition of one or more variables to an already specified model significantly decreases the unexplained variance of the model.⁵⁰ When that occurs, addition of the variable is said to have significantly improved the model’s fit to the observed data. The partial F test is also known as Type 3 test for fixed effects when the addition of only one more variable is contemplated.

Additional variables were added one at a time to the Basic Model, regression analyses were performed, and the results compared with the regression results for the Basic Model without that additional variable. If partial F tests indicated that inclusion of the variable led to significantly improved model fit, the variable was retained in an “Expanded Model.” Alternatively, if including a variable did not significantly improve the model, it was excluded. This process was repeated using Expanded Models in place of the Basic Model, until all variables had been evaluated. The following is a list of the additional independent variables that were tested in this way, listed in the order in which they were added:

- Median Household Income
- Unemployment Rate
- Percent Uninsured
- Obesity Rate
- Diabetes Rate
- Coal Mining (Yes/No)
- Coal Mining (High/Low/None)

RESULTS

The results of ordinary least squares multiple linear regression analysis of the Basic Model are presented in Table 1. These findings indicate that higher age-adjusted all-cause mortality rate was independently related to Poverty Rate, Percent High School Graduates, Rural-Urban Location, and Demographic variables including Sex and Race/Ethnicity rates. Mortality Rate was not significantly related to Percent College Graduates, Physician Supply, or Smoking Rate.

TABLE 1. Basic Model: Ordinary Least Squares Multiple Linear Regression Model; Age-Adjusted All-Causes Mortality Rate

Data Category	Basic Model			
	Variable	Coefficient	SE	P
	Intercept	5179.71	1101.18	<0.0001
Economic status	Poverty Rates	7.99	1.28	<0.0001
Education	Percent High School	−497.87	87.92	<0.0001
	Percent College	−174.43	117.46	0.1383
Location	Rural-Urban Category	−30.54	5.97	<0.0001
Access to health care	MDs and DOs per 1000	2.56	2.61	0.3285
Smoking	Smoking Rate	90.31	100.38	0.3688
Demographics	Percent Men	−805.75	320.29	0.0123
	Percent White	−35.49	11.00	0.0014

TABLE 1. Basic Model: Ordinary Least Squares Multiple Linear Regression Model; Age-Adjusted All-Causes Mortality Rate—Continued

Data Category	Basic Model			
	Variable	Coefficient	SE	P
	<i>Percent Black</i>	− 35.67	10.98	<i>0.0013</i>
	<i>Percent Asian</i>	− 41.35	14.71	<i>0.0052</i>
	<i>Percent Native American</i>	− 33.70	11.94	0.0050
	<i>Percent Latin</i>	− 20.48	6.72	<i>0.0025</i>

Bold and italicized indicates statistically significant variables.
DO, osteopathic doctor; MD, medical doctor.

We then evaluated whether inclusion of additional variables would significantly reduce the unexplained variance of the Basic Model, thus improving its fit to the age-adjusted mortality data. Table 2 presents the results of this sequential testing, indicating F score, P value, and conclusions for each of the seven variables. Inclusion of Median Household Income significantly improved the Basic Model ($P < 0.0001$) and it was retained in an “Expanded Model.” Likewise, Obesity Rate significantly improved the Expanded Model ($P = 0.0022$), and it was retained in a “Further Expanded Model.” By contrast, no improvements resulted from the addition of Unemployment Rate ($P = 0.6852$), Percent Uninsured ($P = 0.3036$), Diabetes Rate ($P = 0.3704$), Coal Mining: Yes/No ($P = 0.6003$), or Coal Mining: High/Low/None ($P = 0.1047$), and they were excluded.

TABLE 2. Explanatory Power of Additional Independent Variables, With Sequential Addition of Significant Variables to the Basic Model, as Evaluated Using Partial F Test

Comparisons	Numerator df	Denominator df	F Score	P	Conclusion
(1), Basic Model					
(1) vs (2) [Basic Model + Income]	1	406	15.220	0.0001	Retain income in model
(2) vs (3) [Basic Model + Income + Unemployment Rate].	1	405	0.165	0.6852	Unemployment Rate does not improve model; Exclude
(2) vs (4) [Basic + Income + Percent Uninsured].	1	405	1.065	0.3036	Percent Uninsured does not improve model; Exclude
(2) vs (5) [Basic + Income + Obesity].	1	405	9.483	0.0022	Retain Obesity in model
(5) vs (6) [Basic + Income + Obesity + Diabetes].	1	404	0.804	0.3704	Diabetes Rate does not improve model; Exclude
(5) vs (7) [Basic + Income + Obesity + Mining (Yes/No)].	1	404	0.275	0.6003	Mining (Yes/No) does not improve model; Exclude
(5) vs (8) [Basic + Income + Obesity + Mining (High/Low/None)].	2	403	2.269	0.1047	Mining (High/Low/None) does not improve model; Exclude

Table 3 presents the results of ordinary least squares multiple linear regression analysis of the Further Expanded Model. The variable Coal Mining: Yes/No has been included to demonstrate its lack of statistical significance when added to the model. These findings indicate that higher age-adjusted all-cause mortality rate was independently related to Poverty Rate, Median Household Income, Percent High School Graduates, Rural-Urban Location, Obesity Rate, and Demographic variables including Sex and Race/Ethnicity rates. The relationship between Mortality Rate and Percent College Graduates was nearly significant ($P = 0.0814$), but Mortality Rate was not significantly related to Physician Supply, Smoking Rate, or Coal Mining: Yes/No.

TABLE 3. Further Expanded Model: Ordinary Least Squares Multiple Linear Regression Model; Age-Adjusted All-Causes Mortality Rate. Coal Mining (Yes/No) Has Been Included for Demonstration Purposes, but Is Not a Component of the Model

Data Category	Variable	Coefficient	SE	P
	<i>Intercept</i>	4977.06	1076.63	<i>< 0.0001</i>
Economic status	<i>Poverty Rates</i>	10.96	1.90	<i>< 0.0001</i>
	<i>Median Household Income (per \$1000)</i>	4.86	1.27	<i>0.0001</i>

TABLE 3. Further Expanded Model: Ordinary Least Squares Multiple Linear Regression Model; Age-Adjusted All-Causes Mortality Rate. Coal Mining (Yes/No) Has Been Included for Demonstration Purposes, but Is Not a Component of the Model—Continued

Data Category	Variable	Coefficient	SE	P
Education	<i>Percent High School</i>	-510.44	90.52	<0.0001
	Percent College	-222.60	127.42	0.0814
Location	<i>Rural-Urban Category</i>	-20.55	6.17	0.0010
Access to health care	MDs and DOs per 1000	2.98	2.59	0.2500
Smoking	Smoking Rate	52.67	98.61	0.5935
Obesity and diabetes	<i>Obesity Rate</i>	5.96	1.97	0.0027
Demographics	<i>Percent Men</i>	-931.40	316.61	0.0035
	<i>Percent White</i>	-36.39	10.74	0.0008
	<i>Percent Black</i>	-37.23	10.71	0.0006
	<i>Percent Asian</i>	-41.38	14.38	0.0042
	<i>Percent Native American</i>	-35.06	11.65	0.0028
	<i>Percent Latin</i>	-21.96	6.56	0.0009
Coal mining	Coal Mining (Yes/No)	4.68	8.92	0.6003

Bold and italicized indicates statistically significant variables.

We also performed regression analyses of the Further Expanded Model after adding each of the excluded variables (Unemployment Rate, Percent Uninsured, Diabetes Rate, Coal Mining: Yes/No and Coal Mining: High/Low/None). First, we added a variable and ran the model, and then we removed that variable and added the next variable and repeated the process so that all variables were individually tested. Then we included all variables in the model at one time (but only one of the Coal Mining variables was included at any time). Adding each or all of those excluded variables did not significantly change the model's parameter estimates or their P values (data not shown); hence, all inferences remained the same.

DISCUSSION

Appalachians suffer disproportionately poorer health and significantly higher mortality rates than the rest of the Nation.³⁻⁵ In general, the Appalachian counties with poorest health are also the most economically distressed, the least educated, and those with the most limited access to social and medical services. In addition, residents of those counties demonstrate generally higher rates of risky behaviors, for example, higher smoking rates, more prevalent obesity, less physical activity, less nutritious diets, and less use of preventive health services. Notably, these often rural, isolated counties include many of the most productive coal-mining areas in Appalachia.⁵¹

Earlier efforts to understand and address the sources of such health disparities have identified a number of independent risk factors associated with specific health outcomes, but have not fully explained the disparities. Some have proposed that health disparities in Appalachia are due in part to factors “unique to each local area.”⁷⁴ A recent series of ecological studies has suggested that the presence of coal mining is such a “local” factor, which is independently related to age-adjusted mortality rates, although the nature of that relationship is uncertain.

To better understand that relationship, we studied all-cause mortality rates for Appalachian residents during 2000 to 2004. Mortality and covariate data were selected to create a Basic Model that closely resembled the models employed in the UWV ecological studies, but did not include coal mining. As seen in Table 1, the regression analysis of that Basic Model indicated that increased mortality rate was significantly associated with greater poverty, lesser educational attainment, rural location, and demographic factors including sex and race. No significant associations were seen for smoking or physician supply.

We then expanded that Basic Model. First, we considered the inclusion of three additional economic measures (Median Household Income, Percent Unemployed, and Percent Uninsured) as independent variables. Those three measures, along with Poverty Rate, are generally correlated, but they are nonidentical and reflect different aspects of socioeconomic status and economic distress.^{5 52 53} All four have been independently associated with Appalachian mortality rates.^{4 5} The WVU model did not include Median Household Income, Percent Unemployed, or Percent Uninsured.

The inclusion of Median Household Income significantly improved the model's fit to the observed data and it was included in an Expanded Model. By contrast, neither of the two other economic variables significantly reduced the unexplained vari-

ance of the Expanded Model (i.e., Basic Model plus Median Household Income); hence, neither was retained in the model.

We next considered whether adding Obesity Rate and Diabetes Rate would improve the Expanded Model's explanatory power. Both are important risk factors for mortality. The World Health Organization has determined that "overweight and obesity" is the fifth leading risk factor for deaths worldwide,⁵⁴ and Centers for Disease Control and Prevention recognizes diabetes as the seventh leading cause of death in the United States.⁵⁵ Obesity is also seen as a more important risk factor for chronic disease than either smoking or poverty.^{56 57} Neither Obesity Rate nor Diabetes Rate was included in the WVU analytical models.

In our analyses, addition of Obesity Rate significantly improved the Expanded Model and it was retained in a Further Expanded Model (ie, Basic Model plus Median Household Income plus Obesity Rate). By contrast, adding Diabetes Rate to that model yielded no significant improvement and it was excluded.

Finally, we considered the effects of including either of the two measures of coal mining in the Further Expanded Model. Neither Coal Mining: Yes/No nor Coal Mining: High/Low/None significantly improved the explanatory power of the model. The findings of this analytical model argue that coal mining is not per se an independent risk factor for increased mortality in Appalachia. By contrast, we found that increased mortality was significantly associated with greater poverty, lower median household income, fewer high school graduates, rural location, obesity rate, and demographic factors including sex and race. Lower college graduate rate was nearly significant. Moreover, we found no significant associations for smoking, physician supply, and diabetes.

It seems surprising that smoking rate was not significantly associated with mortality, given that smoking causes about 20 percent of U.S. deaths,⁵⁸ but similar results were reported in WVU studies.^{16 59} This is likely due to limitations of the available data. BRFSS determines current smoking status, not quantity or duration (The relevant BRFSS questions are "Have you smoked at least 100 cigarettes in your entire life?" and "Do you now smoke cigarettes every day, some days, or not at all?"²⁸), thus BRFSS data do not capture the substantial dose-response gradient linking smoking and mortality.⁶⁰ Also, smoking data were available for only 54 of 420 individual Appalachian counties; for the other 366 counties, the available smoking rate were mean values calculated for each of 84 subgroups of contiguous counties. Thus, Smoking Rate is almost certainly biased by non-differential misclassification, a particular concern in light of evidence that smoking rates are increased in coal-mining areas.^{17 18 59} To the extent that such misclassification "biases toward the null", the link between smoking and mortality would be differentially reduced in high-smoking counties. The available data are not adequate to evaluate whether smoking might act synergistically with other environmental pollutants.

Likewise, we were surprised that Diabetes Rate failed to improve the model, but this is likely explained by two factors. First, obesity is a critical risk factor for diabetes and the two are well correlated. Risk of diabetes, for example, was increased up to elevenfold in Medicare recipients with a history of midlife obesity.⁶¹ Thus Diabetes Rate may add little explanatory value not associated with Obesity Rate. Second, BRFSS self-reported diabetes status is likely to misclassify a substantial proportion of the population because more than 27 percent of adults with diabetes in the United States have "undiagnosed diabetes."⁶² Such misclassification would likely have greatest impact in the economically distressed Appalachian counties where reported diabetes rates are generally higher and utilization of preventive services generally lower than in other counties. Thus, in those counties apparent associations between diabetes and mortality are probably understated.

Lack of a significant association between Physician Supply and mortality rate is also notable. One explanation is that the number of physicians is "just one factor within complex environments," which include other health care workers and a variety of health care delivery systems: "Higher physician supply per se does not amount to better access, quality, or outcomes."⁶³ Some studies report that an increased supply of primary care physicians, but not specialists is associated with reduced mortality.⁶⁴ Reanalysis of their data, however, suggested that benefits were region-clustered and less likely to occur in rural populations.⁶⁵ Finally, there is no standard approach to quantifying the supply of primary care providers using secondary data sets; it is likely that some specialists will be misclassified, while nurse practitioners and physician assistants are ignored.⁶⁵

We doubt that the differences between our findings and those of the WVU studies are due to the ways in which covariates were selected and defined. We chose time periods, variables, and data to closely resemble those studies. In three cases, the WVU studies incompletely or inconsistently defined their covariates. In those cases, we chose the least complex alternative for our model; thus, we used covariates that

were similar, but not necessarily identical. For example, the WVU studies defined Physician Supply as the number of active MDs and DOs per 1000 population. Some results were also reported for “primary care physicians,” a category not specifically contained in the 2005 Area Resource File and no explanation was given as to how “primary care physicians” was defined. We defined Physician Supply as the number of active MDs and DOs per 1000 population; we did not differentiate “primary care physicians.”

A second case involves the rural-urban continuum. Two WVU studies included the nine-point USDA continuum scale,^{16 17} while the third study, citing concerns for non-linearity, recoded the scale into three categories (“metropolitan,” “micropolitan,” and “rural”).¹⁸ Nevertheless, that study did not actually define the categories. To understand how these categories were structured, we reviewed other studies by those researchers who included the USDA scale, but found the scale used in still other ways. One study defined only two categories, “metropolitan” (codes 1 to 3) and “non-metropolitan” (codes 4 to 9), but then treated “rural” and “nonmetropolitan” as equivalent terms: “The terms rural and nonmetropolitan will be used interchangeably in this study.”⁶⁶ A second study coded “metropolitan” status as a “five-level variable,” but no further details were provided.⁶⁷ A third⁶⁸ included “rural-urban setting” as a covariate that was not defined. Our analyses included three explicitly defined categories that seem consistent with the USDA scheme and the least complex of the WVU approaches.¹⁸

The third case involves coal mining. The WVU studies each defined different coal-mining categories. One defined coal-mining areas as “counties with any amount of coal mining” during 1994 to 2005; some analyses also grouped coal-mining counties into those above and below the median production level.¹⁶ A second study defined three groups of counties based on total 2000 to 2004 coal production: more than 3 million tons; less than 3 million tons; and no production.¹⁸ For some analyses, counties with more than 3 million tons of production were compared with all other counties combined and “per capita coal production” (calculated relative to the 2000 census) was also included in those analysis. The third study also defined three groups of counties on the basis of total 2000 to 2004 coal production, but groups were defined differently: more than 4 million tons; less than 4 million tons; and no production.¹⁷ Our approach was similar to the first of those WVU studies, but we considered the time span considered in the latter two studies. Our analysis divided counties into two groups based on whether any amount of coal was mined during 2000 to 2004, and coal-producing counties were further grouped into those above and below the median production level for Appalachian counties during that time period.

Our Expanded Model indicates that coal mining is not per se the cause of increased mortality in rural Appalachia. On the contrary, our results underscore the substantial economic and cultural disadvantages that adversely impact the health of many area residents. Particularly in the coal-mining areas of central Appalachia, there is a potent combination of greater economic distress, lesser educational attainment, decreased access to health care, limited availability of nutritious foods, higher rates of behavior-related risks such as obesity and smoking, and decreased use of preventive health services. The conjunction of such factors and their adverse effects can be seen by comparing Figs. 2 to 5, which show the geographical distributions of various county-level mortality rates, and Figs. 6 to 9, which show the distributions of county-level poverty rate, economic distress, percent high school graduates, and coal mining.

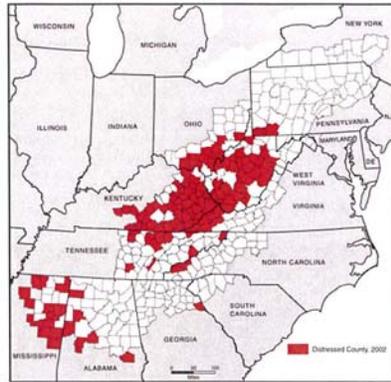


FIGURE 6. Appalachian Regional Commission–designated distressed counties (2002). A county is designated as “economically distressed” if it ranks in the worst 10% of US counties for 3-year average unemployment rate, per capita market income, and poverty rate. Reproduced, with permission, from the Appalachian Regional Commission, June 2002. Data sources: US Bureau of Labor Statistics, LAUS, 1997–1999; US Bureau of Economic Analysis, REIS, 1998; and US Census Bureau, STF3A, 1990.

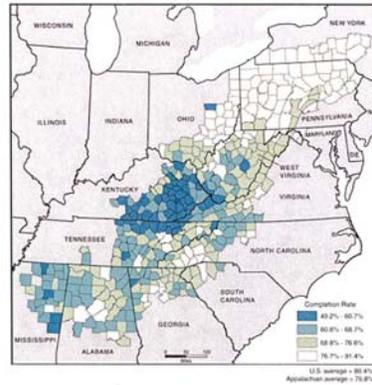


FIGURE 8. High school completion rates in Appalachia (2000). County-level percentages of adults, 25 years and older, completing 12 years or more of school. Reproduced, with permission, from the Appalachian Regional Commission, October 2008. Data source: US Census Bureau, 2000 Census, SF3. Data classification scheme: Natural Breaks.

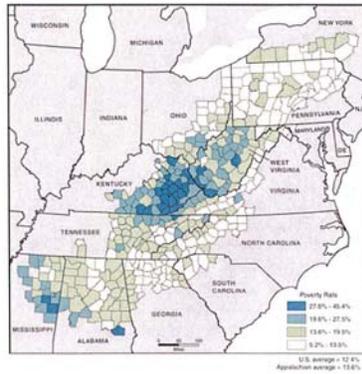


FIGURE 7. Poverty rates in Appalachia (2000). County-level ratios of the persons below poverty level to the total number of persons for whom poverty status has been determined. Reproduced, with permission, from the Appalachian Regional Commission, October 2008. Data source: US Census Bureau, 2000 Census, SF3. Data classification scheme: Natural Breaks.

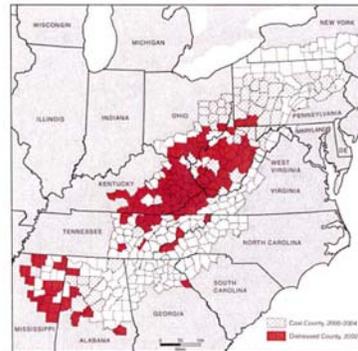


FIGURE 9. Appalachian Regional Commission–designated distressed counties (2002) and coal-producing counties (2000–2004). Counties were designated as “coal producing” if any amount of coal was mined during 2000–2004. Reproduced, with permission, from the Appalachian Regional Commission, September 2011. Data sources: US Department of Energy, EIA, 2011; US Bureau of Labor Statistics, LAUS, 1997–1999; US Bureau of Economic Analysis, REIS, 1998; and US Census Bureau, STF3A, 1990.

Such overlapping risk factors and mortality rates illustrate how difficult it can be to disentangle the effects of the cultural environment from those of the physical environment, a difficulty made greater because the two interact. For example, the physical isolation of the mountainous counties that characterize rural Appalachia poses barriers to industrial diversification and broadening of employment options, and also contributes to lower incomes, reduced access to health care services, reduced availability of nutritious foods, and so forth.^{14 25} The interplay of geographical isolation, kinship, and health-related behaviors further complicates matters. Rural Appalachia is distinguished by tight-knit social networks, “cohesive, extended, and geographically connected” kinships, which often extend beyond biological families.^{15 69} Such networks can exert significant influence on the behaviors and health of their individual members, as recently documented in the Framingham Study. In that well-studied New England community, risks of becoming obese (i.e., the “induction and person-to-person spread of obesity”) were predicted by the closeness of social relationships, not by “common exposure to the local environment.”⁷⁰ Thus, the

physical environment (eg, geographical isolation) can foster cultural practices (eg, tight-knit kinships) that promote adverse health outcomes (eg, obesity).

Accordingly, coal mining in Appalachia, an industrial activity associated with rural, mountainous areas, is likely to be geographically associated with a variety of economic and cultural health risk factors. And, for similar reasons, mining is also likely to be geographically associated with a variety of adverse health outcomes. Although our results indicate that mining is not the direct cause of those outcomes, they do not rule out the possibility that mining contributes to the development of the social environments and cultural practices that adversely impact health. This possibility seems most likely in those specific areas where mining is the principal industry. Likewise, our analyses do not rule out the possibility that some specific mining methods may have greater adverse effects than others on the physical environment.

Ultimately, the issue of greatest concern is that Appalachians suffer disproportionately poor health and increased risks of adverse health outcomes compared with the rest of the nation.³ During the past 50 years, ARC and others have overseen substantial improvements in the well-being of regional residents. Nevertheless, significant shortfalls persist. To eliminate health-related disparities, substantial efforts must be directed at the region's underlying economic and social disparities. To the extent that coal mining is a factor in defining the cultural fabric and socioeconomic environment of Appalachian communities, the coal-mining industry must play a role in efforts to increase economic diversity, develop job-creation programs, ensure access to appropriate health care services, improve educational opportunities, and facilitate access to nutritious foods and diets.

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 - a. According to ARC, a county is “economically distressed” if it ranks in the worst 10 percent of U.S. counties for 3-year average unemployment rate, per capita market income, and poverty rate. By contrast, a county has achieved “economic attainment” if it ranks in the best 10 percent of U.S. counties.⁷¹
 - b. The U.S. Department of Labor defines Labor Market Area (LMA) as “an economically integrated geographic area within which individuals can reside and find employment within a reasonable distance or can readily change employment without changing their place of residence.” In Appalachia, non-metropolitan LMAs are generally identical to counties.⁷²

Mr. LAMBORN. Some people have claimed that there, and maybe they have a study they can pin their statement on, but this study from Yale scientists shows that there is not a medical cause correlation between mortality, in this case, and coal mining. Is that the understanding that you have? And especially you two are the State regulators, this has to be a serious concern of yours that you would be aware of.

Mr. CLARKE. Mr. Chairman, we are concerned about the health impacts. As I pointed out before, we do have a regulatory program that addresses at least the water exposure pathway, and if we knew of a causative agent, which those studies don't identify, then we would attempt to take action to protect the public.

But as things exist now, we think that we have the water exposure pathway covered. No causative agent has been identified through the air exposure pathway. If there were more science developed on that that would establish a causative agent for any health impacts from mining, it would be something that, if we lack the authority to address under our existing regulatory programs, we would be making recommendations to our legislators and to our Congress people for additional authority to address those issues.

Mr. LAMBERT. And Mr. Chairman, I agree with Mr. Clarke's comments.

Mr. LAMBORN. OK. Thank you.

And my last question, why would a stream protection rule, which to me sounds like it is above ground, have affect on underground mining? Could any one of you explain that, please?

Mr. CLARKE. It is my understanding, and there was a presentation at this Committee's appearance in Charleston, West Virginia, by a representative from Consol Energy that went into their projection, and that is primarily a longwall mining company, their projection of impacts to their longwall mining operations from this rule. And I remember it was quite substantial, but I don't recall the figures that were cited. But the requirements of the rule as to protections of streams on the surface above longwall mining operations would seriously hamper the ability of coal companies to recover those reserves, coal reserves by that method.

In addition to that, the fill provisions, and there is this idea of mountaintop mining in Appalachia just being mountaintop removal and fills are only accompanying mountaintop removal mining; fills accompany construction of deep mine face-ups in Appalachia. The valleys are so narrow, the mountain sides are so steep, that if you need a level place upon which to stage your equipment and working area to enter, before you enter the mine, you have to level off a place to do it.

When you level off that place, that creates spoil material that has to be placed somewhere. The only place to put it in a stable, safe fashion in those areas is in a stream bottom, where you have waters of the United States, and usually it is an intermittent or perennial stream. So, it impacts deep mining both in terms of protection of the waters on the surface from longwall mining underground, and it impacts the mine face-ups on the surface for underground mining in Appalachia as well.

Mr. LAMBORN. OK. Thank you.

Representative Huffman.

Mr. HUFFMAN. Thank you, Mr. Chairman.

It is a lovely picture that we have in the background for this conversation. I think it is especially lovely since there is mountaintops in the background. That landscape certainly is a beautiful thing to see in Wyoming.

I don't suppose we have any pictures of the mountaintops that have been removed in Appalachia from mountaintop removal mining. Did staff have anything like that we could put up? Might be a little less pretty.

I enjoyed the picture of the stream that was restored, and I thank you and I congratulate you for your stewardship award on that.

Do we have any pictures of the thousands of miles of Appalachian streams that don't exist anymore because excess waste was dumped into them and they are gone forever? We have any of those pictures that we could maybe put up while we have this conversation?

I think it is important that no amount of stagecraft can sort of change the subject from the absolute environmental destruction that occurs when all streams are despoiled by the improper disposal of this waste. And we, frankly, have lost a lot of Appalachian stream, and that is not in dispute. It is a matter of fact.

We have heard a lot of talk about how terrible and destructive this new proposed Obama Administration rule would be. There was talk about how it would be worse for the environment. Do the witnesses agree that the new Obama Administration rule would be worse for the environment than the Bush rule? That was your testimony, right?

Mr. LAMBERT. No, sir, that wasn't my testimony. My testimony was we don't know because we haven't seen, we haven't been able to comment.

Mr. HUFFMAN. Well, we did have testimony that the Obama Administration rule would make it harder to mitigate and to restore the environment. Anybody want to change that testimony, because that is what was said a few moments ago.

Mr. JONES. No, sir. My testimony was that we wouldn't have the opportunities to do the stream construction because we wouldn't have the opportunities to—

Mr. HUFFMAN. You were asked which rule would be better for the environment. You were asked by my colleague from Ohio, wouldn't the new Obama Administration rule be worse for the environment than what you have now, and you agreed with that proposition. You were asked, others were asked about how it would help or hinder mitigation, environmental mitigation. The testimony was that it would hinder.

There was also testimony about how this Obama Administration rule would affect all mining in America. That was your testimony, sir, correct, not just mountaintop removal mining?

Mr. CLARKE. That is correct.

Mr. HUFFMAN. How many of you have seen the proposed Obama Administration rule?

Mr. LAMBERT. Only the chapters that relate to us and those chapters we were able to comment on. We haven't seen any additional work that has been done by the internal staff since the contractor was fired and the State cooperating agencies were no longer a part of reviewing.

Mr. HUFFMAN. And isn't it true that we don't have a proposed Obama Administration rule at this point?

Mr. LAMBERT. We have the proposed rule that was leaked from OSM.

Mr. HUFFMAN. The proposed rule, it is a term of art. It has specific legal meaning. There is no proposed rule, correct?

Mr. LAMBERT. Well, the term that OSM has been using, especially when the chapters were leaked to us, was this is the proposal that we plan to move forward with.

Mr. HUFFMAN. All right. So, you agree with me, proposed rule has specific meaning.

Mr. LAMBERT. Yes, sir.

Mr. HUFFMAN. It is—it is—

Mr. LAMBERT. Yes, sir.

Mr. HUFFMAN. It means something. You haven't seen the proposed rule, right?

Mr. LAMBERT. We haven't seen the final proposed rule that is supposed to be—

Mr. HUFFMAN. And have any of the witnesses seen a proposed rule?

Mr. JONES. No, sir, I have not seen a proposed rule.

Mr. HUFFMAN. Thank you. Because I think that is an important clarification before we do too much more of this ready, shoot, aim lawmaking, talking about a proposed rule that doesn't even exist.

And then I want to use the last bit of my time to revisit this discussion about the Bush Administration rule being more environmentally protective than the Reagan Administration rule, because my understanding of the Reagan Administration rule, my reading of it, is that it sort of has a presumption of environmental harm, that the Stream Buffer Rule says that unless there is a specific finding that going within the buffer zone would not cause or contribute to the violation of water quality standards or would not adversely affect water quantity or other environmental resources, you can't do it. So this presumption can only be overcome by a very specific agency finding that there won't be these adverse impacts.

By comparison, the 2008 Bush rule substitutes that for a rule that states you simply need to make a finding that avoiding these disturbances is not reasonably possible.

Now, does anybody here believe that a finding of it is not reasonably possible to avoid impacts is more environmentally protective than a finding that there won't be any impacts? Is that seriously the testimony here?

Mr. CLARKE. Let me back up from what you are saying and examine SMCRA when it was passed. When it was passed, section 515(b)(22) established performance standards for placement of fill in streams, intermittent and perennial streams. It couldn't have referred to anything else. So there were performance standards established in the law when Congress passed it to do what you are talking about, the 1983 rule prohibiting.

The 1983 rule's requirements for a waiver cannot be met where fill is placed, but the act that it is attempting to implement provides performance standards for doing just that. So the 1983 rule, if it was interpreted to prohibit mining fills, would be inconsistent with the act passed by Congress under which it was promulgated. So the reading of the 1983 rule to prohibit fills has never been one that either OSM or the States have made. Instead, it has been applied to mining areas adjacent to streams, to stream crossings, et cetera.

And in that regard, the 2008 rule added new protections by requiring minimization efforts and analysis of alternatives to filling streams that did not exist under the previous rule.

Mr. HUFFMAN. I am out of time, but I would just say, with respect to that, that there was a 1999 district court ruling that disagreed with your proposition there and that OSM, EPA, and the Army Corps of Engineers all concurred with that ruling, so we have a bit of a disagreement on that.

And I am out of time.

Mr. LAMBORN. OK.

Representative Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman.

I would like to ask Mr. Jones, have you ever been to the Powder River Basin?

Mr. JONES. Yes, ma'am, I have been there on——

Mrs. LUMMIS. Is that what it looks like?

Mr. JONES. Yes.

Mrs. LUMMIS. Is that stagecraft? That is what I want to know. Is that stagecraft, or does that actually exist?

Mr. JONES. That is the way it looks in the Powder River Basin where I was in Wyoming, yes.

Mrs. LUMMIS. May I ask the other slide be put up.

Now, is that stagecraft, or does that stream really exist?

Mr. JONES. That stream exists. In fact, we put together, we were contacted by an environmental, I can't, I don't even know how you describe it. It is a guy who goes around the country and finds these neat little things that have been done environmentally, and he contacted us and came out and did a little 20-minute video of this site and in comparison to a natural stream that is nearby, and—

Mrs. LUMMIS. I would like to ask—thank you. I would like to ask the gentleman from Virginia and West Virginia, are these types of scenes in existence, or is this stagecraft? Is this a limited Disneyland-like staged example of reclamation?

Mr. LAMBERT. As Mr. Jones stated, that was the first natural stream channel reconstruction in Virginia that was permitted through our agency. Today, we have several streams that have been restored that look similar to that stream.

Mrs. LUMMIS. May I ask the other witness, and I am sorry, my eyesight has gone to heck. I am going to have a little LASIK surgery over the August recess, but I can't even see your nameplate anymore.

Mr. CLARKE. Tom Clarke.

Mrs. LUMMIS. That is what happens when you spend too many years in Congress.

Mr. CLARKE. You are reading too much.

I am Tom Clarke from West Virginia. We have streams that look like that, that have been mined and restored also.

Mrs. LUMMIS. OK. Are there streams in areas that are disseminated, as the Ranking Member has said? Are there places that are just ugly and disseminated and destroyed, honestly?

Mr. CLARKE. Generally, not in the post-reclamation state.

Mrs. LUMMIS. Well, but are there places that have never, in your State, that have never been reclaimed?

Mr. CLARKE. There are still some areas that were mined prior to 1977 that have not been reclaimed by the Abandoned Mine Lands Program.

Mrs. LUMMIS. OK. So—

Mr. CLARKE. The areas that are actively mined since are subject to title V of SMCRA, which is what this rule would be promulgated pursuant to.

Mrs. LUMMIS. OK. So SMCRA originally envisioned that those areas that were blighted or improperly reclaimed or not reclaimed prior to 1977, when SMCRA passed, would be reclaimed using funding that was implemented through 5 cents per ton, as I recall—

Mr. CLARKE. That is correct.

Mrs. LUMMIS [continuing]. On coal in this county, and have those moneys since 1977 been used to reclaim pre-SMCRA blighted and abandoned coal mines?

Mr. CLARKE. Yes, ma'am, they have. We have been working on that continuously.

Mrs. LUMMIS. How far along are you?

Mr. CLARKE. We have a separate office in our department that runs the title IV program. I could give you a better assessment if I were to go back and consult with those people.

Mrs. LUMMIS. Would I be able to, if I visited your State, and you took me to a mine that was done pre-1977 versus post-1977, do you think I might be able to tell the difference?

Mr. CLARKE. For the pre-1977 mines, the ones that haven't been reclaimed, but basically reclaim themselves through volunteer vegetation—

Mrs. LUMMIS. But is it, what about the streambeds, though? I mean, I am concerned because the gentleman says that these streams don't exist anymore, and there is blight, and I mean, I have driven through States in the East that have mountaintops that have just been buzz cut, and they really do look bad. What are we doing? My point is, what are we doing to fix that?

Mr. CLARKE. Well, let me say that a very small percentage of the mining operations in our State have received what is called an AOC variance. An AOC variance, a variance from the requirement of the law to restore approximate original contour is granted where there is a commercial development, a residential development. We have had them for roads, road construction, things of that nature where there is an improvement of the land.

Where there is no improvement of the land, there is no AOC variance, they have to restore the approximate original contour of the land. There has been the Appalachian regional reforestation initiative, which has been targeted growing hardwood forests comparable to what existed on the land before.

Mrs. LUMMIS. So, would you deny that the gentleman was correct, that once upon a time in this country, mining was not properly reclaimed?

Mr. CLARKE. That is correct.

Mrs. LUMMIS. How long has it been since that has been the case, since we are not doing good mine reclamation?

Mr. CLARKE. We changed that in 1977 with the adoption of SMCRA.

Mrs. LUMMIS. I thank the gentleman.

I yield back.

Mr. LAMBORN. Thank you.

Representative Cramer.

Mr. CRAMER. Thank you, Mr. Chairman, Ranking Member.

And I thank the panelists. I apologize. I haven't been here much this morning, but I have been monitoring it very closely. And I had to run up here when I saw that pretty picture of North Dakota disguised as Wyoming. It looks very much like about 100,000 acres of my primitive land in North Dakota.

And I just have to say that watching this process for the last 8 years, as a coal mining and reclamation regulator in North Dakota, now as a Member of Congress, I think in many respects we debate the rule or the proposed rule or the perhaps not proposed rule as though the intention is really to have a certain rule. As we know, with this Administration, no rule is certain until it meets their de-

mands, and frankly, in the absence of that, uncertainty is just as good.

And therein, Mr. Chairman, I think is the problem, that the uncertainty that is created by leaked proposed rules has the same impact as the worst-case scenario that they aspire to. And I think that is why it is so important for this Committee and others to have these oversight hearings to bring people from the States in to discuss the job killing of all of this.

And so I applaud all of you for being here.

Let's not forget that while there may not be a proposed rule in front of anybody yet, whether there ever will be or not, I don't know, but there is a goal that has been stated. It is called skyrocketing electricity prices and bankrupt coal companies. That has been a stated goal. And so I am very proud, when I look at these pictures, I see lots of similarities to reclaimed land in North Dakota. And frankly, in North Dakota, we passed our reclamation laws in 1975, pre-SMCRA, to protect our streams.

And one of the things that we found the most offensive is that the one size fits all. It just doesn't work and it holds up the progress, the proud progress that we have made in protecting our own environment and our own landscape. And I often say to people, one of my favorite things when people visit my State is to take them to a power plant at the mine mouth, go on the roof and then challenge them to point out reclaimed land and compare it to undisturbed land, point out the two for me, if you can, and no one has ever been able to tell the difference. And then we go out and walk the prairie and we find the streams, and oh, the beautiful fishing holes that actually weren't there, God didn't even put them there, they were actually created to enhance the environmental opportunities and recreational opportunities.

And one of the things I am so proud of is the relationship between our coal companies, our regulators, and our game and fish officials, and our State park officials to not just bring the land back to pre-mining levels but to actually improve it, make it more productive for the farmer, more productive for the conservationists and tell a great story. And that is lost, I think, when we have to all sit around and wonder what the Federal Government is going to impose upon us when we are doing it so well at the State level.

So, Mr. Chairman, thank you for not only this hearing but thank you for the bill and, to my colleague, Mr. Johnson, for introducing this bill.

And I appreciate you all being here today to help us better understand it.

I yield back.

Mr. LAMBORN. OK. That concludes the witness section of our testimony and our hearing today.

Thank you all for being here. Thank you for putting up with us as we went back and forth to the House Floor. Members of the Committee may have additional questions for the record, and I would ask that you respond to those in writing.

Finally, I ask unanimous consent to enter into the record comments submitted for this hearing from the Interstate Mining Compact Commission and from the Office of Surface Mining Reclamation and Enforcement.

Hearing no objection, so ordered.
[The information follows:]

PREPARED STATEMENT OF THE OFFICE OF SURFACE MINING RECLAMATION AND
ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR

H.R. 2824—PREVENTING GOVERNMENT WASTE AND PROTECTING COAL MINING JOBS IN
AMERICA

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to provide this statement for the record regarding H.R. 2824, which would direct State surface coal mining regulatory agencies to implement the Office of Surface Mining Reclamation and Enforcement's (OSM) 2008 Stream Buffer Zone Rule (2008 SBZ Rule). OSM opposes H.R. 2824; its enactment would force States to spend limited resources to implement an outdated rule with significant defects. OSM would also like to take this opportunity to provide the Subcommittee with an update on the 2008 SBZ Rule litigation and the development of OSM's Stream Protection Rule.

Congress gave OSM its regulatory authority and responsibilities in 1977, when it passed the Surface Mining Control and Reclamation Act (SMCRA). At that time, Congress mandated that OSM strike a balance between protecting the environment and providing for the Nation's energy needs. Specifically, Congress established the bureau to carry out two basic functions: First, OSM is responsible for ensuring that coal mines operate in a manner that protects both people and the environment, and that the land is restored and is as productive after mining as it was before mining. Second, OSM is responsible for establishing and administering an Abandoned Mine Land program to address hazards to people and the environment that were created during more than 200 years of inadequately regulated coal mining that occurred before SMCRA's enactment.

As Interior Secretary Sally Jewell has stated, our commitment to the President's "all of the above" energy strategy will enable us to continue with the safe and environmentally responsible expansion and diversification of our Nation's energy production, further reducing our reliance on foreign oil, and protecting our land and water at the same time. Protecting people, land, water, and the environment and promoting responsible coal mining are compatible goals. We can have both. The "all of the above" energy strategy is working. Activity in the Gulf of Mexico exceeds levels before the *Deepwater Horizon* spill, within an improved safety and environmental regulatory framework. Similarly, onshore oil production from Federal lands is at its highest level in over a decade.

Along with responsible oil and gas development and the growth of clean, renewable energy, the production of coal is an important component of our Nation's energy portfolio. The responsible development of this important resource is a key part of America's energy and economic security. Coal will remain an important part of our energy mix for years to come. We are committed to safe, responsible coal production and the jobs it supports.

Although OSM is not involved in coal leasing, which is conducted by the Bureau of Land Management for Federal lands, the Administration is also making more coal available, with the number of producing acres rising 4 percent from fiscal year 2009 to fiscal year 2012. In fact, in fiscal year 2012, the Bureau of Land Management leased more Federal coal than at any other time since fiscal year 2003.

Under SMCRA, most coal-producing States have primary responsibility, also known as "primacy", to protect people and the environment from the adverse effects of coal mining. States with primacy have demonstrated that their State regulatory programs satisfy the minimum statutory and regulatory Federal standards established in SMCRA and OSM's regulations. OSM provides assistance to, and oversight of, primacy States to help ensure proper regulation of coal mining and the protection of people and the environment. We also continue to ensure the reclamation of high-priority abandoned mine sites, and are reducing the number of remaining dangerous abandoned mine sites nationwide.

In December 2008, OSM published a final rule that modified the circumstances under which mining can occur in or near streams. The 2008 SBZ Rule has been challenged by 10 organizations in 2 separate complaints filed in Federal District Court for alleged legal deficiencies. The Department of the Interior recognized error in the 2008 SBZ rulemaking process. In a motion filed with the Court in one of the cases on July 17, 2013, the Government admitted error in one of the pending legal challenges to the 2008 SBZ Rule. That error is believed to be a flaw that could result in invalidation of the 2008 SBZ Rule. In that case, the Government has asked that the 2008 SBZ Rule be vacated.

While the litigation has been pending, the Department of the Interior has identified additional considerations that the 2008 SBZ Rule did not address. As a threshold matter, there have been significant advances in science and technology since the promulgation of a 1983 rule, which preceded the 2008 rule. Those advances were not addressed in the 2008 SBZ Rule. The 2008 SBZ Rule, now almost 5 years old, did not incorporate the most modern technology and science that were available at that time, nor does the rule reflect the scientific advances that have occurred since the rule was promulgated. As we proceed with development of the Stream Protection Rule, we are combining on-the-ground experience with peer-reviewed scientific literature to modernize our rules. We will use the best available technology and science to improve mining practices in order to minimize and mitigate environmental damage from coal mining. Our proposed revisions will provide solid benchmarks for companies to meet, and will be based on the latest accepted scientific methods. Clear and uniform standards will provide greater predictability and certainty to the mining industry, and can better protect affected communities.

A revised rule that more effectively incorporates modern science will enable the coal industry to do a better job of reclaiming the land and restoring natural resources, and in many cases, will lead to that work being done in a more economic and efficient manner. These goals are fully consistent with Congress' mandate and OSM's mission, while also retaining much-needed, well-paying jobs, and generating revenue in the Nation's coal-producing regions.

OSM will consider the extensive public and agency comments it has received to date on the Stream Protection Rule, and on the comments it will receive when OSM publishes a proposed rule. Further, it will consider the benefits, as well as the costs, of the agency's regulatory alternatives. Development of the proposed rule language and the Draft environmental impact statement (EIS) is an iterative and interactive process; we are developing each in concert with the other. The cost/benefit analysis of potential rule changes helps inform agency decisions regarding what should be included in the proposed rule. OSM plans to publish a proposed rule and associated Draft EIS in 2014.

As a result of our extensive outreach efforts, we have already received significant input from the public, States, and other Federal agencies on issues that we will consider in drafting the proposed rule, including more than 32,000 comments in 2009, and more than 20,000 after we held public scoping meetings in 2010. Consistent with SMCRA, the National Environmental Policy Act, the Administrative Procedure Act, and other applicable laws, we will ask interested stakeholders—Congress, State agencies, industry, environmental organizations, and members of the public—to comment on the proposed rule and Draft EIS once those documents have been published. We look forward to additional public review and comment on the proposed rule and Draft EIS after they are published.

For the reasons stated we oppose H.R. 2824. We believe the development of the Stream Protection Rulemaking is the approach that will best result in regulatory improvements that will more completely implement the law, make use of the best available science and technology, provide for a more sustainable coal industry and its jobs, better protect streams nationwide, and provide greater clarity and certainty to the mining industry and affected communities.

OSM looks forward to working with you to ensure that we protect the Nation's land and water while meeting its energy needs.

Mr. LAMBORN. If there is no further business, without objection, the Committee stands adjourned.

[Whereupon, at 11:40 a.m., the Subcommittee was adjourned.]

