

Statement of Joseph J. Zaluski
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Before the Committee on Natural Resources
Subcommittee on Energy and Mineral Resources
U.S. House of Representatives

November 15, 2011

My name is Joe Zaluski, I am Executive Vice-President of ECSI, LLC, an engineering consulting group based in Lexington, Kentucky. ECSI was subcontracted by Polu Kai Services (“PKS”) as a subject matter experts to assist with the EIS for the Stream Protection Rule.

In preparation for addressing you today, I watched the entirety of recent testimony by Director Pizarchik before this Committee. I would like to comment on several statements made by the Director.

We have submitted materials to the Committee for your review and those materials are rather voluminous. I do not know if they were also supplied to you by the Office of Surface Mining. They have been supplied to you today as a result of this Congressional Inquiry.

First, as to the credentials of the subject matter experts, I respectfully disagree with any implication that the team was not well qualified. If you wish to elaborate upon that during the question and answer period, I will be glad to do so. However, as to ECSI, I can tell you that the President of the company, Steve Gardner, has spent nearly 30 years in the mining consulting business in virtually every aspect. He is a Professional Engineer and has been involved in various state and national legislative efforts concerning mining, as well as the every day permitting and operational aspects of all types of mining operations. He is extraordinarily active in national organizations and has been recognized by them for his achievements.

Without taking up too much time, I can advise that I became involved in SMCRA before there was a SMCRA. As an attorney, I first worked for the Commonwealth of Kentucky while SMCRA was being lobbied in Congress. I began my career involvement with the regulation of surface and underground mining at that time and have continued, literally, ever since. I helped draft part of SMCRA, I served on the first regulation drafting committee with Walter Heine who became the first Director of OSM in 1978; and participated in the adoption and drafting of the first SMCRA based regulations. I helped in the drafting of Kentucky’s program, both at the regulatory and statutory level. I have been involved with mining in virtually every aspect, not just with rule making, but from the permitting, problem solving and litigation perspective. I have been involved at the local and national levels and believe that I am well respected by counsel and other professionals on virtually every side of the mining issues that have arisen over the years. I served as one of the first chairmen of the Natural Resources Section of the Kentucky Bar Association; and have served as President of the Energy and Mineral Law Foundation, a nationwide nonprofit academic and continued education organization celebrating its 30th year in existence. I have published in this area and know the subject matter very well. I hope that is why I was asked to participate in this process.

Contrary to the Director's intimation that the subcontractors were inept, I believe that the train wreck of an attempt at an EIS was caused by OSM's constant change in direction, instructions, assumptions and restrictions. All that is well documented in the materials we have supplied to the Committee. In fact, an email that will give you some idea as to the relationship between OSM and the contractors is dated December 15, 2010.

We were developing impacts to various types of mining across the nation and believed that our contract specifically required us to solicit industry input on the impact of various alternatives on various types of mining operations across the country. We had packaged up material and had lined up several companies to review our work. At the last moment before sending the material out, we contacted OSM to advise them that we were about to undertake that step. We received an email back through Polu Kai that was written in red and stated "under no circumstance is the internal workings of this team and/or the rule team to be released to outside parties. See suggestions below." The actual email from OSM to Polu Kai stated as follows:

As per my meeting with OSM Director Joe Pizarchik, no part of the SPR rule text or EIS are to be sent to any parties for the purposes of the EIS preparation at any time. He indicated that this direction is non-negotiable, and that violations would have extreme consequences.

His alternative suggestions for how to proceed are two-fold:

1. Contractor team members working with OSM staff should develop our "best estimates" based on sound science and engineering, and provide those as a part of the draft EIS. He and I chatted about the possibility of error, but agreed that the comment period for the draft EIS will give the opportunity for all sides to provide us with additional information. Additionally, he indicated that we should be able to explain exactly how the numbers and assumptions for impacts to coal production were derived, including being able to explicitly list all factors used by the consultants to generate their estimates.
2. The Director suggested that we develop an internal team of mining engineers and other appropriate experts from OSM and other federal agencies to "peer review" the methodology used by the consultants. His suggestion was to include mining engineers in OSM regional and field offices, USGS, BLM and other DOI and non-DOI federal agencies.

My suggestion is that we have a call tomorrow to strategize on how best to proceed.

I think that email really sums up the relationship between OSM and the EIS team. The contractors were threatened with "extreme consequences;" and in the alternative suggestions from the Director makes it very clear that OSM understood that "best estimates" would be used; and, in the second paragraph, that there was a very close working relationship between OSM and the EIS team. This was certainly not the impression that the Director left when he testified before you.

Having been involved in the SMCRA at the national level and the rulemaking at that level, as well as at the state level, I and others stated to OSM at the kickoff meeting for the EIS that the schedule for accomplishing this task was absurdly short. A reasonable schedule for this process, which should have involved all regulatory authorities, state and national, should easily have been set for three years.

Contrary to what the Director stated, OSM was intimately involved throughout this process with not only regularly scheduled face-to-face meetings and telephone conferences, but constant phone calls and emails - most with conflicting instructions. As you will see from the documents supplied to the Committee, OSM embedded dozens of its employees into the EIS Team. We met with them constantly. They approved methodologies, especially with regard to production shifts. They supplied the team with assumptions for financial models. Examples of the assumptions would include which production numbers to use nationwide and requirement that as we determined production shifts that we maintain a national thermal balance. These instructions came directly from OSM.

The assumptions that we were directed to take by OSM, contrary to the Director's testimony, are set forth in the exhibits to the February 15, 2011, letter tendered to the Committee. In addition to the February 15, letter I just referred to, there is a second letter dated February 23, 2010, to the OSM contracting officer responsible for the implementation of the consulting contract with PKS and subsequently ECSI, LLC. I direct your attention in particular to the tab entitled "PKS Detailed Response to OSM Cure Notice," pages 1-20. Every statement made in that section is well documented by emails, letters and other exhibits attached to that same letter.

I would direct attention to the following:

Attachment 1 – OSM, in December 20, 2010, confirms the methodology proposed by the contractors for determining production shifts, if any.

Attachment 2 – as late as February 6, 2011 the consultants are still attempting to resolve with OSM the baseline for calculating production shifts. This was approximately 2 days before OSM issued its Cure Notice.

Attachment 4 – is also worth noting that OSM at this time had reversed its position that the national thermal balance had to be maintained during implementation. These changes were very significant as far as their impact on the work of the EIS team.

Attachment 5 – Bill Winters of OSM on February 18, 2011, changed the implementation timeline from 8 ½ years to 12 years. This would be another significant change that would likely affect production shift and job loss.

Let me conclude my remarks by again reflecting back on the development the initial SMCRA regulations and what is known as the permanent program. The process took years to accomplish with the input from states that had mining within their borders. A great deal of time and expertise went into that effort. The Stream Protection Rule, although it may have a fairly innocent and noble name, seeks to rewrite the very heart of the entire program. To try to accomplish this in short order was a mistake, a big mistake. The experts involved asked very pointed questions of OSM that simply could not be answered.

Thank you for this opportunity.