

Written Testimony of Bradley C. (Butch) Lambert
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Before the House Energy and Mineral Resources Subcommittee re Oversight Hearing on
“Jobs at Risk: Community Impacts of the Obama Administration’s Effort to Rewrite the
Stream Buffer Zone Rule”
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My name is Bradley C. Lambert and I serve as Deputy Director of the Virginia Department of Mines, Minerals and Energy (DMME). I appreciate the opportunity to present this statement to the Subcommittee regarding the views of the DMME on the rewrite on the Stream Buffer Zone Rule.

I would like to begin by providing you with some background information about the Virginia coal industry and DMME. Coal production has been important to Virginia’s economic development since colonial days. The first commercial coal production in the United States occurred in 1748 from the Richmond Coal Basin just west of the State Capital in Richmond, Virginia. Coal production was important to Virginia until the Civil War during which much of the coal industry was destroyed. Commercial coal mining later rebounded in Virginia’s southwestern-most counties in the 1880’s and has been conducted continuously through to the present. Today, coal is produced in the seven extreme southwest Virginia counties.

Virginia first implemented rules to address coal mining and reclamation issues in 1966. The minimal requirements of the early law and regulations failed to keep pace with the rapid expansion of surface mining activities in the Appalachian region. Following the passage of the 1977 Federal Surface Mining Control and Reclamation Act, Virginia sought and obtained primacy from the U.S. Office of Surface Mining (OSM) as the primary regulatory authority for coal surface mining in December of 1981.

The coalfields of Virginia are characterized by steep slopes and narrow valleys. The mines in Virginia predominantly consist of underground and contour surface operations. Other operations include auger and highwall mining. Presently, Virginia has four mountaintop removal coal mines. These four operations have post mining land uses that include farm land, industrial, commercial or residential. Without mountaintop mining operations, land uses such as hospitals, schools, shopping centers, airports, and residential and commercial/industrial development would not exist.

Coal production in Virginia peaked at 47 million tons in 1990. Expected production for 2011 will reach approximately 23 million tons. Virginia coal is of a higher British Thermal Unit (BTU) and lower sulfur content than the national average. This quality has made Virginia coal more desirable for metallurgical coke production and for the export market.

Virginia's regulatory program is recognized across the nation as a leader and an innovator in many areas. Many states have benchmarked with Virginia on areas such as electronic permitting, underground mine mapping and the development of a GIS database that includes all surface mining areas as well as abandoned mined lands. Virginia continues to work on making this information available for public viewing through an outward facing web site. Through our electronic permitting system, other state and federal agencies can access coal mining permit data and applications and provide comments using the electronic application.

OSM's Draft Environmental Impact Statement for the Proposed Stream Buffer Zone Rule

The OSM's annual oversight reports for Virginia have not identified any problems that would necessitate such a drastic rule making. In fact, in the OSM Annual Evaluation Summary Report for the evaluation year of 2011, OSM writes *"Since the mid 1990's OSM has focused oversight on the "on ground" results that states are achieving. OSM is proposing that future oversight will likely include review of state permitting processes more closely. Yet, even when evaluated with a slightly different view on oversight, OSM finds that DMLR has successfully implemented both its regulatory and abandoned mine land program during the past year. OSM did not identify any systemic failures within the State program."* We are submitting for the record a copy of the OSM's Annual Evaluation Summary Report for the Regulatory and Abandoned Mine Land Programs Administered by the Commonwealth of Virginia for 2010.

For years the states have been administering stellar regulatory programs. Now the OSM appears to be determined to impose a drastic change in how states administer their programs. The OSM has not provided any information to the states as to the reason for revising the Stream Buffer Zone Rule that they have now termed the Stream Protection Rule. Nothing in the states' Annual Evaluation Report indicates that the states are doing a poor job of enforcing the current surface mining laws. The U.S. Department of the Interior, U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) signed a Memorandum of Understanding (MOU) in 2009, that appears to be the basis for the effort by OSM to change/revise the long standing Stream Buffer Zone Rule. The states were not consulted about or invited to sign this MOU, which is aimed at altering state regulatory programs. Yet this MOU is having a direct impact on the implementation of state programs. One significant item resulting from the MOU was the proposed the Stream Buffer Zone Rule. Early in the development of the draft rule OSM invited several states; including Virginia to participate in the development of the draft Environmental Impact Statement (DEIS) as cooperating agencies. OSM hired a contractor from outside the coal mining regions who had no mining background. Cooperating agency states voiced their concern about the contractor and its ability to complete the DEIS; however OSM moved forward with the contract.

OSM set an unreasonable time schedule for cooperating agencies to review each chapter of the DEIS and provide comments back to OSM. In most cases only five days were allowed for the review. Due to such short timeframes for review and comment, meaningful input was made

nearly impossible. In order to comply with these deadlines, states had to devote considerable staff time to the preparation of their comments which left less time for review of permit applications, answering citizen's complaints and completing required permit inspections. The cooperating agencies expressed concerns regarding the constrained timeframes under which they had to operate to provide comments and requested an extension for submission of comments on many occasions.

OSM never granted these requests, even though OSM allowed additional time for the contractor to complete their work. It was made clear that if comments were not provided, they would not be accepted. However, any conflicting or critical statements from the cooperating agencies were ignored and not addressed in the DEIS. Later it was learned that other federal agencies that were reviewing the DEIS were not under the same time constraints for providing comments as were the states.

The DEIS provided to cooperating agencies for their review and comments appears to be a document designed to support and rationalize OSM's decision to promulgate rules to diminish or eliminate Appalachian surface coal mining. All the action alternatives examined in the DEIS, other than taking no action, predict that the proposed stream protection rules would decrease Appalachian surface coal mining significantly. The predictions of decrease range from 10% to 100% - with OSM's preferred alternative (Alternative 5 in the DEIS) predicting a 30% decrease.

A major assumption is that metallurgical coal production from the Appalachian regions would need to be offset with production from other areas. The DEIS does not identify any other possible sources of metallurgical coal. This implies metallurgical coal would have to be obtained outside the United States. As metallurgical coal sale prices are usually three or four times higher than coal used for electricity generation, this would have a major economic impact (as inferred in the DEIS) since there will be a significant loss of coal needed for steel production.

The DEIS appears to have been developed by individuals who are unfamiliar with the ecological functions, geology, hydrology, and mining practices in individual states. The data and impacts identified are limited to specific states within the Appalachian Region; however, the requirements contained within this document will pertain to each state within the entire Region.

Instead of a document designed to support and rationalize a pre-determined outcome, the DEIS should be a statement of fact-based alternative environmental results. Furthermore, the alternative outcomes should seriously consider the single most significant factor influencing environmental conditions in Virginia's coalfields - old abandoned mined lands (AML). The DEIS does not address the existing impacts to watersheds from pre-law mining and other non-point sources of impairments which affect most streams in the mining areas in Virginia. Approximately 90 percent of the streams in the Virginia coalfields have been impacted by water quality degradation, stream function degradation, loss of riparian habitat, etc. Surface mining has been used effectively in conjunction with Total Maximum Daily Load (TMDL) requirements to

correct AML features which would never be addressed with AML funding. In fact, the TMDL implementation plans rely almost exclusively on re-mining, TMDL offsets and no-cost agreements to restore these streams to an unimpaired level.

Reduction/elimination of surface mining in Virginia will severely impact stream restoration efforts. There are no other resources available to the coalfield communities to restore impaired streams. The shift of coal mining to the western United States will also reduce the AML funding available to restore impacted eastern streams through the OSM Clean Streams Initiative.

The lack of attention to AML is one of several technical concerns that our agency has with the information in the DEIS. Other technical issues include OSM's efforts to define material damage, mandate post mining land uses, and misrepresent some of the scientific data.

OSM is proposing that material damage to the hydrologic balance be defined as a measurable adverse impact on water quality and quantity resulting from degraded biological conditions in the intermittent and perennial stream network within the watershed. The concept that any measurable adverse impact be considered "material damage" is contrary to the plain language of SMCRA which states in Section 515 (b): "General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation to minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation to the extent possible using the best technology currently available." As can be seen by this language the intent is to "minimize" adverse impacts to the hydrological balance - not to prevent any adverse impact. It is impossible to conduct surface disturbance operations such as coal mining or even underground mining operations, without temporarily leaving a footprint of some sort on the environment.

The DEIS proposes a mandated post-mining land use. This is contrary to the spirit of SMCRA. Even though Virginia encourages reforestation, we recognize the environmental and economical value in a range of post mining land uses and the landowner's rights to implement land uses that are approved and properly implemented. Mandatory post mining land use requirements appear to be designed as simply another general obstacle to surface mining, as opposed to the idea of improving conditions after mining in such a way that mined lands properly reclaimed.

Virginia has been a leader in promoting successful reclamation of mined lands. Working closely with Virginia Tech and other colleges and universities, Virginia and other Appalachian states and OSM developed a method for reclaiming mined lands to a reforestation land use. In 2011 in Virginia, 2226.75 acres were planted with a total of 1,475,293 trees. Of that total, 98.20% of the acres were reclaimed using the method developed. The reforestation method was accomplished in cooperation with the request of the landowner. The DEIS would not take into account the landowner's request for a post mining land use. The statement in the DEIS of post mining land

uses going to hay/land pasture is not true in Virginia. The majority of coal mine reclamation returns land to an unmanaged forest post mining land use.

Many of the scientific studies referenced throughout this EIS have been misrepresented and taken out of context. Others were not extracted from peer reviewed journals and should not be included in a decision document. Studies involving the effects of total dissolved solids (TDS) on coalfield streams did not include data collected from Virginia, even though our agency has been effectively addressing TDS through the TMDL program since 2005. Yet findings of the cited studies are being broadly applied to Virginia.

OSM's proposed rulemaking on "stream protection measures" appears to be headed in a direction that will jeopardize the coal mining industry in Virginia. This proposed rulemaking will almost completely revise the Surface Mining Control and Reclamation Act (SMCRA) of 1977. This will undo over 30 years of progress in developing a regulatory framework in which primacy states, such as Virginia, administer a state-specific program, approved by the Secretary of the Interior, that is as effective as and no less stringent than the federal program.

Several proposals in the OSM DEIS regarding "preferred alternatives" (such as not allowing a mine-through of a stream or drain way) are troubling. The requirements that, before a stream or drain way could be mined through, there must be a demonstration made by the applicant that the stream "form and function" can be restored, and that a premining impaired condition of a stream would not be accepted as the standard for measurement of success fly in the face of the Clean Water Act Rahall Amendment. This amendment authorizes the discharge of impaired waters from reclaimed remaining operations as long as it is as good as or better than the premining baseline water quality.



Chaney Creek restored stream channel comparison: left, before restoration, spring 2005 (restoration was conducted June 2006); right, four years post-restoration, spring 2010. (Courtesy Alpha Natural Resources)

Virginia mining operations containing stream channel reconstructions, such as the one pictured above, have won numerous awards including the Appalachian Region Reforestation Initiative Award presented by OSM, the National Association of State Land Reclamationist Award and the Interstate Mining Compact Commission's Kenes C. Bowling Award.

OSM does not have the statutory authority to over ride Clean Water Act provisions such as the Rahall Amendment. The proposed rule contains numerous statements that OSM does not intend to utilize Clean Water Act provisions. For instance, in the preferred alternative for stream definition, OSM's DEIS preferred alternative states, "This Proposed Action does not follow ... Alternative #4's reliance on the CWA definitions." As the Army Corps of Engineers (CORPS) is charged with designating jurisdictional waters for the purposes of Section 404 mining permits, OSM is establishing a separate stream designation process that it clearly intends to set up at its own discretion. This will most likely result in confusion and litigation, allowing second guessing of Corps' jurisdictional determinations.

Statements in the DEIS lead the readers to believe that underground mining methods such as longwall mining will not be impacted. Underground mining can and will in some cases cause subsidence which will impact surface structures including streams. One statement in the document says that longwall mining does not cause subsidence even at depth. Those familiar with this type of mining know that this statement is not true. In fact, these operations plan for subsidence well in advance of mining. Underground mining, especially longwall mining, would be significantly restricted not only in the Appalachian region but any area where this type of mining is used since streams would be impacted by subsidence.

Turning to the cost of the EIS, it has been determined that OSM had dedicated seven million dollars to completing the DEIS. These are funds that were originally identified for state regulatory programs. After the state cooperating agencies and other organizations outlined grave deficiencies in the DEIS from the contractor, OSM removed the contractor and stopped their work in developing the DEIS. However, the contractor was paid \$3.5 million for their substandard and inaccurate work. OSM never had any discussions with the cooperating agencies about the problem with the contractor and were never notified that the contractor had been removed until after the fact. Now it has been learned that OSM has hired another contractor for \$1 million for additional work on the DEIS. To date, \$4.5 million has been spent on this DEIS with nothing completed.

The impact of the DEIS alternatives on state regulatory programs has not been studied. The implications of these alternatives, such as increased permitting and monitoring requirements would be staggering. The changes proposed by the DEIS would create changes to the permitting process, which would mean increased staff for permit review, bonding review and most of all an increase in required funding for state programs. OSM's proposed funding for state programs has been decreasing over the last several years. In April of this year, states appeared before this subcommittee to express concerns about the potential federal budget reduction for state programs. At no time in the development of the DEIS has OSM consulted with states for input regarding the impact on additional resources and additional permit review times that the various alternatives would require.

On March 8, 2011, Virginia Governor Robert F. McDonnell wrote a letter to Interior Secretary Ken Salazar expressing deep concerns about the DEIS and other regulatory action taken by OSM. (Governor McDonnell's letter and a response from OSM Director Joseph Pizarchik on behalf of Secretary Salazar are submitted for the record.) Among those concerns were the potential significant and negative impacts of these actions on Virginia's coal industry and economy. One of Virginia's vital resources, coal is used to produce 48% of the electricity consumed in the state, and much of Virginia's coals are of high grade metallurgical grade. Governor McDonnell also noted that coal production in the southwest region of the state is the primary economic engine for the region. Coal mining jobs are among the highest paying in the area, and many small businesses depend on the coal industry for their livelihood.

The authors of the DEIS did not consider the census data for population trends. There are continuing out-migrations of people from the Appalachian coalfields, and any loss of jobs from the coal industry will only hasten the exodus. The employment in Virginia's mining industry has continued to decline during the past decade, not grow as indicated in the DEIS. The authors did not consult with state agencies for any employment numbers; they only made assumptions. Throughout the DEIS, the loss of direct service jobs, local retail jobs, as well as other indirect employment appears not to have been considered. In fact, projected employment loss is sometimes noted in the DEIS as being minor. However, local planning agencies in Virginia estimate that the multiplier effect of one coal mining job is from 4-6 additional jobs.

In addition to the impacts of the stream protection measures on the industry and economy, Governor McDonnell noted that these requirements would have a detrimental effect on the re-mining of previously mined lands where lower priority abandoned mine land (AML) features continue to impact the environment. These impacts are not addressed in the DEIS. Nearly 80% of surface coal mining in Virginia involves some re-mining, including the use of no-cost AML projects where mining companies can reclaim AML features adjacent to permitted active coal mining sites. Re-mining has proven to be a viable method of correcting serious environmental and other problems that would not otherwise be funded under the Abandoned Mine Land Program.

Finally, Governor McDonnell voiced his concerns that OSM has failed to follow Administrative Procedures Act and National Environmental Policy Act requirements in their rulemaking process. This equated to OSM writing the rule without completing a valid EIS and stating what the "answer" is without defining the "problem." Contrary to OSM's assertion in OSM Director Pizarchik's response to Governor McDonnell that such failures did not take place, state agencies learned from information leaked on OSM's Share Point website that indeed OSM had developed a draft Stream Protection Rule.

In summary, although the DEIS regarding OSM's proposed Stream Protection Rule examines the effects of the rulemaking on the 25 coal producing states, during the review of the document, staff from Virginia's Department of Mines, Minerals and Energy discovered that the majority of the adverse impacts will be within the Appalachian Basin. The effects of this rulemaking would

eliminate many jobs and millions of dollars of revenue in Virginia. Virginia does not agree with the proposed rulemaking and the findings of the DEIS. Much, if not most, of the data included in the DEIS are not supported by any actual facts or figures. The information provided in the DEIS is often and inexcusably biased against the Appalachian Basin especially, in Virginia. OSM has a predetermined outcome (elimination of surface coal mining in the Appalachian Basin) and has not analyzed data nor conducted any studies to support their conclusions.

Virginia believes that the state's environmental resources are protected by Virginia's current mining laws and regulations. We also believe that the economic impacts of the rulemaking are severely understated. Local level impacts would be intense and a global impact would be expected. A major assumption in the DEIS is that metallurgical coal production from the Appalachian Basin, including Virginia, would be offset with production from other sources. However, high value metallurgical coal would have to be obtained from outside the United States which is another example of industries moving overseas to the detriment of domestic production.

In a July 9, 2002, OSM press release titled, "Reducing the Social Cost of Energy," the agency stated the intent of their oversight role. The release points out that the role of OSM is to help states maintain high standards and maintain a level playing field so the industry in any one state does not have an unfair advantage in interstate competition. Clearly, this is not the direction of the DEIS. As pointed out by the contractor, coal production would be shifted for the Appalachian Basin to the western region, and in the case of metallurgical coal, that production may be moved overseas.

One impact that has not been fully explored is the impacts to the AML program that may see human and health and safety problems go unabated with the loss of AML taxes on coal production. Employment opportunities in the Appalachian Basin are very limited and the loss of over seven thousand jobs as predicted in the DEIS would only increase the poverty level in the area. Mining provides some of the highest paying jobs in Southwest Virginia, and many small businesses depend upon coal companies for the bulk if not all of their income. Coal mining plays a major role in the opening up of areas for development. The Virginia Coalfield Economic Development Authority works closely with the respective county Industrial Development Authorities and coal companies to locate and acquire reclaimed level land for industrial development.

It is also of note that the OSM DEIS does not include any changes to mining and permitting due to EPA's reinterpretation of the Clean Water Act. The combined impacts of these agencies' actions are devastating to the nation's economic and energy future. OSM's rulemaking proposes to shift coal mining production from the eastern United States to the western region to the detriment of the Appalachian Basin's economy.