Statement of Joe Lovett, Appalachian Center for the Economy and Environment to the Committee on Natural Resources. U. S. House of Representatives Subcommittee on Energy and Mineral Resources Oversight Hearing on "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"

April 7, 2011

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

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

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 Appropriations 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.