

**Statement of Bradley C. Lambert, Deputy Director, Virginia Department of Mines, Minerals and Energy on Behalf of the Interstate Mining Compact Commission re 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* before the House Energy and Mineral Resources Subcommittee – April 7, 2011**

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 enhancing 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.<sup>1</sup>

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 (4<sup>th</sup> 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.<sup>2</sup>

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 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

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<sup>1</sup> 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.

<sup>2</sup> 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.

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 (NAAML) 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.