

**Testimony of Russell Hunter on behalf of the Interstate Mining Compact Commission
re Legislative Hearing by the House Energy and Mineral Resources Subcommittee on
H.R. 1644, the *Supporting Transparent Regulatory and Environmental Action in Mining
Act* – May 14, 2015**

Good morning. My name is Russell Hunter and I serve as Counsel with the Division of Mining and Reclamation within the West Virginia Department of Environmental Protection. I am appearing today on behalf of the Interstate Mining Compact Commission (IMCC). We appreciate the opportunity to present this testimony before the Subcommittee regarding H.R. 1644, the *Supporting Transparent Regulatory and Environmental Action in Mining Act* (“*STREAM Act*”). IMCC is a multi-state governmental organization representing 26 coal and mineral producing states throughout the U.S., several of whom implement regulatory programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

H.R. 1644 would amend SMCRA by adding a new Section 530 that mandates the Office of Surface Mining (OSM) within the U.S. Department of the Interior to make publicly available each “scientific product” relied upon by the agency in developing any draft, supplemental, final or emergency rule and any related environmental analysis or economic assessment. This section would also require OSM to publish the raw data from federally funded scientific products and the *curriculum vitae* of researchers receiving federal funds related to these products. The bill would also add a new Section 722 that would fund a study by the National Academy of Sciences to study the effectiveness of OSM’s 1983 stream buffer zone rule in protecting perennial and intermittent streams. Finally, the bill would amend Section 702 by adding a new Subsection (c) that is intended to avoid duplication between the requirements of SMCRA and other federal laws such as the Clean Water Act.

Based on our recent experience over the past five years with OSM’s attempt to promulgate a rule to replace the 1983 stream buffer zone rule, we see great merit in the approach set forth in H.R. 1644, particularly with respect to the availability of scientific studies and data that allegedly support a wholesale departure from existing regulatory frameworks that are working well. As such, we support those provisions that would require the release of these scientific products in advance of the publication of any draft, supplemental, final or emergency rule, or any related environmental analysis or economic assessment. However, we recommend adding the word “proposed” to the list of rulemaking actions undertaken by OSM as this is often the most critical time period in rule development.

An overview of recent OSM rulemaking activity is illustrative of the need for H.R. 1644. The current effort by OSM to rewrite the stream buffer zone rule is in response to two decisions by the Obama Administration: a settlement agreement with environmental groups challenging a 2008 final rule on the matter and a Memorandum of Understanding (MOU) signed by the Interior Department, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers in June of 2009. Both of these decisions committed the agency to develop a new rule for the protection of streams, with a projected completion date of June 2012. However, unlike prior rulemakings in this area, OSM appears to be expanding the scope of the rule well beyond stream buffer zone requirements, taking on topics such as the

definition of material damage to the hydrologic balance, baseline data collection and analysis, monitoring requirements, mining through and subsidence of streams, corrective action thresholds, and fish and wildlife protection and enhancement.

As IMCC has noted in comments that we have submitted to the agency concerning the anticipated new rule and the underlying environmental impact statement (EIS), OSM is faced with the challenge of attempting to address and resolve issues that are much broader than the rule itself. With each successive iteration of the stream buffer zone rule since 1979, more and more pressure has come to bear on the agency to define the rule in such a way as to completely ban the disposal of excess spoil in any type of stream that may be impacted by surface coal mining operations. However, as the U.S. Court of Appeals for the Fourth Circuit clearly articulated in its 2003 opinion in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003), “it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose.” Accord *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, 556 F.3d 177, 195 (4th Cir. 2009). OSM’s rule, therefore, should not be about banning the practice of disposal of excess spoil in streams, nor the mining through or subsidence of streams, but rather defining how it can be done in a manner that comports with the law, which is what the 2008 rulemaking intended to accomplish. And while OSM can prescribe a national standard for accomplishing this task, it remains the responsibility of the states, as exclusive regulatory authorities where primacy programs have been approved, to apply the standard through the permitting process, in which OSM plays no role other than through appropriate federal oversight. Hence our concern that any new rule that contains a significant technical or engineering component be fully supported and justified by the science, and that we have an early opportunity to weigh in on these products.

In its 2011 draft EIS (and in early drafts of the new rule), OSM appears to be searching for the ultimate answer to the appropriate protection of streams that has somehow eluded them. From where we sit, it is not OSM that has failed to articulate the solution to this matter. The agency, on more than one occasion, has engaged in comprehensive analyses through both rulemakings and environmental impact statements (EIS’s) that address the complexity of the issue and provide solutions that are consistent with SMCRA, protective of the environment and respectful of state primacy, including the 2008 final rule. There is little left to offer. The real dilemma lies not with OSM’s rule, but with the practice of excess spoil disposal itself, which the courts have authorized and found to be consistent with the way SMCRA is currently written. Any significant change in direction would therefore require an amendment to SMCRA.

The problem also does not lie at the footstep of the states as primary regulators in this area. Over the course of the past 35 years since states first began to receive primacy, OSM has seldom found concerns with our implementation of the applicable stream buffer zone requirement. In fact, as OSM found with respect to West Virginia’s regulatory program, there has been no indication that the states are applying their respective stream buffer zone rules inconsistently with the historic application of the buffer zone requirements, as approved by OSM over the years. See letter to Joseph Lovett from OSM Regional Director Thomas

Shope dated December 8, 2009. Consequently, as OSM continues to search for any new alternatives to address this matter, two things must be kept in mind: 1) the states' implementation of this rule and its many iterations over the years has not been the stumbling block; and 2) as OSM attempts to move forward once again with a new variation on a common theme, it is critical to bring the states into the final solution given our role as sole issuers of permits that incorporate and implement these standards – including the scientific basis for the rule and accompanying EIS.

As the states consider their regulatory role in the context of these rulemakings, they are particularly concerned about a propensity on OSM's part to insert itself into the state permitting process in inappropriate ways. For instance, in OSM's "Immediate Stream Protection Measures" which were released in November of 2009, OSM indicated that it intended to "coordinate the SMCRA and Clean Water Act (CWA) permitting processes to ensure effective and coordinated compliance with provisions of the Clean Water Act." While the states are fully supportive of coordinated approaches to meeting the objectives of both SMCRA and the CWA, and have in fact advocated this in the past, they are uncertain of where OSM intends to go with such an initiative.

Opportunities for interaction/coordination between these two regulatory programs are built into existing regulatory structures. For instance, there are specific administrative procedures specified under SMCRA for concurrence by EPA regarding the approval of state programs or any amendments thereto. In addition, EPA is involved with the issuance of NPDES permits by states under the CWA, which are often coordinated with the issuance of SMCRA permits. OSM's role is designated as one of oversight pursuant to which it determines whether delegated state programs are consistent with federal counterpart regulations. Any attempts by the federal government to convert their statutorily designated roles into something more intrusive in the name of "coordination" will be met with suspicion, if not outright opposition. As the U.S. Court of Appeals for the District of Columbia has noted relative to SMCRA permits, the state, as the sole issuer of permits, decides "who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. The state . . . inspects the mine to determine compliance; [and] [w]hen permit conditions are violated, the state is charged with imposing appropriate penalties." *In re: Permanent Surface Mining Regulation Litigation* (en banc), 653 F.2d 514, 519 (D.C. Cir. 1981) (citations omitted).

It is obvious from a review of the June 2009 MOU, as well as OSM's rulemaking documents to date, that while there may be some explanation for designing a set of regulatory requirements that applies specifically to mountaintop removal operations in steep slope areas, the stream buffer zone rule has always had, and will likely continue to have, broad implications for all regions of the country. In fact, OSM's proposal to adjust the definitions of "material damage to the hydrologic balance" and "approximate original contour" confirms the national scope of the newest rulemaking. As a result, OSM must consider how any reformulation of the rule will impact each state's program in terms of both implementation

and resources. Understanding the scientific underpinnings of the rule will greatly enhance that analysis.

There is also the question of how OSM's intentions with regard to this new rulemaking comport with SMCRA's goal of creating a level playing field across the 24 state coal regulatory programs. For instance, the term "material damage to the hydrologic balance" is contained in every state's regulatory program and any effort by OSM to define that term for the Appalachian region will have consequences for all other state programs, regardless of how OSM attempts to narrow its scope or applicability. In fact, given the significant differences in geology, hydrology and terrain among the various regions of the country where surface coal mining operations occur, regulatory terms such as "material damage" have necessarily been left to each state to define based on their unique circumstances. This is the very essence of SMCRA's design, whereby Congress vested primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations with the states so as to accommodate the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations.

The draft EIS chapters furnished by OSM to cooperating agency states in late 2010 and early 2011 set forth myriad options for proceeding forward with a new stream buffer zone rule. Most of these are variations on themes that have already been explored in previous rulemakings or EIS's, as noted above. Some alternatives suggest the use of concepts that have proven elusive or difficult to implement in the past, such as quantitative or qualitative thresholds. However, reading between the lines of the early 2011 draft EIS, what we sense is an attempt by OSM to reconcile not just its own regulatory requirements under SMCRA, but a larger, undefined set of standards for water quality protection being advocated by EPA and the Corps. Any stream buffer zone rulemaking simply cannot be taken out of context from all the other activity that has attended the development of the EPA/DOI/Corps MOU referenced above. While much of that activity has been focused in central Appalachia at this time, the overarching concerns regarding conductivity, total dissolved solids, and numerical and narrative biologic water quality standards have implications nationwide. And it must be kept in mind that the setting of narrative water quality standards is a quintessential state function in which the federal agencies play a very limited, prescribed role. By and large, these determinations are left solely to the states under the Clean Water Act. Hence our support for the amendment to Section 702 of SMCRA in H.R. 1644 that would inhibit this type of overreach by OSM and minimize duplicative and confusing regulatory requirements.

If and when OSM moves forward with any adjustments to the stream buffer zone rule and the EIS, the states believe that it is important for both state and federal agencies to agree upon several key issues: 1) who is taking the lead on the issues; 2) what specific regulatory standards are in play under both SMCRA and the CWA; 3) how and where these standards should be incorporated into existing regulatory programs, especially at the state level; and 4) what the expectations are for both implementation of and compliance with those standards. These types of discussions are long overdue and without some resolution with all parties at the table, rulemakings such as that regarding stream buffer zones and related issues

are likely to fail. This is why the study by the National Academy of Sciences (NAS) called for in H.R. 1644 could be particularly useful. Taking a hard look at the overall effectiveness of the stream buffer zone rule in protecting stream would be immeasurably helpful in understanding where those protections need potential adjustment from a technical and engineering perspective in terms of stream integrity and reclamation techniques. We caution, however, that any such study should be focused on scientific aspects such as stream health and reclamation techniques, as opposed to second-guessing state permitting decisions or program implementation. As noted above, the latter has never been identified as a problematic area requiring review or revision.

One of the overarching concerns evidenced in H.R. 1644 and that should be addressed (perhaps in the NAS study) is why OSM feels compelled to move forward with a new rulemaking. We are still uncertain, even after all the debate over the past several years concerning the June 2009 MOU and OSM's new stream protection rule, about the basis for the proposed rulemaking or the problem the agency is attempting to fix. We certainly understand the high levels of angst associated with mountaintop mining operations in Central Appalachia, but what OSM is attempting to do with this new national rulemaking cannot be justified by that public debate. As we have noted in comments to OSM and testimony to the Subcommittee, the appropriate forum for that debate is before Congress, not OSM. Nor can the litigation associated with OSM's 2008 stream buffer zone rule serve as an adequate basis for a new rule. There are other options available to the agency for the resolution of this litigation short of a new rulemaking on the matter. And even though we have requested this information in the past, we are still unaware of any data that supports the need for this rulemaking. Quite to the contrary, the data and information we are familiar with (including OSM oversight reports) indicates that the states have been implementing stream protection requirements in a fair, balanced and appropriate manner that comports with the requirements of SMCRA and our approved regulatory programs. It would therefore be helpful if OSM would finally clarify its goals and the problems it hopes to address in any new rulemaking process.

As we peruse the various "principal elements" of the proposed action spelled out in OSM's 2011 draft EIS to date, one of our primary concerns relates to resource implications for the states. While much remains to be seen in terms of details about the rule, what little we do know signals a major impact on the states in terms of permit reviews, monitoring requirements, various new technical analyses, and intergovernmental coordination. In this regard, we believe that it is critical, as part of any EIS, for OSM to undertake an assessment of the rule's impact on both state resources and federalism implications.

We also recommend that, before moving forward with the EIS and proposed rule, OSM (and ideally the NAS study) seriously consider the other alternatives available to the agency for addressing stream protection. We believe that there are opportunities for the states and the affected federal agencies (OSM, EPA, the Corps and the U.S. Fish and Wildlife Service) to work cooperatively together to address stream protection concerns. However, to date our requests for arranging such meetings have been ignored. We believe that there are a variety of tools, protocols, policies and other measures available to us as state

and federal agencies that, with some coordination, could lead to a comprehensive and effective approach to protecting streams.

Another of our concerns, and one that particularly drives our support of H.R. 1644, is whether the science supports some of OSM's proposed concepts. In particular, it seems to us that there are several technical issues associated with these concepts that require further thought and research, such as sequencing of stream disturbance, bottom up fill construction, diverting water around fills to avoid retention and percolation, and compliance points off the permit area. We also believe that more can be done in the way of developing tools or methods for prevention and prediction. By advancing a rule that embodies some of these concepts without more in the way of scientific support will complicate the ability of the states to accomplish the purposes of SMCRA. The 2008 rule considered several of these concepts and settled on a resolution that was reasonable and workable. We are unaware of any peer reviewed science or technological advances that would significantly change the approach contained in the 2008 rule, contrary to recent statements by OSM.

Without rehashing our previously articulated concerns about the need and justification for both the proposed rule and the accompanying EIS, the states, particularly those who served as cooperators in the EIS development process, continue to stand by their comments regarding the quality, completeness and accuracy of those portions of the draft 2011 EIS on which they have had the opportunity to review and comment. As indicated in the detailed comments the cooperating agency states have submitted to date, there are sections of the draft 2011 EIS that are often nonsensical and difficult to follow. Given that the draft 2011 EIS and proposed rule are intended to be national in scope, the states are also mystified by the paucity of information and analysis for those areas of the country beyond central Appalachia and the related tendency to simply expand the latter regional experience to the rest of the country in an effort to appear complete and comprehensive. The result so far has been a disjointed, unhelpful exercise that will do little to support OSM's rulemaking and which could invite legal challenges to the rule or the EIS. We are hopeful that, in the future, the transparency requirements embodied in H.R. 1644 would result in a different approach and outcome.

We appreciate the opportunity to provide these comments to the Subcommittee concerning H.R. 1644 and OSM's proposed stream protection rule and associated EIS. We urge the Subcommittee to continue its investigation and oversight of the process with the goal of motivating OSM to reconsider the need for this rulemaking and the significant impacts it will have on state regulatory authorities and the communities we protect, as well as the industry we regulate. We believe that H.R. 1644 would further that process and as such we strongly support the bill.