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EFFECT OF THE PRESIDENT'S FY 2012 BUDGET AND LEGISLATIVE PROPOSALS FOR THE OFFICE OF SURFACE MINING ON PRIVATE SECTOR JOB CREATION, DOMESTIC ENERGY PRODUCTION, STATE PROGRAMS AND DEFICIT REDUCTION

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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OVERSIGHT HEARING ON THE "EFFECT OF THE PRESIDENT'S FY 2012 BUDGET AND LEGISLATIVE PROPOSALS FOR THE OFFICE OF SURFACE MINING ON PRIVATE SECTOR JOB CREATION, DOMESTIC ENERGY PRODUCTION, STATE PROGRAMS AND DEFICIT REDUCTION."

Thursday, April 7, 2011
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 10:04 a.m. in Room 1324, Longworth House Office Building, Hon. Doug Lamborn [Chairman of the Subcommittee] presiding.

Present: Representatives Lamborn, Benishek, Duncan, Gosar, Flores, Landry, Fleischmann, Johnson, and Holt.

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

Mr. LAMBORN. The Subcommittee will come to order. The Chairman notes the presence of a quorum, which under Committee Rule 3[e] is two Members, so we are over that 50 percent. The Subcommittee on Energy and Mineral Resources is meeting today to hear testimony on the effect of the President's Fiscal Year 2012 budget and legislative proposals for the Office of Surface Mining on private sector job creation, domestic energy production, state programs and deficit reduction.

Under Committee Rule 4[f], opening statements are limited to the Chairman and Ranking Member of the Subcommittee. 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 five minutes.

During today's hearing, we will hear from the Administration and witnesses on the President's proposed Fiscal Year 2012 budget for the Office of Surface Mining and associated legislative initiatives. Before I review the issues with the President's budget, I want to make one matter very clear. Chairman Hastings and I have initiated an investigation into the Office of Surface Mining's attempt to rewrite the 2008 Stream Buffer Zone Rule and the ongoing fiasco resulting from the Administration's rushed effort to fast-track major changes to an existing and significant rule.

I want to be very clear. This Committee expects the Administration and this agency to be forthcoming in response to Committee requests. Failing to respond to Committee requests in a timely

manner is unacceptable. This Committee will hold this agency and the Department accountable for responding to our requests. As representatives of the American people, Congress has both the obligation and the responsibility to conduct oversight, and we cannot—and this Committee and this Chairman will not—accept stonewalling.

Now moving on to the review of the President's budget, the President's budget includes legislative proposals to change the 2006 amendments to Title IV of the Surface Mining Control and Reclamation Act, SMCRA for short, Amendments that took Congress 10 years to negotiate and pass. The recent proposed changes to Title IV will have a devastating effect on the original deal that states made with the Federal Government and codified in SMCRA where 50 percent of the AML fees are returned to the state of origin.

If the Administration amendments are adopted, those states that are significant donors to the Federal program will question what they got in return for their mandatory investment. As I mentioned above, even more egregious than this budget proposal is the agency's ongoing effort to rewrite the 2008 Stream Buffer Zone Rule, a rule that an independent contractor hired by this Administration found will result in the loss of over 7,000 direct jobs nationwide and eliminate over 20,000 direct and indirect jobs in Appalachia. Over 29,000 people will be driven into poverty.

After the job loss estimates became public, this Administration ended the contract with this particular contractor. Once the information on the economic impact of the preferred alternative became public, the Administration immediately tried to distance itself from the contractor and to deny any knowledge of the forecasted job losses associated with the Administration's preferred alternative.

Since the Administration took office, the Department of the Interior has taken steps to reduce access to domestic energy and mineral resources on Federal lands. With the President's proposed for the Office of Surface Mining and the rewrite of the 2008 Stream Buffer Zone Rule, the Department and this agency in particular is restricting access to private coal deposits. This is because SMCRA applies to all domestic coal mines regardless of surface or mineral ownership status.

More than 130,000 Americans depend on coal production for their livelihood. Throughout America, there are places where the only industry in town is the coal mine. While this Administration may think it is a preferred alternative to displace tens of thousands of workers, destroying coal mining will kill these one-industry towns, push tens of thousands of American families into poverty and leave our nation poorer and drive energy costs higher, all counter to the original intent of SMCRA.

SMCRA was designed to promote the development of the nation's largest resource of conventional fuel to help meet the energy needs of the American people while ensuring that the extraction of the coal resources is done in an environmentally responsible manner. Make no mistake about it. Coal is vital to the American economy, especially to the generation of electricity. Nothing can touch it for efficiency and savings. Unless and until someone comes up with

commercially viable alternatives, it would be foolish to try to get rid of coal.

America is a nation of excellence. Our achievements through the development of our abundant natural resources allowed us to become the richest country in the world, win world wars and raise our standard of living far above much of the world. Increasing access to these resources, yes including coal, will allow us to become less dependent on foreign sources of energy and mineral resources, create new private-sector jobs and add revenues to government coffers, reducing the national debt and thereby increasing our national and economic security.

In closing, I am concerned that this budget makes cuts to programs that are important to states and citizens, proposed ending programs by fiat that are the result of tremendous negotiations in Congress and in the end reprogram money for a rushed and ill-advised rewrite of an important rule, the Stream Buffer Zone Rule. I look forward to hearing from our witnesses, and I now recognize the Ranking Member for five minutes for his opening statement.

[The prepared statement of Mr. Lamborn follows:]

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

During today's hearing we will hear from the Administration and witnesses on the President's proposed FY–2012 budget for the Office of Surface Mining and associated legislative initiatives.

But before I review the issues with the President's budget, I want make one matter very clear.

Chairman Hastings and I have initiated an investigation into the Office of Surface Mining's attempt to rewrite the 2008 stream buffer zone rule and the ongoing fiasco resulting from the Administration's rushed effort to fast track major changes to a significant rule.

I want to be very clear, this Committee expects the Administration to be forthcoming in responses to Committee requests. While the Administration may be unfamiliar with the process of oversight from this Committee, failing to respond to Committee requests in a timely manner is unacceptable and this Committee will hold this agency and the Department accountable for responding to our requests. As Representatives of the American people, Congress has both the obligation and the responsibility, to conduct oversight and we cannot, and this Committee and this Chairman will not, accept stonewalling. Now, moving on to the review of the President's budget.

The President's budget includes legislative proposals to change the 2006 amendments to Title IV (4) of the Surface Mining Control and Reclamation Act, SMCRA for short—amendments that took this body 10 years to negotiate and pass. The proposed changes to Title IV (4) will have a devastating effect on the original deal states made with the federal government and codified in SMCRA where fifty percent of the AML fees are returned to the state of origin. If the Administrations amendments are adopted those states that are significant donors to the federal program will question what they get in return for their mandatory investment.

As I mentioned above, more egregious than this budget proposal, is the agency's ongoing effort to re-write the 2008 Stream Buffer Zone Rule. A rule that an independent contractor, hired by the Administration, found will result in the loss of over 7,000 direct jobs nationwide and eliminate over 20,000 direct and indirect jobs in Appalachia. After the job loss estimates became public, the Administration ended the contract with the contractor.

Once the information on the economic impact of the preferred alternative became public the Administration immediately tried to distance themselves from the contractor and deny any knowledge of the forecasted job losses associated with the Administration's preferred alternative.

There is a famous quote with a wry observation that applies to the Office of Surface Mining's treatment of SMCRA and their state partners.

> "We trained hard, but it seemed that every time we were beginning to form into teams, we would be reorganized.. . .I was to learn that later in life we

tend to meet any new situation by reorganizing, and a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency and demoralization."

Let me repeat the last part of that quote because I believe it aptly describes the outcome of the Administration's actions in the re-write of the 2008 Stream Buffer Zone Rule and the proposed legislative changes to SMCRA—"and a wonderful method it can be for creating the illusion of progress while **producing confusion, inefficiency and demoralization**."

Since the administration took office the Department of the Interior has taken steps to reduce access to domestic energy and mineral resources on federal lands including renewable resources like wind and solar. With the President's proposed budget for the Office of Surface Mining and the re-write of the 2008 Stream Buffer Zone Rule the Department and this agency in particular is restricting access to private coal deposits as SMCRA applies to all domestic coal mines regardless of surface or mineral ownership status.

More than 130,000 Americans depend on coal production for their livelihood. Throughout America there are places where the only industry in town is the coal mine. While this Administration may think it is a "preferred alternative" to displace tens of thousands of workers, destroying coal mining will kill these one industry towns, push tens of thousands of American families into poverty, and leave our nation poorer—all counter to the original intent of SMCRA.

SMCRA was designed to promote the development of the Nation's largest resource of conventional fuel to help meet the energy needs of the American people while ensuring the extraction of the coal resources is done in an environmentally responsible manner.

America is a nation of excellence. Our achievements through the development of our abundant natural resources allowed us to become the richest country in the world, win world wars, and raise our standard of living far above much of the world. Increasing access to those resources will allow us to become less dependent on foreign sources of energy and mineral resources, create new private sector jobs and add revenue to government coffers, reducing the national debt and thereby increasing our national and economic security.

In closing, I am concerned that this budget makes cuts to programs that are important to states and citizens, proposes ending programs by fiat that are the result of tremendous negation in congress and in the end reprograms money for a rushed rewrite of an important rule.

STATEMENT OF HON. RUSH HOLT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. HOLT. Thank you, Mr. Chairman. The Office of Surface Mining, Reclamation and Enforcement is charged with a number of important responsibilities, among them protecting citizens and the general environment from the harmful effects of surface coal mining operations, also for ensuring that land is restored following mining operations, and for addressing the effects of past mining operations by reclaiming and restoring abandoned mines.

Under the Bush Administration, the Office of Surface Mining routinely allowed destructive practices to go unchecked, and in the final days in office, the Administration released what has come to be known as a midnight regulation revising the Stream Buffer Zone Rule to remove key protections for streams and rivers threatened by the dumping of mining waste. To me, this is an egregious rollback of protective responsibility.

Yet, mountaintop removal mining does continue to have significant effects on people and places in Appalachia. According to the EPA, since 1992, nearly 2,000 miles of Appalachian streams have been filled, polluted, as a result of mountaintop removal activities. Mountaintop removal in Appalachia has deforested an area the size of the State of Delaware. A recent EPA study found that mountaintop removal mining has adversely affected aquatic life downstream in nine out of every 10 streams in the region. However, the Bush

Administration's revised Stream Buffer Zone Rule loosened the restrictions on placing valley fill in or near streams. This rule was challenged in court, and the Obama Administration is now going through the process of issuing a new stream protection rule.

Mr. Chairman, I note your call for an investigation or your announcement that you are undertaking a look at how the Office is administering that rule, and I ask that the minority have access to all the relevant documents on this matter. It is critical that the revised rule ensure that our environment and these communities are protected. That is why I am a cosponsor of the Clean Water Protection Act, H.R. 1375, a bill introduced by my colleague from New Jersey, Representative Pallone, a member of this Committee, to prohibit the dumping of waste from mountaintop removal coal mines into rivers and streams.

The Administration is also requesting an additional nearly $4 million and 25 full-time employees to expand oversight of stream protection activities in Appalachia. Regarding the Abandoned Mine Land coal program, the AML program, the Administration is proposing reforms that would eliminate unnecessary spending and focus mine reclamation efforts on the most dangerous abandoned coal mines, and I would ask that the witness characterize what are the most dangerous abandoned mines.

The proposal would do away with payments to states and Native American tribes that have completed their abandoned coal mine reclamation activities saving taxpayers something over a billion dollars over the next decade. It would institute a competitive process for AML grants so that the funds could go to the highest-priority abandoned coal mines. Currently, AML funds are allocated based on current and historic coal production as opposed to where the greatest need for reclamation actually exists, and I look forward to learning more about the merits of the proposal.

The responsibility of OSM to our environment and to people in that region is tremendous, and it is imperative that Congress provide this agency with the tools it needs, the oversight that it deserves and the support that it deserves, and I thank the Chairman for holding this hearing and the witnesses for your testimony to come. Thank you.

[The prepared statement of Mr. Holt follows:]

Statement of The Honorable Rush D. Holt, Ranking Member, Subcommittee on Energy and Mineral Resources

Thank you, Mr. Chairman.

The Office of Surface Mining Reclamation and Enforcement (OSM) is charged with protecting citizens and the environment from the harmful effects of surface coal mining operations, ensuring that land is restored following mining activities, and addressing the effects of past mining operations by reclaiming and restoring abandoned coal mines.

Under the Bush Administration, the Office of Surface Mining routinely allowed some of the most destructive practices to go unchecked. During its final days in office, the Bush Administration issued a "midnight regulation," revising the Stream Buffer Zone Rule to remove key protections for streams and rivers threatened by the dumping of mining waste.

Yet mountaintop removal mining has significant impacts to the people and places of Appalachia. According to the Environmental Protection Agency, since 1992, nearly 2,000 miles of Appalachian streams have been filled as a result of mountaintop removal activities. Mountaintop removal in Appalachia has deforested an area the size of Delaware. A recent EPA study found that mountaintop removal mining ad-

versely impacted aquatic life downstream in nine out of every 10 streams in the region.

However, the Bush Administration's revised stream buffer rule loosened the restrictions on placing valley fill—the waste byproduct of mountaintop removal mining—in or near streams. This rule was challenged in court and the Obama Administration is now going through the process of issuing a new Stream Protection Rule. It is critical that the revised rule ensure that our environment and these communities are properly protected. That is why I am a cosponsor of the Clean Water Protection Act (H.R. 1375), a bill introduced by my colleague from New Jersey, Rep. Pallone, to prohibit the dumping of waste from mountaintop removal coal mines into our precious rivers and streams.

The Administration also is requesting an additional $3.9 million and 25 full time employees to expand oversight of stream protection activities in Appalachia. This commitment must be maintained.

Regarding the Abandoned Mine Land (AML) coal program, the Administration is proposing reforms that would eliminate unnecessary spending and focus mine reclamation efforts on the most dangerous abandoned coal mines. The proposal would do away with payments to states and Native American Tribes that have completed their abandoned coal mine reclamation activities, saving taxpayers approximately $1.2 billion over the next decade. It also would institute a competitive process for AML grants so that the funds could go the highest priority abandoned coal mines. Currently, AML funds are allocated based on current and historic coal production, as opposed to where the greatest need for reclamation activities exists. I look forward to learning more regarding the merits of this proposal.

The responsibility of OSM to our environment and the American public is tremendous, and it is imperative that the Congress provide this agency with the tools it needs to do its job.

I thank the Chairman for holding this hearing and the witnesses for their testimony today. I yield back.

Mr. LAMBORN. OK. And thank you. We will now hear from our first panel of witnesses, and this is Mr. Joseph Pizarchik, Director of the Office of Surface Mining with the Department of the Interior. Thank you for being here this morning, and we look forward to comments. As you probably already know, there are five minutes on the clock. The light after four minutes will turn yellow and then turn red after five minutes. Thank you for being here.

STATEMENT OF JOSEPH PIZARCHIK, DIRECTOR, OFFICE OF SURFACE MINING, U.S. DEPARTMENT OF THE INTERIOR

Mr. PIZARCHIK. Thank you, Mr. Chairman, and members of the Subcommittee for inviting me here today to testify on behalf of the Administration's Fiscal Year 2012 budget request for the Office of Surface Mining, Reclamation and Enforcement. In 1977, Congress enacted the Surface Mining Control and Reclamation Act and created OSM for two basic purposes: First, to assure that the nation's coal mines operate in a manner that protects society and the environment during mining operations and restores the land to beneficial productive use following mining; second, to implement an abandoned mine land program to address the hazards and environmental degradation caused by pre-law unregulated mining.

Now, as then, coal remains an important fuel for America and provides about half of the nation's electricity. Congress, when it enacted the Surface Mining Act, recognized a need to strike a balance between the nation's need for coal as an essential source of energy and the protection of society and the environment from the adverse effects of coal mining. OSM was charged with striking that balance. The 2012 budget is a focused budget. It is a budget that reflects tough choices that we have had to make in these difficult times.

In overview, the Fiscal Year 2012 budget request for OSM totals $145.9 million in discretionary spending, a decrease of $16.9 million from the 2010 enacted level and what level we have been funded out through 2011 to this point. It supports 528 full-time equivalent employees, which is down from about 1,500 in 1994 and supports about 1,900 state and tribal employees that helps to support them. Some of the highlights in the discretionary spending include a regulatory funding program increase of $3.9 million for 25 additional staff to meet our statutory oversight obligations and to continue to fulfill the Administration's commitment to reduce the harmful environmental impacts of coal mining.

However, most of these funds, $2.3 million, and 18 of the FTE's, Full-time Employees, are not really new but are offset from cuts that are proposed to the Federal Emergency Program. Those reductions amount to $3.5 million and 18 employees, and the work that they had been conducting is being picked up and handled by the states due to the significant increases that they have been receiving. We are also proposing to reduce $11 million from the regulatory grants provided to the state and encourage the states to recover those costs from the industries for the services that they provide to the industry.

We propose the reduction of $1 million of Federal high-priority projects. There is a proposed reduction of $1.3 million for funding for technical studies, mine map preservation. We also propose a cut of $500,000 to eliminating a funding for audit services that are no longer needed. We also are proposing cuts in administrative costs of $573,000 to OSM to be achieved through reductions in travel, information technology and strategic sourcing. There was a similar reduction for the current Fiscal Year that we are implementing.

The Administrations's 2012 proposed budget for OSM also includes a legislative proposal to revamp the abandoned mine land program to reduce unnecessary spending and to ensure that the most dangers abandoned coal mine sites are addressed. Major components include the elimination of payments to states and tribes that have certified they have completed reclamation of all of the abandoned mine lands within their boundaries. That is projected to reduced spending for 2012 by $184.2 million and is expected to reduce the Federal budget deficit by $1.2 billion over 10 years.

The proposal also includes a legislative change to modify how the grants for abandoned mine reclamation is distributed going from a production-based formula to a competitive process with an advisory committee to address the most dangerous safety and environmental hazards. Those types of hazards include abandoned mine lands that were created prior to the enactment of the Surface Mining Act that propose an extreme danger to the health and safety to the people or property, that provide adverse effects to health or safety and create severe environmental problems to the environment.

The budget proposal also includes the creation of a parallel abandoned mine land program for the reclamation of abandoned hard rock mines. It would provide for funding from a new AML reclamation fee on hard rock production that would be developed by the Bureau of Land Management within the Department of the Interior. In order to achieve efficiencies, the expertise that OSM has

gained over the years on recovering coal fees would be used to cover the AML fees.

In conclusion, the Fiscal Year 2012 budget is a fiscally sound and responsible budget that lowers the cost to the American taxpayers, reduces the Federal subsidy to the mining industry and will reduce the size of the Federal deficit. Thank you. I am available for questions.

[The prepared statement of Mr. Pizarchik follows:]

Statement of Joseph G. Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify on the Fiscal Year 2012 budget request for the Office of Surface Mining Reclamation and Enforcement (OSM).

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Office of Surface Mining Reclamation and Enforcement for two basic purposes: First, to assure that the Nation's coal mines operate in a manner that protects citizens and the environment during mining operations and restores the land to beneficial use following mining; and second, to implement an Abandoned Mine Lands (AML) program to address the hazards and environmental degradation remaining from two centuries of unregulated mining. These tasks are vital to public health and safety, and the environmental well-being of the United States.

The SMCRA recognized the need to ensure that the Nation strikes a balance between the protection of the environment and the Nation's need for energy. Nearly 34 years after the passage of SMCRA, coal remains an important fuel source for our country, providing about half of our Nation's electricity. In the continued drive to decrease our Nation's dependence on foreign oil, coal will continue to be part of our domestic supply of energy for the foreseeable future.

While new energy frontiers are being explored, including the development of clean coal, the coal supply (conventional coal production) is essential to the Nation's energy requirements. In order to ensure that coal is produced in an environmentally conscious way, OSM is committed to carrying out the requirements of SMCRA in cooperation with States and Tribes. Of the almost 2,400 employees involved in carrying out these two responsibilities on a daily basis, less than 25 percent are employed by OSM. The rest are State and Tribal employees who implement programs approved by the Secretary of the Interior with assistance from OSM. States permit and regulate 97 percent of the Nation's coal production. States and Tribes also abate well over 90 percent of the AML problems.

The major tasks for OSM are to ensure that States and Tribes successfully address coal mining activities by ensuring they have high-quality regulatory and AML frameworks and to oversee implementation of their programs. Importantly, OSM also provides technical assistance, funding, training, and technical tools to the States to support their regulatory and reclamation programs.

Currently, 24 States have approved regulatory programs in place pursuant to Title V of SMCRA. There are 25 States and three Tribes that administer approved AML programs pursuant to Title IV of SMCRA.

Since enactment of SMCRA in 1977, OSM has provided more than $3 billion in grants to States and Tribes to clean up mine sites abandoned before passage of SMCRA. In the course of addressing health, safety and environmental hazards, about 255,000 acres of Priority 1 and 2 abandoned coal mine sites have been reclaimed under OSM's AML Program, though many sites still remain.

The authority to collect and distribute the AML reclamation fee was revised by the Tax Relief and Health Care Act of 2006, which included the 2006 Amendments to SMCRA (Public Law 109–432). Among other things, these amendments extended the authority for fee collection on mined coal through September 30, 2021, and changed the way that State and Tribal reclamation grants are funded, beginning in FY 2008. State and Tribal grants are funded by permanent appropriations that are derived from current AML fee collections and the general fund of the U.S. Treasury.

The 2006 Amendments dramatically increased funding to States and Tribes, from $145.3 million in FY 2007 to the most recent distribution made available of $395.6 million for FY 2011. Because of the increased State and Tribal funding, OSM began phasing out Federal responsibility for addressing AML emergency projects. It is more efficient and cost effective to provide responsibility for AML related issues to a single manager, from a single source of funding. In FY 2012, States with AML programs will have fully assumed this responsibility, so the budget eliminates the

remaining discretionary funding for State emergency grants and Federally-managed emergency projects.

The budget also includes a legislative proposal to reform the AML reclamation program to eliminate unnecessary spending and focus reclamation efforts on the Nation's most dangerous abandoned mines. First, the budget proposes to eliminate the unrestricted payments to States and Tribes that have completed their abandoned coal mine reclamation. Terminating these payments will save taxpayers $1.2 billion over the next decade. Second, the budget proposes to reform the allocation of grants for coal AML reclamation to a competitive process. The current production-based formula allocates funding to States that have the most coal production and not necessarily States with the most critical reclamation needs. A competitive process would ensure that funding addresses the highest priority AML coal sites across the Nation, regardless of which State they are located in and how much coal is currently produced. Third, the budget proposes to create a parallel hardrock AML program, with fees collected by OSM and distributed competitively by the Bureau of Land Management. The mandatory distribution to the United Mine Workers of America (UMWA) health benefit plans, estimated at $225.3 million in FY 2012, will not be affected by this proposal.

Fiscal Year 2012 Budget Request Overview

The FY 2012 budget request for OSM totals $145.9 million in discretionary spending and supports 528 equivalent full-time positions. Compared with the 2010 enacted level of $162.9 million, this represents a net decrease of $17.0 million. The budget request contains a programmatic increase of $3.9 million for expansion and enhancement of Federal oversight and stream protections. Reductions include $11.0 million in discretionary spending for State regulatory program grants to be offset with increased user fees for services provided to the coal industry; $6.8 million for State and Federal emergency grants and projects, Federal high-priority projects, and related Federal reclamation operations staff; $1.2 million for technical studies and mine mapping under the Applied Science Program; $500,000 for audit activities; and $160,000 for coal outcrop fire projects. The budget also includes a decrease of $1.3 million for administrative savings and efficiencies.

OSM's budget also contains an estimated $539.1 million in permanent appropriations. This spending includes $313.8 million for reclamation grants to non-certified States and Tribes (those with remaining abandoned coal mine problems); and $225.3 million for the UMWA for specified health benefits plans. This spending is derived from both the AML and U.S. Treasury Funds. The estimates, as contained in the budget submission, are projections based on information current as of the end of the 2010 calendar year and subject to change since they are based on fee collections and requests from the UMWA.

Regulation and Technology Appropriation

The OSM's overall FY 2012 request includes $118.5 million for the Regulation and Technology appropriation, $8.8 million below the 2010 enacted level. This includes an increase in funding and staff to support the expansion and enhancement of Federal oversight of State programs and stream protections, and reductions for regulatory grants, technical studies, and other efficiency gains. The FY 2012 budget request will enable OSM to provide financial and technical support, and training to the 24 States with approved regulatory programs. It will also enable OSM to continue to administer Federal regulatory programs in States that do not operate their own programs and on Federal and Tribal lands.

The requested programmatic increase of $3.9 million and 25 FTE will support the Administration's commitment to significantly reduce the harmful environmental impacts of coal mining in Appalachia, formalized in a Memorandum of Understanding (MOU) with the Army Corps of Engineers and the Environmental Protection Agency. Increased resources and technical skills are needed to implement this new strategic direction i.e., enhanced oversight, stream protections to maintain the hydrologic balance of watersheds, coordinated permitting, and increased transparency as priorities for the coming years, while continuing to provide the technical support and training that States and Tribes need to maintain program effectiveness.

A large portion of the regulatory and technology funding appropriated to OSM is distributed to the States and Tribes in the form of regulatory grants. These grants account for 51 percent of this proposed appropriation. For FY 2012, the request includes $60.3 million for regulatory grants, $11.0 below the 2010 enacted level. States are encouraged to offset the decrease in Federal funding by increasing cost recovery fees for services to the coal industry. The decrease supports the Administration's commitment to reduce subsidies to fossil-fuel industries.

In addition, a decrease in technical studies of $834,000 is proposed. OSM will use its existing staff to provide direct technical assistance to the States and Tribes to address technical on-the-ground issues instead of funding nationwide or regional studies.

The remaining portion of the budget provides funding for OSM's regulatory operations on Federal and Indian lands, evaluation and oversight of State regulatory programs, technical training and other technical assistance to the States and Tribes as well as administrative and executive activities.

Abandoned Mine Reclamation Fund Appropriation

The request includes $27.4 million for the AML appropriation, which is $8.1 million below the 2010 enacted level. The budget supports OSM's program evaluations and reclamation operations, watershed cooperative agreement projects, fee compliance and audits, technical training and other technical assistance to the States and Tribes as well as administrative and executive activities. Reductions are proposed for State and Federal emergency grants and projects, Federal high-priority projects, related Federal reclamation operations staff, the Applied Science Program (technical studies and preservation of mine maps), audits related to coal export litigation, and coal outcrop fire projects and monitoring.

As previously stated, because of the increased State and Tribal funding, OSM began phasing out Federal responsibility for addressing AML emergency projects. Therefore, the budget request eliminates discretionary funding for State emergency grants and Federally-managed emergency projects. States with AML reclamation programs will now address AML emergencies to improve efficiency and coordination.

The budget proposes to decrease funding for technical studies by $366,000 and $160,000 for coal outcrop fire projects. In addition, the proposal reduces funding for audit activities related to coal export issues because the funding is no longer needed. The balance of the reductions for this account is derived from efficiencies in travel and strategic sourcing.

Permanent Appropriations

The OSM will continue to distribute mandatory funding to States and Tribes under the AML program and make payments to the UMWA health benefit plans. The budget request includes a legislative proposal to eliminate payments to certified States and Tribes and restructure AML coal payments from a production-based formula to a competitive process, allocating $313.8 million in 2012 for reclamation of the highest priority coal AML sites in the Nation. In addition, the proposal will also create a new parallel AML program for the reclamation of abandoned hardrock mines, funded by an AML fee on hardrock production. Altogether, this proposal will reduce Federal spending by an estimated $184.2 million in 2012 and an estimated $1.8 billion over the next decade while ensuring that the Nation's highest priority abandoned coal and hardrock mines are addressed.

Initiatives

The OSM's activities and related budget support the Presidential and Secretarial initiatives for responsible production of coal through the protection, preservation, and restoration of mined lands; restoration of lands left unreclaimed; and provision of opportunities for youth.

It is essential to have properly mined coal and to see that land is reclaimed in accordance with the permit and the law. State permitting actions and inspections of mine sites are among the most important ways to help ensure the law is being implemented and to protect society and the environment. Consistent with the intent of SMCRA that States take the lead in regulating coal mining, in FY 2010, States completed 49,799 partial and 29,095 complete inspections for a total of 78,894 inspections. The OSM conducted 2,067 oversight inspections in primacy States during that year, a 40 percent increase over the number conducted in FY 2009.

As part of the Secretarial initiative to increase youth employment in DOI programs, OSM set a goal in FY 2010 and FY 2011 to increase youth engagement by 35 percent over the FY 2009 baseline. In FY 2010, OSM engaged 218 youth. Accomplishments included engaging 198 youth through partnership efforts and 20 new students under other hiring authorities. In FY 2012, OSM will continue to support the program through ongoing activities and partnerships, with a cumulative goal of engaging 219 youth in its programs.

Conclusion

The FY 2012 budget is a fiscally responsible request that lowers the cost to the American taxpayer while ensuring coal production occurs in an environmentally responsible way.

Thank you for the opportunity to appear before the Committee today and testify on the FY 2012 budget request for OSM.

Please be advised that due to my previous position with the Commonwealth of Pennsylvania, I have recused myself from matters pertaining to Pennsylvania that would present a conflict or an appearance of impropriety. The Committee questions that fall within the scope of my recusal I will refer to my deputy, Glenda Owens, who is here today.

Mr. LAMBORN. OK. Well, thank you for your statement, and we will now begin questioning. Members are limited to five minutes for their question, although we may have additional rounds. I now recognize myself for five minutes for questioning. Mr. Pizarchik, as I understand it, your office reprogrammed approximately $7 million from the states' Title V program to pay for the rewrite of the 2008 Stream Buffer Zone Rule.

Now, this was after the agency had spent more than five years and many millions of dollars to produce the 2008 Stream Zone Buffer Rule, a rulemaking process that included 40,000 public comments and two proposed rules supported by more than 5,000 pages of environmental analysis from five different agencies. According to your Department's own environmental impact statement that was made public, your preferred alternative would eliminate more than 29,000 coal mining and related jobs and eliminate a significant portion of coal production in this country, more than 20 percent of surface mining in the east and up to 50 percent of underground mining nationwide.

You testified in an Appropriations Subcommittee hearing earlier this year that OSM had paid the contractor about $3.5 million so far. That means about half of the reprogrammed money has not been spent. Would you commit to me today to stop this rulemaking process, redirect the money back to states' Title V program and begin to repair the damage caused by this exercise?

Mr. PIZARCHIK. The stream protection rule that we are working on is still under development, and we are in the process and will continue to work forward with the effort to improve the stream protection rules, to refine our regulations, to do a better job of striking the balance between meeting this country's energy needs with coal and protecting the environment from the adverse impacts of coal mining.

Mr. LAMBORN. And the tens of thousands of jobs are just going to be a byproduct that you are going to ignore?

Mr. PIZARCHIK. The numbers to which you refer are working numbers from the contractor's early draft, and those numbers are premature at this point. We are still in the process of developing the proposed rulemaking. We are still in the process of developing the environmental impact statement. In accordance with the National Environmental Policy Act, development of that information is information that we would use in determining what would be in the proposed rulemaking.

At this time, it is premature and speculative to assess any numbers or to provide any impacts of that because we have not progressed to the point of having a draft environmental impact statements that is based on sound science and information that will allow us to make informed decisions on what should be in the proposed rulemaking.

Mr. LAMBORN. Is the contractor that you had initially hired still working for the agency?

Mr. PIZARCHIK. The contractor and the Office of Surface Mining, by mutual agreement, decided it was in the best interest of both parties to end that working relationship.

Mr. LAMBORN. Now, the end of that working relationship, did that have anything to do with the fact that some of the numbers that came out show that there would be massive job losses?

Mr. PIZARCHIK. There were a number of factors that went into the decision to end the relationship. Under the contract terms, it was set to expire May 31 of this year, and the parties concluded it was in their best interest to end that relationship on March 24.

Mr. LAMBORN. But did it have anything to do with the very negative economic news that had been part of the preliminary analysis?

Mr. PIZARCHIK. I believe, if you recall what I had indicated, that was a very early working draft, and from my other testimony, those numbers don't have a sound basis, and we are still in the development stage of preparing a draft environmental impact statement. It is premature to make any speculations as to what numbers would be now or in the future in that the Department is still developing the economic impact analysis, and that information as it is developed will help inform the Department on what should be in the proposed rulemaking.

At this point, we are still in the development process, and we haven't reached the point where we have information on which to decide what will be in the proposed rulemaking.

Mr. LAMBORN. Now, the previous rule took five years, 40,000 public comments, thousands of pages of environmental analysis. Why wasn't that rule sufficient?

Mr. PIZARCHIK. That rule modified a Reagan-era rule and swung the pendulum too far the other way. There were defects that were acknowledged in that rulemaking process. The rule has been challenged in court in litigation, and as part of figuring out what is in the best interest of the environment and society and this country as far as its energy needs, we had decided it was best to modify the existing regulations in order to better strike a balance of protecting the environment while helping meet this country's energy needs.

Mr. LAMBORN. Well, it sounds like what you are working on is being rushed right through. At this point, I am going to defer to the Ranking Member for up to five minutes for questions.

Mr. HOLT. Thank you, Mr. Chairman. I just wanted to make sure that it is clearly stated in the record what you just mentioned in passing. The rule that was changed by this so-called midnight regulation was promulgated in which Administration?

Mr. PIZARCHIK. I am sorry. Which rule? You are talking about the one we are working on, or the midnight one?

Mr. HOLT. The Stream Buffer Rule.

Mr. PIZARCHIK. That was promulgated during the Administration of President Ronald Reagan.

Mr. HOLT. OK. And I would just comment that I find it interesting that the majority is indirectly attributing to the Reagan Administration an attack on jobs. Are you in a position to characterize the degree of deliberation that is going into the current rulemaking

process relative to what went into the process to rescind the Reagan Administration rule?

Mr. PIZARCHIK. Yes. From the standpoint of our current process, we initiated it with an advance notice of proposed rulemaking that we filed in November of 2009. We received over 32,000 public comments on that proposed rulemaking. We had made some suggestions as to possible options that we should consider as well as we solicited ideas from the public. We received a number of ideas from the public. We took that information and used it to develop some potential concepts, and then we went out and conducted about 15 stakeholder sessions where we met with the industry, we met with the regulated community, we met with regulators, we met with environmentalists, United Line Workers of America and received input from them on those possible ideas and concepts. We also conducted scoping sessions on the environmental impact statement and received thousands of comments on that document. We have gone beyond the statutory/regulatory requirements as far as obtaining public input, both the 32,000 comments on the advance notice of proposed rulemaking and the comments we received at the stakeholder outreach sessions are not required by the statute. Those are our efforts to try to get more information from the public and from the regulated community in order to make a better informed decision. We conducted scoping sessions around the country. We had nine public meetings where we invited the public to come in, anyone from the public to come in and provide their comments on what ought to be in the scope of the environmental impact statement. To date, we have received more public comments in the time period than were received the entire time period on the 2008 Stream Buffer Zone Rule.

Mr. HOLT. And just to be clear, in most of what you just said, you were using the past tense. It is still going on, is that correct?

Mr. PIZARCHIK. That is correct because once we get to the point where we actually have a draft environmental impact statement and that we have a proposed rule, those will be published for public comment, and everyone will have the opportunity to comment on that. One other thing that we did differently is during the preparation of the draft environmental impact statement, we solicited and had input from states and other folks who were cooperating on the development of this regulation, and we shared drafts, working drafts, of the chapters as they were being prepared when they first came right off the press from the contractor to obtain their input.

The states have been helpful in providing input and suggestions on that. That information we are using to help prepare the final draft of the environmental impact statement. Again, that is another process where we have tried to be more open with the cooperating agencies and going beyond what was required by the statute.

Mr. HOLT. Would you say that this is a more-inclusive, more-deliberative process than went into the December 2008 decision to revise the three-decade-old rule?

Mr. PIZARCHIK. That is my understanding. We have already had more public input than was received on that process when we started at a much earlier basis. To my understanding, the public input on the 2008 rule was limited to what was provided on the proposed rulemaking when it was published.

Mr. HOLT. Thank you. Thank you, Mr. Chairman. I will have a couple more questions if there is an opportunity.

Mr. LAMBORN. OK. I thank the Ranking Member. Now I would like to recognize the Member who was here when the gavel came down, Representative Flores of Texas.

Mr. FLORES. I have no questions at this time, Mr. Chairman.

Mr. LAMBORN. OK. Then, we will go to Dr. Benishek. Excuse me. Yes. I want to make sure I follow the right order. Thank you. Dr. Benishek?

Dr. BENISHEK. Thank you, Mr. Chairman, and I thank the witnesses for joining us today as well. My northern Michigan district has a long history of iron and coal mining, and while Michigan is not home to surface coal mining operations, 68 percent of our power is generated by coal, so coal production matters to people in Michigan. It becomes clear to me every day that a major barrier to job creation is red tape and regulations by the Federal Government, and they are often job killers.

Mr. Pizarchik, proposed changes to the stream protection rule are not the only regulations that coal mining communities have to deal with. The Army Corps of Engineers and the EPA have their own regulations concerning coal production. Is your Department looking at the big picture and taking into account the cumulative impact of proposed stream protection rule? How is it duplicative or inconsistent with existing Clean Water Act regulations?

Mr. PIZARCHIK. In the process of deciding and evaluating the existing regulations and the statutory requirements in determining what we think needs to be improved in order to utilize the best science that we have available and the best modern techniques that we have available to do a better job of allowing mining to meet the environmental standards that are out there and to protect environment and society, we are looking at the big picture of that.

The provisions that we are considering are not duplicative of the Clean Water Act in that under the Surface Mining Control and Reclamation Act, it specifically provides that any provisions dealing with the Clean Water Act are within the exclusive jurisdiction of the Environmental Protection Agency.

What we are considering to include in the proposed rulemaking is revisions of the existing regulatory requirements that we have in the regulations, many of which have been there for three decades or so to take advantage of that modern science and that new information and to more fully implement the provisions of the Surface Mining Act that charge OSM specifically with protecting the environment, to making sure that the society is protected from the adverse impacts of the coal mining and to make sure that there are provisions taken to enhance the water resources, the wildlife resources and the fish resources.

That is repeated a number of times in the statute. Not only that, the statute specifically provides that mining is to be designed to prevent material damage to the hydrologic balance, a/k/a to the streams, outside the provides it for it to minimize damage within it.

Dr. BENISHEK. But I guess my problem is that so many times we have these answers where people are responsible to more than one agency, and despite what you say, it becomes very difficult for any-

one in business to deal with multiple agencies of the government, and how can you assure me that there are not going to be contradictory regulations that people are having difficulty wading through all this stuff in order to keep people employed?

Mr. PIZARCHIK. Part of what our charge is when looking at these regulations is to determine where there is ambiguity or need for clarity. We intend to make those types of changes. We are also evaluating and considering a provision providing for the regulatory authorities to cooperate in their decision-making process, but notwithstanding that, we are not waiting for the regulations in that particular area.

We have embarked on a process with the Army Corps of Engineers and with the Environmental Protection Agency and Office of Surface Mining and Reclamation, and we have started to do a better job of improving the permit coordination decisions because there are some provisions in that if you have a mine where you are going to either mine a stream or bury a stream you need to obtain a permit from the Army Corps of Engineers and the EPA. If you are going to be discharging water, you need a permit from the Clean Water Act regulatory authority.

What we worked out with those agencies and in the State of Tennessee where we are the primary regulatory authority is a process where the agencies have agreed to get together in the early stages to work with the operator in order to minimize any duplication and to streamline the process so that there aren't any inconsistencies or any contradictions in the requirements for a surface mining permit or for a Clean water Act permit.

We have offered our services, the Office of Surface Mining Reclamation and Enforcement to work with the other states on it and to try to facilitate a development of those improvements in that particular state so perhaps they can improve their processes with the EPA and the Army Corps and the state SMCRA and Clean Water Act regulatory authorities.

Dr. BENISHEK. I would appreciate forwarding to the Committee the people that are involved in this process of streamlining it so that I can better understand the process.

Mr. PIZARCHIK. OK. If you may, I could also provide a copy of the memorandum of understanding, standard operating procedures that we developed in Tennessee in conjunction with the Tennessee folks and the Federal agencies. That might help you understand what we are trying to do.

Dr. BENISHEK. Thank you.

Mr. LAMBORN. OK. I thank the Member. Now we will hear from the person who is next in line when we started the hearing, and that would be Representative Johnson of Ohio.

Mr. JOHNSON. Well, thank you, Mr. Chairman, and, Mr. Pizarchik, I have a lot to cover here in a short time, so I am going to ask you to keep your answers clear and concise if at all possible. As I am sure you are probably aware, I represent Southern and Eastern Ohio, and the coal mining industry is a vital economic driver in my district, and this proposed Stream Buffer Zone Rule rewrite could potentially shut down three coal mines in my district resulting in the loss of 1,300 direct jobs and over 10,000 indirect

jobs while simultaneously reducing coal production in Ohio by 55 percent.

Now, this is not only going to devastate parts of my district because of the job loss, but it is going to cause electricity rates in Ohio and the Midwest to skyrocket, and I am looking forward to some serious and truthful answers from you today about this action over the last two years and what it is going to result in. How can you say that the rewrite of this rule is to take into consideration the environment and what is best for American society and our energy policy?

I don't see the wisdom in further bureaucratic regulatory overreach that will destroy thousands of jobs, reduce coal production and ultimately result in skyrocketing electric rates. Explain to me the wisdom of how that fits into what is good for America and what is good for our energy policy?

Mr. PIZARCHIK. We do not yet have a proposed stream protection rule. We are in the process of developing that. We do not know what is going to be in that rule yet, so any numbers or anything else is pure speculation without a basis.

Mr. JOHNSON. OK. Well, it is not speculation, Mr. Director. It is the result of the study that was done by the contractor that you hired and since released. That is where those numbers came from, so let me get into that. I would like to point out, as has been noted, this previous Stream Buffer Zone rulemaking process took five years, 5,000 plus pages of environmental analysis and 40,000 public comments. Yet, you assert that this one-and-a-half-year process that you folks are going through now is more deliberate and more complex and more comprehensive than that. Explain.

Mr. PIZARCHIK. In the previous process, that was five years. It was totally within the Department with its resources. In the process that we have engaged upon, we were using internal resources and outside contractor resources to prepare some of the information in a more expedited fashion on that, and from the standpoint where that document was not released by us, that was the first working draft of the contractor, and it was a very preliminary document.

Mr. JOHNSON. Has there been any negotiations and settlement agreements with the environmental groups that challenged the original 2008 rewrite? Yes or no.

Mr. PIZARCHIK. We had a meeting with the——

Mr. JOHNSON. Yes or no, have there been negotiations and a settlement?

Mr. PIZARCHIK. We had a meeting with the Plaintiffs where——

Mr. JOHNSON. Has there been a settlement with those environmental groups?

Mr. PIZARCHIK. There is a settlement agreement for part of the——

Mr. JOHNSON. OK. There is a settlement. Let me move on. Let me move on to the contractor. Can you explain the process by which you hired Polu Kai Services in June 2010? Was this a competitive bidding process for this contract?

Mr. PIZARCHIK. Yes.

Mr. JOHNSON. OK. So at the time that you hired them, obviously you felt that they were qualified do to the work, correct?

Mr. PIZARCHIK. We used a competitive process.

Mr. JOHNSON. At the time that you hired them, you felt that they were qualified, or you wouldn't have hired them, correct?

Mr. PIZARCHIK. Based on the documents they provided, they made the impression they were the best qualified.

Mr. JOHNSON. I will take that as a yes. Now, can you walk me through the process of terminating? You said it was of mutual interest. I don't want to know what Polu Kai's mutual interests were. I want to know what the Office of Surface Mining's mutual interests were in terminating that contract. How did that fit into what is best for America and our energy policy? What were your interests in terminating that contract?

Mr. PIZARCHIK. The contract ended at the mutual agreement of the parties. It was not terminated.

Mr. JOHNSON. No. You said it was based on mutual interests. What were your mutual interests, and why did you want that contract terminated?

Mr. PIZARCHIK. From the standpoint of the working relationship that we had with the contractor——

Mr. JOHNSON. Did you ever speak to anyone in the Executive Office of the President about the devastating effects that this potential rule rewrite or the results that Polu Kai had found, have you talked to anyone in the Executive Office of the President because he says we are supposed to be creating jobs, not destroying jobs? That is what he says, but clearly that is not what this rewrite is going to do.

Mr. PIZARCHIK. It is premature to speculate what this rewrite will do because we do not yet have a proposed rulemaking.

Mr. JOHNSON. So the contractor that you hired that you felt was qualified that produced results of a subcontractor that was experienced in the industry, so you don't find credibility in what your contractor provided, correct? They are the ones that said that this could destroy jobs.

Mr. PIZARCHIK. As part of the rulemaking process, it is important for me to have an understanding of the bases in the documents on that. In working through that, it was our determination that it was in the mutual interest to both parties that we end the working relationship.

Mr. JOHNSON. I realize I am over my time, Mr. Chairman. Let me just end by saying this: I find it incomprehensible that anyone could determine that this process is in the best interest of America, America's energy policy moving forward and the President's stated goal of creating jobs. I yield back, Mr. Chairman.

Mr. LAMBORN. OK. Thank you. We are going to go to the next questioner, and that would be Representative Landry of Louisiana.

Mr. LANDRY. Mr. Chairman, I would like to yield some time to Mr. Johnson so he could finish his remarks.

Mr. JOHNSON. OK. Thank you to my colleague for giving me a little more time. In that way, we are not quite so rushed. Let me get back to have you spoken to anyone in the Executive Office of the President about the mutual decision to terminate Polu Kai?

Mr. PIZARCHIK. The decision was a mutual agreement of the Office of Surface Mining and Polu Kai Services to end the working relationship.

Mr. JOHNSON. OK. I am going to give you a little bit more time to go back to answer that question. What was your office's interest, and why did you want to terminate that contract? Did it save money?

Mr. PIZARCHIK. We did not terminate the contract. It was in the mutual interest of both of the parties that we agreed to end the working relationship.

Mr. JOHNSON. Yes, but you wanted results out of that contract. I have served in the U.S. Government in the Defense Department for over 27 years. We don't terminate contracts unless we either get what we pay for, which is a good use of taxpayer dollars, or the contractor is not delivering, so explain to this panel, please, what was your interest in terminating that contract?

Mr. PIZARCHIK. Again, we did not terminate the contract. We had certain expectations.

Mr. JOHNSON. Did the contract end?

Mr. PIZARCHIK. By mutual agreement of the parties.

Mr. JOHNSON. Well, that is a contract termination, Mr. Pizarchik. Under whatever terms you want to call it, that is a termination. It might not have been termination for cause, but it was a termination. What was your interest in terminating the contract?

Mr. PIZARCHIK. We had contracted for certain services, and over the course of the time period, there were work products which we received from the contractor that met our expectations, and there were some work products where they did not, and——

Mr. JOHNSON. Explain which ones did not.

Mr. PIZARCHIK. At this point, it is our best interest, and we think it makes more sense to move forward rather than to getting into information and things that have already——

Mr. JOHNSON. But you had a reason for terminating that contract. I would like to know what work products from that contractor were you not happy with? Did it happen to be the statistics on the number of job losses and the potential production of coal reductions that would result from this action?

Mr. PIZARCHIK. The numbers that were provided by the contractor were not the basis for the parties mutually agreeing to end the working relationship.

Mr. JOHNSON. OK.

Mr. PIZARCHIK. There were a number of other factors that got involved. As under any contract, I think as you are aware, that sometimes things develop differently through the course of the contract than either of the parties had anticipated.

Mr. JOHNSON. Well, clearly you are not going to answer my question about what your interests were in terminating the contract, and I find that disturbing, but that is up to you. It seems clear to me that before this hearing today that there was collusion at some level between certain members of the Department of the Interior, OSM and outside groups to change the 2008 Stream Buffer Zone Rule without respect to the lengthy five-year process that led to that rulemaking, and that this stems from their disgust with the coal mining industry as a whole.

Unfortunately, with your testimony today, I have no reason to believe that this was not the case. It seems to me that certain people at OSM and at the Department of the Interior were going to

change this rule without respect for the impacts on the coal mining industry and the economy as a whole, and in my opinion, Mr. Director, that is just absolutely wrong. I am deeply concerned with the process and the actions of OSM over the past two years, and I can assure you that I will continue to closely monitor this issue in the future because the jobs and the livelihoods of the thousands in my district are on the line with this rule rewrite and are very much of a concern of mine.

I was able to get an amendment in our first continuing resolution that prevented funding for you to complete this process, and if I have the opportunity, and I am going to look for it, I am going to reinsert that amendment so that if we can influence your inability to implement this, I am going to do so, and I hope that you, OSM and the Department of the Interior keep those people in mind that are going to lose their jobs and that are going to experience these skyrocketing electric rates with this rulemaking process, and with that, Mr. Chairman, I yield back.

Mr. LAMBORN. OK. Thank you. That time has expired, so we will now recognize the gentleman from Arizona, Representative Gosar.

Dr. GOSAR. Mr. Director, my district, Arizona's First Congressional District, can be a national model for an energy-driven economic recovery. Rural Arizona is rich with natural resources ripe for extraction, including some of the largest copper deposits in North America. Currently, over 67,000 people in the Arizona's natural resources and mining sector. In 2008, it was estimated that the sector directly contributed to over $4.7 trillion to the state's gross domestic product.

The natural resources mining and energy generation sector is critical to my district's local economy. However, regulatory and bureaucratic barriers not only prohibit the expansion and development of the sector, but they threaten existing jobs. Times are tough in my district and in my state. The states of Arizona's unemployment rate sits at 9.6 percent, well above the national average. In my district, it is even worse.

The unemployment rate in all eight of the counties is all above the national average, and six of the eight are over 10 percent. In fact, in two of my leading areas, unemployment in the Navajo Nation is approaching 60 percent, and the San Carlos Tribe is almost 75 percent. I strongly believe we must find a careful balance between environmental protection, worker safety and economic activity, but the Federal Government needs to work with industry, not against it.

Specifically, I, like many of my colleagues here today, are concerned about OSM's effort to rewrite the 2008 Stream Buffer Zone Rule. There are 10 major active mines in Northeastern Arizona, and this policy threatens their viability. In particular, I would like to highlight the Kayenta Coal Mine, which would be adversely affected by OSM's draft environmental impact study. The Kayenta employs about 500 people, mostly Hopi Native Americans. The coal from that mine is delivered to the Navajo Generating Station located about 100 miles East in Page, Arizona.

The plant provides 95 percent of the electricity in the Central Arizona Project, a critical water infrastructure project in my state that delivers over 500 billion gallons of Colorado River Water to a

three-county service area that includes more than 80 percent of the population, Phoenix, Tucson and Pinal Counties. The plant and the coal mine provide $137 million in revenue and wages to the Navajo Nation and its tribal members and about $12 million annually to the Hopi Tribe, which is 88 percent of the tribe's annual operating budget.

The total operation completely located in Arizona has a significant economic benefit for the tribes in my state. So now here comes my question, OK? I think several of my colleagues have started hitting on it. Is there any credible evidence that streams cannot be restored in Kayenta?

Mr. PIZARCHIK. The existing regulations that we have under the current Surface Mining Act do not provide for a complete collection of the baseline data as to what is in the stream, and if you——

Dr. GOSAR. I am really confused. There seems to be no evidence is what we are finding out. There is no evidence that shows that under current rules those streams cannot be taken care of as is.

Mr. PIZARCHIK. And under the proposed concepts that we have been considering, the operator will have the opportunity if they choose to mine through a stream to restore its form and function.

Dr. GOSAR. Then let me ask the next question. Why is the mine being penalized as we speak?

Mr. PIZARCHIK. I am sorry, sir. I have no idea what you are referring to as far as the mine being penalized.

Dr. GOSAR. Well, that coal mine in Kayenta is already being penalized based upon jurisdiction over that stream reconstruction. There is no evidence, and so I am wondering why we are actually penalizing the tribe and trying to close their mine?

Mr. PIZARCHIK. That is something of which I am not familiar with.

Dr. GOSAR. I would like to have an answer on that, please.

Mr. PIZARCHIK. We will have to be able to get back to you on that.

Dr. GOSAR. Thank you.

Mr. PIZARCHIK. Do you have any more specifics as to what is occurring there?

Dr. GOSAR. I will make sure you get all the specifics so that we can get that answer.

Mr. PIZARCHIK. OK. Thank you.

Dr. GOSAR. Why doesn't the draft EIS specifically address the economic impacts of the Native American communities?

Mr. PIZARCHIK. We don't have a draft EIS yet. We are still working on a draft EIS, and we expect our draft EIS when it comes out to cover all of the points that are appropriate and required under the National Environmental Policy Act.

Dr. GOSAR. But isn't there evidence that there was collusion based upon what we are seeing within the aspects of the data collection in this agency, and just to give you a hint, I do believe the Hopi Nation actually kicked out the environmentalists doing some of the data collection, did they not?

Mr. PIZARCHIK. I have no information on that, Congressman.

Dr. GOSAR. Thank you. I am running out of time. Page 219 of the EIS table, 4.5 to 6.8 illustrates coal royalties and estimates disbursements to the states for the Fiscal Year 2008. Why is this out-

dated? Why aren't we showing more updated information in regards to royalties given to tribes?

Mr. PIZARCHIK. As I indicated, we do not have a draft EIS at this point in time. The draft EIS is still under development and preparation.

Dr. GOSAR. Why aren't we showing updated panels and disbursements for royalties? Isn't that part of the process and part of the equation?

Mr. PIZARCHIK. We do not have a draft EIS at this point. We are attempting to make sure we have one that covers all the appropriate information required by the National Environmental Policy Act.

Mr. LAMBORN. OK. I thank the member. Now the Member from South Carolina, Representative Duncan.

Mr. DUNCAN. I thank you, Mr. Chairman. Thank you for having this hearing. South Carolina doesn't have a lot of coal mines, if any. We do have some contractors in our state that operate on mines in other states, so I appreciate the validity and the timeliness of this because it seems like the Administration continues to thwart American resources being used for American energy needs. It is concerning to folks in South Carolina.

When we talk about open-pit mining, we are concerned that they may affect the granite mines that we have in our state, which we are blessed with that, so Mr. Chairman, I would like to yield the balance of my time back to the gentleman from Arizona to finish his line of questioning.

Dr. GOSAR. Thank you to my colleague. I want to go back to this draft EIS, specifically addressing the economic impacts. Why doesn't specifically address the Native American communities?

Mr. PIZARCHIK. Again, the document to which you are referring, it was the first working draft prepared by the contractor. There is not a draft EIS in place yet. We expect to have a draft EIS that would comply with all the NEPA requirements and include the information necessary when it is ready. Right now, we do not have such a document.

Dr. GOSAR. I understand the Navajo and Hopi's are designated environmental justice communities. Don't you think it would be appropriate that the EIS address those significant economic ramifications for those communities?

Mr. PIZARCHIK. I believe it would be appropriate for a draft EIS when we have one to address all the requirements that are appropriate under the National Environmental Policy Act. At this point, we aren't there yet.

Dr. GOSAR. So shouldn't we be taking into specific dialogue the cumulative effects of coal production on the jobs and revenue on the Native Americans in Arizona, New Mexico and Montana specifically?

Mr. PIZARCHIK. Part of our job is to strike that balance between protecting the environment while helping meet the country's energy needs. The purpose of having a draft environmental impact statement is to garner the information, to provide the information so that I, the Department, we can make a determination of what ought to be in the proposed rulemaking. We do not have a draft EIS yet. We do not have the information that we need to make the

determination as to what is appropriate to include in the proposed rulemaking, so anything at this point is just speculative.

Dr. GOSAR. It may be speculative, but unfortunately, in my state, what we see is the random selection of information that we want to include and not to include. I want to bring up specifics. We just had the USGS try to do a subsurface model without going back to the communities of interest to look at information that should be included in an environmental or actually a dialogue of mapping out subsurface waters, and it seems like we see this over and over again with agencies that we are picking and choosing what information we want to use, and it seems like the Native Americans seem to have been left out in this process, and we don't want them to be left out of any process.

Mr. PIZARCHIK. And I agree. I don't want them left out either. I have been out to meet with Hopi and Navajo as well as with the Crow, and I am well aware of the circumstances out there and how important coal is to their communities and to their economy, and I am well aware of the concerns out there and the situation on that. From our standpoint, we need to have all appropriate information required under the Environmental Policy Act in order to be able to make informed decisions, and we are not at the point where we have that information that we need in order to be able to make the determination and inform this determination as to what should be in the proposed rulemaking.

Dr. GOSAR. And you do understand the ramifications of the Navajo Generating Station and its key operating services to the State of Arizona and to the Southwest? You are aware of those?

Mr. PIZARCHIK. Yes, I am.

Dr. GOSAR. Very specifically?

Mr. PIZARCHIK. Yes.

Dr. GOSAR. OK. Thank you, sir.

Mr. LAMBORN. OK. I am assuming the Director could stay for a shorter second round because there are fewer of us here?

Mr. PIZARCHIK. Yes, sir.

Mr. LAMBORN. We appreciate that. Thank you so much. For my five minutes, I am going to yield to the gentleman from Ohio, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Director, I have just a few more questions. First of all, have any states asked for a rewrite of the Stream Buffer Zone Rule? Have they expressed concerns about the quality of their streams?

Mr. PIZARCHIK. I do not recall receiving such a request.

Mr. JOHNSON. Have any of them expressed concerns about the economic impact of the rewrite of this rule?

Mr. PIZARCHIK. I believe there may have been some concerns expressed in some letters to me, yes.

Mr. JOHNSON. OK.

Mr. PIZARCHIK. I don't recall the specifics.

Mr. JOHNSON. All right. As I am sure you are aware, last year OSM placed a request to the House Interior Appropriations Committee to reprogram $7 million from state grant funding in order to pay for the environmental impact study. Has Polu Kai been paid for any of the work that they did up until the time that contract ended?

Mr. PIZARCHIK. Yes.

Mr. JOHNSON. How much?

Mr. PIZARCHIK. I believe they were paid about $3.7 million.

Mr. JOHNSON. $3.7 million?

Mr. PIZARCHIK. Yes.

Mr. JOHNSON. And what was the total value of the contract?

Mr. PIZARCHIK. The contract was slightly under $6 million.

Mr. JOHNSON. OK. So over half of the funds that were to be spent for the work that Polu Kai was to do has been paid to them, and is it safe to say are you redoing the entire environmental impact statement?

Mr. PIZARCHIK. First, I would like to correct I actually believe the contract was almost $5 million, not $6. I made a mistake on that.

Mr. JOHNSON. OK.

Mr. PIZARCHIK. We are evaluating the work product that we have received from the contractor. They have provided some materials and information and provided some good services. For instance, in conducting the EIS scoping sessions and gathering the data, we received valuable work product from them. Some of the other work, we are evaluating on how best to proceed.

Mr. JOHNSON. Does OSM plan to ask for more funding either through a supplemental budget request or reprogramming to do a new EIS or complete the existing rework?

Mr. PIZARCHIK. We do not have plans at this time to ask for more money.

Mr. JOHNSON. OK. I want to go back just briefly to another line of questioning from earlier because I am not sure I understood the answer. Have you or anyone in your Department spoken to anyone in the Executive Office of the President about the Stream Buffer Zone Rule rewrite and its implications?

Mr. PIZARCHIK. I can only speak for myself, and I have not had discussions.

Mr. JOHNSON. Do you know if anybody in your upward chain in the Department of the Interior, has anyone, Secretary Salazar or anyone else, had any communication with the Executive Office of the President in that regard?

Mr. PIZARCHIK. I don't know the answer to that, Congressman.

Mr. JOHNSON. OK. Mr. Chairman, I think I yield back the remaining on my time.

Mr. LAMBORN. OK. Thank you, and I recognize the Ranking Member for up to five minutes.

Mr. HOLT. Thank you, Mr. Chairman. Mr. Pizarchik, in the Environmental Protection Division, you plan to have 25 additional employees at a cost of nearly $4 million. This is in a division that is having a proposed spending reduction of nearly 10 percent. Can you explain that reassignment?

Mr. PIZARCHIK. Yes.

Mr. HOLT. What would these 25 employees be doing?

Mr. PIZARCHIK. The majority of those 25 employees would be conducting oversight inspections for the Office of Surface Mining. Over the years, the agency had been downsized either through riffs or through attrition, and we were not in a position that we were conducting oversight to be able to address concerns or allegations that the states were or were not doing a good job.

Mr. HOLT. So where does this bring the staffing compared to what it was in the heyday of that office if there was a heyday of that office? In other words, how much are you restoring that was lost, or are you going to a more robust office than previously existed.

Mr. PIZARCHIK. It will not even come close to what previously existed. If these are approved, 18 of the positions are offsets from reductions in our abandoned mine land program and will still leave us less than half of what the agency had years ago, maybe even a fraction of that.

Mr. HOLT. OK. Thank you. On the question of abandoned mine, the AML, how do you determine what are the mines that most need attention? How do you characterize the danger that they present?

Mr. PIZARCHIK. There has been a process over the years.

Mr. HOLT. And by the way, is it danger that it the primary criterion?

Mr. PIZARCHIK. The primary criterion gets in the danger to the health and safety of the public and adverse effects on health and public safety, and then under the current ranking system where there is evaluation, there are regulations that lay out how sites are ranked. All of the states have participated and created an inventory of the abandoned mine lands, and so we look at the way they have been ranked by the states in accordance with the Federal standards.

Mr. HOLT. OK. I mean, could you tick off two or three? Give us some idea of how you characterize them quickly, please.

Mr. PIZARCHIK. Some of the factors could be dangerous high walls, impoundments with water slide area, open mine shafts where people could fall into those portals, vertical openings, clogged streams on lands.

Mr. HOLT. OK. And I think you also said temporary dams that would give way or makeshift dams and that sort of thing?

Mr. PIZARCHIK. Yes.

Mr. HOLT. OK. Changing the subject, earlier this week, a witness, Laura Skaer from Northwest Mining Association advocated a good Samaritan law to allow mining companies with no previous involvement to be involved in reclamation and restoration of abandoned mines. This is through the BLM to remove some of their liability. This might be worthwhile. I am certainly willing to consider it, but my question for her was well, what would entice a company, what would be the motivation of a company to want to clean up even if we removed the threat of liability? Do you see any merit in a good Samaritan law? Might it apply to your work at all?

Mr. PIZARCHIK. Yes, I do see merit, and in the coal mining area, there are amendments that were commonly referred to as the Rahall amendment that deals with liability fore acid mine drainage on mine sites, and it encourages reclamation of those sites through remining by operators. In my personal experience in Pennsylvania, it has been very successful.

Mr. HOLT. Removing the liability is one thing. What would provide the motivation for a company who no longer is liable to undertake such work?

Mr. PIZARCHIK. It is opportunity to keep their people employed and to make money, basic capitalism on that, and I think we in the Federal Government deserve and have a responsibility to structure our regulations in a way that helps facilitate jobs for people in this country.

Mr. HOLT. Thank you. Thank you, Mr. Chairman.

Mr. LAMBORN. All right. Perfect timing. Thank you, and now I think we only have one or two more questions from Representative Gosar of Arizona, and then we will be done, and I thank you in advance for having been here. Representative?

Dr. GOSAR. Director, we have this large Navajo Nation where we actually extracted uranium during the Atomic Energy Commission's days which the government is responsible. We also had the Bennett Freeze where particularly anything was prohibited from being changed regardless of cleanup, changing a window, rebuilding a house. Tell me what we are going to do there? How are we going to clean that up?

Mr. PIZARCHIK. I am not familiar with what you are referring on this. You say Bennett Freeze?

Dr. GOSAR. Called the Bennett Freeze. What it was was an arbitrary line drawn across the Navajo Nation that forbids anybody to do anything of substance, replacing a window, changing a house. These people are living in like the Third World, and we have tailing piles everywhere that are direction relation from Federal mining that are sitting out there contaminating water. We have people living by these areas. I want to know your priority aspects since the Bennett Freeze has now been lifted last year where in the priority, and I hope I hear it is number one that we are going to go back in there and start clearing up.

Mr. PIZARCHIK. In this 2012 budget proposal, there is a provision for creation of an abandoned hard rock mind land fee program, and that would provide the resources for directly addressing those types of problems on it.

Dr. GOSAR. Well, I think it should be the direction of the Federal Government to direct specifically to a such project, that they direct that accordingly because their responsibility is direct here.

Mr. PIZARCHIK. And there is legislation being drafted to accomplish this, and I understand that is under development. It is being worked on through the Bureau of Land Management. I am not quite sure, and I don't have expertise in uranium mines or hard rock abandoned mines and that, but that certainly sounds like something that ought to be considered for being addressed in that aspect of it.

Dr. GOSAR. I would like to make this a real priority issue because when we are looking at the quality of uranium, our area—Breccia Pipes—has the highest concentration of uranium in the whole country. We have the ability to mine our own and to have actually some increased energy issues in providing that type of ore for very substantive additions. The regular folks, the mining folks, are being held accountable to a different level than the Federal Government, and they are being held back, and that is not something that I can stand for.

The Federal Government must answer the call here to make sure things are put back right because if you are asking the mining industry to hold to a standard, so should the Federal Government.

Mr. PIZARCHIK. And again, sir, that is an area of which I am familiar.

Dr. GOSAR. I would like your answers submitted what we are going to do and how we are going to do it and who the authorities are.

Mr. PIZARCHIK. We will do what we can on that to provide an appropriate response, yes.

Dr. GOSAR. Thank you.

Mr. LAMBORN. OK. That concludes the questioning. I want to thank you, Mr. Pizarchik for being here. We have asked some probing questions, but only because these are some very serious issues, so we thank you for being here, and we appreciate your time.

Mr. PIZARCHIK. You are welcome, and it is my understanding, I just had a little note, that as far as what the Executive Office of the President, including some of the offices, and I guess maybe I didn't have a clear understanding on that question on that, so as far as some of my discussions, I have briefed folks at say the CEQ on where we were on our rulemaking, provided some information on that, so that was something I really just did not have a full appreciation of the scope of the Executive Office of the President, so I wanted to make that clarification and thank you all for the opportunity to be here today.

Mr. LAMBORN. OK. Thank you so much. That concludes our first panel.

We will now bring up the four witnesses for our second panel, and they are Mr. Eugene Kitts of the International Coal Group, Senior Vice President of Mining Services testifying on behalf of the National Mining Association; Ms. Loretta Pineda, Director of the Division of Reclamation, Mining and Safety of the Colorado Department of Natural Resources testifying on behalf of the National Association of abandoned mine land programs and the interstate mining compact. It is always good to have someone from Colorado here.

Third, we have Mr. Butch Lambert, Deputy Director of the Virginia Department of Mines, Minerals and Energy testifying on behalf of the Interstate Mining Compact Commission, and also we have Mr. Joe Lovett of the Appalachian Center for the Economy and the Environment, so for all four of you, you maybe have seen how this operates. You push the button to be able to be heard on the microphone. It will turn green. After four minutes, the light turns yellow, and then after five minutes it turns red.

There is the possibility that we will have some votes called here in the next 10 to 20 minutes. If that happens, I am going to ask in advance your patience although I know it is an imposition, but we will have to take a recess for the hearing and go over to the chamber and come back, and depending on how many votes, it could be anywhere from 30 to 60 minutes. Hopefully, it will be shorter rather than longer, so I ask you in advance to bear with us if that happens because I think we are supposed to have a vote here pretty soon. That is the prediction. That is what the oracles on high have said. OK. We will start with you first, Mr. Kitts. Thank you for being here.

STATEMENT OF EUGENE KITTS, SENIOR VICE PRESIDENT, MINING SERVICES, INTERNATIONAL COAL GROUP

Mr. KITTS. Thank you and good morning. My name is Gene Kitts, and I am Senior Vice President of Mining Services for International Coal Group, a leading coal producer in Northern and Central Appalachia and the Illinois Basin. I am appearing on behalf of the National Mining Association, which represents ICG and other producers of most of America's coal, metals, industrial, and agricultural minerals. Thank you for holding this oversight hearing today. It is vital that this Committee and others in Congress carefully review the Office of Surface Mining's recent activities. Today, I will discuss two initiatives by OSM, the "Stream Protection Rule" and the agency's "State Program Oversight" activities.

With regard to the Stream Protection Rule, OSM worked from 2003 to 2008 developing the current Stream Buffer Zone Regulation. Building a multi-agency programmatic EIS done in 2003 to 2005, OSM published adiscussion document and two proposed rules before finalizing the regulation, included public comment on each one, held four public hearings on the subject and also completed another EIS to support the final rule, which was finally published with EPA's written concurrence in December 2008.

The 2008 Stream Buffer Zone Rule was a clarification of the earlier rule, but it also added significant environmental protections, including a requirement to avoid mining activities in or near streams, if reasonably possible, and to use the best technology currently available to prevent the contribution of additional suspended solids to stream flow. Operators must also minimize disturbances and adverse impacts on fish, wildlife and related environmental values to the extent possible.

The current rule requires operators to demonstrate that generation of excess spoil material has been minimized, all practical alternatives for the disposal of that excess earth have been considered, and the options showing at least overall adverse impact on fish, wildlife and related environmental values has been selected. However, despite five years of study, millions of taxpayers' dollars spent, two environmental impact statements and 43,000 public comments, OSM suddenly decided to shelf it before it was ever implemented.

Instead of defending the rule when it was challenged by environmental organizations, the Secretary asked the Judge to vacate it so that OSM could reinterpret the old rule through a guidance document. The Judge refused and required the Secretary to follow the legal rulemaking procedures. OSM responded by signing a backdoor settlement agreement with environmental groups promising to publish a proposed rule by February 28, 2011, and requiring taxpayers to pay for all the environmental groups' attorneys' fees. OSM's Stream Protection Rule is not occurring in a vacuum.

For example, EPA and the Corps have instituted an unlawful de facto permit moratorium on Clean Water Act Section 404 permits. Since March 2009, 235 coal mining Section 404 permits have been blocked, and in the ensuing two years, only eight of those permits have been issued. These strategies were mapped out in a memorandum of understanding between EPA, the Corps and the Interior Secretary on June 11, 2009. That MOU explained how such new

policies have been designed to reduce the "environmental consequences" of Appalachian surface coal mining operations, and "diversify and strengthen" the Appalachian regional economy.

Only later did we discover that diversifying and strengthening the Appalachian regional economy meant destroying tens of thousands of coal mining and related jobs in their region. The Stream Protection Rule is the most far-reaching rewrite of OSM's regulations in the last 30 years. It provides less clarity, and it changes the focus of the program from a balance between environmental protection and coal production to actually a punitive attack on coal mining.

OSM's own analysis predicts that the rule will destroy tens of thousands of coal mining and related jobs across the country, and we believe that this significantly understates potential job losses. OSM has not justified the need to abandon the 2008 rulemaking, but has admitted that we had already decided to change the rule following the change of Administrations on January 20, 2009. Both the rulemaking and the process being used by OSM have been universally criticized by states charged with administering SMCRA, including the majority of the state EIS cooperating agencies, the Interstate Mining Compact Commission and the Western Governors Association.

I understand that Interior announced on March 31 that the EIS contractor has been terminated. In 2010, OSM reprogrammed $7 million in its budget to pay for this ill-advised Stream Protection Rule and EIS with much of the money coming at the expense of the states. OSM has already spent an estimated $4.4 million on the rule and EIS, yet has not completed a draft of the proposed rule and then fired its contractor. Now the agency is seeking an additional $3.9 million in Fiscal Year 2012 to implement this job-killing regulation and increase state program oversight.

We strongly urge you to reject any further funding for these misguided efforts. Now, the state program oversight, in a primacy state, exclusive regulatory authority rests with the state, which is the sole issue of permits. OSM plays no role in issuing permits, and it does not retain veto authority over state permit decisions. Despite this clear statutory structure language and court decisions, OSM's director issued a memo on November 15, 2010, unilaterally asserting that the agency now has the authority to interfere with change and as a practical matter veto state permitting activities.

In fact, not only has OSM asserted that it has such authority, but it has followed through with its threats against two of my company's state-issued mining permits. The agency's Fiscal Year 2012 budget requests an additional increase of $3.9 million for activities related to state program oversight and for the Stream Protection rulemaking. At the same time, OSM is proposing to slash by $11 million state Title V grants used by states to run their programs.

We strongly urge this Committee and others in the Congress to stop funding the agency's controversial state permit review policy and Stream Protection Rule and restore the necessary funding for the states to properly implement their SMCRA programs as intended by Congress. Thank you.

[The prepared statement of Mr. Kitts follows:]

Statement of Eugene Kitts, Senior Vice President, Mining Services, International Coal Group, Inc., on Behalf of the National Mining Association

Good morning. My name is Gene Kitts, and I am Senior Vice President of Mining Services for International Coal Group, Inc. ICG is a leading producer of coal in Northern and Central Appalachia and the Illinois Basin. We have 12 active mining complexes located in Northern and Central Appalachia and one in Central Illinois. We control over one billion tons of high-quality coal reserves that are primarily high-BTU, low-sulfur steam and metallurgical quality coal. Over the past three years, ICG's mines and our 2,750 employees have been recognized an average of seven times a year with environmental awards from state and federal mining regulators.

I am appearing on behalf of the National Mining Association (NMA). NMA represents ICG as well as other producers of most of America's coal, metals, industrial and agricultural minerals.

I want to thank the Committee for holding this oversight hearing today. It is vital that this Committee and others in Congress carefully review the Office of Surface Mining's (OSM's) recent activities. Today I plan to discuss two initiatives by OSM, the "stream protection rule" and the agency's "state program oversight" activities.

Stream Protection Rule

OSM spent over five years, from 2003 to 2008, developing the current "stream buffer zone" regulation. This was a collaborative effort drawing on the October 2005 programmatic environmental impact statement, which was sponsored by four federal agencies including OSM, EPA, the Corps, and the Fish and Wildlife Service (FWS). It included 30 scientific and economic studies, comprising over 5,000 pages of material. OSM published a discussion document and two proposed rules before finalizing the regulation, including public comment on each one, as well as four public hearings on the subject. OSM also completed another environmental impact statement to support the final regulation. OSM published the final rule, with EPA's written concurrence, in December 2008.

While the 2008 stream buffer zone rule was a clarification of the longstanding regulatory interpretation of the earlier rule, it also added significant environmental protections that have been largely ignored in the debate. These include a requirement to avoid mining activities in or near streams if reasonably possible, and to 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. Operators must also minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, to the extent possible.

The current rule also requires that surface coal mining operations be designed to minimize the creation of excess spoil and the environmental impacts of fills constructed for the placement of excess spoil and coal mine waste. Mine operators must do this by:

- making a demonstration to the satisfaction of the regulatory authority that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible;
- identifying a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills; and
- selecting the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

However, despite 5 years of study, millions of taxpayer dollars spent, two environmental impact statements and 43,000 public comments in developing the current regulation, OSM suddenly decided to shelve it before it was ever implemented on the ground. The rule was challenged by environmental organizations and instead of defending the rule, the Secretary of the Interior asked a federal judge to vacate it so that the new administration could reinterpret the old rule, through a guidance document. The judge refused, and told the Secretary that if he desired to make any changes to a valid regulation then he must follow the legal requirements that afford full public participation through notice and comment rulemaking. OSM responded by signing a back-door settlement agreement with environmental groups promising to publish a proposed rule by February 28, 2011, a very short timeframe. The agency also agreed to pick up the tab for all of the environmental groups attorneys' fees, at taxpayer expense, despite the fact that those groups didn't win the case.

OSM's proposed changes to the stream protection rule are not occurring in a vacuum. Other agencies, including the Environmental Protection Agency (EPA) and the

Army Corps of Engineers (Corps) have implemented similar policies aimed at severely restricting coal mining operations. EPA and the Corps have instituted an unlawful de-facto permit moratorium on Clean Water Act § 404 permits through guidance documents and memorandum. Since March 2009, 235 coal mining § 404 permits have been blocked, and in the ensuing two years only eight permits out of those 235 permits have been issued.

All of these strategies were mapped out in a memorandum of understanding between EPA, the Corps, and the Interior Secretary on June 11, 2009. That document explained how such new policies have been designed to reduce the "environmental consequences of Appalachian surface coal mining operations" and "diversify and strengthen the Appalachian regional economy." Only later did we discover, through news media reports, that "diversifying and strengthening the Appalachian regional economy" meant destroying tens of thousands of coal mining and related jobs in our region.

The stream protection rule is the most far reaching rewrite of the agency's regulations in the last 30 years. Far from providing more regulatory clarity, it fundamentally changes longstanding interpretations of the law and prohibits widely accepted mining techniques. In OSM's own words, this rule is "much broader in scope than the 2008 stream buffer zone rule," and will apply nationwide in scope.

Despite OSM's statements to the contrary, its own analysis predicts that the restrictions contained in the rule will destroy tens of thousands of coal mining and related jobs across the country. Specifically, the agency's draft EIS predicts that it would eviscerate almost 1/3 of all surface coal mining production in Appalachia, over 20% in the Illinois Basin, over 25% of the production in the Gulf Region, and 84% of Alaska's coal production. OSM's draft EIS predicted that total job losses in the Appalachian region alone are expected to exceed 20,000. NMA believes that this document significantly underestimates the potential job losses, because it does not account for any losses of underground mining jobs through the sterilization of coal reserves and denial of permits to conduct highly efficient full extraction underground mining operations.

Remarkably, OSM has offered little in the way of any real justification for the need to abandon the 2008 rulemaking. Indeed, the only explanation appears in the agency's candid admission that ". . .we had already decided to change the rule following the change of Administrations on January 20, 2009." 75 Fed. Reg. 34,667 (June 18, 2010). Perhaps this pre-determination by the agency explains both the absence of any meaningful opportunity for consultation with the States and, in part, why the agency has had so many problems with the quality of its environmental impact statement. Those problems were recently acknowledged by Deputy Secretary David who testified that Interior is so unhappy with the work on the EIS that they may terminate the contractor. I understand that Interior announced on March 31 that the contractor has indeed been terminated. Both the rulemaking and the process being used by OSM have been universally criticized by states charged with administering SMCRA including the majority of the State EIS-cooperating agencies, the Interstate Mining Compact Commission, and the Western Governors' Association.

In 2010, OSM reprogrammed $7 million in its budget to accommodate development of this ill-advised stream protection rule and accompanying EIS. Much of this money came at the expense of the States, who are the primary regulators under SMCRA. In a recent letter to this Committee, OSM indicated that it has already spent an estimated $4.4 million on the rule and EIS, yet "has not completed a draft of the proposed rule." Now the agency is seeking an additional $3.9 million in fiscal year 2012 to implement this job-killing regulation and increase state program oversight. Based on what we have seen thus far, we strongly urge you to reject any further funding for this misguided regulation and we hope that you will continue to vigorously oversee this agency's actions on the stream protection rule.

State Program Oversight

As part of the MOU on surface coal mining in Appalachia mentioned earlier, OSM committed to reevaluate "how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA," and specifically agreed to remove what it described as "impediments to its ability to require correction of permit defects in SMCRA primacy states." Although OSM is inappropriately changing a number of its state program oversight policies in response to this MOU, I would like to focus my remarks today on the most objectionable aspect of those changes, the so-called "ten-day notice" policy.

SMCRA § 503, grants a state ***exclusive*** jurisdiction over the regulation of surface coal mining operations within its borders by submitting a state program to the Secretary of the Interior and securing the Secretary's approval of that program. Cur-

rently all coal mining states, except Tennessee and the state of Washington, have approved state programs and thus enjoy this exclusive regulatory jurisdiction.

To all, with perhaps the exception of OSM, the statutory language and structure is clear—"exclusive" means just that, it does not mean parallel or concurrent jurisdiction with OSM. Thirty years of case law establishes the following principles of SMCRA: (1) the law sets out a careful and deliberate allocation of authority of mutually exclusive regulation by either OSM or the state, but not both; (2) in a state with an approved program that authority rests with the state; (3) states are the sole issuers of permits in which OSM plays no role; (4) OSM does not retain veto authority over state permit decisions; and (5) OSM intervention at any stage in a state permitting matter unlawfully frustrates the deliberate statutory design and allocation of authority.

Despite the clear statutory structure, language and court decisions, OSM's director issued a memorandum on November 15, 2010, unilaterally asserting that the agency now has the authority to interfere with, change and, as a practical matter, veto state permitting decisions with which it disagrees. In fact, not only has OSM asserted that it has such authority, but it has followed through with its threats against two of my company's state-issued mining permits.

In Kentucky, OSM has improperly inserted itself into a state water discharge permit controversy between ICG and the Sierra Club. OSM issued a Ten Day Notice in response to a citizen's complaint that directed the state regulatory agency to conduct water monitoring at our mine and to allow the outside parties to participate. This essentially provided free and federal agency assisted pre-lawsuit discovery to the opponents of our twenty year old mining operation. Moreover, the complaint relates to a permit that was not issued under the State SMCRA program but the State Clean Water Act program. It is not a matter over which OSM has any authority under SMCRA and is another example of improper mission creep.

An ICG subsidiary in northern West Virginia was issued a state surface mining permit in October 2010. Local opponents of this project chose to not appeal the issuance of this permit to the West Virginia Surface Mine Board but rather filed in February 2011 a lengthy complaint with OSM alleging "permit defects" and asking OSM to intervene. OSM dutifully responded by issuing a Ten Day Notice to the West Virginia DEP, which in turn replied by stating its objection to use of a Ten Day Notice in these circumstances. Not only has OSM unlawfully frustrated the deliberate statutory design of mutually exclusive state-federal jurisdiction, it has enabled a third party to circumvent the exclusive avenue and the specific deadlines for permit appeals under the state program. If the permit had been issued by OSM in a non-primacy state such as Tennessee, it could not allow such a back-door attempt to belatedly appeal that decision. Here OSM's actions are doubly-wrong by facilitating this unlawful attempt to collaterally challenge a state permit in a primacy state.

Permit delays and regulatory uncertainty are thwarting capital investment that will create and sustain the high-wage jobs needed and valued in our coal communities. At a time when our nation is recovering from a deep recession and requires low-cost and reliable fuel to remain globally competitive, agency policies are crushing these job-creating enterprises that will be the engine for our economic growth and prosperity.

The agency's fiscal year 2012 budget requests an additional increase of $3.9 million for activities related to additional state program oversight and for the stream protection rulemaking. At the same time, OSM is proposing to slash by $11 million State title V grants, used by States to run their SMCRA regulatory programs,. We strongly urge this Committee and others in the Congress to stop funding the agency's controversial ten day notice policy and stream protection rule, and restore the necessary funding for the States to properly implement their SMCRA regulatory programs as intended by Congress..

Thank you. I would be happy to answer any questions from members of the Committee.

Mr. JOHNSON [presiding]. Thank you, Mr. Kitt. Ms. Pineda?

STATEMENT OF LORETTA PINEDA, DIRECTOR, DIVISION OF RECLAMATION, MINING AND SAFETY, COLORADO DEPARTMENT OF NATURAL RESOURCES

Ms. PINEDA. Thank you. My name is Loretta Pineda. I am the Director of the Division of Reclamation Mining and Safety within

the Colorado Department of Natural Resources. I am appearing today on behalf of the National Association of Abandoned Mine Land Programs and the Interstate Mining Compact Commission. The National Association of AML Programs represents 30 states and tribes with Federally approved abandoned mine land programs authorized under the Surface Mining Control and Reclamation Act.

The Interstate Mining Compact Commission represents some 24 states, many of whom implement programs regulating the active mining industry under SMCRA. Based on SMCRA fee collections, the Fiscal Year 2012 mandatory appropriation for state and tribal AML grants should be $498 million. Instead, OSM has only budgeted $313.8 million, a reduction of $184.2 million. This would eliminate funding to those states and tribes that have certified completion of their highest-priority coal reclamation sites.

From the beginning of SMCRA in 1977 to the latest amendment in 2006, Congress promised that at least half of the money generated from the coal fees collected within the boundaries of a state or tribe, referred to as state or tribal share, would be returned for uses as described in the Act. For certified states and tribes, the state and tribal share funds can be used for environmental stewardship, cleaning up abandoned coal and hard rock mines, sustainable development, infrastructure improvements and alternative energy projects, all stimulating economic activity, protecting health and safety, creating green jobs for local communities and improving the environment.

Each of these specific goals has been embraced by the Administration. Breaking the promise of state and tribal share funding will upset 10 years of negotiation that resulted in the balance and compromise achieved in the 2006 amendments to SMCRA. We therefore respectfully ask the Committee to continue funding for certified states and tribes at the statutory authorized levels and turn back any efforts to amend SMCRA in this regard.

The proposed budget would also eliminate $6.8 million for the Federal AML emergency program. Section 410 of SMCRA was unchanged by the 2006 amendments and requires OSM to fund the emergency AML program. Additionally, the Act does not allow states and tribes to fund an emergency program from their AML grants. On the contrary, it requires strict compliance with non-emergency funding priorities. If Congress allows the elimination of the emergency program, states and tribes will have to set aside large portions of their non-emergency AML grant funds to be prepared for future emergencies. This will result in funds being diverted from other high-priority projects.

It will also present special challenges for minimum program states since they may have to save up multiple years of funding in order to address a single emergency thereby delaying work on other projects. For these reasons and many others, we urge the Committee to restore funding for the AML emergency program in Fiscal Year 2012.

Finally, we oppose OSM's proposal to drastically reform the distribution process for AML funds to non-certified states through a competitive grant program. This proposal will completely undermine the balance of interests and objectives achieved by the 2006 amendments. Among other things, the proposal would cede author-

ity to both emergency and non-emergency funding decisions to an advisory council. Aside from the time delays associated with this approach, it leaves many unanswered questions regarding the continued viability of state and tribal AML programs where they do not win in the competitive process.

It also upsets the predictability of AML funding for long-term project planning. We urge the Subcommittee to reject this unjustified proposal, delete it from the budget and restore the full mandatory funding amount of $498 million. Resolutions to this effect adopted by both the National Association of AML Programs and the Interstate Mining Compact Commission are attached to my testimony as well as a comprehensive list of questions regarding the legislative proposal. I respectfully request that they be included as part of the record of this hearing.

To the extent that the Subcommittee does desire to pursue changes to SMCRA to improve or clarify operation of the AML program, the states and tribes would recommend looking at three areas. First, is the use of the unappropriated state and tribal share balances to address non-coal AML and acid mine drainage projects; second, the limited liability protection at Section 405[l] of SMCRA; and third, an amendment to the Section 413[d] regarding liability under the Clean Water Act for acid mine drainage projects.

We would welcome the opportunity to work with the Subcommittee on these initiatives, including H.R. 785 recently introduced by Representative Pearce of New Mexico. Thank you for the opportunity to present our views this morning, and I am happy to answer any questions you may have.

[The prepared statement of Ms. Pineda follows:]

Statement of Loretta Pineda, Director, Division of Reclamation, Mining and Safety, Colorado Department of Natural Resources on Behalf of the National Association of Abandoned Mine Land Programs and the Interstate Mining Compact Commission

My name is Loretta Pineda and I serve as the Director of the Division of Reclamation, Mining and Safety within the Colorado Department of Natural Resources. I am appearing today on behalf of the National Association of Abandoned Mine Land Programs (NAAMLP) and the Interstate Mining Compact Commission (IMCC). The NAAMLP represents 30 states and tribes with federally approved abandoned mine land reclamation (AML) programs authorized under Title IV of the Surface Mining Control and Reclamation Act (SMCRA). IMCC represents 24 states that are responsible for operating both Title IV AML programs, as well as regulatory programs under Title V for active mining operations. My testimony today will focus primarily on the Title IV program under SMCRA.

Title IV of SMCRA was amended in 2006 and significantly changed how state AML grants are funded. State AML Grants are still based on receipts from a fee on coal production, but beginning in FY 2008, the grants are funded primarily by mandatory appropriations. As a result, the states should receive $498 million in FY 2012. We adamantly oppose the Office of Surface Mining Reclamation and Enforcement's (OSM) proposed budget amount of $313.8 million for State AML grants, a reduction of $184.2 million, and reject the notion that a competitive grant process would improve AML program efficiency. The proposed spending cuts would eliminate funding to states and tribes that have "certified" completion of their highest priority coal reclamation sites. OSM has also proposed a $6.8 million reduction in discretionary spending that would eliminate the federal emergency program under Section 410 of SMCRA. I appreciate the opportunity to testify before the Subcommittee and outline some of the reasons why NAAMLP and IMCC oppose OSM's proposed FY 2012 budget.

SMCRA was passed in 1977 and set national regulatory and reclamation standards for coal mining. The Act also established a Reclamation Fund to work towards eliminating the innumerable health, safety and environmental problems that exist

throughout the Nation from the mines that were abandoned prior to the Act. The Fund generates revenue through a fee on current coal production. This fee is collected by OSM and distributed to states and tribes that have federally approved regulatory and AML programs. The promise Congress made in 1977, and with every subsequent amendment to the Act, was that, at a minimum, half the money generated from fees collected by OSM on coal mined within the boundaries of a state or tribe, referred to as "State Share", would be returned for uses described in Title IV of the Act if the state or tribe assumed responsibility for regulating active coal mining operations pursuant to Title V of SMCRA. The 2006 Amendments clarified the scope of what the State Share funds could be used for and reaffirmed the promise made by Congress in 1977.

If a state or tribe was successful in completing reclamation of abandoned coal mines and was able to "certify" under Section 411 of SMCRA, then the State Share funds could be used to address a myriad of other abandoned mine issues as defined under each state or tribes approved Abandoned Mine Reclamation Plan. These Abandoned Mine Reclamation Plans are approved by the Office of Surface Mining and they ensure that the work is in accordance with the intent of SMCRA. Like all abandoned mine reclamation, the work of certified states and tribes eliminates health and safety problems, cleans up the environment, and creates jobs in rural areas impacted by mining.

This reduction proposed by OSM in certified state and tribal AML grants not only breaks the promise of State and Tribal Share funding, but upsets the balance and compromise that was achieved in the comprehensive restructuring of SMCRA accomplished in the 2006 Amendments following more than ten years of discussion and negotiation by all affected parties. The funding reduction is inconsistent with the Administration's stated goals regarding jobs and environmental protection. We therefore respectively ask the Subcommittee to support continued funding for certified states and tribes at the statutory authorized levels, and turn back any efforts to amend SMCRA in this regard.

In addition to the $184.2 million reduction, the proposed FY 2012 budget would terminate the federal AML emergency program, leaving the states and tribes to rely on funds received through their non-emergency AML grant funds. This contradicts the 2006 amendments, which require the states and tribes to maintain "strict compliance" with the non-emergency funding priorities described in Section 403(a), while leaving Section 410, Emergency Powers, unchanged. Section 410 of SMCRA requires OSM to fund the emergency AML program using OSM's "discretionary share" under Section (402)(g)(3)(B), which is entirely separate from state and tribal non-emergency AML grant funding under Sections (402)(g)(1), (g)(2), and (g)(5). SMCRA does not allow states and tribes to administer or fund an AML emergency program from their non-emergency AML grants, although, since 1989, fifteen states have agreed to implement the emergency program *on behalf of OSM contingent upon OSM providing full funding* for the work. As a result, OSM has been able to fulfill their mandated obligation more cost effectively and efficiently. Ten states and 3 tribes continue to rely solely on OSM to operate the emergency program within their jurisdiction.

Regardless of whether a state/tribe or OSM operates the emergency program, only OSM has the authority to "declare" the emergency and clear the way for the expedited procedures to be implemented. In FY 2010, OSM made 153 emergency declarations in Kentucky and Pennsylvania alone, states where OSM had operated the emergency program. In FY 2011, OSM issued guidance to the states that the agency "will no longer declare emergencies." OSM provided no legal or statutory support for its position. Instead, OSM has "transitioned" responsibility for emergencies to the states and tribes with the expectation that they will utilize non-emergency AML funding to address them. OSM will simply "assist the states and tribes with the projects, as needed". Of course, given that OSM has proposed to eliminate all funding for certified states and tribes, it begs the question of how and to what extent OSM will continue to assist these states and tribes.

If Congress allows the elimination of the emergency program, states and tribes will have to adjust to their new role by setting aside a large portion of their non-emergency AML funds so that they can be prepared for any emergency that may arise. Emergency projects come in all shapes and sizes, vary in number from year to year and range in cost from thousands of dollars to millions of dollars. Requiring states and tribes to fund emergencies will result in funds being diverted from other high priority projects and delay certification under Section 411, thereby increasing the backlog of projects on the Abandoned Mine Land Inventory System (AMLIS). For minimum program states and states with small AML programs, large emergency projects will require the states to redirect all or most of their AML resources to address the emergency, thereby delaying other high-priority reclamation. With

the loss of stable emergency program funding, minimum program states will have a difficult, if not impossible, time planning, budgeting, and prosecuting the abatement of their high priority AML problems. In a worst-case scenario, a minimum program state would not be able to address a costly emergency in a timely fashion, and would have to "save up" multiple years of funding before even initiating the work to abate the emergency, in the meantime ignoring all other high priority work.

OSM's proposed budget suggests addressing emergencies, and all other projects, as part of a competitive grant process whereby states and tribes compete for funding based on the findings of the proposed AML Advisory Council. OSM believes that a competitive grant process would concentrate funds on the highest priority projects. While a competitive grant process may seem to make sense at first blush, further reflection reveals that the entire premise is faulty and can only undermine and upend the deliberate funding mechanism established by Congress in the 2006 Amendments. Since the inception of SMCRA, high priority problems have always taken precedence over other projects. The focus on high priorities was further clarified in the 2006 Amendments by removing the lower priority problems from the Act and requiring "strict compliance" with high priority funding requirements. OSM already approves projects as meeting the definition of high priority under its current review process and therefore an AML Advisory Council would only add redundancy and bureaucracy instead of improving efficiency.

We have not been privy to the particulars of OSM's legislative proposal, but there are a myriad of potential problems and implications for the entire AML program based on a cursory understanding of what OSM has in mind. They include the following:

- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM's proposal?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term "remaining funds" in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be re-directed to the Fund based on an equivalent amount of funding being paid to certified states and tribes each year? Would the "remaining funds" include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period?
- Will this new competitive grant process introduce an additional level of bureaucracy and result in more funds being spent formulating proposals and less on actual AML reclamation? The present funding formula allows states and tribes to undertake long-term strategic planning and efficiently use available funds.
- How long will OSM fund a state's/tribe's administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How does OSM expect the states and tribes to handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?
- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding levels through the end of the AML program. Because state and tribes were provided with hypothetical funding levels from OSM (which to date have proven to be quite accurate), long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made accurately and efficiently. How can states/tribes plan for future projects given the inherent uncertainty associated with having to annually bid for AML funds?

Given these uncertainties and the negative implications for the accomplishment of AML work under Title IV of SMCRA, Congress should reject the proposed

amendments to SMCRA as being counterproductive to the purposes of SMCRA and an inefficient use of funds. We request that Congress continue mandatory funding for certified states and tribes and provide funding for AML emergencies. Resolutions to this effect adopted by both NAAMLP and IMCC are attached, as is a more comprehensive list of questions concerning the legislative proposal. We ask that they be included in the record of the hearing.

One of the more effective mechanisms for accomplishing AML restoration work is through leveraging or matching other grant programs, such as EPA's 319 program. Until FY 2009, language was always included in OSM's appropriation that encouraged the use of these types of matching funds, particularly for the purpose of environmental restoration related to treatment or abatement of acid mind drainage (AMD) from abandoned mines. This is an ongoing, and often expensive, problem, especially in Appalachia. NAAMLP and IMCC therefore request the Subcommittee to support the inclusion of language in the FY 2012 appropriations bill that would allow the use of AML funds for any required non-Federal cost-share required by the Federal government for AMD treatment or abatement.

We also urge the Subcommittee to support funding for OSM's training program and TIPS, including moneys for state/tribal travel. These programs are central to the effective implementation of state and tribal AML programs as they provide necessary training and continuing education for state/tribal agency personnel, as well as critical technical assistance. Finally, we support funding for the Watershed Cooperative Agreements in the amount of $1.55 million because it facilitates and enhances state and local partnerships by providing direct financial assistance to watershed organizations for acid mine drainage remediation.

To the extent that the Subcommittee desires to pursue changes to SMCRA to improve or clarify the operation of the AML program, the states and tribes would recommend looking at three areas: 1) the use of unappropriated state and tribal share balances to address noncoal AML and acid mine drainage (AMD) projects; 2) the limited liability protections for noncoal AML work at section 405(l) of SMCRA; and 3) an amendment to Section 413(d) regarding liability under the Clean Water Act for acid mine drainage projects.

The reauthorization of the AML program in 2006 by Congress did not in any way change the provisions that allow AML funds to be used to ameliorate either coal or non-coal mine public health and safety hazards. However, OSM adopted final rules implementing the 2006 Amendments (November 14, 2008 at 73 Fed. Reg. 67576), based on a Departmental Solicitor's Opinion (M–37104), that would prohibit some of this funding from being used to address many of the most serious non-coal AML problems. As a result, NAAMLP and IMCC strongly support H.R. 765, a bill recently introduced by Rep. Pearce of New Mexico that makes minor changes to SMCRA to correct the misinterpretation by the U.S. Department of the Interior. H.R. 765 will return states and tribes to their longstanding role under SMCRA of directing abandoned mine grant funds to the highest priority needs at either coal or non-coal abandoned mines.

NAAMLP and IMCC have worked closely with the Western Governors Association in providing information to quantify the non-coal AML cleanup effort. While the data is seldom comparable between states due to the wide variation in inventory criteria, they do demonstrate that there are large numbers of significant safety and environmental problems associated with inactive and abandoned non-coal mines, and that remediation costs are very large. Some of the types of numbers that have been reported by NAAMLP and IMCC in response to information we have collected for the General Accountability Office (GAO) and others include the following: Number of abandoned mine sites: Alaska—1,300; Arizona—80,000; California—47,000; Colorado—7,300; Montana—6,000; Nevada—16,000; Utah—17,000—20,000; Washington—3,800; Wyoming—1,700. Nevada reports over 200,000 mine openings and Minnesota reports over 100,000 acres of abandoned mine lands.

States and Tribes are very familiar with the highest priority non-coal problems within their borders and also have limited reclamation dollars to protect public health and safety or protect the environment from significant harm. States and tribes work closely with various federal agencies, including the Environmental Protection Agency, the Bureau of Land Management, the U.S. Forest Service, and the U.S. Army Corps of Engineers, all of whom have provided some funding for non-coal mine remediation projects. For states with coal mining, the most consistent source of AML funding has been the Title IV grants received under SMCRA. Section 409 of SMCRA allows states to use these grants at high priority non-coal AML sites. The funding is generally limited to safeguarding hazards to public safety (e.g., closing mine openings) at non-coal sites.

The urgency of advancing this legislation has been heightened, Mr. Chairman, by statements in OSM's proposed budget for Fiscal Year 2012. Therein, OSM is pro-

posing to further restrict the ability of states to expend AML funds on noncoal reclamation projects. This will apparently occur as part of a legislative proposal that the Administration intends to aggressively pursue in the 111th Congress. While the primary focus of that proposal will be the elimination of future AML funding for states and tribes that are certified under Title IV of SMCRA (which we adamantly oppose), OSM's proposal will also substantially restructure the method by which AML funds are distributed to the states in an effort to "direct the available reclamation funds to the highest priority coal AML sites across the Nation."

H.R. 765 would also address a similar restriction on the use of the unappropriated state and tribal share balances for the Acid Mine Drainage (AMD) set-aside program under SMCRA. Congress expanded this program in the 2006 Amendments to allow states and tribes to set-aside up to 30% of their grants funds for treating AMD now and into the future. AMD has ravaged many streams throughout the country, but especially in Appalachia. The states need the ability to set aside as much funding as possible to deal with these problems over the long term. Again, OSM has acted arbitrarily in their interpretation of the reauthorizing language by limiting the types of funds the state may use for the set-aside program. H.R. 765 includes language that would correct this misinterpretation and allow the states to apply the 30% set-aside to their prior balance replacement funds.

In summary:

- Since the inception of SMCRA in 1977 and the approval of state/tribal AML programs in the early 1980's, the states and tribes have been allowed to use their state share distributions under section 402(g)(1) of the AML Trust Fund for high priority noncoal reclamation projects pursuant to section 409 of SMCRA and for the set-aside program for acid mine drainage (AMD) projects.
- In its rules implementing the 2006 Amendments, OSM has stated that these moneys cannot be used for noncoal reclamation or for the 30% AMD set-aside.
- Pursuant to Section 411(h)(1) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under section 409 and for the 30% AMD set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it.

Our second suggested amendment is needed to clarify a further misinterpretation of SMCRA contained in OSM's final rules of November 14, 2008. Section 405(l) of SMCRA provides that, except for acts of gross negligence or intentional misconduct, "no state (or tribe) shall be liable under any provisions of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a state abandoned mine reclamation plan approved under this section." In its rules, OSM concluded that because of the language of SMCRA, including the generally unrestricted nature of the Title IV funds provided to certified states and tribes in Sections 411(h)(1) and (2), certified states and tribes can no longer conduct noncoal reclamation or other projects under Title IV of SMCRA (73 Fed. Reg. 67613). Thus, to the extent that certified states and tribes choose to conduct noncoal reclamation, OSM asserts that they do so outside of SMCRA and OSM's regulations, including the limited liability provisions of Section 405(l) of the Act.

This strained reading of the 2006 Amendments is having severe consequences for certified states and tribes conducting AML work pursuant to their otherwise-approved state programs. Without this limited liability protection, these states and tribes potentially subject themselves to liability under the Clean Water Act and CERCLA for their AML reclamation work. Nothing in the 2006 Amendments suggested that there was a desire or intent to remove these liability protections, and without them in place, certified states and tribes will need to potentially reconsider at least some of their more critical AML projects. We therefore recommend that the Subcommittee consider an amendment to SMCRA that would clarify that the 2006 Amendments were not intended to affect the applicability of section 405(l) to AML projects undertaken by certified states and tribes. We would welcome an opportunity to work with you to craft appropriate legislative language to accomplish this.

Finally, we recommend an adjustment to Section 413(d) of SMCRA to clarify that acid mine drainage projects which are eligible for AML funding under Section 404 of the Act, including systems for the control or treatment of AMD, are not subject to the water quality provisions of the Federal Water Pollution Control Act. This amendment is necessary to address a November 8, 2010 decision by the U.S. Court of Appeals for the Fourth Circuit, which decreed that the Clean Water Act's NPDES permitting requirements apply to anyone who discharges pollutants into the waters of the United States, regardless of whether that entity is private or public in nature. More specifically, the court noted that "the statute contains no exceptions for state agencies engaging in reclamation efforts; to the contrary, it explicitly includes them within its scope."

The result of this far-reaching decision by the Fourth Circuit will be to require some, if not all, state AML reclamation projects to obtain NPDES permits before work can commence. This will be particularly problematic for acid mine drainage control and treatment projects where water quality is already significantly degraded and is unlikely to ever meet effluent limitation guidelines under the Clean Water Act. Essentially, efforts by state agencies, and the watershed groups who work cooperatively with the states, will be stymied. In some cases, existing water treatment systems could be turned off and abandoned to the inability to obtain NPDES permits. We do not believe that this result was intended by either Congress or the courts, and thus believe that an immediate legislative clarification should be pursued. Again, we would welcome the opportunity to work with this Subcommittee to craft appropriate legislative solutions to address this conflict of laws situation.

Over the past 30 years, tens of thousands of acres of abandoned mine lands have been reclaimed, thousands of mine openings have been closed, and safeguards for people, property and the environment have been put in place. Be assured that states and tribes are determined to address the unabated hazards at both coal and noncoal abandoned mines. We are all united to play an important role in achieving the goals and objectives as set forth by Congress when SMCRA was first enacted—including protecting public health and safety, enhancing the environment, providing employment, and adding to the economies of communities impacted by past coal and noncoal mining. Passage of these suggested amendments will further these congressional goals and objectives.

Thank you for the opportunity to testify today. I would be happy to answer any questions you may have.

Resolution

Interstate Mining Compact Commission

BE IT KNOWN THAT:

WHEREAS, Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Abandoned Mine Land (AML) reclamation program; and

WHEREAS, the Interstate Mining Compact Commission (IMCC) is a multi-state organization representing the natural resource and environmental protection interests of its 24 member states, including the elimination of health and safety hazards and the reclamation of land and water resources adversely affected by past mining and left in an abandoned or inadequately restored condition; and

WHEREAS, pursuant to the cooperative federalism approach contained in SMCRA, several IMCC member states administer AML programs approved, funded and overseen by the Office of Surface Mining Reclamation and Enforcement (OSM) within the U.S. Department of the Interior; and

WHEREAS, SMCRA, Title IV establishes a reclamation fee on each ton of coal mined in the United States to pay for abandoned mine land reclamation; and

WHEREAS, SMCRA, Title IV mandates that fifty percent (50%) of the reclamation fees collected annually are designated as state share funds to be returned to the states from which coal was mined to pay for reclamation projects pursuant to programs administered by the states; and

WHEREAS, SMCRA, Title IV also mandates that a minimum level of funding should be provided to ensure effective state program implementation; and

WHEREAS, Congress enacted amendments to SMCRA in 2006 to address, among other things, continued collection of AML fees and funding for state programs to address existing and future AML reclamation; and

WHEREAS, the 2006 Amendments established new, strict criteria that ensure states expend funds on high priority AML sites; and

WHEREAS, the proposed 2012 budget for the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior would disregard the state-federal partnership established under SMCRA and renege on the funding formula under the 2006 Amendments by, among other things, eliminating mandatory funding for states who have certified the completion of their coal reclamation work and adjusting the mechanism by which non-certified states receive their mandatory funding through a competitive bidding process; and

WHEREAS, if statutory changes are approved by Congress as suggested by the proposed FY 2012 budget for OSM, reclamation of abandoned mine lands within certified states would halt; reclamation of abandoned mine lands in all states would be jeopardized; employment of contractors, suppliers, technicians and others currently engaged in the reclamation of abandoned mine lands would be endangered; the cleanup of polluted lands and waters across the United States would be threat-

ened by failing to fund reclamation of abandoned mine lands; minimum program state funding would be usurped; the AML water supply replacement program would be terminated, leaving coalfield citizens without potable water; and the intent of Congress as contained in the 2006 Amendments to SMCRA would be undermined

NOW THEREFORE BE IT RESOLVED:

That the Interstate Mining Compact Commission opposes the legislative proposal terminating funding for certified states and altering the receipt of mandatory AML funding for non-certified states contained in the FY 2012 budget proposal for the Office of Surface Mining Reclamation and Enforcement and instead supports the AML funding mechanism contained in current law.

Issued this 10th day of March, 2011

ATTEST:

Gregory E. Conrad
Executive Director

NAAMLP

National Association of Abandoned Mine Land Programs [1]

RESOLUTION

OF

THE NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS

WHEREAS, Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Abandoned Mine Land (AML) reclamation program; and

WHEREAS, the National Association of Abandoned Mine Land Programs (NAAMLP) was established as a nonprofit corporation to accomplish the objectives of its thirty member tribes and states to eliminate health and safety hazards and reclaim land and water resources adversely affected by past mining and left in an abandoned or inadequately restored condition; and

WHEREAS, NAAMLP members administer AML programs funded and overseen by the Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior; and

WHEREAS, pursuant to the cooperative federalism approach contained in SMCRA, all tribes and states who are members of NAAMLP have federally approved abandoned mine reclamation plans; and

WHEREAS, SMCRA, Title IV, establishes a reclamation fee on each ton of coal mined in the United States to pay for abandoned mine land reclamation; and

WHEREAS, SMCRA, Title IV, mandates that fifty percent (50%) of the reclamation fees collected annually are designated as state/tribal share funds to be returned to the states and tribes from which coal was mined to pay for reclamation programs administered by the states and tribes; and

WHEREAS, SMCRA Title IV also mandates that a minimum level of funding should be provided to ensure effective state program implementation; and

WHEREAS, Congress enacted amendments to SMCRA in 2006 to address, among other things, funding for state and tribal programs and fee collection to address existing and future AML reclamation; and

WHEREAS, the 2006 Amendments established new, strict criteria that ensures states and tribes expend funds on high priority AML sites; and

WHEREAS, the proposed 2012 budget for the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior would abandon the 50/50 state-federal partnership established under SMCRA and renege on the funding formula under the 2006 amendments by, among other things, eliminating mandatory funding for those states and tribes who have certified the completion of their coal reclamation work and adjusting the mechanism by which non-certified states receive their mandatory funding through a competitive bidding process; and

WHEREAS, if statutory changes are approved by Congress as suggested by the proposed FY 2012 budget for OSMRE, reclamation of abandoned mine lands within certified states and tribes would halt; failing to fund reclamation of abandoned mine

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[1] ALABAMA ALASKA ARIZONA ARKANSAS CALIFORNIA COLORADO CROW HOPI ILLINOIS INDIANA IOWA KANSAS KENTUCKY LOUISIANA MARYLAND MISSISSIPPI MISSOURI MONTANA NAVAJO NEVADA NEW MEXICO NORTH DAKOTA OHIO OKLAHOMA PENNSYLVANIA TENNESSEE TEXAS UTAH VIRGINIA WEST VIRGINIA WYOMING

lands in some states; minimum program state funding would be usurped; the AML water supply replacement program would be terminated, leaving coalfield citizens without potable water; and the intent of Congress as contained in the 2006 amendments to SMCRA and its 2006 Amendments would be undermined

NOW, THEREFORE:

BE IT RESOLVED BY THE NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS THAT ITS MEMBER TRIBES AND STATES:

> Opposes the legislative proposal terminating funding for certified states and tribes and altering the receipt of mandatory AML funding for non-certified states contained in the FY 2012 budget proposal for the Office of Surface Mining Reclamation and Enforcement and instead supports the AML funding mechanism contained in current law.

ISSUED THIS 22nd DAY OF FEBRUARY, 2011

ATTEST:

Michael P. Garner
PRESIDENT, NAAMLP

Mr. JOHNSON. Thank you, Ms. Pineda. Mr. Lambert, Mr. Lovett, regrettably, the lights are on. We have to run vote, so at this time, the Committee stands in recess until votes are over. That is approximately 25 minutes from now. Thank you for your patience.

[Recess.]

Mr. LAMBORN [presiding]. OK. The Subcommittee will come back to order. Thank you for your patience. We did finish the votes, and we should be in good shape for the rest of the time, and I think we are now to Mr. Lambert, and I look forward to hearing your testimony.

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

Mr. LAMBERT. Thank you. My name is Butch Lambert, and I am the Deputy Director of the Virginia Department of Mines, Minerals and Energy, and I am appearing today on behalf of the Interstate Mining Compact Commission to present views of the Compact's member states concerning the Fiscal Year 2012 budget request for the Office of Surface Mining. In its proposed budget, OSM is requesting $60.3 million to fund Title V grants to states and Indian tribes with the implementation of the regulatory programs, a reduction of $11 million or 15 percent below the Fiscal Year 2010 enacted and the Fiscal Year 2011 CR levels.

In Fiscal Year 2010, Congress approved an additional $5.8 million increase for states Title V grants over the Fiscal Year 2009 enacted levels for a total of $71.3 million. For the first time in many years, the amount appropriated for these regulatory grants aligned with the demonstrated needs for the states and thereby eliminating the ever-widening gap between the states' requests and what they received. In the Fiscal Year 2012 budget, OSM has once again reversed the course and essentially unraveled and undermined the progress made by Congress in supporting state programs.

This comes precisely at the wrong time. There are states that are still in the process of putting the recent improvements funding to work in their programs through the filling of vacant positions and the purchase of much-needed equipment. We trust that the recent increase approved by Congress will remain the new base of which we build our programs into the future. In this regard, it should be kept in mind that a 15-percent cut in Federal funding translates

to an additional 15-percent cut for overall program funding for many states since these states can only match what they receive in Federal money.

For instance, in Virginia should OSM reduction prevail, we would be looking at a $1.2 million cut. OSM's solution to this drastic cut for state regulatory programs comes in a way of an unrealistic assumption that these states can simply increase user fees in an effort to eliminate the de facto subsidy to the coal industry. OSM's proposal is completely out of touch with the realities associated with establishing and enhancing user fees. IMCC's recent polling of its member states confirms that it would be difficult, if not impossible, for most states to accomplish this fete at all let alone in less than one year.

We strongly urge this Subcommittee to reject this approach, mandate that OSM work through the complexities associated with the future user-fee proposal in close cooperation with the states and approve not less than $71 million for the state and tribal Title V regulatory grants for Fiscal Year 2012. If Congress seeks to restrain OSM's budget, we suggest that this Subcommittee look seriously at the OSM proposal to increase its own budget by $4 million and 25 FTE's for Federal oversight of state programming. OSM justifies this increase based on its new strategic direction, most of which in turn is based upon a June 2009 MOU between Interior, EPA and the Army Corps of Engineers.

However, beyond the MOU itself, OSM has never justified or explained its rationale for proceeding in this way. In fact, OSM's own annual oversight evaluation reports indicate that the states are doing a commendable job in implementing their programs. In our view, OSM has adequately accomplishing its statutory oversight obligations with current Federal program funding and any increase in workloads are likely to fall upon the states, especially given the potential permitting requirements growing out of the OSM's anticipated Stream Protection Rule.

While not alluded to or fully addressed in the OSM budget justification document, the states also have serious concerns with several aspects of OSM's enhanced oversight initiative, especially three recent adopted directives on annual oversight procedures, corrective actions and the issuances of 10-day notices. IMCC has submitted extensive comments on these directives over the past year. I would like to submit a copy of those comments for the record here today.

We are particularly concerned about the potential of Federal actions to duplicate and/or second guess state permitting decisions. Aside from the impact on limited state and Federal resources, these actions undermine the principles of primacy that underscore SMCRA and are likely to have debilitating impacts on the state-Federal relationship envisioned by the Act. As Federal courts have made it clear, SMCRA's allocation of jurisdiction was careful and deliberate and that Congress provided for mutually exclusive regulation either by the Secretary or the states, but not by both.

Thank you for the opportunity to appear before this Subcommittee today, and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Lambert follows:]

Statement of Bradley C. Lambert, Deputy Director, Virginia Department of Mines, Minerals and Energy on Behalf of the Interstate Mining Compact Commission

My name is Bradley C. Lambert and I serve as Deputy Director of the Virginia Department of Mines, Minerals and Energy. I am appearing today on behalf of the Interstate Mining Compact Commission (IMCC). I appreciate the opportunity to present this statement to the Subcommittee regarding the views of the Compact's 24 member states on the Fiscal Year (FY) 2012 Budget Request for the Office of Surface Mining Reclamation and Enforcement (OSM) within the U.S. Department of the Interior. In its proposed budget, OSM is requesting $60.3 million to fund Title V grants to states and Indian tribes for the implementation of their regulatory programs, a reduction of $11 million or 15% below the FY 2010 enacted/FY 2011 CR level. OSM also proposes to cut discretionary spending for the Title IV abandoned mine land (AML) program by approximately $6.8 million, including the elimination of funding for the emergency program, and a reduction in mandatory AML spending by $184 million pursuant to a legislative proposal to eliminate all AML funding for certified states and tribes.

The Compact is comprised of 24 states that together produce some 95% of the Nation's coal, as well as important noncoal minerals. The Compact's purposes are to advance the protection and restoration of land, water and other resources affected by mining through the encouragement of programs in each of the party states that will achieve comparable results in protecting, conserving and improving the usefulness of natural resources and to assist in achieving and maintaining an efficient, productive and economically viable mining industry.

OSM has projected an amount of $60.3 million for Title V grants to states and tribes in FY 2012, an amount which is matched by the states each year. These grants support the implementation of state and tribal regulatory programs under the Surface Mining Control and Reclamation Act (SMCRA) and as such are essential to the full and effective operation of those programs.

In Fiscal Year 2010, Congress approved an additional $5.8 million increase for state Title V grants over the FY 2009 enacted level, for a total of $71.3 million. This same amount was approved for FY 2011. For the first time in many years, the amount appropriated for these regulatory grants aligned with the demonstrated needs of the states and tribes. The states are greatly encouraged by the significant increases in Title V funding approved by Congress over the past three fiscal years. Even with mandated rescissions and the allocations for tribal primacy programs, the states saw a $12 million increase for our regulatory programs over FY 2007 levels. As we noted in our statement on last year's budget, state Title V grants had been stagnant for over 12 years and the gap between the states' requests and what they received was widening. This debilitating trend was compounding the problems caused by inflation and uncontrollable costs, thus undermining our efforts to realize needed program improvements and enhancements and jeopardizing our efforts to minimize the potential adverse impacts of coal extraction operations on people and the environment.

In its FY 2012 budget, OSM has once again attempted to reverse course and essentially unravel and undermine the progress made by Congress in supporting state programs with adequate funding. This comes at precisely the wrong time. The states are still in the process of putting the recent improvements in funding to work in their programs through the filling of vacant positions and the purchase of much needed equipment. As states prepare their future budgets, we trust that the recent increases approved by Congress will remain the new base on which we build our programs. Otherwise, we find ourselves backpedaling and creating a situation where those who were just hired face layoffs and purchases are canceled or delayed. Furthermore, a clear message from Congress that reliable, consistent funding will continue into the future will do much to stimulate support for these programs by state legislatures and budget officers who each year, in the face of difficult fiscal climates and constraints, are also dealing with the challenge of matching federal grant dollars with state funds. In this regard, it should be kept in mind that a 15% cut in federal funding generally translates to an additional 15% cut for ***overall*** program funding for many states, especially those without federal lands, since these states can only match what they receive in federal money.

OSM's solution to the drastic cuts for state regulatory programs comes in the way of an unrealistic assumption that the states can simply increase user fees in an effort to "eliminate a de facto subsidy of the coal industry." No specifics on how the states are to accomplish this far-reaching proposal are set forth, other than an expectation that they will do so in the course of a single fiscal year. OSM's proposal is completely out of touch with the realities associated with establishing or enhanc-

ing user fees, especially given the need for approvals by state legislatures. IMCC's recent polling of its member states confirmed that, given the current fiscal and political implications of such an initiative, it will be difficult, if not impossible, for most states to accomplish this feat at all, let alone in less than one year. OSM is well aware of this, and yet has every intention of aggressively moving forward with a proposal that was poorly conceived from its inception. We strongly urge the Subcommittee to reject this approach and mandate that OSM work through the complexities associated with any future user fees proposal in close cooperation with the states and tribes before proposing cuts to federal funding for state Title V grants.

At the same time that OSM is proposing significant cuts for state programs, the agency is proposing sizeable increases for its own program operations ($4 million) for federal oversight of state programs, including an increase of 25 FTEs. OSM justifies this increase based on its "new strategic direction," i.e. expanded and enhanced oversight of state regulatory programs and strengthened stream protections to maintain the hydrologic balance of watersheds pursuant to the June 2009 Memorandum of Understanding with the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. However, as we have articulated on numerous occasions over the past 18 months in comments submitted to the agency, OSM has never fully explained or justified the basis for these new directions. In fact, OSM's annual oversight reports indicate that, in general, the states are doing a commendable job of implementing their programs.

In making the case for its funding increase, OSM's budget justification document contains vague references to the need for improvement in approximate original contour (AOC) compliance and reevaluation of bonding procedures in 10 states with respect to bond adequacy. OSM also notes a marked increase in the number of potential violations pursuant to enhanced federal oversight inspections during FY 2010. However, when placed in context, neither of these two explanations justifies the significant increase in funding for federal operations. Increasing the number of federal inspections can logically be expected to generate more Ten-Day Notices, especially where state regulatory authorities are not invited to accompany federal inspectors (as required by OSM's own regulations). The oversight process can also be expected to identify areas of potential program improvement, especially where OSM has designated certain areas for more intensive, nationwide review, as it did in FY 2010 with regard to AOC and bond adequacy. Again, the overall performance of the states as detailed in OSM's annual oversight reports demonstrates that the states are implementing their programs effectively and in accordance with the purposes and objectives of SMCRA.[1]

In our view, this suggests that OSM is adequately accomplishing its statutory oversight obligations with current federal program funding and that any increased workloads are likely to fall *upon the states,* which have primary responsibility for implementing appropriate adjustments to their programs identified during federal oversight. In this regard, we note that the federal courts have made it abundantly clear that SMCRA's allocation of exclusive jurisdiction was "careful and deliberate" and that Congress provided for "mutually exclusive regulation by either the Secretary or state, but not both." *Bragg v. West Virginia Coal Ass'n,* 248 F. 3d 275, 293–4 (4th Cir. 2001), cert. Denied, 534 U.S. 1113 (2002). While the courts have ruled consistently on this matter, the question remains for Congress and the Administration to determine, in light of deficit reduction and spending cuts, how the limited amount of federal funding for the regulation of surface coal mining and reclamation operations under SMCRA will be directed—to OSM or the states. For all the above reasons, we urge Congress to approve not less than $71 million for state and tribal Title V regulatory grants, as fully documented in the states' and tribes' estimates for actual program operating costs.[2]

With regard to funding for state Title IV Abandoned Mine Land (AML) program grants, Congressional action in 2006 to reauthorize Title IV of SMCRA has significantly changed the method by which state reclamation grants are funded. Beginning

[1] While not alluded to or fully addressed in OSM's budget justification document, there are myriad statutory, policy and legal issues associated with several aspects of the agency's enhanced oversight initiative, especially three recently adopted directives on annual oversight procedures (REG–8), corrective actions (REG–23) and Ten-Day Notices (INE–35). IMCC submitted extensive comments regarding the issues associated with these directives and related oversight actions (including federal inspections) on January 19, 2010, July 8, 2010 and January 7, 2011.

[2] We are particularly concerned about recent OSM initiatives, primarily by policy directive, to duplicate and/or second-guess state permitting decisions through the reflexive use of "Ten-Day Notices" as part of increased federal oversight or through federal responses to citizen complaints. Aside from the impact on limited state and federal resources, these actions undermine the principles of primacy that underscore SMCRA and are likely to have debilitating impacts on the state-federal partnership envisioned by the Act.

with FY 2008, state Title IV grants are funded primarily by mandatory appropriations. As a result, the states should have received a total of $498 million in FY 2012. Instead, OSM has budgeted an amount of $313.8 million based on an ill-conceived proposal to eliminate mandatory AML funding to states and tribes that have been certified as completing their abandoned coal reclamation programs. This $184.2 million reduction flies in the face of the comprehensive restructuring of the AML program that was passed by Congress in 2006, following over 10 years of Congressional debate and hard fought compromise among the affected parties. In addition to the elimination of funding for certified states and tribes, OSM is also proposing to reform the distribution process for the remaining reclamation funding to allocate available resources to the highest priority coal AML sites through a competitive grant program, whereby an Advisory Council will review and rank AML sites each year. While we have not seen the details of the proposal, which will require adjustments to SMCRA, it will clearly undermine the delicate balance of interests and objectives achieved by the 2006 Amendments. It is also inconsistent with many of the goals and objectives articulated by the Administration concerning both jobs and environmental protection, particularly stream quality. We urge the Congress to reject this unjustified proposal, delete it from the budget and restore the full mandatory funding amount of $498 million. A resolution adopted by IMCC concerning these matters is attached. We also endorse the testimony of the National Association of Abandoned Mine Land Programs (NAAMLP) which goes into greater detail regarding the implications of OSM's legislative proposal for the states.

We also urge Congress to approve continued funding for the AML emergency program. In a continuing effort to ignore congressional direction, OSM's budget would completely eliminate funding for state-run emergency programs and also for federal emergency projects (in those states that do not administer their own emergency programs). When combined with the great uncertainty about the availability of remaining carryover funds, it appears that the program has been decimated. Funding the OSM emergency program should be a top priority for OSM's discretionary spending. This funding has allowed the states and OSM to address the unanticipated AML emergencies that inevitably occur each year. In states that have federally-operated emergency programs, the state AML programs are not structured or staffed to move quickly to address these dangers and safeguard the coalfield citizens whose lives and property are threatened by these unforeseen and often debilitating events. And for minimum program states, emergency funding is critical to preserve the limited resources available to them under the current funding formula. We therefore request that Congress restore funding for the AML emergency program in OSM's FY 2012 budget.

One of the more effective mechanisms for accomplishing AML restoration work is through leveraging or matching other grant programs, such as EPA's 319 program. Until FY 2009, language was always included in OSM's appropriation that encouraged the use of these types of matching funds, particularly for the purpose of environmental restoration related to treatment or abatement of AMD from abandoned mines. This is a perennial, and often expensive, problem, especially in Appalachia. IMCC therefore requests the Committee to once again include language in the FY 2012 appropriations bill that would allow the use of AML funds for any required non-Federal share of the cost of projects by the Federal government for AMD treatment or abatement.

We also urge the Committee to support funding for OSM's training program, including moneys for state travel. These programs are central to the effective implementation of state regulatory programs as they provide necessary training and continuing education for state agency personnel. In this regard, it should be noted that the states provide nearly half of the instructors for OSM's training course and, through IMCC, sponsor and staff benchmarking workshops on key regulatory program topics. IMCC also urges the Committee to support funding for TIPS, a program that directly benefits the states by providing critical technical assistance. Finally, we support funding for the Watershed Cooperative Agreements in the amount of $1.55 million.

Attached to our testimony today is a list of questions concerning OSM's budget that we request be included in the record for the hearing. The questions go into further detail concerning several aspects of the budget that we believe should be answered before Congress approves funding for the agency or considers advancing the legislative proposals contained in the budget. Also attached to our testimony is a copy of comments recently submitted to OSM concerning the agency's most recent oversight directives, which we also request be included in the record for this hearing. Those comments explain in greater depth the states' concerns with OSM's enhanced oversight initiative, especially as it impacts the exclusive jurisdiction of the states under SMCRA.

Thank you for the opportunity to present this statement. I would be happy to answer any questions you may have or provide additional information to the Subcommittee.

Questions re OSM's Proposed FY 2012 Budget

1. What does OSM plan to do with the additional $3.8 million that has been budgeted for "enhanced federal oversight of state regulatory programs"? How much of this will be designated for the ongoing development of the stream protection rule and accompanying EIS? What portion of this money is actually a re-designation of FTEs from the federally-managed AML programs to Title V program oversight?
2. How do you justify an increase in money for federal oversight while decreasing money for state Title V grants? What is the demonstrated need for an additional 25 FTEs to perform federal oversight of state programs? Will this not simply lead to duplication of effort, second-guessing of state decision-making, undermining of state primacy and wasted resources? If OSM needs additional resources to implement the anticipated stream protection rule, what about the states, who are responsible for implementing the rule through permit issuance, inspection and enforcement? Will OSM be attempting to recoup any of this discretionary funding for oversight via permit fees of its own? How will OSM allocate the reduced amount of funding to the states under its proposed reduction of $11 million for state Title V grants? To what extent will OSM continue to support technical training and technical support programs for the states, especially for things such as mine mapping, software enhancements and travel?
3. If pressed by Congress, how expeditiously does OSM intend to push the states to recover more of their regulatory costs from the coal industry through user fees? Has OSM undertaken a full analysis of the administrative and rulemaking complexities inherent in such an undertaking?
4. OSM's newest AML legislative proposal (to eliminate payments to certified states and tribes and to utilize a competitive bidding process for the allocation of remaining AML reclamation funds for non-certified states) is the third time that the agency has put forth potential legislative adjustments to the 2006 amendments to SMCRA in its proposed budgets. To date, no legislative proposal has been drafted that we are aware, much less shared with the states, tribes or Congress. When can we expect to see a draft of this most recent legislative proposal? At this point, there are many more questions than answers about how this process will work. (See attached list) Do you intend to seek input from the states and tribes during the early drafting stages, especially given the role that the states and tribes will play in the bidding/selection process and the significant impact this will have on current program administration? What is the basis for OSM's proposal to essentially upend the carefully crafted legislative resolution related to future AML program funding and AML reclamation work approved by Congress in 2006? Has OSM thought and worked through the implications for AML program management and administration that would result from its legislative proposal?
5. Why has OSM chosen to advocate for a hardrock AML reclamation fee to be collected by OSM but not distributed by OSM? Why bring another federal agency (BLM) into the mix when OSM has the greater expertise in this area?

Specific Questions re Cost Recovery/User Fees

As it did last year, OSM has once again requested an amount of $60 million for state Title V regulatory program grants in FY 2012, which reflects an $11 million decrease. And while OSM does not dispute that the states are in need of an amount far greater than this, the agency has suggested once again that the states should be able to make up the difference between what OSM has budgeted and what states actually need by increasing cost recovery fees for services to the coal industry. What exactly will it take to accomplish this task?

Assuming the states take on this task, will amendments to their regulatory programs be required?

How long, in general, does it take OSM to approve a state program amendment?

It is my understanding that the state of Alabama submitted a program amendment to OSM last year to raise current permit fees and authorize new, additional fees but to date OSM has still not approved these amendments, resulting in lost fees of over $50,000 to the state. If OSM is unable to approve requested state program

amendments for permit fee increases at this time, how does the agency expect to handle mandated permit increases for all of the primacy states within a single fiscal year?

If OSM is not expecting to pursue this initiative in fiscal year 2012, why include such a proposal in the budget until OSM has worked out all of the details with the states in the first instance?

Speaking of which, what types of complexities is OSM anticipating with its proposal at the state level? Many of the states have already indicated to OSM that it will be next to impossible to advance a fee increase proposal given the political and fiscal climate they are facing.

OSM's solution seems to be that the agency will propose a rule to require states to increase permit fees nationwide. Won't this still require state program amendments to effectuate the federal rule, as with all of OSM's rules? How does OSM envision accomplishing this if the states are unable to do it on their own?

Even if a federal rulemaking requiring permit fee increase nationwide were to succeed, how does OSM envision assuring that these fees are returned to the states? Will OSM retain a portion of these fees for administrative purposes?

Specific Questions re Federal Program Increases

At a hearing before the House Interior Subcommittee on March 10 regarding the agency's budget, OSM Director Pizarchik stated, in response to a question from the Chairman about how he would characterize the permitting process for mining in the United States, that permitting is primarily a state responsibility under SCMRA and that OSM provides technical assistance to the states. In OSM's written testimony, the agency also notes that the states permit and regulate 97 percent of the Nation's coal production and that OSM provides technical assistance, funding, training and technical tools to the states to support their programs. And yet OSM proposes in its budget to cut funding to the states by $11 million while increasing OSM's own federal operations budget by nearly $4 million and 25 FTEs. How does OSM reconcile these seemingly contradictory positions?

Director Pizarchik also spoke about the various permitting enhancements that OSM and other federal agencies hope to accomplish pursuant to the 2009 MOU between Interior, EPA and the Corps. While supposedly focused on Appalachia, this effort is clearly aimed at all of the states based on recent actions taken by OSM, EPA and others. Assuming OSM succeeds in developing these national permitting enhancements, who is responsible for implementing them?

Mr. Pizarchik also noted in his statement, and in his recent testimony, that OSM needs additional resources to implement a new "strategic direction" growing out of the 2009 MOU, which will include enhanced oversight, stream protections, coordinated permitting, and increased transparency. Again, assuming a new stream protection rule is put in place, who will be responsible for implementing the rule and issuing permits? Who will be responsible for assuring that permitting is indeed better coordinated?

OSM's budget justification document points out in more detail why it believes additional federal resources will be needed based on its recent federal oversight actions during FY 2010, which included increased federal inspections and special oversight studies on approximate original contour and bond adequacy. Was OSM not in fact able to accomplish this enhanced oversight with its current resources? If not, where were resources found wanting? How much of the strain on the agency's resources was actually due to the stream protection rulemaking and EIS process?

What is the justification for OSM's enhanced oversight initiatives and hence its federal program increase? The states have been requesting opportunities to meet with OSM and Interior management to better understand the basis for these actions since last January but still do not have definitive answers. In light of recent annual oversight reports over the past five years which demonstrate high levels of state performance, what is the basis for these new initiatives?

Something has to give here—no doubt. There is only so much money that we can make available for the surface mining program under SMCRA. Both Congress and the courts have made it clear that the states are to exercise exclusive jurisdiction for the regulation of surface coal mining operations pursuant to the primacy regime under the law. It begs the questions of whether OSM has made the case for moving away from supporting the states and instead beefing up the federal program. Unless the agency can come up with a better, more detailed justification for this realignment of resources, how can Congress support its budget proposal?

Specific Questions re Stream Protection Rule

During OSM Director Pizarchik's testimony on March 10 before the House Interior Appropriations Subcommittee, in response to a question from Rep. Moran re-

garding what OSM would do if restrictions on its funding were enacted as part of the Continuing Resolution for FY 2011, Director Pizarchik stated that because OSM would be unable to expend any of its funding on the development of the stream protection rule and EIS, pollution of streams would continue and OSM would not be able to utilize the new science and the newest technologies that are now available to protect streams. Aside from the question of whether this "new science" has in fact been peer reviewed and proven, this response intimates that there is no one on the front lines responsible for protecting streams and assuring the quality of our Nation's water. Does this imply that the states are not doing the job?

If OSM believes the states are not doing a good job, why have the states consistently received positive annual reports indicating that they are effectively administering their programs? And again, assuming new requirements are put in place based on new science, will it not be the states who are responsible for implementing these requirements through the issuance of permits?

Does SMCRA allow mountaintop mining? Does SMCRA allow steep slope mining? Were impacts to streams anticipated as a result of these authorized mining techniques? Have states been complying with the law and OSM's regulations as currently written? If these laws or rules are changed, does OSM have any reason to doubt that the states will not enforce the laws as written? If the answer to all of these questions is "yes", why does OSM envision the need for enhanced oversight and increased federal resources? Will it not in fact be the states that will require enhanced resources to comply with any adjustments to current law, especially if expanded monitoring, permitting and lab analyses are required?

Specific Questions re OSM Oversight Initiative

In response to a question by Rep. Hinchey at the March 10 budget hearing by the House Interior Appropriations Subcommittee, OSM Director Pizarchik stated that if OSM did not increase its oversight presence in the coalfields through increased federal inspections, there could be more violations and citizen complaints in the future. It appears that the basis for his position is the fact that there was an increase in the number of Ten-Day Notices issued by OSM in FY 2010. Was there not a 40% increase in the number of federal inspections over those conducted in FY 2009? Would that not, in and of itself, explain the increase in TDNs?

What percentage of federal inspections during FY 2010 resulted in the issuance of TDNs when a state inspector did not accompany the federal inspector? Don't OSM's regulations at 30 CFR 842.11(a)(1) mandate joint inspections when requested by the state? Does OSM's recent oversight directive (REG–8) acknowledge and incorporate this rule?

OSM has recently finalized a Ten-Day Notice directive (INE–35) that had previously been withdrawn in 2006 based on a decision by then Assistant Secretary of the Interior Rebecca Watson. The basis for terminating the previous directive was several court decisions that clarified the respective roles of state and federal governments pursuant to the primacy regime contained in SMCRA. The Secretary's decision also focused on the inappropriate and unauthorized use of Ten-Day Notices under SMCRA to second-guess state permitting decisions. OSM's new TDN directive flies in the face of both this Secretarial decision and federal court decisions. Does OSM have a new Secretarial decision on this matter? If not, how can its recent action overrule this prior decision? Has the Solicitor's office weighed in on this matter? If so, does OSM have an opinion supporting the agency's new TDN directive? Will OSM provide that to the Committee?

In light of limited funding for the implementation of SMCRA, how does OSM justify the state and federal expenses that will necessarily follow from reviewing and second-guessing state permitting decisions? States have complained that responding to a single OSM TDN, especially with respect to state permitting decisions, can require the investment of 2—3 FTE's for upwards of a week. How do you justify this?

Questions and Concerns re the AML Legislative Proposal in OSM's FY 2012 Budget

The Proposed Competitive Allocation Process

- What is the potential for this new review and ranking process to reduce expenditures and increase efficiency without being counter-productive? Will it introduce an additional level of bureaucracy and result in more time being spent formulating proposals and less on actual AML reclamation? The present funding formula, while not perfect, at least provides some direction on which to base long term strategic planning and efficient use of available funds. The closest analogy to what OSM is proposing by way of its competitive allocation process is the way BLM and the Forest Service currently allocate their AML

funds through competitive proposals to various state offices and regions. Because of the uncertainties of funding, neither agency has been able to develop significant in-house expertise, but instead often rely on SMCRA-funded states like MT, NM, UT and CO to do a good portion of their AML work. Why would OSM want to duplicate a system that has proven problematic for other agencies?

- Who would be the "other parties" potentially bidding on AML grant funds? Would this include federal agencies such as BLM, FS, NPS, etc? If so, in many cases, those agencies already rely on the states to conduct their reclamation work and also determine priorities based on state input or guidance.
- What do the state project managers and inspectors do if a state does not win a competitive bid for AML funds? How does a state gear up if it receives funding for more projects than it can handle with present staffing? Each state and tribe has different grant cycles. Unless all are brought into one uniform cycle, how will everyone compete for the same dollars? In this regard, how can the competitive allocation process and the use of the Advisory Council be more efficient and simple than what we already have in place?
- How long will OSM fund a state's/tribe's administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects on AMLIS? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How do the states and tribes handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?
- What ranking criteria will be used to determine the priority of submitted AML project grant requests? The number of people potentially affected? The current priority ranking on AMLIS? How would the Council determine whether a burning gob pile near a city presents a greater hazard than a surface mine near a highway or an underground mine beneath a residential area? Would the winning bid be the "most convincing" proposal? The one with the most signatures on a petition? The one with the most influential legislative delegation? Will AMLIS continue to serve as the primary mechanism for identifying sites and their priority status?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term "remaining funds" in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be re-directed to the Fund based on an equivalent amount of funding being paid to certified states and tribes each year? Would the "remaining funds" include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period? What about the amounts due and owing to certified states and tribes that were phased in during FY 2009—2011?
- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites for reclamation within the context of the current AML program structure under to the 2006 Amendments? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM's proposal?

The Nature and Purpose of the Advisory Council

- Who would be on the AML Advisory Council and how could they collectively have better decision-making knowledge about hazardous AML sites than the state and tribal project managers and administrators who work with these sites on a daily basis?
- What will be the criteria to serve on the Advisory Council? Will the Federal Advisory Committee Act (FACA) requirements apply to the formation and deliberations of the Council? How long does OSM envision it will take to establish the Council and when will it become operational?

- Will the Advisory Council be providing recommendations to OSM or will OSM make all final decisions? Will these decisions by appealable? If so, to who? Does OSM envision needing to develop internal guidance for its own review process? If so, how long will it potentially take from Advisory Council review and recommendation to final OSM decision in order to complete the grant process so a state can begin a project?
- What degree of detail will be required in order to review and approve competitive grant applications? Will the Council review each project? What type of time constraints will be placed on their review?
- Will the Advisory Council consider partial grants for projects that may exceed the allocation for a single year? Would minimum program states be authorized to apply for a grant that would exceed $3 million?
- Will grant applications be based on an individual project or will the grant be based on a project year? How will cost overruns be handled?

Planning for AML Work

- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding through the end of the AML program. Because state and tribes were provided with hypothetical funding levels from OSM (which to date have proven to be quite accurate), long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made more accurately and efficiently. How can states/tribes plan for future projects given the uncertainty associated with having to annually bid for AML funds? NEPA compliance issues alone can take years of planning. One state recently asked its State Historic Preservation Office for initial consultation regarding project sites that may be reclaimed over the next five years. This process will also have significant impacts on those states that utilize multi-year construction contracts that are paid for with annual AML grants.
- State and tribal AML projects are often planned 18 months to two years in advance of actually receiving construction funds, based on anticipated funding under the 2006 Amendments. During that time, states and tribes are performing environmental assessments, conducting archeology reviews, completing real estate work and doing NEPA analyses. There could be considerable effort and money wasted if a project does not get approved during the competitive allocation process.
- At what point does a State or Tribe seek approval from the advisory council? Considerable investigation must take place prior to developing most projects, whether they be acid mine drainage projects or health and safety projects. How much time should be spent in design prior to proceeding to the Council? How accurate must a cost estimate be prior to taking a project before the Council? The greater the accuracy, the greater the design time expended, possibly for a project that will be rejected.
- State and tribes often seek and obtain considerable matching funds from watershed groups, which take considerable lead time to acquire. It will be difficult to commit to partners if we don't know what level of funding, if any, will be made available.
- Several states have committed significant amounts of money to waterline projects across the coalfields. Local governmental entities have started designs and applied for additional funds from other agencies to match AML funds in order to make these projects a reality. Ending all AML funding for these projects (assuming they are not considered "high priority") could have significant consequences for local communities. Our understanding is that these projects were excluded under the 2006 Amendments from the priority scheme contained in section 403(a) of SMCRA.
- Does OSM's proposal allow acid mine drainage (AMD) projects to be undertaken? Can these be designated as high priority? (Our understanding is that those AMD projects undertaken pursuant to the "AMD set-aside program" are not subject to the priority scheme under Section 403(a) and that those AMD projects done "in conjunction with" a priority 1 or 2 project are considered "high priority".) How do states handle ongoing engineering, operating and maintenance costs for existing AMD treatment systems? As the Administration works diligently to develop a new rule to protect stream nationwide, why would it advance a proposal to essentially halt the cleanup of streams funded by the AML program?

Overarching Concerns

- Given the original design of SMCRA by its framers with regard to the allocation of AML funds to those states who first agree to implement Title V regulatory programs for active mining operations, to what extent can we expect that states will continue to implement and fund their Title V programs if Title IV funding is drastically cut or eliminated under the proposal? Furthermore, since states and tribes will not know what level of staffing to maintain from year to year under the proposal, who would desire to work for a program that is in a constant state of flux?
- The SMCRA 2006 Amendments were the result of roughly ten years of negotiations, discussions, and debates in Congress. Since the legislative process to enact these changes could take years, why didn't OSM begin with the legislation and then follow with the budget proposal? Why weren't the states/tribes or the NAAMLP included in discussions that led to this budget proposal?
- As OSM develops the legislative proposal for a competitive bidding process, the agency should consider the impacts on minimum programs and consider maintaining the minimum allocation of $3 million for minimum program states.
- What type of state AML plan amendments does OSM foresee as a result of this new process?

Proposed Elimination of Funding for AML Emergencies

- While amendments to Title IV of SMCRA in 2006 (P.L. 109–432) adjusted several provisions of the Act, no changes were made to OSM's emergency powers in Section 410. Quite to the contrary, Section 402(g)(1)(D)(2) states that the Secretary shall ensure "strict compliance" with regard to the states' and tribes' use of non-emergency grant funds for the priorities listed in Section 403(a), none of which include emergencies. The funding for the emergency program comes from the Secretary's discretionary share, pursuant to Section 402(g)(3) of the Act. This share currently stands at $416 million. OSM's proposed elimination of funding for the emergency program will result in the shift of approximately $20 million annually that will have to be absorbed by the states. This is money that cannot be spent on high priority AML work (as required by SMCRA) and will require the realignment of state AML program operations in terms of personnel, project design and development, and construction capabilities. In most cases, depending on the nature and extent of an emergency project, it could preclude a state's ability to undertake any other AML work during the grant year (and even following years), especially for minimum program states. How does OSM envision states and tribes being able to meet their statutory responsibility to address high priority AML sites in light of the proposed elimination of federal funding for AML emergencies? How does OSM reconcile this proposal with the intentions of Congress expressed in the 2006 amendments to move more money out of the AML Fund sooner to address the backlog of AML problems that continue to linger? If Congress were to approve the elimination of funding for AML emergencies (which in our view would require an amendment of SMCRA to accomplish, not just a stroke of the budget pen), what type of transition protocol does OSM envision putting in place to accomplish this significant shift in responsibilities from the federal government to the states?

Proposed Elimination of Funding to Certified States and Tribes

- From what we can ascertain, OSM proposes to eliminate all payments to certified states and tribes—in lieu of funds; prior balance replacement funds; and monies that are due and owing in FY 2018 and 2019 from the phase-in during the past two fiscal years. Is this accurate? OSM says nothing of what the impact will be on non-certified states as a result of eliminating these payments to certified states and tribes—especially the equivalent payments that would otherwise be made to the historic production share that directly relate to "in lieu of" payments to certified states and tribes under section 411(h)(4). Previously, OSM has stated that "the amounts that would have been allocated to certified states and tribes under section 402(g)(1) of SMCRA will be transferred to the historical production allocation on an annual bases **to the extent that those states and tribes receive in lieu payments from the Treasury (through the Secretary of the Interior) under section 402(i) and 411(h)(2) of SMCRA."** By OSM's own admission in its FY 2012 proposed budget, this will amount to $1.2 billion over ten years. If the in lieu payments are not made (as proposed), how can the transfer to historic production occur? The result, of course, would be a drastic impact on the historic

production allocation otherwise available to uncertified states. Will OSM address this matter in its proposed legislation? If so, how?

- OSM recognizes (as does the Interior Department) that a "legislative proposal" will be required in support of its "assumption" in the FY 2012 budget concerning the proposed end to mandatory payments to certified states and tribes. More specifically, OSM states the following on page 138 of its Budget Justification Document: "The budget proposes to terminate the unrestricted payments to certified States and Tribes. Certified States and Tribes have already completed their coal reclamation projects [this is NOT true in all cases] and now use their AML payments for general revenue [also NOT true—a majority of these moneys are targeted as either hardrock AML reclamation projects or at impacts associated with coal development.] These payments rarely contribute to the reclamation of abandoned coal mine lands [Congress clarified in 2006 that they didn't have to be]. Terminating these payments will save the taxpayer $1.2 billion over the next decade." The attempt by OSM to develop a legislative proposal in both FY 2010 and FY 2011 never materialized to the point that a formal proposal was ever shared with Congress, much less the tribes or the states. OSM has a fiduciary duty to consult with the Indian tribes regarding any proposed legislation that potentially impacts them given the Interior Department's trust responsibilities for Native American communities. As a partner with the states in the reclamation of abandoned mine lands, OSM should also share any proposal with the states. Since we are uncertain exactly what OSM and Interior have in mind with respect to the legislative proposal, especially given the language cited above, it is essential that the states and tribes be brought into the legislative development process as soon as possible. At least one draft proposal that we saw went much further than simply eliminating payments to certified states and tribes, and addressed such issues as: providing some baseline funding for certified states and tribes; immediately transferring unappropriated state and tribal share balances for certified states and tribes into the historic coal production account; ensuring that all future payments to certified states and tribes are transferred to historic coal; clarifying the "adjacent to" provision in Section 403(a); modifying the "in conjunction with" provision in Section 402(g)(7); clarifying how uncertified states may use the various types of AML funds; and modifying the certification standards in section 411(a). Some of these were encouraging; others were very troubling. How and when will OSM bring the states and tribes into the legislative development process?
- Has OSM considered the fiscal and programmatic impacts that could result if the certified states and tribes, who no longer receive AML monies, choose to return their Title V regulatory programs to OSM (especially given the severe reductions being proposed for FY 2012 in Title V grants)?
- Finally, how do the cuts in the Title IV program line up with the Administration's other economic, fiscal and environmental objectives as articulated in the economic stimulus plans and the jobs bills that have considered by Congress? These objectives include environmental stewardship, cleaning up abandoned mines (coal and noncoal) nationwide, creating green jobs, pumping dollars into local communities, putting money to work on the ground in an expeditious manner, sustainable development, infrastructure improvements, alternative energy projects, protecting public health and safety, and improving the environment. It seems to us that there is a serious disconnect here and we remain mystified as to how these laudable objectives and OSM's budget proposal can be reconciled.

Mr. LAMBORN. Thank you for your testimony, and now if we could hear from our next witness, Mr. Lovett I believe? Thank you.

STATEMENT OF JOE LOVETT, DIRECTOR, APPALACHIAN CENTER FOR THE ECONOMY AND THE ENVIRONMENT

Mr. LOVETT. Thank you, and thank you for the opportunity to testify here today. My name is Joe Lovett, and I am Executive Director of the Appalachian Center for the Economy and the Environment, a non-profit law and policy center located in West Virginia. It is important for Congress to provide adequate for Federal agencies like the Office of Surface Mining to enforce the laws designed

to protect the people and the environment they depend on. Yet, without adequate oversight from Congress, the Agencies will not do their jobs. This is particularly true I think of OSM.

Since at least 2001, OSM has refused to enforce the Surface Mining Act. The failure of OSM to carry out its duties has had devastating impacts on Appalachia. Appalachian coal is cheap because OSM ignores its duty to enforce SMCRA and it allows the coal industry to pass its costs onto its workers, communities, local and state economies and the environment. The mining industry naturally takes advantage of the Federal regulator's failure to enforce the law, and one of the worse consequences of OSM's disregard for the law is the prevalence of mountaintop removal mines in Central Appalachian.

Mountaintop removal mines are large strip mines with attendant valley fills, and they have already destroyed many hundreds of miles of streams in my region. Valley fills are just large waste disposal areas created when mining companies blow up mountains, so in my region, mining companies are engaged every day in blowing up the mountains in my region and filling the streams with the waste that comes from the blowing the mountains up.

The coal-rich mountains of Central Appalachia are home to generations-old communities and contain beautiful hollows through which thousands of pristine and ecologically rich mountain streams flow. The forests in our region are the most diverse and productive, temperate hardwood forests in the world. Yet, they are being laid to waste by the mining industry. Though OSM is supposed to protect our environment and our communities, it is not doing so. Valley fills are strongly associated with violations of water quality standards and loss of stream uses.

EPA recently stated that increasing levels of conductivity that result from the valley fills have significant adverse effects on biological communities in the streams. A recent EPA study found that nine out of every 10 streams downstream from surface mining operations are impaired and that they therefor violate the Clean Water Act and also SMCRA. OSM's waste of money appropriated by Congress, as well as illustrated in its ongoing efforts to promulgate a new buffer zone rule, OSM promulgated the Stream Buffer Zone Rule originally under President Reagan to carry out the Congressional mandate to protect the hydrologic balance of waterways in coal mining regions.

The need for strong oversight by Congress is made even clearer because of the way OSM has handled the Stream Buffer Zone Rule over the years, and unfortunately, these problems have continued during the Obama Administration. Until 2008, the Buffer Zone Rule Protected intermittent and perennial streams from incursions by mining. However, the last Administration, the Bush Administration, rescinded the Reagan rule and replaced it with a rule that provided really no protection for our streams. OSM is engaged in an activity of replacing that rule yet again.

However, I think the Subcommittee has heard and there has been other testimony that EPA is bungling its rulemaking. In fact, the rulemaking has become a fiasco, and I agree very little with Mr. Kitts, but I think we are in agreement that OSM's current rulemaking will lead to no good for anyone and in fact is a waste

of money. The present Administration is in the process of promulgating this rule and is conducting an environmental impact study, but I am not optimistic that it will actually accomplish anything.

OSM appears once again to be failing in its duty to enforce the law or protect our streams. Indeed, only the U.S. EPA, one of the three Federal agencies responsible for regulating mining, has taken any meaningful action to protect our streams as OSM is supposed to do. I hope this Committee will use the budget process to take action, to compel OSM to enforce SMCRA rather than allow it to continue squander money and time on a bungled rulemaking. Thank you for your time.

[The prepared statement of Mr. Lovett follows:]

Statement of Joe Lovett, Executive Director, Appalachian Center for the Economy and Environment

Introduction

Good morning. Thank you for the opportunity to testify today. My name is Joe Lovett and I am the Executive Director of the Appalachian Center for the Economy and the Environment, a non-profit law and policy center located in Lewisburg, West Virginia. I am also a lawyer who has been attempting for over a decade to enforce surface coal mining and other environmental laws that federal and state regulators refuse to enforce in Appalachia.

From its inception in 2001, the Appalachian Center has been at the forefront of the battle to end the abuses associated with the devastating method of coal mining known as mountaintop removal. The Center serves low-income citizens, generations-old communities, and local and grassroots groups of central Appalachia.

It is important for the Congress to provide adequate funding for federal agencies like the Office of Surface Mining Reclamation and Enforcement ("OSM") to enforce the laws designed to protect people and the environment they depend upon from unacceptable harm caused by surface coal mining. Yet without adequate oversight from Congress—and due to a lack of political will within agencies like OSM to do their job—no amount of money will achieve the goals of Congress. Accordingly, real oversight by Congress is needed to ensure OSM uses the money appropriated to the agency to enforce the law and do its job to protect streams and mining communities.

Further, money provided by OSM to the state agencies in states in which the Center works (West Virginia, Kentucky and Virginia) is too often spent not on protecting the environment and the communities in coal mining communities, but rather on protecting coal operators from enforcement. For example, the cabinet secretary of West Virginia's Department of Environmental Protection, Randy Huffman, recently sued the United States Environmental Protection Agency for trying to raise the level of protection given to streams in the region. This action was taken to protect the coal industry from EPA and citizen enforcement of environmental laws, including SMCRA. I would, therefore, suggest that State agencies that are unwilling to enforce environmental laws should not continue to be provided with operating funds from OSM.

In the abstract, the Surface Mining Control and Reclamation Act ("SMCRA") is an imperfect but useful law. Since at least 2001, however, the Office of Surface Mining Reclamation and Enforcement has refused to enforce the Act. The failure of OSM to carry out its duties has had devastating impacts on Appalachia. Appalachian coal is "cheap" because OSM ignores its duty to enforce SMCRA and allows the coal industry to pass its costs onto workers, communities, local and state economies, and the environment. The mining industry naturally takes advantage of federal regulators' failure to enforce the law. One of the worst consequences of OSM's disregard for the law is the prevalence of mountaintop removal mines, large strip mines with attendant valley fills that have already destroyed 2000 miles of streams in my region.

The coal-rich mountains of central Appalachia are home to generations-old communities and contain beautiful hollows through which thousands of pristine and ecologically rich mountain streams flow. Mountaintop removal mining carelessly lays waste to our mountain environment and communities. The deforestation is not only an ecological loss, but a permanent blow to a sustainable forest economy in a region in desperate need of long-term economic development. Mountaintop removal has already transformed huge expanses of one of the oldest mountain ranges in the world into a moonscape of barren plateaus and rubble.

Mountaintop Removal Coal Mining

To show the need for strong oversight of OSM, I'd like to give the Subcommittee some background on how devastating the particular mining practice of mountaintop removal mining is in Appalachia and how little the OSM has done to try to protect our waters or local communities from these impacts, as they are required to do by law.

Disregarding human and environmental costs, mountaintop removal coal mining as currently practiced in Appalachia eradicates forests, razes mountains, fills streams and valleys, poisons air and water, and destroys local residents' lives. Toxic mine pollution contaminates streams and groundwater; hunting and fishing grounds are destroyed. Because the large-scale deforestation integral to mountaintop removal takes away natural flood protections, formerly manageable storms frequently inundate and demolish downstream homes. The toll on coalfield communities is tremendous, and for this reason, I joined with other citizen groups in my region to petition EPA to take account of the environmental injustice of this practice; other agencies, including the OSM, also have the obligation to consider the human toll taken by mountaintop removal on these communities. (See attachment 1.)

From 1985 to 2005 over 7000 valley fills were authorized in central Appalachia for mountaintop removal and other strip mining operations. This has led to the destruction of over 1700 miles of Appalachian streams. Past, present, and future mining in Appalachia may cumulatively impact 1.4 million acres. The destruction of these nearly 1.5 million acres of forest is profound and permanent Mountaintop mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions.

Valley fills are strongly associated with violations of water quality standards and loss of stream uses. EPA in its 404(c) veto of the Spruce No. 1 permit in West Virginia stated that increasing levels of conductivity have "significant adverse effects" on biological communities in streams. EPA's April 1, 2010 guidance on water pollution downstream from mountaintop removal sites further outlines significant water quality impacts from surface mining operation. "A recent EPA study found that nine out of every 10 streams downstream from surface mining operations were impaired based on a genus-level assessment of aquatic life. Another federal study found elevated levels of highly toxic and bioaccumulative selenium in streams downstream from valley fills. These impairments are linked to contamination of surface water supplies and resulting health concerns, as well as widespread impacts to stream life in downstream rivers and streams. Further, the estimated scale of deforestation from existing Appalachian surface mining operations is equivalent in size to the state of Delaware. Appalachian deforestation has been linked to significant changes in aquatic communities as well as to modified storm runoff regimes, accelerated sediment and nutrient transport, reduced organic matter inputs, shifts in the stream's energy base, and altered thermal regimes. Such impacts have placed further stresses on water quality and the ecological viability of watersheds. A 2008 seminal EPA study found that mountaintop removal mining is strongly related to downstream biological impairment.

The Surface Mining Control and Reclamation Act makes clear that the Clean Water Act and other applicable laws take supremacy over any provision in SMCRA:

> "Nothing in this Act shall be construed as superseding, amending, modifying, or repealing...the National Environmental Policy Act of 1969 (42 U.S.C. 4321–47), or any of the following Acts or with any rule or regulation promulgated thereunder, including...(3) [the Clean Water Act], the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality." 30 U.S.C. § 1292. For the same reason, that same Mining Act gives EPA the ability to refuse to concur in any proposed regulation from OSM.

Despite all of these impacts, OSM is not enforcing SMCRA in the region. SMCRA requires OSM and state agencies to prevent material damage to the hydrologic balance. Both science and common sense show that the hydrologic balance of our region is being decimated mountaintop removal. Congress continues to direct funds to OSM to enforce the SMCRA, but the agency does not carry out its duties to protect central Appalachia. In fact, the environmental harm occurring in our region today dwarfs the harm that was occurring when the Act was passed in 1977.

Environmental Impact Statement on Mountaintop Removal

Because of litigation that I brought in 1998, a programmatic Environmental Impact Statement on mountaintop removal was performed by EPA, the Army Corps of Engineers and OSM.

The EIS concluded that mining could impact 244 terrestrial species, including, for example, 1.2 billion individual salamanders, and that the loss of the genetic diversity of these affected species "would have a disproportionately large impact on the total aquatic genetic diversity of the nation." The EIS also observed that valley fills are strongly associated with violations of water quality standards for selenium, a toxic metal that bioaccumulates in aquatic life. All 66 selenium violations identified in the EIS were downstream from valley fills, and no other tested sites had selenium violations.

OSM's response to these devastating conclusions was to further weaken its enforcement of the Act in Appalachia.

In 2001 and 2002, the federal agencies responsible for regulating mountaintop removal weakened the EIS and did not proceed with necessary scientific studies when they realized that the science was showing that mountaintop removal could not be practiced without devastating the environment and economy of our region. The agencies simply halted the economic study that was crucial to the EIS when it became apparent that the results were not what OSM wanted them to be.

In sum, the EIS was supposed to demonstrate the environmental and economic impacts of large scale strip mining on Appalachia and propose ways to protect the environment and mitigate the impacts of mining on the region. In spite of the fact that the environmental studies that were performed all showed significant harm to the environment, OSM guided the other agencies involved to make permits easier for mining operators to receive. OSM ignored the science and turned the EIS on its head.

Because of OSM's role in this process, we still desperately need an adequate and impartial EIS to be performed to demonstrate the far reaching impacts this form of mining is having on the Appalachian region.

Stream Buffer Zone

One of the most important provisions of SMCRA requires that no mines be permitted unless they prevent material damage to the hydrologic balance off site and minimize disturbance on site. OSM promulgated the stream buffer zone rule under President Reagan in 1983 to carry out the Congressional mandate to protect the hydrologic balance of waterways in the coal mining regions.

The need for strong oversight by Congress is made even clearer because of the way OSM has handled the Stream Buffer Zone rule over the years—and unfortunately, these problems have continued during the Obama Administration.

Until 2008, the buffer zone rule, 30 C.F.R. 816.57, stated that no land within 100 feet of a perennial stream or an intermittent stream may be disturbed by surface mining unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream. On its face, this rule prohibited valley fills in intermittent and perennial streams and, in 1999, a federal judge in West Virginia agreed that this is what the rule means. That decision was reversed on appeal for purely procedural reasons—the Court of Appeals did not reach the merits.

To protect the coal industry, OSM utterly failed to enforce this law and instead as a last minute give away to the coal industry, the previous administration changed the Stream Buffer Zone rule to remove the "buffer" and expressly allow coal companies to dump their wastes right into streams. It is absurd to allow, as OSM has, more than 2000 miles of mountain streams to be permanently buried beneath mining waste and still claim to be protecting the hydrologic balance. Rather than weakening the rule to accommodate the mining industry, a responsible agency would force the industry to conform to the law. Yet the exact opposite has occurred.

The present administration has pledged to conduct and Environmental Impact Statement on this regulation and to propose a revised rule, but I am not optimistic that it will actually accomplish anything, despite the fact that OSM is spending several million dollars on the study.

In 2009, it appeared that the Secretary of Interior and OSM might correct the rules and start protecting streams again. In the spring of 2009, the Secretary of the Interior asked a court to vacate the 2008 midnight rule, recognizing that it was unlawful and needed to be removed.

In June 11, 2009, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the U.S. Department of Interior issued a joint Memorandum of Understanding to address the environmental impacts of surface mining in the Appalachian states. In this Agreement, OSM and the other agencies recognized that:

> "The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities....[Surface mining] often stresses the natural environment and impacts the health and welfare of surrounding human communities. Streams once used for swimming, fishing, and drinking water have been adversely impacted, and groundwater resources used for drinking water have been contaminated. Some forest lands that sustain water quality and habitat and contribute to the Appalachian way of life have been fragmented or lost." June 2009 MOU at 1.

The agencies jointly announced an interagency plan that said it was "designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law." *Id.* As part of this plan, Interior specifically promised that OSM would "issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts." *Id.* at 3. This statement was widely interpreted as a decision finally to start enforcing the 1983 rule, and finally start protecting Appalachian streams.

Unfortunately, OSM appears to be failing again in its duty to enforce the law or protect streams. Indeed, only the U.S. EPA, of the three federal agencies responsible for regulating mining in the region, has taken meaningful action to protect our streams or help local communities avoid the environmental impacts of mountaintop removal mining.

OSM's proposed rulemaking to replace the buffer zone rule is shaping up to be an expensive fiasco. Here is what has happened so far with OSM [1]:

In November 2009, OSM issued an Advance Notice of Proposed Rulemaking in November 2009 that included problematic statements about the 2008 rule and the 1983 stream buffer zone rule. Then, in April 2010, OSM published a Notice of Intent to complete an environmental impact statement for its new rule. At the same time, OSM also publicly announced that it had agreed to propose a new rule "in early 2011" and would finalize it "in mid-2012." It also stated that "[a]s we move forward, we are talking with citizen groups, conservationists, coal industry representatives, state regulators, and others to seek their input in order to write a better rule that will be more protective of streams affected by mining."

In February, the draft environmental impact statement ("DEIS") and OSM's proposed rule were both leaked to the public, although reports indicated the drafts may have been leaked to industry earlier. OSM then stated publicly that there were significant problems with the draft environmental impact statement in progress for the new rule, and that information contained in the proposed draft was not credible. Then, on March 31, 2011, OSM announced that was terminating the contract with the company preparing the DEIS.

OSM's rulemaking appears to be in complete disarray, and OSM has yet to fully disclose the reasons it has encountered these obstacles, how the draft of the DEIS got leaked to industry and the press, how the draft already identified a preferred alternative under NEPA when all of the work done to date has been discredited, or why they waited so long to even acknowledge that it has encountered obstacles. We currently do not know when the OSM will complete its work on the DEIS or draft rule, but it is already many months behind its promised deadlines for revising the rule.

Meanwhile, mountaintop removal continues to devastate Appalachia and mining permits continue to be issued by the states; OSM does nothing to prevent their issuance. Both the leaked draft environmental impact statement and draft proposed rule suggest that OSM's process is not following important legal requirements and will not fully protect streams.

The draft EIS is a useless document. It has a section on environmental impacts that does not recognize the basic science showing the harm that occurs when mining waste permanently buries American waterways. Both the environmental and economic analysis are incomplete, inaccurate, and ignore the state of the art science that other agencies, including EPA, are already using. A comparison between the Spruce No. 1 Mine Veto, which includes an environmental analysis of just one mine, reveals the inadequacies of OSM's work. (See attachment 2.)

The draft EIS does not even reach the level of the 2003 draft programmatic EIS or final 2005 EIS that the prior Administration issued. Apparently, OSM now recognizes how problematic the draft EIS is and has ended the contract with its contractor and distanced itself from the draft EIS. According to the Wall Street Journal on March 31, 2011,: Interior Deputy Secretary David Hayes told a House Appropria-

[1] http://www.osmre.gov/topic/StreamProtection/StreamProtectionOverview.shtm

tions Subcommittee "that Interior was unhappy" with the work of the contractor chosen to create the draft EIS.

The Appalachian region is historically one of the poorest in the nation, particularly because the mining industry has cut jobs in order to increase its profit at the expense of the environment and the law. The law requires protection of waters, and policymakers need valid economic data to assist communities transition from man economy based on mountaintop removal to less harmful forms of mining and a sustainable economy. As a presidential candidate, Mr. Obama expressed "serious concerns about the environmental implications" of mountaintop mining," saying: "We have to find more environmentally sound ways of mining coal than simply blowing the tops off mountains." It is time for OSM to help make the President's commitment a reality.

Cumulative Hydrologic Impacts

OSM is also charged with protecting the cumulative hydrological integrity of the mining region. Again, OSM utterly fails to discharge its duty to assure that states are performing adequate cumulative hydrological impact analyses as the Act requires. For example, more than11.5 percent of the land area in the region encompassing eastern Kentucky, southern West Virginia, western Virginia, and areas of eastern Tennessee is being impacted by mountaintop removal. As a result of this destruction of headwater streams, mountaintop removal mines cumulatively devastate aquatic ecosystem. Recent studies, peer-reviewed, support this conclusion. (See attachment 3.) OSM has not attempted to analyze and minimize the environmental harm of past, present, and reasonably foreseeable future surface mining operations in the Appalachian. These impacts include total elimination of all aquatic life in buried streams, negative impacts on the proper functioning of aquatic ecosystems, including fisheries located downstream of mountaintop removal mining operations, and impairment of the nutrient cycling function of headwater streams.

For example, in the Coal River watershed in West Virginia, existing and pending surface mining permits cover 12.8 % of watershed. In the Laurel Creek watershed Coal River, existing and pending surface mining permits cover 28.6 % of the watershed. Surface mining permit including valley fills cover 14.5% of first order streams and 12 % of all streams in Coal River and surface mining permits including valley fills cover 37.3% of first order streams in Laurel Creek and 27.9% of all streams.

The United States Fish and Wildlife Service recognize that mountaintop removal mining results in forest loss and fragmentation that is significant not only within the project area, but also regionally and nationally. In particular, the mines cause a fundamental change in the environment from forestland to grassland habitat, cause significant adverse impacts to the affected species, cause loss and/or reduced quality of biodiversity, and cause loss of bird, invertebrate, amphibian, and mammalian habitat.

When Congress passed the Surface Mining Act in 1977, it thought that it was enacting a law to protect the environment and citizens of the region. OSM has used and has allowed the states to use the Act as a perverse tool to justify the very harm that the Congress sought to prevent. The members of Congress who voted to pass the Act in 1977 could not have imagined the cumulative destruction that would be visited on our region by the complete failure of the regulators to enforce the Act.

Approximate Original Contour

Also at the heart of the Surface Mining Control and Reclamation Act is the requirement that mining companies must restore surface mines to approximate original contour, or AOC. If mines are restored to AOC, the disturbed area is smaller, valley fills and stream impacts are reduced. The Act provides that approximate original contour is the surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain.

Remarkably, there are few, if any, large surface mines in Appalachia that comply with this basic requirement. Instead, mining operators, with the acquiescence of OSM, thumb their noses at the law and create monstrous valley fills and sawed off mountains that more closely resemble the surface of the moon than our lush, green hills. There is nothing even close to "approximate" about it.

Mountaintop removal mines are not required to restore the post mining site to AOC. The Act sanctioned mountaintop removal mining, but only in very limited circumstances. The Act requires that all mines be restored to AOC unless the mining company shows that it will restore the site to an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use.

Almost no post-mining land in Appalachia is put to any of these uses. The post mining land is in isolated mountain areas, the land is unstable for building and it will no longer support native vegetation. There is no surface or groundwater available on the post mining sites because the mountain has been blown to bits. In short, mountains and valleys have been changed dramatically in contour so that they resemble no surface configuration on Earth and the land is useless for future development. Whether the mines are technically "mountaintop removal mines" or not (and OSM has so bent the definition of "mountaintop removal" that not all mines that have the affect of mountaintop removal mines are classified as such), almost all Appalachian surface mines fit this description. OSM has not lifted a finger to stop this complete abuse of the most important provision of the Act.

Higher and Better Use and Topsoil

The Act requires that all post mining sites be restored to conditions that are capable of supporting the uses they were capable of supporting before any mining or higher or better uses. The Act also requires operators to save and replace the topsoil found on the mining site.

Again, OSM's record here is dismal. Our mountains have been reduced to scrubland that will not support native hardwood tree species. Far from requiring a higher or better use of that land, OSM has acquiesced to allowing operators to turn the most productive temperate hardwood forests in the world into useless and unproductive grasslands. One of the reasons for the sham reclamation practices that are common practice on Appalachian surface mines is OSM's failure to assure that operators save and reuse the topsoil. Very few, if any operators, save the topsoil as the law requires. Instead, they are permitted to use "topsoil substitutes" and dump the irreplaceable topsoil into bottoms of valley fills, losing this valuable resource and destroying streams in the process.

Economics

Mountaintop removal is also devastating the economy of the coal bearing regions of Appalachia. In 1948, there were 125,669 coal mining jobs in West Virginia and 168,589,033 tons of coal mined. In 1978, there were still 62,982 coal mining jobs in West Virginia with only 84,696,048 tons mined. By 2010, however, only 20,452 of these jobs remained despite the fact that coal production had again risen to 144,017,758 tons mined.

So, although coal production today is roughly the same as it was sixty years ago, coal mining jobs have decreased by approximately 80%. This job loss has been driven not by environmental production or decreased production, but by coal operators themselves who have replaced workers with machines and explosives. McDowell County, which has produced more coal than any other county in West Virginia, is now one of the poorest counties in the Nation. Far from being an economic asset to communities, mountaintop removal devastates economies wherever it occurs.

Conclusion

I hope that that this Committee it will use the budget process to take action compel OSM to discharge its duties. I hope that it will require OSM to follow the clear science and the law. The absence of energetic oversight invariably leads to problems, particularly with agencies, like OSM, that have close ties with the industries they regulate. We saw this very same dynamic play out, with devastating consequences, last year within another Department of the Interior agency, the Minerals Management Service. The OSM situation is really no different.

Finally, I would like to take this opportunity to invite members of this Subcommittee and the full Committee and its staff to travel to West Virginia to witness the devastation caused by mountaintop removal to help you appreciate the incalculable harm that OSM's failure to enforce the Act has done to our region. We would be pleased to provide flyovers of mountaintop removal area and to arrange meetings with community members whose lives and property are severely impacted by the illegal mountaintop removal mines that OSM refuses to regulate.

Mr. LAMBORN. Well, thank you for your testimony and thank all four of you for being here. We are going to start our first round of questions, and there may be another Member or two join us if we could make sure they know we are doing questions now. First, Mr. Kitts, I would like to ask you something. You may have covered some of this when I was out of the room, but I would like a little more detail if possible in case you have already addressed it? Can

you elaborate on what impact the Stream Buffer Zone Rule as anticipated by OSM and the more stringent regulations contained therein would have on industry, on the Appalachian communities and on the U.S. economy?

Mr. KITTS. The documents that I have seen that are drafts or work documents generated by OSM and its contractors indicate that the rules affecting any activities near streams, such as the development of valley fields for surface mining of all types, not just mountaintop mining, would be severely restricted. I understand that an OSM official stood on a large surface mine in the Powder River Basin and pointed out that if these regulations were passed, that mining of about half of that reserve area would not be allowed because they could not guarantee that they could reconstruct the stream as it existed there even though it was essentially a dry wash.

That is one component of the proposed Stream Protection Rule that would impact mining across the entire country. It would have especially devastating effects in Appalachia where any type of mining operation must create space on which to operate whether it is a surface mine or a deep mine or a processing plant or whatever. The streams that we are talking about for the most part are simply ephemeral or in some cases intermittent streams that are almost ditches running up these steep hillsides. They are not flowing streams where we are displacing people who like to fish or boat or anything like that. These are very, very small streams, so it would make mining in general in Appalachia extremely difficult.

Another provision of the proposed rule that is mentioned in the draft EIS is that any effects on streams from underground mining, the change of elevation of a streambed according to the draft EIS would be considered something that was irreversible and thus would not be allowed. That would eliminate long-wall mining, which is the most productive means of mining in Northern Appalachia, in Ohio and actually are the most productive mines in the world, so this rule is far-reaching in its scope. We really, really think that the estimate of job losses and production impacts is vastly understated in this document that we have reviewed.

Mr. LAMBORN. Did the SMCRA Act ever contemplate the possibility that there would be some valley fill, or is that a new development that was not anticipated and needs to be addressed for the first time?

Mr. KITTS. Actually, in the statute itself, it says when placing a valley fill that the designer must address the flow from springs, seeps and natural water courses. Underdrains must be placed in those fields so that water is discharged to provide for the long-term stability of the valley fill. The Fourth Circuit Court in a decision on February 13, 2009, clearly stated that SMCRA contemplated the placement of valley fills in streams.

I was around in 1977 when the Act was passed, and the requirement to backfill high walls when surface mining and restore the ground to its original contour and to place the excess spoil material in engineered valley fills was a fundamental concept that all the other environmental protections were based on, so it is ludicrous to think that SMCRA could do all that it has done but not contemplate the creation of valley fills.

Mr. LAMBORN. OK. Thank you for your answers, and before I turn it over to the next questioner, are you all able to stay for another round or two, if necessary, of questions? There aren't a lot of us here, so I don't think each round will take a lot of time, but we would appreciate that opportunity. OK. Thank you. Now I would like recognize Representative Johnson from Ohio.

Mr. JOHNSON. Well, thank you, Mr. Chairman, and thank you folks again for being with us today. Mr. Lambert, I understand that your agency was one of several state agencies that are cooperating agencies in the development of the draft environmental impact statement for the OSM proposed stream protection rule. Did OSM ever sit down with the states charged with implementing SMCRA and ask their opinion whether such a comprehensive rewrite of the 2008 Stream Buffer Zone Rule was necessary?

Mr. LAMBERT. No, sir, they did not.

Mr. JOHNSON. In your opinion, has OSM provided those states with a compelling reason to justify this rewrite of the rule?

Mr. LAMBERT. No, sir, they have not. Actually, in their oversight report, they indicate that states are doing a commendable job in applying their programs.

Mr. JOHNSON. OK. Mr. Lambert, also in your testimony you expressed concerns about recent changes to OSM oversight policies that are at odds with SMCRA state primary structure. Does SMCRA give OSM authority to veto state permits issued by the state?

Mr. LAMBERT. No, sir, we believe it doesn't.

Mr. JOHNSON. Have there been any legal challenges to their trying to do so?

Mr. LAMBERT. I have been involved with the mine program in Virginia for 20 years, and to my knowledge, no.

Mr. JOHNSON. OK. Mr. Kitts, can you briefly give an overview of how your company ensures that water flows are protected in the instances where you engage in surface mining?

Mr. KITTS. Yes. We follow a very detailed mine development plant, a water management plan. We provide for sediment control and drainage management before mining starts. We conduct mining based on the geology of the particular site. For instance, if there are materials that might potentially create acid mine drainage, for instance, those materials are identified and specially handled in the mining process, so as a result of all the built-in controls over where materials go, where the water goes and so forth, we have been able to successfully manage our mining operations to avoid long-term water quality impacts.

Now, recently EPA has brought up issues about conductivity in water, and OSM is apparently attempting to adopt many of those theories into its program. Conductivity is just a measure of impact, not of damage, so we think that is misguided and it has severely impacted the industry, and it is something that OSM should certainly stay away from in any regulation changes that it anticipates.

Mr. JOHNSON. OK. It is my understanding that you participated or your company participated in the 2008 rewrite of the Stream Buffer Zone Rule, do I have that correct?

Mr. KITTS. Yes.

Mr. JOHNSON. Can you give us some idea of what your experience was with that process?

Mr. KITTS. Well, me, personally, I was involved in the litigation Bragg v. Robertson where the opponents of mining, specifically Arch's Spruce Mine, claimed that valley fills were a violation of the Stream Buffer Zone Rule, so despite to me the clear reading of SMCRA that valley fills are anticipated, the ambiguity in the regulations led the industry to propose that this needs to be fixed. We don't need to be in court every time we apply for a surface mining permits, so the process was begun by OSM to clarify the rule, provide protections. I think they accomplished that.

Not only did they define when activities could be done in streams, but it also required alternatives analysis of what can we do other than impact streams, and it required a minimization analysis to say that if we have to be in a stream, then we have to put in the fewest, smallest fills that allow us to conduct our mining activity, so again we participated in terms of comments in working with the state agencies to try to push that in that direction.

After it was adopted, my company encouraged the State of Kentucky and the various entities, stakeholders there in advance of OSM actually implementing the 2008 rule to develop their own fill minimization and AOC policy, which they did by sitting down with the environmental groups, the regulators, including OSM, the state agencies and the industry, and that worked out very successfully.

Mr. JOHNSON. I have some additional questions, but I will wait until the next round. Mr. Chairman, I yield back.

Mr. LAMBORN. OK. Thank you. At this point, we will start a second round of questions, and for Ms. Pineda or Mr. Lambert, how would your state be affected if this rule as proposed goes into effect and it has the result that many of us are concerned about, namely that jobs would be lost in the coal mining industry, production would go down and prices would go up? What would be the economic impact within your state if that happens?

Mr. LAMBERT. Yes, sir. Actually, it was made known that Virginia is a cooperating agency participating in commenting on the chapters of the rule, and some of our comments were directed directly toward the economic impact on the state or the Commonwealth of Virginia, and we estimated that could be up to as many as 3,000 coal jobs. In addition, we used a multiplier of either a three or a four of value attached to those direct jobs which could mean upward of 7,000, 8,000 jobs entirely.

Coal production would drop. From our state of this past year, we produced 21 million tons of coal. It could drop to somewhere between 15 and 16 million tons of coal if that rule was to be implemented as proposed. In addition to just the jobs loss, the tax revenue base for the counties would be reduced significantly, which most of our counties depend on that as a major source of their tax revenue, so the economic impact to Virginia would be significant.

Mr. LAMBORN. Ms. Pineda?

Ms. PINEDA. Thank you. Colorado is not one of the cooperating agencies on the EIS, and so I haven't fully reviewed the economic impact, but there are significant coal jobs in Colorado, so there would be the similar kind of impact that you see in West Virginia

or Virginia and the Appalachian states, so I can certainly get back to the Subcommittee on specifically what that impact would look like.

Mr. LAMBORN. I would certainly appreciate that. Thank you.

Ms. PINEDA. OK.

Mr. LAMBORN. And, Mr. Kitts, looking at the macro level, the national level, if production goes down, what does that do to the cost of electricity and other kinds of economic impacts in America?

Mr. KITTS. The ability to produce dependable, low-cost electricity in this country I think it something that has helped us build the strength that we enjoy, the middle class, for instance, based on manufacturing jobs that again are dependent on low-cost electricity. There was a new plant, brought something like 400 new jobs to Louisville, Kentucky, and the owners specifically stated it was because of the electricity cost based on coal-fired electricity.

If you do such a misguided change to the regulations, regulations that have worked well over 30 years, and have been implemented on a state-by-state basis, if you change all that up, try to standardize and such, take the authority and the funding away from the states and then try to make SMCRA essentially mimic the Clean Water Act in all the efforts that are being made under it to restrict mining, the impact to the overall economy in this country could be extremely damaging.

I mean, there are job losses, the increase in electricity prices, the disruption of the transportation system, for instance. If you say that we are going to lose Appalachian production and Appalachian jobs, but coal could be moved in from out west, our infrastructure is just simply not up to the task. They are shipping what coal can be shipped out of the Powder River Basin right now, so to say that we will make up the deficit with coal from elsewhere I don't think is a reasonable proposition, so it could have basically a trickle effect throughout the entire economy, and none of it that I see would be good.

Mr. LAMBORN. OK. Thank you very much. At this point, I would like to yield to the Ranking Member for up to five minutes. Thank you.

Mr. HOLT. Thanks. Mr. Lovett, I would like to ask several questions. Let me just state them now and ask you to address them. First of all, are you familiar with the EPA study that found that water quality in nine out of every 10 streams downstream from surface mining operations is impaired? If you are familiar with it, how serious is this effect in your judgment or in the judgment of the water quality scientists?

Second, the restoration that takes place in Appalachian mountaintop mining is really of a different nature than what is done for restoration and reclamation say in Powder River or other areas. How many examples are there, how would you describe the successful reclamation efforts in Appalachia, and is the Office structured and funded and so forth well enough to accomplish the kind of restoration that is needed there?

The third has to do with the famous rulemaking, the midnight rulemaking. That has come under a lot of criticism from the majority Members today. Do you think that the 2008 change of the two-decade-old rule was justified or does it need revisiting I guess is

the way I would describe it? If you could take all three of those, and I am sorry. I have only given you two or three minutes to do it.

Mr. LOVETT. That is fine, thank you. I will move quickly as I can. I will move backwards from your questions. The first question about the 2008 rule change, I think I heard Mr. Kitts just testify that he helped or his company helped with that rule change, so you can imagine that the people living near the mines weren't very satisfied with the rule change drafted by the Bush Administration and coal industry lobbyists.

On the other hand, this rule change that OSM is proposing, as much as I think it is not well-considered, is done by OSM. I give it credit for that. It hasn't involved the environmental community in the rulemaking at all. The other thing I would say is what we think should happen is that the Reagan rule, the original rule should be restored, and that is what we asked OSM to do was just to go back to the Reagan rule. Instead, OSM on its own took off on this rulemaking without any input from the environmental community.

Mr. HOLT. So the short answer to that question is you thought the two-decade-old rule was fine?

Mr. LOVETT. Yes.

Mr. HOLT. Didn't need to be changed? OK. Got it. Thank you.

Mr. LOVETT. We thought that rule should not have been changed, and especially with the rewrite by the coal industry it sounds like from Mr. Kitts' testimony.

Mr. HOLT. OK. Thanks.

Mr. LOVETT. In terms of familiarity with EPA studies and the impairment levels, there is no question that all of the streams below big valley fills are impaired. Now, Mr. Kitts testified correctly that valley fills were anticipated by SMCRA. They are, but not valley fills of the size we are seeing today. There is a difference between a valley fill in an ephemeral or a smaller stream and in a perennial stream, and these valley fills have become so big, we are now challenging one valley fill that is more than two miles long, so it is filling a stream that is longer than two miles.

Those are the valley fills that we think are impermissible, and there is no question that the fish populations, all of the aquatic life populations beneath these filles are significantly impaired and therefore violate the Clean Water Act and SMCRA. In terms of restoration and reclamation, Appalachian streams cannot be restored. Even during the Bush Administration, the head of the Army Corps of Engineers' regulatory branch in Washington testified that he had never seen a successful stream restoration project in Appalachia. That is because our streams are fed by groundwater.

This area is coursing with water. It is not like the Powder River basis. If you blow up the mountain, you destroy the source of the streams, the groundwater, and there are no more streams. The streams can't be restored, haven't been restored, and it is really a fiction to think that they can be, and it is a fiction that the coal industry uses to continue to get permits.

Mr. HOLT. That is useful testimony. Thank you very much.

Mr. LAMBORN. OK. Thank you. Representative Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman. I would like to ask just a few quick questions, and I am not sure which of you needs to respond. Have any of you been involved or been in contact with Polu Kai, the contractor that was contracted to write the EIS?

Mr. LAMBERT. Yes, sir. I think I can answer that question for you. As a cooperating agency, we were not allowed to contact the contractor.

Mr. JOHNSON. OK. So do you have a perception or an opinion about why the Office of Surface Mining wanted to end that relationship?

Mr. LAMBERT. Yes, sir. The opinion of Virginia would be that they ended that relationship because of the false and misinformation contained in the chapters that were being released.

Mr. JOHNSON. And your assertion is that there is false and misleading information in those chapters?

Mr. LAMBERT. Yes, sir. As a cooperating agency, we are certainly of the opinion that there is some false and misleading information. To carry that a step further, the numerous hours that Virginia spent on providing comments on that document, most of our comments were never even used or never showed up in that document.

Mr. JOHNSON. OK. Mr. Kitts, I would like to give you the remainder of my time, about three and a half minutes here, to respond to the questions that the Ranking Member asked just a few minutes ago about surface mining.

Mr. KITTS. Yes. Thank you. If you get your information from websites put up by anti-mining organizations, you might think that Appalachia is being devastated, that it is being leveled. One of those organizations had on its website that mountaintop mining had caused flooding, that it kills hundreds of people and left thousands homeless. That was completely false, but there is no way to measure the accuracy of those statements unless you are on the ground, and you can see what is happening, and what we see happening in Appalachia is well-managed, well-controlled mining of the reserves that are left.

About 40 percent of the coal production from Appalachia comes from surface mining jobs. Not all mountaintop removal jobs, but all types of surface mining, which I guess is now defined as mountaintop mining in steep terrain, so to come out and change a regulation that would make such mining nearly impossible if you can't put in fills, you can't mine through these small, intermittent streams up on the side of a mountain to do a contour mine because you can't prove that you will restore it back to exactly its pre-mining condition with the same type of insects living there and the same substrate and so forth, then you are going to stop mining.

If the intent is to stop all impacts of mining, then the answer is you stop mining, but mining by its definition has impacts. It has impacts on the land. It has impacts on the water. The conductivity issue with the change in insect populations. That is considered impairment, a reasonable person would not say that is the reason to abandon the fundamental industry that supports the economy in Appalachia, the fact that you may not have a certain genus of May Fly, but it is replaced by a different insect that provides the downstream services that the aquatic ecosystem requires.

There is research being done by others than EPA that indicates that is the case.

Mr. JOHNSON. I want to ask one final question before I finish here. It seems to me that there really is a very overt attempt to basically stop mining in America and so seriously restrict our ability to go after the natural resources that will move our energy footprint forward that is being collaborated by and bought into by this Administration and the Department of the Interior and the OSM and others. Is my perception valid in your opinion?

Mr. KITTS. That is my opinion. That is what I have seen. That is what I derived from comments made. For instance, when the June 2009 MOU was released, there was a press conference, and the head of CEQ said that this was going to allow Appalachia to move toward a sustainable green economy with green jobs, and there were comments made at that time that people could be put to work repairing the devastation left behind by surface mining. It seems like there was no realization or acknowledgment whatsoever that coal companies post bond on these mined areas. They have a legal obligation to do the reclamation up to standards, and it is measured over time, and if we fail to do that, we lose the bond, and we lose the right to obtain future permits.

Mr. JOHNSON. OK. Thank you very much. Thank you for extending my time, Mr. Chairman. I yield back.

Mr. LAMBORN. OK. Thank you, and we will have one last and final round, and I just have basically one question and that is for you, Mr. Kitts. Do you believe that the process was flawed in how the Obama Administration and Secretary Salazar quickly moved from the existing 2008 rule to pursuing another rule with OSM?

Mr. KITTS. Yes, I certainly do. The 2008 rule with its additional provisions for fill minimization, approximate original contour and alternatives analysis was never given a fair chance to be implemented on the ground to see what environmental benefits that would bring. That would level the playing field between the Appalachian states, for instance, where West Virginia already had such a plan in place. Of course, the Stream Buffer Zone Rule that existed from 1983 was somewhat in conflict with the statute itself, so the desire was not to write a new law but to remove that ambiguity, so we think the 2008 rule accomplished that accomplished it very well. Again, it was never given a chance to be put into place.

Mr. LAMBORN. What about the court decision? Was there a caving in to the other side as opposed to carrying out to a more normal conclusion?

Mr. KITTS. There certainly was. The court decision in February of 2009 basically said that valley fills were legal, and the Corps of Engineers had the discretion that they should receive deference in applying the Section 404 rules and so forth. It was at that time that EPA specifically stepped up and said that we have not had time to properly evaluate all these pending permits, so we want to install essentially an extra legal process for doing permit reviews, and as a result of that, there have been virtually no mining permits, Section 404 permits specifically, issued in that time.

The regulatory program is all tied together, the Section 404 permits, the SMCRA permits, or the EPA or the NPDES permits, so the tentacles of this effort to stop, slow down, make mining so dif-

ficult that it simply can't be done is in all of those programs. It is very difficult to get a water discharge permit now. It is almost impossible to get a Corps permit, so the SMCRA permit that is issued right now is almost meaningless because it is sitting on the shelf.

Under the changes that are being proposed as per these draft regulations and EIS, it would just essentially roll everything into one, formalize it and make mining in Appalachia extremely difficult, extremely expensive, and probably, in many cases, not practical.

Mr. LAMBORN. OK. Thank you so much. At this point, I will see if Representative Johnson has any final questions?

Mr. JOHNSON. I do. I do have a couple of final ones. In Director Pizarchik's testimony, he comments that state permitting actions and inspection of mines are among the most important ways to help ensure the law is being implemented and to protect society and the environment. However, in their budget, the Department proposes to decrease funding for these state activities by $11 million. Can you explain to us how the state permitting and inspections process will be affected by this $11 million proposed cut? I am not sure which one of you want to answer that. Probably, Mr. Lambert?

Mr. LAMBERT. Yes, sir, I will be happy to take that question. You asked me a question a minute ago if primacy had ever been challenged. What this additional oversight inspection rule would do, actually OSM would have the ability now to come in and challenge the states' permitting processes thereby the states have that primacy right, right now, to review and approve mining permits, and we are certainly concerned about states' primacy if that happens.

Also, we are concerned about the additional oversight inspections that they would be doing in addition permit decisions. Additional inspections on the ground without state inspectors who have the knowledge of the permitted area, who has the knowledge of the permitted area, who has the knowledge of the program would certainly put OSM in a position of second guessing and additional resources that we would have to expend to go out and take care of perceived or violations that will be discovered by OSM, so the additional resources, second-guessing our permit decisions, we can see the states' programs suffering from those issues.

Mr. JOHNSON. And this reduction in budget authorization, funding authorization of $11 million, that only serves to exasperate that situation, right?

Mr. LAMBERT. You are correct. That would only increase the reductions that we would have to take in our state program to absorb that cut.

Mr. JOHNSON. OK. Let's see. From a state perspective, Mr. Lambert, what are your thoughts on OSM no longer conducting emergency abandoned line mine reclamation projects and the closing of OSM state emergency offices? Do the states have adequate resources in existing grants to carry out these functions on their own, or will we see a decrease in abandoned land mine reclamation projects?

Mr. LAMBERT. For Virginia, we do not have the resources to absorb the emergency program. We are operating on a limited staff at this point with a limited amount of money to reclaim only the

Priority 1 and Priority 2 sites that you heard talked about from Director Pizarchik this morning. If you add in having to take the emergency program, then those resources that were dedicated to the Priority 1's and Priority 2's, which is public health and safety, we would no longer be able to do those and have to focus only on the emergency program. In addition, if we go to the competitive bid process like is being proposed, there is no way we could plan a budget from year to year even to do Priority 1 and Priority 2 projects.

Mr. JOHNSON. Yes.

Mr. LAMBERT. We would be tied up in a competitive bid process pitting Virginia, Kentucky, all the other states against one another on who is going to get any money for that particular year, and I think Ms. Pineda could probably address that a little further than I could since she is directly related to the AML program.

Ms. PINEDA. Yes. Thank you. Yes, it would be a hardship, particularly the emergency program on minimum program states that only get between like $2 and $3 million a year. It is specifically a hardship on them, and then in addition, OSM still has some of the regulatory authority to declare emergencies, so on one hand, they are going to cut the funding, but on the other hand, they still want to have some say in whether or not a site is an emergency and whether or not states can do that work, so that certainly is an issue.

As Butch said, Mr. Lambert noted the competitive process of these grants is also problematic because it takes several years for us to develop AML projects going through the NEPA process, going through our public participation process and all the different communities and identifying these high-priority projects, so going to a competitive process year to year would certainly hamper our process.

Mr. JOHNSON. Sure. I appreciate your answers. Real quickly, let me close with saying this. I appreciate the testimony from all of you, and I am disturbed because I hear creative double talk coming from the Department and from the Administration. Out of one side they scream protect the environment, protect the environment. Out of the other side, they handcuff the states, reduce budgets and hamper your ability to respond to cleanup activities, and then they want to use those as justification for further regulatory outreach, over-reach. It is just kind of sad. Thank you, and, Mr. Chairman, I yield.

Mr. LAMBORN. OK. Thank you. That concludes our questions. I want to thank each of you for being here and for your time and for your testimony. Members of the Subcommittee may have additional questions for the record, and I would ask that you would respond to these in writing should you receive these, and as a matter of final business, I have a letter here dated February 27 of this year from the Western Governors Association to Secretary Salazar detailing concerns about the proposed rulemaking process, and I would ask that it be entered into the record without objection. So ordered. Thank you for being here, and this hearing is concluded.

[Whereupon, at 12:11 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[A letter submitted for the record by the Alabama Surface Mining Commission, Indiana Department of Natural Resources, Kentucky Department for Natural Resources, Railroad Commission of Texas, Utah Division of Oil, Gas and Mining, Virginia Department of Mines, Minerals and Energy, West Virginia Department of Environmental Protection, and Wyoming Department of Environmental Quality follows:]

November 23, 2010

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining, Reclamation and Enforcement
U.S. Department of the Interior
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

We are writing to you as cooperating agencies that are participating in the Office of Surface Mining's development of a draft Environmental Impact Statement (EIS) to accompany a soon-to-be-proposed rule on stream protection. Our role as cooperating agencies, as defined by the memoranda of understanding that each of us entered into with your agency, is to review and comment on those Chapters of the draft EIS that are made available to us (at present, Chapters 2 and 3). Based on our participation to date, we have several serious concerns that we feel compelled to bring to your attention for resolution.

Without rehashing our previously articulated concerns about the need and justification for both the proposed rule and the accompanying EIS, we must object to the quality, completeness and accuracy of those portions of the draft EIS that we have had the opportunity to review and comment on so far. As indicated in the detailed comments we have submitted to date, there are sections of the draft EIS that are often nonsensical and difficult to follow. Given that the draft EIS and proposed rule are intended to be national in scope, we are also mystified by the paucity of information and analysis for those areas of the country beyond central Appalachia and the related tendency to simply expand the latter regional experience to the rest of the country in an effort to appear complete and comprehensive. In many respects, the draft EIS appears very much like a cut-and-paste exercise utilizing sometimes unrelated pieces from existing documents in an attempt to create a novel approach to the subject matter. The result so far has been a disjointed, unhelpful exercise that will do little to support OSM's rulemaking or survive legal challenges to the rule or the EIS.

We also have serious concerns regarding the constrained timeframes under which we have been operating to provide comments on these flawed documents. As we have stated from the outset, and as members of Congress have also recently noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with only five working days to review the material, some of which is fairly technical in nature. In order to comply with these deadlines, we have had to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business such as permit reviews. While we were prepared to reallocate resources to review and comment on the draft EIS Chapters, additional time would have allowed for a more efficient use of those resources and for the development of more in depth comments.

There is also the matter of completeness of the draft Chapters that we have reviewed. In the case of both Chapters 2 and 3, there are several attachments, exhibits and studies that were not provided to us as part of that review. Some of these are critical to a full and complete analysis of OSM's discussion in the chapters. OSM has developed a SharePoint site that will supposedly include many of the draft materials, but to date the site is either inoperable or incomplete.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. The first of those reconciliations (which was focused on Chapter 2) occurred via conference call on October 14. The call involved little in the way of actual reconciliation but amounted to more of an update on progress concerning the draft EIS. There was talk about another reconciliation session, but to date this has not occurred. There were also several agreements by OSM during the call to provide addi-

tional documents to the states for their review, including a document indicating which comments on Chapter 2 from cooperating agencies were accepted and passed on to the contractor, as well as comments provided by OSM. OSM also agreed to consider providing us a copy of a document indicating those comments that were not accepted. To date, neither of these documents has been provided to us. And even though a draft of Chapter 3 has now been distributed and comments have been provided to OSM, we are still awaiting a reconciliation session on this chapter. [1]

Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately. We are therefore requesting that these revised Chapters be provided to us as soon as practicable.

We understand that OSM is considering further adjustments to the time table for review of additional Chapters of the draft EIS. We are hopeful that in doing so, the agency will incorporate additional time for review by the cooperating agencies, especially given the size and complexity of Chapter 4 and the full draft EIS. Pushing back the time for the completion of these drafts by OSM without additional time being provided for review by the cooperating agencies would be wholly inappropriate. We request that you please provide us with these new time tables as soon as possible so that we can begin our own internal planning.

You should know that, as we continue our work with OSM on the development of the draft EIS, some of us may find it necessary to reconsider our continued participation as cooperating agencies pursuant to the 30-day renegotiation/termination provision in our MOUs. Under the NEPA guidance concerning the status of cooperating agencies, some of the identified reasons for terminating that status include the inability to participate throughout the preparation of the analysis and documentation as necessary to meet process milestones; the inability to assist in preparing portions of the review and analysis and help resolve significant environmental issues in a timely manner; or the inability to provide resources to support scheduling and critical milestones. As is evident from much of the discussion above, these are some of the very issues with which many of the cooperating agencies are struggling given OSM's time schedule for the EIS and the content of the documents distributed to date. We continue to do our best to meet our commitments under the MOUs but based on our experience to date, this has become exceedingly difficult.

Finally, as you have likely noted throughout the submission of comments by many of the cooperating agencies, there is great concern about how our comments (limited as some of them are due to time constraints for review) will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", given what we have seen so far of the draft EIS we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are wrestling with the consequences of their names appearing on the EIS, as it would assume tacit approval independent of the comments that have/have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore request an opportunity to jointly draft a statement with you that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

Sincerely,

Randall C. Johnson
Director
Alabama Surface Mining Commission

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[1] We also understand that OSM had planned to contact the states to provide estimates of the additional time and resources that would be required to review/process a permit under the proposed rule. This information would be used by OSM to prepare at least one of the burden analyses that are required by various executive orders as part of federal rulemakings. We now understand that OSM plans to generate these estimates on its own. We are somewhat mystified about how OSM intends to accomplish this without direct state input and urge the agency to reconsider the methodology under which they are currently operating.

Bruce Stevens
Director
Division of Reclamation
Indiana Department of Natural Resources

Carl E. Campbell
Commissioner
Kentucky Department for Natural Resources

John Caudle
Director
Surface Mining and Reclamation Division
Railroad Commission of Texas

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines Minerals and Energy

Thomas L. Clarke
Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

John Corra
Director
Wyoming Department of Environmental Quality

[A letter submitted for the record by Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission, and Douglas C. Larson, Executive Director, Western Interstate Energy Board, on behalf of the WIEB Reclamation Committee, follows:]

January 7, 2011

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

This letter represents the comments of the Interstate Mining Compact Commission (IMCC) and the Reclamation Committee of the Western Interstate Energy Board (WIEB) concerning three draft documents recently released by the Office of Surface Mining (OSM) as part of its Oversight Improvement Actions initiative. The documents consist of a new directive on "Ten Day Notices" (INE–35), a revised directive on "Corrective Actions for Regulatory Program Problems and Action Plans" (REG–23) and a revised directive on "Oversight of State and Tribal Regulatory Programs" (REG–8). Together, these three documents represent the heart of OSM's oversight procedures and policies under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and its implementing regulations. Given the fact these are OSM directives, they are binding on OSM only and cannot, in and of themselves, affect the rights (or impose or alter obligations) of the states beyond the requirements in SMCRA and the Secretary's regulations. Nonetheless, given the nature and scope of these documents, they are of critical importance to the state regulatory authorities that we represent. Several of our member states implement approved regulatory programs under SMCRA and are therefore subject to the federal oversight process anticipated by the Act and addressed by these three draft documents.

We alerted OSM to our initial concerns with the direction and approach that the agency was taking with respect to federal oversight in comments we submitted to OSM on January 19th of last year. Since that time, we have submitted additional comments on various components of the oversight initiative (see our comments of July 8, 2010) and have also had occasion to meet with OSM both formally and informally to discuss the agency's actions. The most recent draft documents not only fail to reflect the nature and substance of our comments and discussions to date, but

appear fully committed to a preconceived decision regarding the need for a strong command and control approach by the federal government to the implementation of SMCRA in ways not supported by the Act and the Secretary's own regulations.

We are well aware of the fact that the majority of OSM's oversight improvement actions have been in response to a June 2009 Memorandum of Agreement between the Interior Department, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers. These three directives, in particular, represent commitments made by the Interior Department under the MOU to "remove [alleged] impediments to OSM's ability to require correction of permit defects in SMCRA primacy states" and "to reevaluate and determine how OSM will more effectively conduct oversight of state permitting, state enforcement and regulatory activities under SMCRA." However, nowhere during the time since the MOU was released and over the course of OSM's release of its various oversight improvement actions has the Interior Department or OSM articulated exactly what its vision or philosophy is for oversight. And while we have now seen a plethora of proposed approaches for handling the specifics of oversight (such as the use of Ten Day Notices, oversight inspections, and data collection and analysis), we continue to be at a loss for OSM's overall objective for these various approaches.

In the comments that follow, we present our perspective on what oversight means and how it is to be conducted consonant with the requirements of SMCRA and OSM's regulations. Much of our philosophy regarding federal oversight is the result of a collaborative process that began in the early 1990's through federal/state discussions and negotiations about the meaning of oversight and our respective roles in the process. Interestingly, where we ended up with the specifics of the process (via Directive REG–8) is completely consistent with SMCRA and OSM's regulations, as it obviously should be. However, OSM's new direction, as evidenced by its various oversight improvement actions and in particular the three directives that are the subject of this letter, suggests that the agency has changed its philosophy about oversight, and along with it, the specific approaches that align with this significant policy shift.

We are extremely concerned that this cultural shift by OSM will completely undermine the progress that we have made in this area over the years. It will also stifle the innovative ideas and approaches that have been the hallmark of our regulatory programs and the oversight process in recent years, particularly as states put forth new ways of dealing with what have often been viewed as intractable issues. A heavy-handed approach to oversight, in which state permitting decisions are second-guessed and differences of approach to environmental challenges are rejected in favor of a one-size-fits-all criterion, discourages new thinking about problems and inevitably makes a mockery of primacy and all that it stands for.

While we set out many of our concerns in the comments that follow, along with both legal and statutory support and suggested changes to the directives, the issues and the procedures addressed by these directives do not lend themselves well to paper arguments. We believe it is therefore essential that we sit down with you, our federal partners, and talk through our concerns and work through the details of a realistic approach to oversight. We have done this in the past with remarkable results. In fact, the current oversight directive (which is still in effect) calls for the Oversight Steering Committee to "analyze the implementation and results of oversight policies, standards and procedures to ensure that the objectives of SMCRA are achieved." This Committee should be convened to undertake a detailed review of the proposed revisions to both REG–8 and REG–23. A separate working group should be composed to address INE–35 and the implications of reinstituting this directive. In the meantime, we urge your serious consideration of the following comments as you contemplate next steps in the federal oversight process.

Introduction and Background

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) is one of several laws passed in the environmental decade of the 1970s that provided for a cooperative and somewhat unique blend of federal and state authority for implementation of its provisions. One of the law's key underpinnings was that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the states with an oversight role accorded to OSM. It has taken a good portion of the past thirty years to sort out the components of these often competing roles, but the result has been a balance of authority that generally works.

The first attempt at designing a meaningful oversight program in the early 1980's (following on the heels of primacy program approvals) was primarily an exercise in data gathering or output measurement. We were concerned then with numbers of inspections, numbers of permit reviews and numbers of enforcement actions. How-

ever, the numbers that were collected into oversight reports told us little or nothing about whether the objectives of SMCRA were being met. OSM also tended to look behind state permitting decisions to determine whether OSM would have handled them in the same way. This type of paternal "second-guessing" generated significant conflict and even resentment between the states and OSM. Rather than a statistics-gathering/second-guessing approach, it made more sense to focus on the following: what was happening on the ground?; how effectively were state programs actually protecting the environment?; how well was the public being protected and how effectively were citizens being served?; how well were we working together as state and federal governments in implementing the purposes of SMCRA?

Following an effort by OSM and the states in the late 1980's to fashion a more effective state program evaluation process based on a goal-oriented or results-oriented oversight policy and another review of the process in the mid-1990's, a performance measurement approach was adopted, based in large part on the requirements of the Government Performance and Results Act (GPRA). The new outcome indicators focus on the percentage of coal mining sites free of off-site impacts; the percentage of mined acreage that is reclaimed (i.e. that meets the bond release requirements for the various phases of reclamation); and the number of federal, private and tribal land and surface water acres reclaimed or mitigated from the effects of natural resource degradation from past coal mining, including water quality improvement and correction of conditions threatening public health or safety. These new measurements are intended to provide Congress and others with a better picture of how well SMCRA is working and how well the states are doing in protecting the public and the environment pursuant to their federally-approved programs.

From the time of initial state program approvals (from 1980 through 1982) until Robert Uram was confirmed Director in 1994, far more effort and resources were spent arguing and litigating over the validity of issues raised by OSM during oversight than in trying to find solutions. Furthermore, the regulated coal industry was constantly caught in the middle of disputes between OSM and states. By 1993, it had reached the point where IMCC submitted a petition for rulemaking in order to return some meaning to primacy as intended by SMCRA. (*See* 58 FR 54594, August 17, 1993, copy attached).

Before Director Uram arrived in March 1994, Secretary of Interior Bruce Babbitt brought in outside leadership on a temporary basis and launched a broad review of OSM in an effort to understand why there was such a high level of controversy surrounding OSM and its programs. Although Director Uram made organizational changes that partially addressed this issue, the primary change he implemented was the approach to oversight embodied in current Directive REG–8. Those changes, and the work of the state/federal Oversight Steering Committee that helped to direct them, were recognized by Vice President Gore with a "Hammer Award" under the National Performance Review for helping "to build a government that works better and costs less". State performance-based programs have also received national recognition for their effectiveness and efficiency.

In addition to a re-examination of the oversight process, the antagonistic environment between OSM and the states led to the development of the "Ten-Day Notice" rule in 1988 (30 CFR Section 843.12). That rule was not fully and effectively implemented until the Clinton Administration under the leadership of Director Uram following the rule's validation in federal court in 1994. In response to the continued tensions between OSM and the states, and partially in response to IMCC's rulemaking petition on appropriate federal oversight and enforcement action in primacy states, Director Uram developed "Principles of Shared Commitment" which served as the basis for the joint development by OSM and the states of the oversight policy (REG–8) that is still in operation today.[1]

As a result, during the past fifteen years, the working relationship between the states and OSM has been much more productive and non-contentious. We have moved beyond the second-guessing of state decisions that predominated the early years of state program implementation and instead are engaged in more cooperative initiatives where OSM strives to support the states through technical advice and training and where the states and OSM work together to solve difficult policy and legal questions. OSM's oversight program is more focused on results, looking at on-the-ground reclamation success and off-site impacts, which better reflect the true

[1] The TDN rule was also in partial response to a rulemaking petition by industry on federal NOV authority. In addition to clarifying the "appropriate action" and "good cause" criteria with respect to state responses to TDNs, it also provided states an appeal process as part of the TDN process within which to raise their concerns.

measure of whether the purposes of SMCRA are being met.[2] We articulated many of these perspectives in a letter to the Obama/Biden Transition team dated December 4, 2008, a copy of which is attached. It includes a resolution on state primacy adopted by the IMCC member states, which we hereby incorporate by reference.

Unfortunately, almost everything OSM has laid out in its recent Oversight Improvement Actions documents seems designed to undermine these accomplishments and return us to a time when OSM was at its maximum size and its ineffective worst. What is contemplated by OSM's suggested approach is far more than a reexamination of the process to improve/enhance oversight—it is closer to a complete reinvention, in contravention of the Secretary's rules. It appears to be the dismantling of a good oversight product and the replacement of it with an older and much more expensive model that has already proven to be ineffectual.[3]

Draft Directive INE–35 re Ten-Day Notices

Overview

The primary premise behind OSM's newly revised directive on TDNs rests on a decision by OSM Director Pizarchik that is contained in his memorandum dated November 15. In that memorandum, Director Pizarchik states that "this guidance clarifies that OSM's TDN and pertinent Federal enforcement regulations at 30 CFR Parts 842 and 843 apply to ***all*** types of violations, including violations of performance standards or permit conditions and violations of permitting requirements." Director Pizarchik notes the effect of this decision is to "reject the rationale set forth in the *Metiki* decision and to reaffirm OSM's historic position on this issue." There are myriad problems with the Director's memorandum and its rationale which we will address below.

Firstly, we do not believe that a Departmental decision rendered by an Assistant Secretary on behalf of the Secretary of the Interior can be summarily reversed by a Bureau Director with the concurrence of a Deputy Assistant Secretary, as was done here. The letter decision of October 21, 2005 rendered by then Assistant Secretary Rebecca Watson was clearly designated as a "final decision of the Department of the Interior" and was based on a substantive review of SMCRA provisions as interpreted by Federal court decisions. Hence it remains the position of the Secretary and is binding on OSM until such time as either the Secretary chooses to reverse it or a federal court rules otherwise.

Secondly, Director Pizarchik states that his decision "reaffirms OSM's historic position on this issue." However, OSM's position is irrelevant if it is in conflict with the Secretary's position regarding SMCRA and the Secretary's own regulations. Further, history shows that OSM has struggled with its position on whether TDNs should apply to "all types of violations", and specifically whether TDNs should be issued to state regulatory authorities with respect to permit defects. As far back as 1987, OSM has issued a series of directives, reports and recommendations attempting to articulate the appropriate balance of jurisdiction and programmatic responsibility with respect to federal oversight of state permitting decisions. Letters from IMCC to OSM concerning the matter over the period 1995—1997 during the Clinton/Gore Administration are attached that evidence the wide range of discussions that occurred during this period and that eventually led to revised versions of INE–35 to accommodate state concerns. However, occasional confusion and concern related to the oversight of state permitting decisions continued and thus the Secretary

[2] In the most recent official statement by OSM regarding federal oversight of state programs, former OSM Director Brent Wahlquist stated the following at an oversight hearing conducted on November 13, 2007 by the Senate Committee on Energy and Natural Resources concerning "The Surface Mining Control and Reclamation Act of 1977: Policy Issues Thirty Years Later": "The first years after SMCRA's passage were filled with controversy, contention, litigation, and uncertainty. OSM faced the challenge of striking the proper balance between oversight, direct enforcement, and assistance, in order to promote both qulity state programs and achieve a high level of industry compliance. Through the years, efforts to clarify OSM's oversight role, increase cooperation with states, develop a training program, provide technical tools, and promote technology transfer have largely eliminated the highly contentious relationship with states and other interested parties that existed during the early years of SMCRA. We believe that OSM has succeeded in its efforts to develop and implement a stable regulatory structure that achieves the desired balance between environmental protection and energy production, while respecting the role of states as the primary regulators."

[3] Nowhere in OSM's Oversight Improvement Actions document has OSM suggested, much less substantiated, that is has missed something in its evaluation of state programs, or been precluded from conducting effective federal oversight. In contrast, a review of data submitted as part of the state program evaluation process over the past 20 years (and reported in OSM's annual reports to the public) demonstrates that there has been a dramatic reduction in citizen complaints, TDNs and federal enforcement in primacy states.

rendered a final decision on the matter in the *Metiki* case, which ultimately led to the rescission of OSM's sixth iteration of INE–35 in 2006.

Interestingly, since the rescission of the last version of INE–35 in 2006, there have been few cases that we aware of where OSM felt the need to rely on the use of a TDN to address state permitting issues. The only exception is the recent TDN issued to the state of Oklahoma involving Georges Colliers, Inc. (Permit 54/86–4105), which we will discuss later in our comments. We believe that over the past five years, to the extent that there have been OSM concerns regarding state permitting matters, these have been appropriately handled under the state program oversight process pursuant to OSM's Directive REG–8. This is as it should be given OSM's limited statutory role to oversee the administration of state regulatory programs, which includes the state permitting process, but not individual permits. More on this later in our comments.

Thirdly, there is the matter of legal support for Director Pizarchik's November 15 memorandum. The memorandum references the legal advice received from the Office of the Solicitor regarding the use of TDNs in primacy states. However, short of the November 16 decision document in the Oklahoma TDN case referenced above (which contains some limited jurisdictional analysis), we have not seen this larger legal analysis. Given the significance of the Director's reversal of the Secretary's decision in the *Metiki* case, which included extensive legal analysis of its own from the Solicitor's office, we believe it is critical that the Director release this analysis for our review.

Importantly, beyond the lack of a rational basis in the Director's November 15, 2010 memorandum refuting the carefully articulated legal analysis laid out in Secretary Watson's decision, the changes being contemplated in revised directive INE–35 dramatically affect the rights of both state regulatory authorities and mine operators and thus constitute rulemaking subject to the Administrative Procedures Act (APA). Any significant adjustments to these rights must occur through a formal rulemaking process that lays out a basis and purpose for the rule demonstrating why it is needed and how it is consistent with SMCRA—hurdles that, as explained in more detail below, cannot be met.

Secretary Watson's decision in the *Metiki* case laid out broad principles of general application in reaching a case-specific decision. However, despite its broad circulation, no one stepped forward in any forum with jurisdiction to challenge the merits of the decision's arguments or to claim that it reflected a change in policy. Rather, as elaborated upon below, in 2007, the Secretary referenced this decision and its rationale in support of removing Section 843.21 from the CFR after receiving comments strongly supporting both the proposed removal and the rationale for such a change in the proposed rule. No negative comments were received on either the rule's removal or the rationale behind doing so.

The Director's memorandum refers to the "confusion" that has allegedly attended OSM's oversight and enforcement responsibilities with respect to permitting issues arising under state regulatory programs, purportedly attributable to the departmental decision in the *Metiki* case. Based on our experience, there appears to be little in the way of confusion at the OSM staff level that we aware of, especially given the clear articulation of the department's position concerning the use of TDNs to challenge state permitting decisions in the *Metiki* decision document. To the contrary, we believe it is the Director's memorandum that will lead to new confusion and potential controversy. As we explain below, Section 521 of SMCRA and the agency's regulations at 30 CFR Parts 842 and 843, when read in context with all relevant provisions in SMCRA, were never intended to apply to state permitting decisions.

But as importantly, OSM's decision to boldly declare in the November 15 memorandum and the revised version of INE–35 that TDNs apply to "all violations of permitting requirements" in primacy states makes no practical sense and will lead to the very confusion OSM hopes to avoid. There are several related problems here:

- OSM intermixes the use of terms like "permit defect" and "permitting violation". Clearly SMCRA and OSM's implementing regulations are structured to assure that all permit requirements and permit conditions are complied with by mine operators and that violations of those requirements or conditions lead to enforcement action by the regulatory authority. However, where OSM determines that a state (as opposed to a mine operator) is failing in some way to comply with the permitting provisions of its approved program, the only appropriate route for OSM to pursue is limited federal intervention that is permissible after following the applicable notice and hearing requirements set forth in sections 504 and 521 of SMCRA and further elaborated upon in Part 733 of OSM's rules. If by its use of the term "permitting violation", OSM means violations of a state-issued permit by a mine operator, then the ten

day notice requirements of section 521(a)(1) would be applicable. If, however, OSM means differences of opinion between itself and the state regarding appropriate implementation of the state's permitting function, then the notice and hearing provisions of section 521(b) come into play (following an impasse between the state and OSM to resolve the matter). It matters little whether this involves one permit decision or a series of permitting decisions—in every case where there is a difference of opinion between state and federal regulatory authorities (whether self-initiated by OSM as part of program oversight or triggered by a citizen complaint), SMCRA sees this as a programmatic issue requiring resolution through the Part 732 and 733 process, failing all else.

- The use of the term "violation" throughout SMCRA and OSM's own regulations envisions an act of noncompliance by a mining operator for which abatement is possible. (See definition of "violation" at section 701.5). OSM's regulation at 843.12 reinforces this understanding when it refers to OSM's authority to issue NOVs "during federal enforcement of a state program under section 504(b) ***or*** 521(b) of the Act ***and*** Part 733 of this chapter", meaning after the notice and hearing required for federal takeover of all or part of a state program, after which OSM then becomes the regulatory authority responsible for enforcing the provisions of the state-issued permit. Any other interpretation leads to absurd results. For instance, let's assume that OSM believes a state did not follow its program requirements for a cumulative hydrologic impact analysis (CHIA) and thus asserts that the state "violated" this permitting component of its state program and that the permit is therefore "defective". If OSM issues a TDN to the state, and the state refuses to take further action (based on its belief that it fully complied with its program requirements), under OSM's reading of the Act and its rules, it would be authorized to issue a notice of violation to the mine operator. What would OSM require for abatement of the violation? That the operator force the state RA to revise the permit? What if the state refuses? The operator would then be faced with a cessation order for something he had no ability to control or abate. Would OSM further consider the permit "invalid", thereby subjecting the operator to a charge of "mining without a permit"? If so, an imminent harm cessation order would be the order of the day and a TDN wouldn't be needed in the first place. Let's assume that the state agreed from the outset to address the specific defect alleged by OSM. If the state continued to abide by its view of CHIA determinations under its approved program for other permits, OSM would be faced with a continuing round of TDNs, rather than focusing on the programmatic issue through oversight discussions or, if all else fails, a federal takeover of this aspect of the state program.
- The definition of what types of "violations" lead to TDNs is further complicated by the language used in OSM's draft TDN directive (INE–35), wherein a "permit defect" is defined as a type of "violation" consisting of "any procedural or substantive deficiency in a permit-related action taken by the RA." Several examples follow, including the broad criterion "an error in the analysis of technical or other information of plans." It was this very type of second-guessing language that generated so much confusion and controversy in the past. Essentially, any difference of opinion between an OSM field office oversight inspector and a state permit reviewer will result in a violation of SMCRA, thereby leading to a TDN and eventual federal enforcement action. Not only does this fly in the face of primacy under SMCRA, it will also result in a monumental waste of government resources due to intergovernmental squabbling. Furthermore, these types of permit "defects" are not violations attributable to the operator; they are programmatic issues between OSM and the state that can only be addressed through direct interaction between these two parties and outside a process that is focused on enforcement against an operator. Clearly the situation begs for a different approach to oversight, as eluded to above.

Legal and Statutory Framework

The Surface Mining Control and Reclamation Act establishes a two-phased implementation scheme for the regulation of surface coal mining operations. The first stage, or "interim program", involves the promulgation of federal standards implementing certain aspects of SMCRA with federal enforcement of those standards accompanied by continuing, or concurrent, state regulation. 30 U.S.C. § 1252. The second phase, or "permanent program", is to be adopted in each state through a state or federal program "with enforcement responsibility lying with either the State or Federal Government." *Hodel v. Virginia Surface Mining and Reclamation Associa-*

tion, 452 U.S. 264, 269 (1981) (emphasis added). If a state receives approval of its program, it assumes exclusive jurisdiction, or "primacy", over the regulation of surface coal mining operations within its borders, 30 U.S.C. § 1253(a) and the "statute does not provide for concurrent jurisdiction in the states and federal government." *Haydo v. Amerikohl Mining Co., Inc.,* 830 F.2d 494, 497 (3d Cir. 1987). *See also id.* at 497 ("We have encountered nothing...which leads us to believe that anything other than the ordinary meaning of 'exclusive' was intended.")

In a primacy state, it is the state law, state regulations and a state-issued permit which apply and establish an operator's obligations. 30 U.S.C. § 1253(a); *Haydo,* 830 F.2d at 498; *In Re Permanent Surface Mining Regulation Litigation,* 653 F.2d 514, 519 (D.C. Cir.) (*en banc*), *cert. denied sub nom., Peabody Coal Co. v. Watt,* 454 U.S. 822 (1981) (*Surface Mining Regulation Litigation); National Wildlife Federation v. Luján,* 928 F.2d 453, 464 n.1 (D.C. Cir. 1991) (Wald, J., concurring). Neither SMCRA nor the federal permanent program rules apply in a primacy state. *Luján,* 928 F.2d at 455 n.1. *See also Hodel,* 452 U.S. at 271 (permanent program is not self-implementing, but becomes effective through the approved state or federal program under Sections 503 or 504). At best, SMCRA and federal rules only establish standards for the approval of state programs. *Haydo,* 830 F.2d at 498 n. 2. Pursuant to a state program, the state applies the national standards to the local conditions in that state through the implementation of its program requirements. Once the Secretary approves the state program as capable of meeting the Act's requirements, he "is not directly involved in local decision making." *Surface Mining Regulation Litigation,* 653 F.2d at 518. The state becomes "the sole issuer of permits...[and] permit decisions are matters of state jurisdiction in which the Secretary plays no role." *Id.* at 519.

Just as the state program is the law in a primacy state, the state-issued permit applies the law and establishes the permittee's obligations. The primacy 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.

Surface Mining Regulation Litigation, 653 F.2d at 519 (citations omitted). Thus, when it assumes exclusive jurisdiction over the regulation of surface coal mining operations, the state, as the "regulatory authority", performs the duties and functions required under SMCRA through state laws and regulations.

The primary means of guaranteeing "effective state programs" is the state program approval process exercised by the Secretary. The principal components required of a state program are:

- A state law for the regulation of surface mining operations in a manner consistent with SMCRA;
- Sanctions for violations of state law, regulations, and permit conditions;
- State law which provides for effective implementation, maintenance, and enforcement of a permit system consistent with SMCRA.

30 U.S.C. § 1253(a).

These requirements include a permitting system that provides procedures, public participation, and appeals; citizen complaints; and appeals of the state authority's decisions on those complaints. 30 CFR § 732.15(b)(10). In other words, state permits are issued under state laws and are subject to state procedures and remedies the state adopts in order to obtain regulatory authority under the Act. *Cf. Laurel Pipeline Co. v. Bethlehem Mines Corp.,* 624 F.Supp. 538, 539–41 (W.D. Pa. 1986); *:Luján,* 928 F.2d at 464 n. 1.

The Secretary of the Interior maintains an oversight role once the state has assumed jurisdiction and how this oversight is performed goes directly to the issue of the allocation of authority under SMCRA between the state and federal governments. Typically, this oversight role is carried out through occasional federal inspections of "surface coal mining and reclamation operations...to evaluate the administration of approved state programs." 30 U.S.C. § 1267(a). In one of the first opinions surveying the statute and its allocation of authority, the U.S. Court of Appeals for the District of Columbia characterized the state program approval process as the "Secretary's primary means of guaranteeing effective state programs," *Surface Mining Regulation Litigation,* 653 F. 2d at 520 (emphasis added); and the court described the federal takeover of a state program under Section 521(b) of SMCRA as "the Secretary's ultimate power over lax state enforcement." *Id.* at 519.

As the federal courts have repeatedly held, and as the Interior Department has confirmed, SMCRA's allocation of exclusive jurisdiction was "careful and deliberate". Congress provided for "mutually exclusive regulation by either the Secretary or state, but not both." *Bragg v. West Virginia Coal Ass'n,* 248 F.3d 275, 293–4 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002). *See also Pennsylvania Federation of Sportsmen's Clubs, Inc., v. Hess,* 297 F.3d 310, 318 (3d Cir. 2002).

The June 11, 2009 Memorandum of Understanding among the U.S. Army Corps of Engineers, the Department of Interior, and the Environmental Protection Agency obligates OSM to "remove impediments to its ability to require correction of permit defects in SMCRA primacy states." Frankly, we believe OSM has several options that it can legitimately pursue when it has reason to believe that a state is not appropriately implementing its permitting requirements. OSM simply lacks the authority to take direct enforcement action against operators for perceived defects in state-issued permits as well as the authority to directly require changes in those permits without going through the procedures outlined in 30 CFR Part 733 and Section 521(b) of SMCRA to take over enforcement and permitting. That lack of authority cannot be altered or overcome by issuance of a new Directive INE–35 since Directives are only internal policy guidance to OSM staff and cannot impose or create obligations on outside parties. That can only be done by changing SMCRA and/or the Secretary's regulations.

In any discussion of alleged permit "defects", it is important to reiterate an overriding principle that is often overlooked: namely, any existing permit for a coal mining operation issued under SMCRA, including those issued by state regulatory authorities, is, **by definition**, in full compliance with SMCRA and the regulatory program since, under 30 CFR § 732.15, the duly authorized regulatory authority has, after opportunity for public input, made written findings to that effect before issuing the permit.

For those who disagree with a permitting decision (including a permit recipient who may disagree with restrictions contained in that permit), SMCRA (section 514) and its implementing regulations (30 CFR Part 775) prescribe administrative and judicial procedures and timeframes for challenging that decision. Further, the regulatory authority, subject to administrative and judicial review, may, by order (after preparing written findings to support the order), subsequently require permit revisions "to ensure compliance with the Act and the regulatory program." 30 CFR § 774.10(b). However, the revision provisions serve to strengthen the view that an existing SMCRA permit is, by definition, in full compliance with SMCRA and the regulatory program unless and until a duly authorized body, under the limited procedures identified above, concludes otherwise.

While the States feel this issue has always been clear, we acknowledge that, because of a failure to look critically at SMCRA, its own rules, and Court rulings, OSM has taken various positions on this issue as reflected in, among other things, its six iterations of Directive INE–35 from 1987 through 1995, before it finally rescinded that directive in 2006. Years of frustration with OSM over its abuse of the TDN process as reflected in INE–35 led IMCC to submit a petition for rulemaking in 1993. The petition laid out our objections to using the TDN process to raise alleged permit defects to a state regulatory authority. (*See* 58 FR 43603—43608) That discussion is hereby incorporated by reference into these comments. Some of the points made in that discussion are also made below for emphasis.

The issue of using the TDN process in permitting oversight was clarified for OSM in the October 25, 2005 letter decision in the *Metiki* case by the Assistant Secretary for Land and Minerals Management in response to a state request to review a decision by an OSM field office to conduct a federal inspection in response to a citizen's complaint alleging defects in a state-issued permit even though no activity had yet been initiated on the ground. That letter decision was a final decision on behalf of the Department of Interior and led OSM to rescind INE–35 in 2006. That decision also caused OSM to reconsider its regulations at 30 CFR § 843.21 providing OSM enforcement authority against improvidently issued state permits (the first two iterations of this rule had been struck down by the Court of Appeals for the District of Columbia Circuit and the third iteration was subject to further revision as required by a settlement with the National Mining Association to resolve pending litigation challenging it). After notice and comment (no opposing comments were received) OSM removed 30 CFR § 843.21 in its entirety on December 3, 2007. In doing so it stated:

> Its removal provides greater regulatory stability through clarification of the State/Federal relationship related to permitting in primacy States, which has been a source of great confusion for many years. 72 FR 68024

Under SMCRA and the Federal regulations, permitting is an entirely separate function from inspections and associated enforcement. Regulatory provisions related

to permitting are found in Subchapter G of 30 CFR, while inspection and enforcement provisions are in Subchapter L. The statutory and regulatory provisions related to permit review and decisions are found at Section 510 of the Act and 30 CFR Part 773. Review of permitting decisions is covered by Section 514 of the Act and 30 CFR Part 775 respectively. Permit revisions, including the authority to require a permit revision, are covered by Section 511 of the Act and within 30 CFR Part 774 respectively. By statute and regulation, an order to revise a permit must be based upon written findings and is subject to administrative and judicial review requirements established by the State or Federal program. See Section 511(c) of the Act and 30 CFR Parts 773 and 775. In contrast to inspection and enforcement provisions, there is nothing in any of these statutory or regulatory provisions related to permitting that provide for or authorize Federal intervention in state permitting decisions.

In its landmark *en banc* 1981 decision upholding OSM's authority to promulgate permitting requirements not specified in the Act, the Court of Appeals for the D.C. Circuit (the only Circuit with jurisdiction to review the Secretary's national rules implementing the Act) laid the groundwork for its holding with a discussion of the roles of the States and the Secretary in administering the Act, including the States' role under an approved program. In addition to ruling that "the State is the sole issuer of permit," the court also noted that "[a]dministrative and judicial appeals of permit decisions are matters of State jurisdiction in which the Secretary plays no role. Act § 514." *Surface Mining Regulation Litigation,* 653 F.2d at 519.

The following footnote was attached to the last sentence quoted above.

> The independence of a State administering an approved State program under the Surface Mining Act may be contrasted with the continuing role of the Environmental Protection Agency after a State has assumed responsibility for pollution discharge permits under the Federal Water Pollution Control Act, 33.U.S.C. 1251—1376 (1976 & Supp. II 1978). The EPA Administrator retains veto power over individual permit decisions under that statute. See id. 1342(d).

Surface Mining Regulation Litigation, 653 F.2d at 519 n. 7.

This discussion by the Circuit Court is plain and unambiguous and leaves no room for debate. OSM simply does not retain authority to require revision of an existing state issued permit or to issue violations for actions expressly authorized by that permit without going through the procedures of § 521(b) of SMCRA.

The above quote from the Circuit Court was cited in the October 21, 2005 decision by the Assistant Secretary. It was also cited, along with the Assistant Secretary's 2005 decision, in the December 3, 2007 Federal Register notice (72 Fed. Reg. 68000) removing 30 CFR § 843.21 as follows:

> On October 21, 2005, the Department of the Interior's Assistant Secretary for Land and Minerals Management (ASLMM) issued a final decision concerning a citizen's group's request that OSM conduct a Federal inspection in a case where the citizen's group was dissatisfied with a State regulatory authority's decision to issue a coal mining permit. (A copy of the ASLMM's October 21, 2005, final decision is contained in the public record for this rulemaking.) The citizen's group requested an inspection even though mining on the permit had not yet commenced and the citizen's group had failed to prosecute a direct appeal of the State's permitting decision in State tribunals.
>
> In her decision, the ASLMM pointed out that "OSM intervention at any stage of the state permit review and appeal process would in effect terminate the state's exclusive jurisdiction over the matter and [would frustrate SMCRA's] careful and deliberate statutory design." See also Bragg v. Robertson, 248 F. 3d 275, 288–289, 293–295 (4th Cir. 2001) (regulation under SMCRA is "mutually exclusive, either Federal or State law regulates coal mining activity in a State, but not both simultaneously"; primacy States have "exclusive jurisdiction" over surface coal mining operations on nonfederal lands within their borders).
>
> The final decision also explained that in a "primacy state, permit decisions and any appeals are solely matters of the state jurisdiction in which OSM plays no role." In support of this statement, the final decision cited the U.S. Court of Appeals for the District of Columbia Circuit's landmark en banc decision in In re Permanent Surface Mining Regulation Litig., 653 F. 2d 514, 523 (DC Cir.) (en banc), cert. denied sub nom., Peabody Coal Co. v. Watt, 454 U.S. 822 (1981) (PSMRL). In that case, the en banc court held that SMCRA grants OSM the rulemaking authority to require States to secure permit application information beyond the Act's specific information

requirements. Id. at 527. The court laid the groundwork for its holding with a discussion of the relative roles of the Secretary of the Interior and the States in administering the Act.

After then quoting the Court's opinion listed above, OSM went on to state in that same Federal Register notice:

> The ASLMM's decision, and the materials cited therein, caused us to look more carefully at the statutory and regulatory scheme governing our oversight role related to State permitting decisions and, in particular, the propriety of retaining section 843.21. Inasmuch as section 843.21 authorized direct Federal enforcement against State permittees based on State permitting decisions, it was inconsistent with the ASLMM's decision and PSMRL's admonition that a primacy State is the "sole issuer of permits" within the State.
>
> Further, under SMCRA, State permitting is entirely separate from Federal inspections and associated Federal enforcement. The statutory provisions related to permit application review and permit decisions are found at section 510 of the Act, 30 U.S.C. 1260, and appeals of permitting decisions are provided for under section 514 of the Act, 30 U.S.C. 1264. There is no mention in these statutory provisions of the need for an inspection—the predicate to Federal enforcement under section 521 of the Act (30 U.S.C. 1271)—in connection with State permitting decisions, and certainly nothing in these provisions mandates Federal intervention in State permitting decisions. Our regulations governing administrative and judicial review of permitting decisions (30 CFR part 775) are likewise silent as to the need for an inspection in the context of permitting appeals. Moreover, nothing in our Federal inspection regulations at 30 CFR parts 842 and 843 suggests that those procedures can be used as an alternative to our permitting appeal provisions.
>
> The Act's provisions for Federal inspections expressly provide that such inspections are of mining "operations." See SMCRA Sec. 517(a), 30 U.S.C. 1267(a) (referring to inspections of surface coal mining and reclamation operations) and SMCRA Sec. 521(a) (referring to inspections of surface coal mining operations). The definitions of surface coal mining and reclamation operations and surface coal mining operations at SMCRA Sec. 701(27) and (28), 30 U.S.C. 1291(27) and (28), do not mention anything about permits or permitting decisions. Instead, those definitions refer to activities and the areas upon which those activities occur. In short, the purpose of a Federal inspection is to determine what is happening at the mine, and, thus, SMCRA's inspection and enforcement provisions do not readily apply to State permitting decisions because they are not activities occurring at the mine. See, e.g., Coteau, 53 F. 3d at 1473 ("Permitting requirements such as revelation of ownership and control links are not likely to be verified through the statutorily-prescribed method of physical federal inspection of the mining operation * * *.").
>
> In summary, the statutory and regulatory provisions related to inspections and enforcement are separate and distinct, both practically and legally, from permitting actions. The Act and our regulations provide specific administrative and judicial procedures for persons adversely affected and seeking relief from permitting decisions; our Federal inspection regulations do not serve as an alternative to those procedures. Distinct from the review of permitting decisions, Congress provided for inspection and enforcement for activities occurring at the mine and purposely excluded permitting activities from the operation-specific inspection and enforcement process. In short, Congress did not intend for OSM to second guess a State's permitting decisions. Instead, the Secretary of the Interior's ultimate power over a State's lax implementation of its permitting provisions is set out in section 521(b) of the Act, 30 U.S.C. 1271(b). PSMRL, 653 F. 2d at 519. The Secretary's power under section 521(b) includes taking over an entire State permit-issuing process. Id.

In past discussions regarding "Review of Permits During Oversight", OSM cited 30 CFR § 701.4(b)(1) as authority to conduct reviews of state issued permits during oversight. However, 30 CFR § 701.4(b)(1) expressly distinguishes conducting inspections of mining and reclamation operations from reviewing state issued permits by placing an "and" between the two. Therefore, that rule is entirely consistent with the discussion above and affirms that the permitting process is entirely separate from the inspection and enforcement process. Thus, 30 CFR § 701.4(b)(1) does not support using the TDN process to address concerns resulting from an OSM review

of a state issued permit. To the contrary, it supports the view that it would be inappropriate to apply the TDN process to permitting issues, since that process is, by law (through sections 517 and 521 of SMCRA and 30 CFR Parts 842 and 843), expressly linked to inspections.[4]

Importantly, the 1988 TDN rule (53 FR 26728) does not support using a TDN to address permitting disagreements between OSM and a State regulatory authority. In fact one of the express purposes of the 1988 TDN rule was to avoid situations where operators are caught in the middle because of disputes between OSM and States. The preamble contains a discussion (at pages 26729 and 26730) of when OSM is obligated under Section 521(a)(3) of SMCRA to issue a Federal NOV during enforcement of a state program under 521(b). That discussion notes:

> Thus, where OSMRE takes over an inadequately enforced state program, Congress clearly envisioned a time lag in the suspension or revocation of permits in situations where an operator was in violation because of a permit not requiring full compliance with the State program. Rather than penalizing the operator when the State is at fault, OSMRE must allow a reasonable time for a permittee to comply with additional permit conditions required by OSMRE when the permittee has been complying with the original permit conditions. Although the proviso expressly addresses suspensions and revocations, it naturally follows that during the reasonable period for compliance, OSMRE would refrain from issuance of NOVs and cessation orders related to the problem being corrected. The same principle is also established in Section 504(d) of SMCRA. (53 FR 26730)

In litigation over the TDN rule, the National Wildlife Federation claimed this discussion substantially eroded OSM's mandatory enforcement obligation and represented an attempt to regulate through preamble in violation of the APA because it stated that "OSMRE would refrain from issuance of NOVs and cessation orders related to the problem being corrected." In dismissing the complaint, the Court stated:

> The Court concludes that the statements in the preamble to the TDN rule are not inconsistent with the rulemakings concerning this issue and therefore permissible under SMCRA. As repeatedly mentioned above, it is not unfair not to punish a permittee if it has fully complied with state permit obligations later determined to be inadequate.

National Coal Association v. Uram, 1994 U.S. Dist. LESIX 16404 at *60 (D.D.C. Sept. 16, 1994).

In summary, OSM cannot, through any iteration of INE–35, give itself authority to take direct action against operators for alleged permit defects without going through the requirements of Section 521(b) of SMCRA.

Finally, OSM's insistence on using TDNs to address permit defects is simply unworkable, as we noted earlier. In most instances where OSM disagrees with a state-issued permit, ad-hoc federal intervention in an individual permit through direct enforcement action against the permittee would have the same effect as commandeering the state permitting process. The statute and case law would preclude such a result since the grant of exclusive jurisdiction vests the state as the sole issuer of permits "in which the Secretary plays ***no*** role." *In re: Permanent Surface Mining Regulation Litigation* (en banc), 653 F.2d 514, 519 (D.C. Cir. 1981) (hereinafter "In Re: (en banc)"). An enforcement action against the permittee based upon OSM's view of non-conformity of a permit to applicable standards would be nothing less than exercising a "veto power" over state permits, authority which Congress expressly withheld from the Secretary. To allow OSM to accomplish at the back-end what Congress forbade initially would essentially vest OSM with day-to-day "concurrent jurisdiction" which does not exist under the permanent program in a primacy state; *Haydo v. Amerikohl Mining Company, Inc.,* 830 F.2d 494, 497; and im-

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[4] Alleged deficiencies about the quantity and quality of either information or technical analysis hardly provides what the Act requires as reason to believe that "any person is in violation of any requirement of this Act or any permit condition required by this Act." Section 521(a)(1). Instead, these issues involve a difference of opinion as to whether two people would make the same policy judgment based upon a given set of facts and information. Such issues are not amenable to the purpose of the enforcement procedures whereby the inspector must set forth: The nature of the permittee's violation; remedial action required; the period of time established for abatement; a description of the surface coal mining operation to which the notice applies; and a statement that the failure to meet the abatement date leads to an order for the cessation of the operation. Section 521(a)(2) and (5). These enforcement provisions contemplate that abatement is within the power of the permittee. This simply is not the case where a permittee is subjected to an action by the federal agency (which lacks permitting authority) merely because of a continuing disagreement with the state agency (which is vested with the permitting authority under SMCRA).

properly allows the Secretary to become "directly involved in local decision making after the program has been approved." *In Re: (en banc),* 653 F.2d at 518.

Furthermore, the use of SMCRA's inspection and enforcement provisions as a means to dislodge state permitting decisions does not fit well with the statutory scheme. Issues involving the non-conformance of a permit to applicable standards are resolved through a request by the state regulatory authority to the permittee for a permit revision, and not enforcement action. *See* Section 511(c); 30 CFR 774.11(b). This process is accompanied by notice, findings supplying the basis for the request, and an opportunity for a hearing before the revision must be submitted.

Even when OSM is the regulatory authority, it must proceed to correct permit problems through the revision process. It appears incongruous for OSM to take direct enforcement action against a permittee in a state where it has no direct jurisdiction, and lacks permitting authority, when it could not conduct itself in such a manner where it ***does*** have "exclusive jurisdiction" as in a federal program state. Moreover, an enforcement action under Section 521(a) generally requires the prescription of abatement measures to assure compliance and presumes that such measures are within the power of the permittee. However, if the enforcement action requires the submission of a revision to a state-issued permit, the state regulatory authority is the only one empowered under SMCRA to request and approve a revision. If the state disagrees that a revision is warranted under the state program, the permittee cannot fully comply with the federal enforcement action and remains in jeopardy because of a continuing disagreement between the state and OSM. Moreover, the permittee has been denied its rights to prior notice, findings, and a hearing under SMCRA for permit revisions.

It also appears incongruous with the statutory scheme to permit OSM in its general oversight role to take action it could not otherwise pursue even when it takes action to substitute either federal enforcement or a federal program for all or part of the state program. In two provisions which discuss direct federal intervention, the statute requires that the Secretary, ***before*** issuing any enforcement orders, first afford the permittee an opportunity to revise a permit it finds does not conform to the requirements of the applicable regulatory program. Section 504(d), 521(b). *See also* 53 Fed. Reg. 26730, 26735. A permittee operating in a primacy state in which OSM has not completed, let alone initiated, a proceeding to "take over" a state program has ample ground for relying on the permit issued by the state permitting authority without becoming subject to direct intervention or enforcement by OSM in its oversight role.

However, this is not to say that OSM has absolutely no recourse. The federal action, if OSM decides it is necessary, is captured in the TDN rule's guiding principles for OSM's oversight role in these circumstances: "the regulatory focus shifts from individual situations to a broader evaluation of a state's overall program." 53 Fed. Reg. 26731. *See also* 53 Fed. Reg. at 26738. In other words, OSM will use the other mechanisms the law provides for "resolving problems with state implementation of the program; and, these mechanisms allow inadequacies to be corrected without placing the mine operator in the middle of conflicting orders from state and federal officials." *Id.*

One final legal matter: In the November 16, 2010 Decision for Informal Review issued by OSM Regional Director Ervin Barchenger regarding Georges Colliers, Inc., Permit 54/86–4105, there is legal discussion of "Jurisdiction" on pages 3—5 of the document. There is significant reliance on two Interior Board of Land Appeals decisions and two U.S. Court of Appeals decisions. All of these are cited for the proposition that "OSM has jurisdiction to address state permitting issues under its TDN authority." However, OSM misunderstands the reasoning in these decisions and misapplies them to the question of OSM's TDN authority in primacy states.

First, it is instructive to note that both IBLA decisions in the *Kuhn* and *Mullinax* cases preceded OSM's regulatory decision regarding the issuance of TDNs in primacy states in December of 2007. 72 Fed. Reg. 68000. This regulation is the most recent and most definitive ruling by the Interior Department concerning the use of TDNs in primacy states and thus is the applicable and operative law. Furthermore, the *Kuhn* case references the 1988 ten-day notice rule but fails to even examine, let alone discuss, its possible application to the case at hand, and instead sets forth erroneous premises citing a string of cases all decided prior to the 1988 ten-day notice rule. For example, the Board stated in *Kuhn* "no definition of the phrase *appropriate action* has been provided by OSM." 120 IBLA at 16, *citing* a 1982 version of 30 CFR 843.12. This is flatly wrong, and the opinion makes no mention of the other consideration of whether the state showed good cause for not taking action.

Kuhn also misstates some of the precedent that serves as the basis for its decision as follows: "where it is evident that a permit has been issued in violation of state regulatory requirements, this Board has declared such action inappropriate, and has

ordered *federal enforcement.* 120 IBLA at 20, *citing W.E. Carter, supra.* Not only was *W.E. Carter* not decided under the ten-day notice standards that are now applicable, the Board in *W.E. Carter* only ordered a federal inspection but never reached the issue of what type of federal action should follow the inspection. In many respects, *Kuhn* is advisory at best since the Board chose to articulate its views despite the fact that the permitting controversy was moot. 120 IBLA at 23, n. 9. *Compare with Hopi Tribe v. OSM,* 109 IBLA 374, 381 (1989) (an appeal is moot if there is no effective relief which the Board can afford to the appellant).

It should also be noted that all of these Board cases were considered in the context of citizen complaints and the Board was either never advised of or chose not to consider the issue (discussed in other sections of our comments) that citizen complaints cannot displace the more specific procedures to contest state permit decisions. To the extent one construes these cases as rejecting this view, the cases then simply remain contrary to applicable case law because they would allow the Secretary to review state permitting decisions, a matter in which "the Secretary plays no role." *In Re: (en banc),* 653 F.2d at 519.

Secondly, OSM completely misreads the two U.S. Courts of Appeals decisions. In *National Mining Ass'n v. Dep't of the Interior,* 177 F.3d 1 (D.C. Cir. 1999), the U.S. Court of Appeals for the District of Columbia Circuit pointed to the very construction of SMCRA which we articulated above—that OSM may not take remedial action against a state permittee until ***after*** the agency complies with the provisions of Section 504(b) and 521(b) of SMCRA, which require that OSM first provide notice to the state and hold a public hearing prior to taking over that portion of a state's program that relates to the permitting function (or any other function, for that matter). This process is embraced by OSM in its regulations at 30 CFR Part 733 and is a prerequisite to any federal enforcement action by OSM. While this process may take more time than OSM and others would prefer, Congress believed that meaningful concepts of state primacy and exclusive regulatory authority require nothing less. Short of changes to the underlying statute, this is the mechanism designed by Congress and for good reason. And short of the Secretary articulating a rational basis for departing from the Department's current regulatory position on this matter (as set forth in the preamble to the final rule removing 30 CFR 843.21 at 72 Fed. Reg. 68024—68026), OSM must continue to abide by its interpretation of SMCRA's requirements.

Recommended Changes to Draft INE–35

Based on the above discussion and rationale, IMCC and WIEB see no need for INE–35 and urge the agency not to pursue it further. OSM should, instead, simply follow its regulations. However, if OSM feels compelled to guide its field personnel via directive, IMCC and WIEB recommend several changes to draft INE–35 as follows:

Permit Defects—OSM should remove all references to the use of TDNs to address permit defects and should clarify that any concerns with the state permitting process or function should be handled as a programmatic issue, utilizing the various mechanisms available to OSM such as action plans, technical reviews, and the 732 or the 733 process where appropriate. More specifically, OSM should delete sections 3(i) (definition of "Permit Defect"); section 4(g)(3) (regarding when a TDN will not be issued for a permit defect); and sections 6(a)(5) and (b)(5) (regarding the procedures for handling permit defects).

Citizen Complaints—OSM should either remove all references to the use of TDNs to convey citizen complaints to states or, in the alternative, define the term "reason to believe" to include an investigation by OSM of the veracity of the complaint prior to conveying the complaint to the state via TDN. Given the requirement at 30 CFR 732.15(b)(10) that a state program must contain a citizen complaint mechanism in order for the program to be approved by OSM, this mechanism must be given an opportunity to work prior to OSM intervening in the process. This is further confirmed by 30 CFR 842.12, which requires a person requesting a federal inspection to notify the state regulatory authority in writing of the existence of a violation, condition or practice. As a result, any federal action under Section 521 of SMCRA should be held in abeyance until the state has issued its findings pursuant to its own citizen complaint process. If a citizen is unsatisfied with this result, it may then approach OSM about the need for a federal inspection. Following a "reason to believe" determination (including a review of the state's findings), OSM may then issue a TDN to the state concerning the alleged violation as a precursor to a possible federal inspection, in accordance with Section 521.

In conjunction with this change, OSM should also define the term "reason to believe", since the current standard (i.e. "the facts alleged by the citizen, if true, would constitute a violation") is unduly and inappropriately broad. As long as OSM holds

to this standard, the threshold established by the definition is unreasonably and unworkably low and flies in the face of the legislative history concerning the term. In its discussion of Section 521(a)(1) of the Act, Congress stated that "it is anticipated that 'reasonable belief' could be established by a *snapshot of an operation in violation* or other simple and *effective documentation of a violation.*" (H. Rep. No. 95–218, 95th Cong., 1st Sess., at 129 (1975) (emphasis added). Obviously Congress had something more in mind with regard to the "reason to believe" determination than the mere filing of a complaint. OSM is expected to go behind the bald allegations of the complaint and determine, based on a "snapshot" (or, in our view, an investigation, even if limited in scope) of the alleged violation at the surface mining site, or some other effective documentation (such as the state's analysis contained in its response to the complaint) establishing whether to proceed with any further action (be it a TDN, or in the case of imminent harm, a federal inspection followed by appropriate enforcement action). This process would provide a degree of credence and credibility to the primacy scheme contained in SMCRA by deferring to the procedures in the approved state program. It would also provide for serious and meaningful consideration by the federal government in its oversight capacity whether to proceed with expanded federal involvement in the state's business via a TDN. If OSM is unwilling to do this via directive, then we would advocate for a rulemaking on the matter, similar to what we advanced in our rulemaking petition of 1993.

OSM's reluctance to allow the states to first process citizen complaints that are received by OSM reflects a mistrust of either our procedures or our ability. In either case, the answer is not to incorporate federal intervention in the process, but to assess whether there are systemic or programmatic issues that must be addressed and resolved from a larger perspective. If the states are truly to have primacy, OSM must be wiling to allow the states to function independently. The mere receipt of a citizen complaint by OSM, rather than by the state, does not change this integral aspect of primacy. Instead, it compels OSM to act in a way that respects the states' role under SMCRA, which in this instance means forwarding the complaint on to the state for initial review and action. Only after that opportunity should a complaint be ripe for any type of OSM review, and then pursuant to the approach suggested in our comments above.

Transmittal of a citizen complaint through a ten-day notice when the state has not been previously apprised of the complaint by the citizen triggers a federal process which is duplicative of the existing state program procedures. Congress' intent was to avoid such federal-state overlap. S. Rep. No. 128 at 90; *See also* section 201(c)(12) (cooperate with state regulatory authorities to minimize duplication of inspection, enforcement, and administration of the Act). Citizen complaint procedures and the ten-day notice process must be reconciled with the deliberate allocation of authority under SMCRA. If OSM immediately invokes the ten-day notice process to intervene in a state program matter when the citizen has never availed himself of the state procedures and remedies, OSM undermines the statutory provisions for primacy and the rationale for the requirement that state programs provide the same opportunities found in SMCRA for citizen participation.

To the extent a state persistently handles citizen complaints inadequately, OSM's general oversight role provides the avenue to evaluate the state's administration of its program. Citizens may also petition the Director to evaluate the state's implementation of the program if they believe the state is not effectively implementing, administering or enforcing, 30 CFR 733.12(a)(2). The general oversight function serves adequately to ensure that states will routinely handle citizen complaints under their programs without OSM intruding upon the state's jurisdiction on a case-by-case basis. The use of ten-day notices upon receipt of a citizen complaint which has not been previously made to and pursued with the state undermines the state program and creates "federal-state overlap" which Congress expressly intended to avoid.

Appropriate Action—OSM's definition of "appropriate action" incorrectly cites the applicable regulation in the Code of Federal Regulations. It should be 30 CFR 842.11(b)(1)(ii)(B)(**3**).

Arbitrary, Capricious or Abuse of Discretion Standard—OSM's definition of this standard at section 3(b) is confusing and overly broad. What is the difference between the use of the term "irrationally" in (b)(1) and the words "without a rational basis" in (b)(4)? This seems unnecessarily duplicative. Furthermore, the standard in (b)(4) is new and seems to line up more with NEPA than SMCRA, especially the use of the term "hard look". We suggest that (b)(4) be deleted. In addition, we recommend that the following language be added to Section 4(d) regarding field office determinations regarding whether an RA's response is arbitrary, capricious or an abuse of discretion: "The arbitrary, capricious or abuse of discretion standard does not allow OSM as a reviewer to substitute its judgment for that of the RA. Adher-

ence to this standard mandates a finding of *appropriate action* or *good cause* if the RA presents a rational basis for its decision, even if OSM might have decided differently if it were the RA. In reviewing TDN responses, OSM must determine whether the RA's action or response is based on a reasonable consideration of the relevant factors and is an exercise of reasoned discretion that does not deviate from the approved state program. If OSM determines that the RA's response to a TDN does not constitute appropriate action or a showing of good cause for inaction, the written determination must provide a reasonably detailed explanation of the basis for the conclusion that the RA response is arbitrary, capricious or an abuse of discretion."

Authorized Representative – OSM should include the wording "in accordance with the right of entry requirements of 30 CFR 842.13" at the end of subparagraph (c)(1).

Definition of Federal Inspection—this definition at section 3(e) includes an all-embracing catch-all phrase in subparagraph (3) that reads: "Any other inspection conducted by OSM or jointly by OSM and an RA." Recent experience causes us to inquire what OSM has in mind with this definition. Would a meeting between OSM and the state to discuss an oversight issue constitute "any other inspection" for purposes of this definition? If so, we believe it is overly broad. We recommend that this paragraph be written to read: "An inspection by OSM, either individually or jointly with a state RA, under 30 CFR 842.11(a)(1)." In addition to this change, OSM should also insert the words "an authorized representative of" before the word "OSM" in subparagraphs (1) and (2) when referencing inspections.

Section (4)(g)—When TDNs will not be issued—in conjunction with our position that TDNs should not be issued for alleged permit defects, we recommend the inclusion of the following subsection under this Section so as to clarify OSM's options for programmatic issues. This is also consistent with section 5(b)(9) of the draft directive:

"(5) Programmatic issues. OSM will not use a TDN once an issue has been determined to be programmatic in nature. The following types of issues have been determined to be programmatic:

(1) there is or may be a systemic implementation of an aspect of an approved program which OSM believes is inconsistent with the approved program; or

(2) the state program lacks a counterpart to a requirement of the Act or federal regulations resulting in the RA's inability to take enforcement action against certain types of violations or to perform certain regulatory functions; or

(3) the RA and OSM disagree on the adequacy of permit information or the adequacy of reviews required as part of the permitting process."

In conjunction with this suggested language, OSM should also add the following in Section 6:

"(f) Programmatic issues—When there is a programmatic issue as described in section (4)(g)(5), OSM will void any TDN, if the dispute arises from issuing a TDN, and will

(1) enter into corrective action plans with the RA as part of oversight work plans or performance agreements;

(2) initiate actions under 30 CFR Parts 732 or 733, as appropriate;

(3) initiate joint OSM/RA or other state/federal agency technical reviews; or

(4) defer to the RA's technical expertise and judgment with the understanding that, if a performance standard violation develops, either a state enforcement action or a TDN will address it."

Section 6(b)(4) regarding Field Office evaluation of an RA's response to a TDN. In an effort to facilitate resolution of TDNs at the state level, we recommend adding the following language at the end of this section: "When the Field Office Director anticipates that it will decide that the RA's response is arbitrary, capricious or an abuse of discretion, the Field Office Director is encouraged to inform the RA of the basis for the conclusion before issuing a final written determination to give the RA a final chance to take enforcement action or to provide any final views. This process should not delay the time it takes OSM to complete its evaluation of the RA's response."

Section 6(c)(2)(d)—we recommend that the Field Office Director should make available to the RA not only items I—V, but also item VI so that the RA is fully aware of, and has an opportunity to respond to, the synopsis of the case and the rationale for the Field Office TDN determination, if the RA has not had the opportunity to do so previously. Similarly, in section (6)(3)(c), the RA should be given an opportunity to review and respond to information the Field Office submits to the Regional Director that was not previously available to the RA.

Draft Directive REG–23 re Corrective Actions for Regulatory Program Problems

As with other elements of OSM's oversight actions, OSM is again making false assumptions about the current progress of program implementation and performance by the states. Nothing in the record before OSM (i.e. recent annual oversight reports and OSM's budget justification document and GPRA reporting) supports the assertion that there are significant programmatic issues that have not been adequately addressed by the states as part of the existing oversight protocol. Furthermore, nothing in the record supports the assertion that states need to be "induced" to take corrective action. The cooperative working relationship that we are familiar with between OSM and the states has led to effective problem solving and resolution of outstanding issues. We are not dealing with a program that is broken or bleeding; to the contrary, we have been a model of cooperative federalism that is often commended by other state and federal agencies.

In terms of the options available to OSM to insure correction of programmatic issues, while some may label them as "severe", we would describe them as congressionally mandated and deliberately conceived to preserve state primacy. And while the options may be limited in scope, we believe this is also intentional. Congress did not intend for state primacy to be easily undermined through a streamlined second-guessing process by the federal government. Instead, Congress anticipated that any adjustments or "corrections" to a state program or implementation thereof be preceded by either an opportunity for public hearing and comment (for programmatic changes) or an opportunity for the state to take appropriate action or show good cause for not doing so (for alleged violations of the state program).[5]

OSM's suggested resolution of this matter is to reinstate policy and procedures previously contained in Directive REG–23 for the development and implementation of process-oriented action plans to address programmatic issues and/or to place a condition on state regulatory program grants to require correction of issues. We are uncertain what OSM has in mind with regard to its use of "action plans", but this appears to hearken back to the days when oversight was focused on the minutia of state program implementation, rather than on-the-ground performance. OSM further tips its hat toward this approach in draft Directive REG–8 where the agency states that it will maintain "to the extent possible" the focus on on-the-ground results. We are very uncomfortable with the direction that this "enhancement" is heading and urge extreme caution.

Whenever OSM references OSM's options for dealing with our failure to complete the terms of an action plan (as in Subparagraph 5(a)), it is critical that the directive reference the procedure set forth in Section 521(b) of SMCRA and 30 CFR 733.12 of its regulations.

With regard to the suggestion in Section 6(a) of the draft directive that states' Title V grants be conditioned to encourage correction of issues, we are totally opposed to this approach. First, we assert that this action is in contravention of SMCRA. Section 705 contains no suggestion that these "support" grants are to be restricted or otherwise conditioned for any reason. Quite the contrary: Section 102 of SMCRA anticipates that OSM will "assist the states in developing ***and implementing*** a program to achieve the purposes of this Act." 30 U.S.C. § 1202(g). Restricting the federal funding provided in Section 705 flies in the face of Section 102. Additionally, OSM has not received permission from either the authorizing or appropriating Committees of Congress to proceed in this manner. We assert that both of these bodies expect that OSM will use and apply the moneys appropriated for state regulatory grants for the purposes intended and without restriction or condition.

Secondly, it makes little sense to restrict the states' ability to spend federal (and matching state) moneys to implement their regulatory programs when the very reason for "the issue being corrected" may result from limited resources in the first place. And even if this is not the case, after working diligently for the past 10 years to secure increases for Title V funding, it sends the wrong message to now restrict, via conditions, the expenditures of those funds—especially given the fiscal constraints within which states are operating. This incredulous suggested approach by OSM leaves the states wondering what the agency's true intentions are with regard

[5] OSM appeared to understand and capture this important principle of state primacy in the draft discussion paper that was provided to us in August of 2009 where the agency said: "OSM's primary role in a State with an approved program is to monitor the State to ensure that it maintains the capability to fulfill those SMCRA responsibilities, to assist the State in implementing their responsibilities and to report on its evaluation of the State program. OSM maintains its authority under SMCRA to intervene ***when there is a clear breakdown in the States' implementation."*** (Emphasis added). This is much closer to congressional and judicial intent, as noted above.

to "enhancing" oversight. Are we back to the "gotcha" approach to oversight? We trust not. Too much progress has been made over the years to recede to this type of state/federal interaction.

We also question the process that OSM has in mind with respect to grant conditioning. OSM notes in the draft directive that it will target additional resources to correct identified problems or reduce grants based on poor performance. Does OSM have specific criteria in mind that will be used to target additional resources or reduce grants based on performance? Will something other than the key performance measures set out in REG–8 be utilized? If so, it will be incumbent on OSM to work with the states to develop these criteria so that we are aware of these new criteria for performance.

OSM's draft directive also seems to anticipate that problems will inevitably be found when it uses language on page 3 under "Responsibilities" in subparagraph (5)(c)(1) that Field Office Directors will "identify regulatory program problems." Again, the history of oversight, especially over the past 15 years, does not support this conclusion. In fact, quite to the contrary, there have been relatively few "problems" that have begged for the far-reaching types of solutions and procedures that OSM is proposing in this draft directive. This is one of the reasons that Directive REG–23 was rescinded in the first place. If OSM continues to insist on the need for a new directive, we suggest that the language in Subparagraph 5(c)(1) be changed to read "Determine if Regulatory Program Problems Exist." Similar adjustments should also be made in Subparagraph (5)(c)(2), where the words "if a regulatory program problem is determined to exist" should be added to the end of the sentence and in Subparagraph (5(c)(3) where the word "identified" should modify "Regulatory Program Problems". We also suggest adding at the end of subparagraph (5)(c)(3) the words: "An opportunity should be provided for the states or tribe to review and comment on the action plan". This will be consistent with paragraph 6(b) on page 4 of the draft directive.

Finally, in subparagraph 5(b)(2), the directive should be amended to provide an opportunity for the state or tribe to request appropriate technical assistance, not just the Field Office Director.

Draft Directive REG–8

This directive has grown exponentially since the last version in 2006 (from 45 pages to 105 pages) and the primary explanation appears to be the June 2009 MOU. Substantial new sections of the directive have been added under oversight inspections, off-site impacts, stream impacts, bond release, special category permits and regulatory program problems—all of which trace their roots to obligations in the MOU directed at OSM. Were it not for the MOU, it is unlikely that this directive would have been revisited at all. It certainly would not have undergone such a drastic facelift. Based on the annual oversight reports received by the states over the past five years, there has been no evidence to support such a major overhaul.

While we understand that OSM has struggled with the presentation of certain data elements contained in REG–8 that are used to support oversight reports, OSM's own annual report, and responses to requests from Congress, the General Accountability Office (GAO) and others, what OSM has undertaken with this revision goes well beyond that concern. We have offered on numerous occasions to work with OSM on these data needs, most recently during the summer of 2009. Rather than engage us on this matter, OSM has chosen to move in a direction that once again reverses much of the progress we have made over the years and sets up a confrontational environment that will do little to meaningfully evaluate and report on state program implementation. Instead, the directive is structured to provide maximum leverage for OSM to implicate the states for their failure to comply with commitments made on our behalf by OSM in the June 2009 MOU. Some of those commitments require rulemakings to accomplish, not internal directives. The section on "mitigating the impacts to streams" is particularly egregious, as it advances OSM's objectives under its stream protection rule prior to actual promulgation.

It is difficult to know where to begin in providing comments on this expanded directive. In addition to changes to the text of the directive, there are significant adjustments to the various charts for collecting data and information. We provided detailed comments on the portion of the directive entitled "Oversight Inspections" on July 8 of this year but the draft reflects only a few of our suggested changes. We believe the most effective process for reviewing and sorting out our respective concerns with current and proposed oversight procedures and requirements is through a collaborative effort, as has been utilized in the past. The Oversight Steering Committee has facilitated this process and the result has been an oversight directive and evaluation process that reflects a meeting of the minds. We believe that such an ap-

proach is critical and recommend that that Oversight Steering Committee meet in the immediate future to begin an appropriate review process.

In the meantime, below are a sampling of some of our concerns with REG–8, all of which (in addition to others that will likely be identified) require further review and discussion.

Page 3—**item (h) Performance Agreement/Evaluation Plan** and **(j) Action Plan**—allows OSM to concoct a written plan with or without the primacy State's concurrence. It basically anticipates the State will sign, but notes that signing is not mandatory for OSM to proceed as it wishes to conduct oversight. This attitude undermines many years of State and OSM cooperation and collaboration in implementing SMCRA.

Page 4—Subparagraph (5)(a)(2) indicates that the Director/Deputy Director will appoint an Oversight Steering Committee "when appropriate". We cannot imagine a scenario where this would not be appropriate. Part of the past success of OSM's oversight policy and procedure has been attributable to the work of this Steering Committee. As suggested above, we believe this is the proper forum for discussing and resolving the many issues associated with the new draft directive and we urge OSM to rejuvenate this Committee as soon as possible.

Page 5—item (d)(4)—The States have no problem with public participation as allowed under their approved programs, which must be consistent with and as effective as that provided under the federal regulations. OSM seems to be anticipating far more public participation than that currently required by law and regulation.

Page 6—item 5—preparing a Performance agreement/Evaluation Plan "to the extent possible" cooperatively with the State regulatory Authority—intent is explicit that OSM will prepare the plan as it deems appropriate, even absent the regulatory authority's cooperation and concurrence.

Page 8—OSM does not mention the effect that this new draft directive will have on other REG–8 change notices, including Transmittal Number 932 dated July 1, 2008 and Transmittal Number 943 dated October 6, 2008.

Appendix—Page 1–2, last paragraph—This is a federal guidance document and does not have the weight of regulation or statute. While OSM may feel that the States have "respective roles and responsibilities", those are set forth by law and regulation. The States should not and are not bound by this federal guidance document.

Appendix—Page 1–3—OSM notes in paragraph 2 that oversight reviews, "may be associated with evaluation of customer service, actual or potential on-the-ground or permitting problems, and end results." This sets up the classic second-guessing scenario, especially with respect to permitting issues. OSM's authority is restricted to review of the state's permitting process and program, not individual permitting decisions. The suggestion that "potential" problems are fair game also unduly expands the reach of OSM's oversight review and authority. And while OSM states that its oversight "will not be process-driven", the draft directive allows OSM to essentially review and second guess the regulatory authority's decisions and actions at any time. In this regard, paragraph 2 on page 1–3 seems inconsistent with paragraph 4 that follows. OSM sets percentages of the number of inspectable units it will focus on, then provides a caveat that it may review more should it so choose. Not only will this be duplicative of the regulatory authority's processes, the additional record keeping and reporting will further strain OSM and State resources and foster uncertainty in the regulated community.

Appendix—Page 1–4—Outreach—OSM needs to be sure that it does not confuse its oversight role with the jurisdictional role of the state regulatory authority. To actively seek other federal agency concerns is the role of the state regulatory authority under its primacy program, either as part of the permitting process or in the initial stages of program approval or later program amendments. This is not and should not be a function of OSM oversight. OSM's expansion of the role of other federal agencies in the oversight process is a clear indication of the far-reaching impact of the 2009 MOU.

Appendix—Pages 1–5 through 1–8—Oversight Inspections—This is an entirely new section of REG–8, also driven by the 2009 MOU. In it, OSM has decided upon a shotgun approach without a statistical basis for selecting the types and percentage of inspections it intends to conduct—with or without concurrence of the regulatory authority. Independent inspections con-

travene and usurp a State regulatory authority's primacy. If independent inspections are conducted, OSM's inspections should always be conducted with reasonable notice to the regulatory authority. OSM's intent to give less than 24 hours notice is unrealistic and unreasonable. OSM and the States have many years of cooperation and trust in implementing SMCRA. OSM is reverting back to the days of mistrust and confrontation with the States. OSM's inspector should give his/her State counterpart at least 5 working days notice of the inspection date. OSM would not have to disclose the permit or site location until the day of the inspection. OSM's intent to conduct independent inspections without notice to the regulatory authority is unacceptable and contrary to State primacy.

Appendix—Page 1–6—Oversight Inspections—OSM states in the second paragraph of this section that "inspections that do not specifically address the purpose of an oversight inspection [such as citizen complaints and federal enforcement inspections] will not be counted in meeting the targeted number of inspections in the Performance Agreement/Evaluation Plan". The fact is, all OSM inspections have the effect of evaluating the effectiveness of a state's program in some form or another. As a result, all OSM inspections in primacy states should be accounted for in determining the actual number of oversight inspections for each respective state or tribe.

Appendix—Page 1–7—OSM notes with respect to the selection of random and focused inspections that "the final decision on the types of inspections to be used for evaluation of any state or tribal program will be at the discretion of the FOD." This would seem to undercut any agreements that were reached between the state and the FOD during the negotiation and development of the state's annual performance agreement.

Appendix—Pages 1–9 through 1–13—Offsite Impacts—The current REG–8 provisions addressing offsite impacts should remain in place. The draft greatly expands the universe of offsite impacts and goes far beyond the jurisdictional control of the regulatory authority. Offsite impacts should be limited to violations cited under SMCRA. OSM's draft would also consider violations cited by other federal and state agencies that are outside the scope of SMCRA. Several of the reporting requirements are new and deserve further discussion before being incorporated in the directive. Again, in many cases, OSM is utilizing the directive to foist new requirements on state regulatory authorities which do not find their support in existing regulations. This is particularly true with respect to the collection of information on unregulated off-site impacts in addition to those regulated or controlled by the state program and the identification of off-site impacts where no violation was required or cited. In addition to the potential confusion and controversy this could engender, spending limited state and federal resources on these matters seems inappropriate.

Appendix—Pages 1–13 through 1–18—Reclamation Success—The decision to apply for a phase bond release is a business determination of the permittee. While the regulatory authority can encourage the permittee to submit a bond reduction application, it cannot by regulation or law mandate this result. The timeliness measurements of the approval of the various bond release phases may not provide the most accurate data.

Appendix—Pages 1–20 through 1–21. OSM is moving toward an enhanced database for oversight, especially with the expanded "Regulatory Program Data for States and Tribes" (DST). It is absolutely critical that OSM engage in discussions with the states about the ability to provide the data being sought by OSM before the agency moves forward with this aspect of oversight. The states will likely face challenges associated with both the availability of this data and the resources required to provide the data. If OSM is to be successful in the collection and analysis of this important program data, the agency's state partners must be brought into the process.

Appendix—Page 1–23—OSM is proposing to place minutes from meetings between OSM and the states in OSM's "Evaluation Files", which in turn would be placed on OSM's website. These oversight "team meetings" are often frank exchanges about challenging issues, and may involve discussions about potential future enforcements actions against operators. Making these types of notes and discussions available to the public could prove problematic. These materials should enjoy the same protection as attorney-client privilege and work product.

Conclusion

We appreciate the opportunity to submit these comments on the three oversight directives discussed above. We call upon OSM to reconvene the Oversight Steering Committee to engage in further discussions concerning both REG–8 and REG–23 to address the various concerns raised in our comments. We also urge OSM to appoint a separate working group composed of state and federal representatives to work through the issues associated with the proposed reinstitution of INE–35. We stand prepared to meet with you at your earliest convenience.

Sincerely,

Gregory E. Conrad
Executive Director
Interstate Mining Compact Commission

Douglas C. Larson
Executive Director
Western Interstate Energy Board
On behalf of the WIEB Reclamation Committee

[A letter submitted for the record by the Western Governors' Association, to The Honorable Ken Salazar, Secretary, U.S. Department of the Interior, dated February 27, 2011 follows:]

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February 27, 2011

The Honorable Ken Salazar
Secretary of the Interior
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Dear Secretary Salazar:

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

Several of our member states who are "cooperating agencies" have delivered a letter (see attached letter dated November 23, 2010) to your Director of OSMRE expressing serious concerns about the need and justification for both the proposed rule and accompanying environmental impact statement (EIS), as well as the quality, completeness and accuracy of the chapters of the EIS that they had the opportunity to review. WGA is also concerned by the procedures used by your agency in developing the EIS to support this rule. Members who are "cooperating agencies" on the

EIS feel that they have not had a meaningful opportunity to comment on its contents, given the constrained time periods for reviewing and submitting comments.

WGA feels that the OSMRE has not provided a sufficient basis to support the need for sweeping regulatory changes, hi fact, one of the primary justifications put forward by the agency in its Federal Register notice is a June 11, 2009 memorandum of understanding (MOU) between the Administrator of the U.S. Environmental Protection Agency, the Acting Assistant Secretary of the Army, and you. However, the MOU was specifically targeted at "Appalachian Surface Coal Mining," which expressly refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia." (See MOU at p. 1 [REMOVED ADVANCE FIELD] and fn 1). Despite this limitation in the MOU, the OSMRE rules will be applied to coal mines throughout the United States, including coal-producing Western states that we represent.

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

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

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

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

Sincerely,

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

Christine O. Gregoire
Governor of Washington
Vice Chair

Enclosure

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