

STATEMENT OF  
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BEFORE THE

COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

FOR THE  
OVERSIGHT HEARING ON:

"STATUS OF OBAMA ADMINISTRATION'S REWRITE OF THE STREAM  
BUFFER ZONE RULE AND COMPLIANCE WITH COMMITTEE SUBPOENAS"

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Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify on efforts by the Office of Surface Mining Reclamation and Enforcement (OSM) to better meet our statutory responsibility to allow for responsible development of our nation's coal resources while protecting the environment on which our communities depend for their health, safety and way of life.

**Introduction**

Along with responsible oil and gas development and the growth of clean, renewable energy, coal is an important component of our nation's energy portfolio, and the responsible development of this important resource is a key part of America's energy and economic security.

While the Administration is striving to improve our regulatory framework and achieve an appropriate balance that allows responsible coal production and protects communities and the environment, we also recognize the vital role coal plays in our energy portfolio, and we are committed to coal production and the jobs it supports. In the past three years the Bureau of Land Management has issued federal coal leases for more than 1.4 million acres, and nearly 1.4 billion tons of coal has been produced from more than 300 federal coal leases.

Further underscoring the Administration's commitment to the goals of energy security and job creation, federal coal leases on nearly a half million acres of federal mineral

estate generated over \$780 million in royalties in Fiscal Year 2011. This coal is used to generate electricity in at least 40 states, accounting for more than one-fifth of all electricity generated across the country. Furthermore, the BLM held four coal lease sales in 2011, generating \$700 million in bonus bids.

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Office of Surface Mining Reclamation and Enforcement for two basic purposes: First, to assure that the Nation's coal mines operate in a manner that protects communities and the environment during mining operations and restore the land to productive use following mining; and second, to implement an Abandoned Mine Lands (AML) program to address the hazards and environmental degradation remaining from two centuries of unregulated mining. These tasks are vital to public health and safety and the environmental and economic well-being of the United States.

### **Stream Protection Rulemaking**

In December 2008, during the final weeks of the previous administration, OSM published a final rule that modified the circumstances under which mining can occur in or near streams. The so-called "Stream Buffer Zone Rule" was challenged by nine organizations in two separate complaints filed in District Court for alleged legal deficiencies, including the failure to properly conduct Endangered Species Act Section 7 consultation.

While the litigation was pending, the Administration identified significant matters the 2008 Rule failed to address. As a threshold matter, there have been significant advances in science and technology since the establishment of the 1983 rule which were not addressed in the 2008 Rule. Incorporating the most up-to-date science, technology, and knowledge about the effects of surface coal mining is essential to developing maximally beneficial modern regulations. The 2008 Rule also failed to provide objective standards for important regulatory decisions, such as a requirement to collect all the information needed to establish a baseline and to assess the likelihood of impacts during and after mining or to assure proper reclamation. In addition, although SMCRA requires that each surface coal mining operation be designed to prevent "material damage to the hydrologic balance," the 2008 Rule provided no definition, criteria or guidance that would assist operators or interested parties in determining whether the statutory requirement is being met. Thus, in addition to the legal issues raised by a number of parties in their lawsuits challenging the rule, the 2008 Rule failed to set forth basic "rules of the road" for operators and interested third parties that would ensure that SMCRA's environmental protection standards would be met, despite clear evidence in the rulemaking record that some coal mining operations were having a deleterious impact on stream health and fish and wildlife. Furthermore, OSM's existing rules allow for the practice of dumping

excess spoil over the side of mountains, burying streams in valleys below. This practice must be consistent with the requirement, in Section 515(b) of SMCRA, that the mine operators transport and place all excess spoil material resulting from coal surface mining and reclamation activities in a controlled manner to allow for compaction, and in such a way to assure mass stability and prevent mass movement. Without ensuring such compaction, operators may cause impacts to additional valleys and streams that need not be affected by these mining operations.

To address legal and policy concerns, the Department published an Advance Notice of Proposed Rulemaking (ANPR) on November 30, 2009, at 74 Fed. Reg. 62664, soliciting comments on ten potential rulemaking alternatives. The ANPR resulted in a large number of comments provided to OSM which indicated that technological advances not addressed in the 2008 Rule may enable industry to do a better job of repairing any damage by reclaiming the land and restoring natural resources for the benefit of the communities that will remain long after the coal is gone. We determined that development of a comprehensive stream protection rule proposal, broader in scope than the 2008 rule, would be the most effective way to proceed.

In March of 2010, the parties to the litigation over the Stream Buffer Zone Rule ultimately entered a settlement agreement in which the Department agreed, in line with the comments received on the ANPR, to propose a new rule to replace the 2008 Rule. This settlement agreement did not prescribe any specific provisions that must be included in either the proposed or final rule.

While this ongoing rulemaking takes place, the 2008 rule remains in effect on lands for which OSM is the regulatory authority (i.e., in Tennessee and Washington, and on Indian lands). For those states that have assumed primary responsibility—or “primacy”—for their own surface coal mining programs, the provisions approved in existing state programs govern mining in and near streams. In all primacy states, existing state programs are based upon the 1983 stream buffer zone rule. While the 2008 rule has not yet been adopted by any primacy state, the 2008 rule is the current federal regulation and has replaced the 1983 rule in OSM’s regulations.

The Committee has expressed great interest in the on-going, administrative deliberations that the Office of Surface Mining is engaged in as it develops a proposed regulatory approach for meeting SMCRA’s mandate that surface coal mining and reclamation operations be conducted to minimize disturbances to fish, wildlife, and related environmental values to the extent possible using the best technology currently available. Central to this exercise is the on-going preparation of a draft Environmental Impact Statement that will, in accordance with the law, fully evaluate whatever proposal the Office of Surface Mining releases for comment while, at the same time, it identifies and

evaluates a range of other potential alternatives.

When OSM has completed its deliberative process, both its proposed rule, and the accompanying draft Environmental Impact Statement, will be released and made available for public comment. At that time, the Office of Surface Mining will welcome public and Congressional comment on whatever proposal is advanced by OSM, and on the adequacy of the draft environmental analysis that will accompany the proposed rule. Currently, however, there is no pending proposed rule and there is no completed environmental impact statement that evaluates a proposed rule and alternatives. Rather, the deliberative process is ongoing.

OSM is continuing to review its rulemaking options, and is continuing to ensure that the analysis included in the environmental review that will accompany the proposed rule will be accurate and comprehensive. Indeed, given concerns expressed about unreleased elements of a prior environmental analysis, OSM is taking the extra step of subjecting economic analysis of the potential impacts of a variety of potential rulemaking approaches to robust peer review. The Office of Surface Mining will welcome full scrutiny of the regulatory approach that it ultimately determines is most appropriate, along with the comprehensive analysis that will accompany the proposal.

The Office of Surface Mining is taking great care as it develops a proposed approach for meeting SMCRA's statutory requirements that operators protect and restore streams and lands that are impacted by mining activities.

As we proceed with development of a proposed rule, we are considering ways to improve key regulatory provisions. For example, SMCRA requires that surface coal mining and reclamation operations be conducted to minimize disturbances to fish, wildlife, and related environmental values "to the extent possible using the best technology currently available." We are considering revisions that will provide solid benchmarks for companies to meet, and that will be based on the latest accepted scientific methods. The ANPR published on November 30, 2009, contains a brief description of additional possible rulemaking options. It includes, for example, the fact that while SMCRA prohibits "material damage to the hydrologic balance outside the permit area," the phrase has never been defined in OSM's regulations. We are considering ways to provide a clear definition that can be applied uniformly across the country and to ensure that the law is fully implemented to protect water resources both within and beyond the area covered in the mining permit; to protect drinking water; and to protect water quality and resources for recreation, wildlife, and scenic values. Protection of our waterways is a high priority as we continue to develop our important coal resources.

The ANPR also invited the public to identify additional provisions in the regulations, such as the requirement for coal operators to return mine sites to their approximate original contour, that the bureau should consider revising. SMCRA requires that mine operators reclaim mined areas to closely resemble their original pre-mining shape and size. Decades of research and on-the-ground practice have demonstrated that careful restoration of post-mining areas can limit, and, in many cases, eliminate, harmful levels of pollution from mines that often impact the public health of local communities and degrade downstream aquatic resources. Uniform regulations that result in carefully reclaimed areas will create opportunities for continued productive use of the land and water after coal mining ends.

As previously noted, we have already received extensive input from the public, states, and other Federal agencies on issues that we should consider in drafting a proposed rule, including more than 32,000 comments in 2009 on the ANPR, and more than 20,000 received following the public scoping meetings we held in 2010. We will consider these comments, as well as the benefits and the costs, of the agency's regulatory alternatives, as we move forward.

The draft Environmental Impact Statement (EIS) that OSM is developing in support of a proposed rule will examine a range of alternatives. In addition to analyzing the significant environmental issues associated with any proposed Stream Protection Rule and its alternatives, the EIS will evaluate the economic impacts of each alternative, and will provide OSM with critical information needed to inform its regulatory decision-making and the public. As we work toward publication of a proposed rule and draft EIS, OSM will take the time necessary to make informed regulatory decisions supported by the draft EIS analysis, with ample opportunity for additional public input on both the proposed rule and its draft EIS.

Once a proposed rule and draft EIS have been published, we will ask interested stakeholders —from Congress, industry, environmental organizations, or members of the public — to read and comment on the documents, consistent with the National Environmental Policy Act, the Administrative Procedure Act, and other applicable laws.

We look forward to receiving additional public review and comment on a proposed rule and draft EIS once they are published.

### **Requests for Documents Related to the Stream Protection Rule**

The Department is fully committed to continuing to work in good faith to accommodate the Committee's legitimate oversight interests in this matter. We have made significant accommodations and will continue to do so. We hope that the Committee will similarly

work in good faith with the Department in a manner that recognizes the challenges and important interests presented where congressional oversight involves ongoing Executive Branch deliberations. The Constitution envisions, as courts have long recognized, a process of accommodation between the Legislative and Executive branches to resolve any conflicts that may arise when each Branch's interests and prerogatives are in tension. As Attorney General William French Smith wrote during the Reagan Administration, "The accommodation process is not, and must not be, simply an exchange of concessions or a test of political strength. It is the obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other Branch." 5 Op. O.L.C. 27, 31; 43 Op. Atty Gen. 327 (1981).

### **Accommodating the Needs of Coordinate Branches**

The Department recognizes the important role of congressional oversight, including oversight of the Department's activities. The Department appreciates that oversight is an important underpinning of the legislative process. Congressional committees, such as this one, need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law.

At the same time, as the Department has explained on many occasions, attempts to conduct congressional oversight of an ongoing rulemaking effort, while deliberations are ongoing, raise substantial separation of powers concerns. By attempting to insert itself into an ongoing Executive Branch deliberative process, the Committee threatens to impede the ability of OSM to accomplish its statutory duties. The Committee's requests for internal, deliberative, pre-decisional communications concerning OSM's ongoing development of a rulemaking proposal go to the heart of the relationship between the Legislative and Executive Branches and the separation of powers in the Constitution.

The Department is committed to complying with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations and interests of the Executive Branch. And, in the case of the Stream Protection rulemaking, the Department has provided the Committee with many meaningful accommodations including over 13,500 pages of documents responsive to the Committee's requests and subpoenas, multiple offers for *in camera* review of additional documents (some of which the Committee has yet to accept), briefings, and testimony before the Committee on several occasions. The accommodation approach the Department has taken has been consistent with oversight practices across administrations.

However, as the Department has previously explained, the Executive Branch's well-established confidentiality interests regarding its internal deliberations are heightened

when requests for such deliberative communications are made before the Executive Branch has made a decision regarding the pending issue and disclosure would thus reveal the Executive Branch's preliminary, non-final thinking on the matter. Indeed, there is a substantial question regarding the extent to which such requests pertain to an appropriate subject of congressional oversight. As Attorney General William French Smith explained:

It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be conducted with reference to information concerning decisions which the Executive Branch has already reached. . . . Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

5 Op. O.L.C. 27, 43 Op. Atty Gen. 327.

Even aside from the question of oversight authority, the Committee has not articulated to the Department why review of the proposed rule and draft analysis after they are completed and made public is not sufficient to address the Committee's concerns regarding the proposed rule's scope and potential impacts. As noted above, the next step in the process is not a final rule, but a *proposed* one – and after that proposal is made public, Congress, states, regulated industry and the rest of the American public will have a chance to provide feedback that will inform the final rule.

In response to the Committee's multiple document requests and subpoenas for documents pertaining to deliberations about developing a Stream Protection Rule proposal, the Department has been striving to accommodate the Committee's oversight interests in the bureau's process and handling of a contractor while protecting the substantive decision-making inherent in the Executive Branch function of executing the law.

Striking the right balance between the Committee's and the Executive Branch's legitimate interests takes time and effort. To be clear, the Department is not refusing to comply with the Committee's requests and subpoenas. To the contrary, the Department has been working diligently to satisfy the Committee's core oversight interests, consistent with the important confidentiality and independence of the deliberative process in which

the Department is engaged to develop a Stream Protection Rule proposal.

### **Conclusion**

Thank you for the opportunity to appear before the Committee today to testify on the development of OSM's Stream Protection Rule. The Department recognizes congressional oversight is an important part of our system of government, and we remain hopeful that the Department and the Committee can continue to work together to satisfy the Committee's oversight interests in this matter, while also safeguarding the independence, integrity, and effectiveness of the Department's ongoing efforts to develop a Stream Protection Rule. In that effort, we remain committed to developing a proposal that will more fully carry out the bureau's mission, make use of the best available science and technology, better protect communities and water supplies from the adverse impacts of surface coal mining, and provide greater clarity and certainty to the mining industry and the affected communities. We remain just as committed to providing ample opportunity for the Congress, public, industry, stakeholders and others to provide input on that proposal that will help us develop a balanced and responsible final rule. I would be happy to answer your questions.