

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

Testimony on “Jobs at Risk: Community Impacts of the Obama Administration’s Effort to Rewrite the Stream Buffer Zone Rule.”
September 26, 2011

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

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

- A decrease in surface mine coal production in the Appalachian Basin of 30%;
- A loss of 10,749 jobs in the Appalachian basin under the worst case scenario;
- Lowering an additional 29,000 people in the Appalachian Basin beneath the poverty level;
- A 13.1% loss in severance tax; and,
- An 11.7% decrease in income taxes.

Recently, there has been a good deal of public discourse over the appropriate level of environmental protection that should govern the coal mining industry. The debate is reminiscent of the issues that were debated publicly and in Congress in the years leading up to SMCRA’s adoption. In OSM’s Stream Protection Measures environmental impact statement and rulemaking, it is playing to a constituency that, like their predecessors a generation ago, favors abolishing or greatly restricting surface coal mining in Appalachia. After at least six years of debate in the 1970’s, Congress rejected this approach and chose to strike a balance between energy production and environmental protection. In adopting SMCRA, Congress found, “expansion of coal mining to meet the Nation’s energy needs makes even more urgent the

establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public” 30 U.S.C. § 1201(d). Among the express purposes Congress set forth in the Act was to:

[A]ssure that the coal supply essential to the Nation’s energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation’s need for coal as an essential source of energy . . .

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

The Basis for OSM’s Decision to Undertake the Stream Protection Measures Rulemaking

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

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

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

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

OSM is Promoting Regulatory Uncertainty

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

The EIS Process Has Excluded Meaningful State Participation

OSM correctly realized that its planned Stream Protection Measures rulemaking was sufficient in scope to require the preparation of an environmental impact statement (EIS) in accordance with the National Environmental Policy Act. However, OSM’s schedule for completing this EIS was unrealistically ambitious. When the June 11, 2009 MOU committed OSM to changing its 2008 stream buffer zone rule, OSM was already in litigation with environmental groups challenging the 2008 rule. On March 19, 2010, after OSM was unsuccessful in persuading the court to allow it to simply cast aside the 2008 rule, OSM entered into a “friendly” settlement agreement with the opponents of this rule. In this settlement, OSM

committed to issuance of a proposed regulation replacing the 2008 rule, i.e., the Stream Protection Measures rule, by February 28, 2011. This necessarily required OSM to complete the draft EIS for the Stream Protection Measures rule within the same time frame, by February 28, 2011. The unreasonableness of the timeframe OSM targeted for completion of this EIS might be best illustrated by a comparison with the EIS it conducted for the 2008 stream buffer zone rule, which it aimed to replace. From OSM's announcement of its intent to prepare an EIS for the 2008 stream buffer zone rule through issuance of a draft EIS, a little more than 26 months passed. Importantly, the EIS for the 2008 rule built upon the more extensive Mountaintop Mining – Valley Fill EIS that had recently been completed in 2005. In contrast, the EIS for the Stream Protection Measures Rule has been conducted as a stand-alone EIS for a much more sweeping regulatory change than the 2008 stream buffer zone rule. OSM announced its intent to prepare the Stream Protection Measures EIS in April, 2010 and again in June, 2010. This allowed OSM only eight months to complete a draft EIS for the Stream Protection Measures Rule.

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

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

The West Virginia Regulatory Program's Existing Stream Protection Requirements

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

- Core drilling must be conducted in the area where surface mining is proposed. Each layer of rock in the core sample is analyzed for chemical content. The data is used to determine which rock layers have potential to leach and produce pollutants. The principal focus has been on prevention of acid mine drainage (low pH and iron) and selenium pollution. Rock layers that exhibit this potential are required to be specially handled and placed, so the opportunity for these materials to come into contact with water is minimized.
- The applicant must conduct extensive water sampling to establish the pre-mining baseline condition for surface and ground water quality and quantity in the area of the proposed mine. The number of samples taken must be sufficient to establish the seasonal variation in these baseline conditions.
- The applicant must perform a detailed analysis of the likely effects of its proposed mining operation. This analysis is called a "PHC" (prediction of Probable Hydrologic Consequences).
- The applicant must include a Hydrologic Reclamation Plan ("HRP") in its application. The HRP must contain measures the applicant will take to reduce the hydrologic impact of its proposed mining operation, comply with effluent limitations imposed under the CWA and a plan for replacement of the water supply of anyone whose water supply is unexpectedly contaminated or interrupted by the mining operation.
- The applicant must perform a Storm Water Runoff Assessment (SWROA). In the SWROA, the applicant must model storm water runoff from the proposed mining operation under pre-mining, worst case during mining, and post mining scenarios. The SWROA must demonstrate that the mine has been designed so as to not allow a net increase in peak runoff in comparison to the pre-mining condition. There is no federal counterpart to West Virginia's SWROA requirement.

- The application must contain detailed engineering design information for all drainage control or water retention structures.
- The applicant must demonstrate that it has minimized the amount of mine spoil it is not using in reclamation (excess spoil) and placing outside the mined area in a drainway or stream. West Virginia requires applicants to utilize a modeling tool called AOC+ (approximate original contour) in making this demonstration. This modeling tool has been in use for more than ten years and has been approved by USEPA, the Army Corps of Engineers and OSM as a legitimate means of demonstrating the amount of mine spoil returned to the mined-out area for use in reclamation has been optimized and the size of any fill placed in a stream outside the mined area has been minimized.
- The agency must perform a Cumulative Hydrologic Impact Assessment (“CHIA”) for the proposed mine and all other existing or proposed mining in the cumulative impact area for the proposed operation. A permit will not be issued unless the agency can make a finding that the applicant has affirmatively demonstrated that its proposed operation has been designed to prevent “material damage to the hydrologic balance outside the permit area”.
- West Virginia is one of a few states that have promulgated regulations defining “material damage to the hydrologic balance”. There is no federal definition of this term.
- The agency performs a Buffer Zone Analysis (“BZA”) for any permit which contemplates placement of spoil within one hundred feet of an intermittent or perennial stream. The BZA involves detailed environmental analyses of the environmental impacts of spoil placement in such areas and has been relied upon by the Army Corps of Engineers in its issuance of permits for mining-related fills in waters of the United States under section 404 of the Clean Water Act. There is no parallel to the BZA in federal surface mining regulations. The BZA is described in more detail in the attached letter from Thomas D. Shope of OSM to Joseph M. Lovett dated December 8, 2009. This letter also contains a detailed discussion of how the West Virginia regulatory program complies with the State stream buffer zone rule, which the subcommittee may also find to be of interest.
- The permit must establish plans for monitoring surface and ground water quality and quantity during mining, so predictions in the applicant’s PHC can be verified. It must also include a during-mining monitoring plan for verification of the predictions of the SWROA it has conducted.

- The State recently adopted permitting guidance for application of its narrative water quality standard for the protection of the biologic component of the aquatic ecosystem in NPDES permitting under the CWA. As a result, the Aquatic Ecosystem Protection Plans required under this guidance for the NPDES permitting program are now also being included in HRPs for mining operations. CHIA's the agency performs are also addressing protection of the aquatic ecosystem.

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

Impacts of the Stream Protection Rule

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

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

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

state relationship that previously existed and impose substantial new bureaucratic regulatory burdens on the states.

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

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

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

30 U.S.C. § 1201(f).

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

- SMCRA provides that it is not to be applied in a manner that will supersede, amend or repeal the federal Clean Water Act. 30 U.S.C. § 1292(a). This provision of SMCRA has been applied by the courts to reject a past attempt by OSM to establish what amounted to water quality standards. At the present time, several of the Appalachian states, including West Virginia, are in the process of establishing how narrative state water quality standards for the protection of biologic components of the aquatic ecosystem are to be applied in the context of the regulation of coal

mining. This process involves great potential for conflict between USEPA and the states over the application the Clean Water Act in this area. OSM intends to interject itself in the middle of the debate between USEPA and the states over this issue by including a biologic component in its material damage definition . There is great potential for this element of OSM's rules to conflict with the Clean Water Act. The biologic component of the material damage definition may be another unlawful attempt by OSM to establish what amounts to a water quality standard.

- A proposed performance standard that would prohibit adverse impacts to a stream's biologic community. This proposal suffers from the same defects that affect OSM's proposal to include a biologic component in its material damage definition, as discussed in the paragraph above.
- The material damage definition is also expected to include "quantification methods" to define what constitutes material damage. Again, OSM appears to be at risk of interfering with the Clean Water Act where these quantification methods amount to de facto numeric water quality standards.
- The material damage definition will also include "corrective action thresholds" to identify trends and require correction before the level of material damage is reached. This, too, presents great potential for conflict with the Clean Water Act. The NPDES permitting program under the Clean Water Act has a process to establish effluent limitations for protection of water resources. Discharges from mines or other facilities that comply with these limitations are lawful and discharges that exceed these limitations are unlawful. OSM's corrective action thresholds would appear to be attaching regulatory consequences to what would otherwise be lawful discharges under the Clean Water Act's NPDES program, in conflict with the Clean Water Act.
- The material damage definition is expected to codify OSM's Acid Mine Drainage Policy. Without getting into an in-depth discussion of the AMD policy, this probably is a sufficient enough departure from the statutory language of SMCRA to require it to be adopted through Congressional action rather than agency rulemaking.
- OSM will propose that approval to mine through natural drainage ways or streams be "sequenced". By this, OSM means that a mine must completely reclaim a drainway it has mined through, including restoration of the pre-mining biologic community in the drainway, before the mine will be allowed to mine through any subsequent drainway. In as much as drainways across Appalachian mountain sides may be separated by only a couple hundred feet, this proposal is entirely unrealistic.

- The portion of the Stream Protection Measures Rule that deals with disposal of excess spoil proposes to require constructed aquatards within excess spoil fills. Historically, nearly all of the construction standards that have applied to excess spoil fills have been oriented toward assuring their stability. One element of the design has been to assure that these structures drain freely. An aquatard is a layer of decreased permeability where water will be forced to drain laterally through the interior of a fill. This has the potential to seriously compromise the structural integrity of these fills. Our engineers refer to the aquatard as a “failure plane.” The failure of such a structure would be a threat to public safety.
- The excess spoil disposal rules will also require the tops of fills to be sloped to cause drainage to run off instead of infiltrating the fill. Achieving the goal of promoting runoff will cause peak flow to increase during rain events, contributing to offsite flooding.
- OSM proposes to place additional restrictions on the granting of variances from the existing requirement for restoration of the approximate original contour of mined lands. This proposal has great potential to conflict with West Virginia land use planning laws. The coal mining areas of southern West Virginia have had little economic development because the terrain is too rugged. The State Legislature has recognized that mining presents a unique opportunity to provide a resource that these areas lack, flat land. This is essential to the future, post-mining economic viability of these areas. The State has adopted legislation which requires county level economic development authorities to develop county-wide master land use plans. These plans are required to be approved by state government and to meet certain minimum state requirements. Each plan must be updated and re-approved by the State at three year intervals so as assure that it remains current. Under these plans, land that is proximal to supporting infrastructure, such as four lane highways or other transportation corridors, is targeted for development while forestry and comparable land uses are planned for more remote lands. New mining operations are required to attain a post mine land use that comports with the county master land use plan. OSM’s proposal to further restrict variances from the approximate original contour requirement conflicts with these State land use laws and may foreclose the opportunity to provide flat land through the mining process, so there can be economic development of these historically coal dependent areas after the coal is gone.

Conclusion

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