



West Virginia Coal Association

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Statement of Jason D. Bostic

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**HOUSE NATURAL RESOURCES COMMITTEE- SUBCOMMITTEE ON ENERGY AND
MINERAL RESOURCES:**

***“JOBS AT RISK: COMMUNITY IMPACTS OF THE OBAMA ADMINISTRATION’S EFFORTS
TO REWRITE THE STREAM BUFFER ZONE RULE.”***

September 26, 2011

Good morning and thank you for the opportunity to address this Committee. I am Jason Bostic with the West Virginia Coal Association. On behalf of our membership, which accounts for 98 percent of West Virginia’s underground and surface coal production, we are grateful for the opportunity to address this Subcommittee.

West Virginia is the nation’s second largest coal producing state, averaging 155 million tons of annual coal production, 60 percent of which comes from underground mining operations.

West Virginia is the nation’s leading underground coal producer and 21,000 men and women show up every day at mines in West Virginia to produce one of the most valuable energy resources found anywhere in the world. For electrical generation, West Virginia coal offers a fuel source that is both high in BTU content and low in emissions. For domestic and international steel producers, coal from West Virginia and Appalachia is irreplaceable as a feedstock for the production of iron and steel. Our coal is also used in a variety of manufacturing processes that produce everything from plastics, to medication to cosmetics.

In short, West Virginia coal does everything from charging your iphone to forging the steel for our nation’s infrastructure to making the plastic bottle for your soda. Our coal

is shipped to 33 states and 23 countries. Energy produced in West Virginia fuels 40 percent of all electrical consumption on the east coast.

Coal is also the broad-shouldered Atlas of West Virginia's economy. In addition to the 21,000 coal miners directly employed by the mining industry, coal production supports another 42,000 jobs throughout the economy. These are jobs that pay twice the average annual state wage and represent \$3.4 billion in direct wages annually. Coal is also the backbone of West Virginia's government and social program structure, providing almost \$500 million in severance taxes to support vital state, county and local services. Together with the electric utility industry, coal provides upwards of 60 percent of all business taxes collected in West Virginia.

The thousands of coal miners in West Virginia, Appalachia and across the nation need your help.

While the President speaks of stimulating the economy, at every turn his regulatory agencies are erecting substantial barriers to the expansion of the mining industry. While he pleads the case for more jobs the agencies under his authority seem determined to drastically increase unemployment and increase those living below the poverty level. As the President calls for review of administrative actions, one of his executive agencies appears determined to push through a regulation with little public participation.

All of the benefits provided by the coal industry, and all that results from having a domestic source of energy that is so versatile in the economy, has been placed in jeopardy by the actions of the current administration. With its current initiative to re-write the Stream Buffer Zone Rule, the federal Office of Surface Mining (OSM) has joined the Environmental Protection Agency (EPA) in advancing an anti-coal agenda that targets all coal production but seems to focus specifically on the Appalachian coal basin. To implement this agenda, these agencies rely on policy, guidance and, in the case of OSM, secretive regulatory revisions that are developed behind closed doors, wrapped in bureaucratic intrigue. As the mining industry and our employees struggle to decipher and cope with this assault, we cannot help but marvel how this administration's stated commitment to transparency stops at Appalachia and the coal industry.

At the very outset of the new administration, the White House Council on Environmental Quality engineered a "blueprint" that committed the entire federal regulatory structure to restricting coal production and unfairly targeting Appalachian

coal miners. The ideology expressed in this June 11, 2009 Memo (copy provided as an attachment) has been used by EPA to halt the legal and orderly processing of mining permit applications. Marching to its orders under the June 11 memo, EPA embarked on an unprecedented campaign to twist the federal-state relationship under the Clean Water Act (CWA) to nullify the rights of individual states with respect to water quality standards. So bad are the actions of EPA that individual states, including West Virginia, have sued in federal court to preserve their sovereign authority.

The rulemaking from OSM that is the subject of the hearing today is particularly offensive. The agency has set out to radically change the mining regulatory program with no justification. As the agency itself admitted in the Federal Register, "...we had already decided to change the rule following the change of administrations on January 20, 2009" (75 Fed. Reg. 34667, June 18, 2010)

The path to revise the Stream Buffer Zone rule began by way of settlement agreement between OSM and anti-mining factions that have consistently, yet unsuccessfully, legally harassed the orderly regulation of coal mining. From there, came the June 11 memo and an OSM established rulemaking schedule that will astonish most observers- the agency committed to rewrite its regulations and complete an Environmental Impact Statement by February 2012—perhaps the fastest rulemaking exercise ever undertaken by a federal agency.

Under this record-breaking rulemaking schedule, OSM would quash a prior effort that took four years to complete and certainly included more public comment opportunities than the current initiative.

Far from being the "midnight regulation" as accused by OSM and this administration, the 2008 revisions were a thoughtful and inclusive change to federal mining regulations that remained faithful to the federal Surface Mining Control and Reclamation Act (SMCRA) and reflected several federal court decisions. Under this current regime, OSM has embarked on the most sweeping changes to the mining regulatory program since its creation in 1977 by Congress.

OSM's political leadership would have you believe these changes are but mere clarifications. Changes that, by OSM's own conservative estimates, stand to potentially reduce coal production in Appalachia by as much 30 percent and throw 20,000 people out of work are not minor. Further, and we can't stress this important fact enough,

despite the efforts of some to mask the impact of these revisions as confined to surface mining, the changes being contemplated by OSM could dramatically impact underground coal mines. They are in fact changes that betray the very will and intent of Congress as expressed in SMCRA.

Just as we have seen from EPA and its actions under the CWA, unelected bureaucrats within OSM are set to radically alter the place of coal in our nation's energy mix. They will do so with a stroke of the regulatory pen, ignoring public scrutiny and debate before Congress. Even the regulatory process associated with these changes has become secretive. Individual states, which SMCRA envisioned as the primary regulators of mining activity, have been locked out of the process by OSM.

The coal industry is not alone in its observation that OSM is attempting to change an act of Congress by way of regulation. Individual mining states have been openly critical of this process, with one state agency properly characterizing the rulemaking as "junk" and many others alleging the rule will clearly violate SMCRA.

It is against this backdrop of a federal assault, waged by EPA and OSM on coal that we welcome the Subcommittee's interest in this rule change. The strong demand for West Virginia coal should be reassuring to our mining families and encouraging investment and expansion that puts even more people to work. But that is not the case.

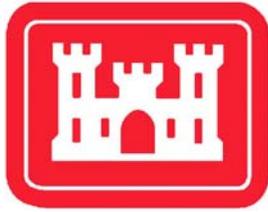
The politically-motivated actions of OSM and EPA have cast a long shadow of uncertainty over the coal industry. For our mining families and their communities these mysterious rule changes hang over their heads like an ominous cloud. They worry about their jobs, their children, paying their bills and the fabric of their communities. We are left to ponder why, if Washington is so concerned about creating good jobs, that it seems so determined to take away those that already exist.

Coal has allowed West Virginia and other mining states to survive recent economic disruptions relatively unscathed without massive budget deficits and drastic reductions in social services. Coal production in West Virginia and elsewhere in this nation has a potentially bright future as the country struggles to regain its economic footing. We will need coal to power factories and forge steel. We will need coal to provide reliable, affordable electricity to our citizens. Coal cannot only sustain current jobs but could add even more if these arbitrary actions from Washington are contained through effective oversight from Congress.

We seek not a subsidy or handout. We just need the permission to work. To continue doing for this country what we've done for years—providing it with the energy and industrial fuel that so many in the developing world crave as they aspire to economic greatness and providing the wages and taxes that support our states and communities.

We ask that you pull OSM and the other regulatory agencies from the shadows of their secretive routines and demand real answers.

Thank You.



MEMORANDUM OF UNDERSTANDING AMONG THE
U.S. DEPARTMENT OF THE ARMY,
U.S. DEPARTMENT OF THE INTERIOR,
AND U.S. ENVIRONMENTAL PROTECTION AGENCY

IMPLEMENTING THE INTERAGENCY ACTION PLAN ON APPALACHIAN
SURFACE COAL MINING¹

JUNE 11, 2009

PREAMBLE

The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities. These mountains also contain some of the nation's richest deposits of coal, which have been mined by generations of Americans to provide heat and electricity to millions in the U.S. and around the world. After generations of mining, however, the region's most readily available coal resources have diminished, and the remaining coal seams are less accessible to non-surface mining methods.

In response, a surface mining technique commonly referred to as "mountaintop mining"² has become increasingly prevalent in the Appalachian region. Although its scale and efficiency has enabled the mining of once-inaccessible coal seams, this mining practice 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. These negative impacts are likely to further increase as mines transition to less accessible coal resources within already affected watersheds and communities.

With this Memorandum of Understanding (MOU), the Department of the Interior (DOI), U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps)

¹ For purposes of this MOU, "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

² The term "mountaintop mining" may also be referred to as "mountaintop removal" or "valley fill mining."

are announcing this Interagency Action Plan (IAP) designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law. This IAP includes a set of short-term actions to be implemented in 2009 to existing policy and guidance, and a longer term process for gathering public input, assessing the effectiveness of current policy, and developing regulatory actions.

The Federal government has made a commitment to move America toward a 21st-century clean energy economy based on the recognition that a sustainable economy and environment must work hand in hand. Federal Agencies will work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities. This interagency effort will have a special focus on stimulating clean enterprise and green jobs development, encouraging better coordination among existing federal efforts, and supporting innovative new ideas and initiatives.

Interagency Action Plan

I. COORDINATION ON REGULATORY PROGRAMS

This MOU formalizes the agencies' IAP for coordinating the regulation of Appalachian surface coal mining. The elements of the plan are:

- A series of interim actions under existing authorities to minimize the adverse environmental consequences of Appalachian surface coal mining;
- A commitment by the agencies to investigate and, if appropriate, undertake longer term regulatory actions related to Appalachian surface coal mining;
- Coordinated environmental reviews of pending permit applications under the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act (SMCRA); and
- A commitment to engage in robust public participation, through public comment mechanisms and Appalachian public outreach events, helping to inform Federal, State, and local decisions.

In addition to the steps taken above, the Federal government will help diversify and strengthen the Appalachian regional economy. This effort will include the agencies to this MOU, and other Federal agencies, as appropriate, and will work to focus clean energy investments and create green jobs in Appalachia.

Coordination of interagency policy discussions and assessment of policy effectiveness will be achieved in consultation with the Council on Environmental Quality.

II. SHORT-TERM ACTIONS TO MINIMIZE ENVIRONMENTAL HARM

The signatory agencies will take the following short-term actions under existing laws, regulations, and other authorities to reduce the harmful environmental consequences of Appalachian surface coal mining.

Before the end of 2009, the Corps and EPA will take the following steps:

- Within 30 days of the date of this MOU, the Corps will issue a public notice pursuant to 33 C.F.R. § 330.5 proposing to modify Nationwide Permit (NWP) 21 to preclude its use to authorize the discharge of fill material into streams for surface coal mining activities in the Appalachian region, and will seek public comment on the proposed action.
- EPA and the Corps, in coordination with DOI's Fish and Wildlife Service (FWS), will jointly develop guidance to strengthen the environmental review of proposed surface coal mining projects in Appalachia under the CWA Section 404(b)(1) Guidelines.
- Recognizing that the regulation of surface coal mining extends beyond CWA Section 404, EPA will improve and strengthen oversight and review of water pollution permits for discharges from valley fills under CWA Section 402, and of state water quality certifications under CWA Section 401, by taking appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting of surface mining operations under these programs.
- The Corps and EPA, in coordination with FWS and consistent with the agencies' regulations governing compensatory mitigation, will jointly issue guidance clarifying how impacts to streams should be evaluated and how to evaluate proposed mitigation projects to improve the ecological performance of such mitigation implemented to compensate for losses of waters of the United States authorized by Section 404 permits.
- EPA, in coordination with the Corps, will clarify the applicability of the CWA waste treatment exemption for treatment facilities constructed in waters of the United States in order to minimize the temporary impacts of mining operations on streams.

Before the end of 2009, DOI will take the following steps:

- If the 2008 Stream Buffer Zone Rule is vacated by the U.S. District Court for the District of Columbia in *Coal River Mountain Watch et al v. Kempthorne*, 1:08-cv-02212-HHK C, as requested by the Secretary of the Interior on April 27, 2009, the Office of Surface Mining Reclamation and Enforcement (OSM) will issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts.
- OSM will reevaluate and determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA.
- OSM will remove impediments to its ability to require correction of permit defects in SMCRA primacy states.

III. DEVELOPMENT OF LONGER TERM REGULATORY ACTIONS TO BETTER MANAGE APPALACHIAN SURFACE COAL MINING

A. OBJECTIVES

The signatory agencies will review their existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining. At a minimum, the agencies will consider:

- Revisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone Rule and Approximate Original Contour (AOC) requirements;
- Eliminating use of Nationwide Permit 21 in connection with surface coal mining in the Appalachian region when the Nationwide Permit Program is reauthorized in 2012; and
- Revisions to how surface coal mining activities are evaluated, authorized, and regulated under the CWA.

B. PROCESS

The signatory agencies will create an interagency working group to coordinate the development of short-term actions, longer term regulatory actions, and coordination procedures for Appalachian surface coal mining. The group will ensure robust public involvement in the development of any proposed actions or regulatory reforms.

For any proposed regulatory revision or other action under this MOU that is a major federal action significantly affecting the quality of the human environment (and is an action subject to NEPA), an Environmental Impact Statement (EIS) will be prepared to inform the decision-making process. At an early stage in the interagency coordination process, the working group will determine whether coordinating these NEPA processes programmatically would more effectively guide regulatory development and decision-making. The interagency group will coordinate with CEQ regarding the implementation of the National Environmental Policy Act (NEPA) in the development of regulatory reforms.

IV. INTERIM INTERAGENCY COORDINATION PROCEDURES

A. Clean Water Act

EPA and the Corps will begin immediately to implement enhanced coordination procedures applicable to the Clean Water Act review of Section 404 permit applications for Appalachian surface coal mining activities that have been submitted prior to execution of this MOU. The goal of these procedures is to ensure more timely, consistent, transparent, and environmentally effective review of permit applications under existing law and regulations. The agencies are issuing these

enhanced joint procedures concurrently with this MOU. Also concurrently, EPA is clarifying the factual considerations it is using to evaluate pending CWA permit applications under the 404(b)(1) Guidelines.

Pending Clean Water Act Section 404 permit applications for Appalachian surface coal mining activities will continue to be evaluated by the Corps and EPA on a case-by-case basis. The agencies will focus their reviews of Appalachian surface coal mining permit applications based on likely environmental impacts with the goal of avoiding, minimizing, and mitigating such impacts to the extent practicable under the CWA Section 404(b)(1) Guidelines and consistent with NEPA. This approach will enable the continued permitting of environmentally responsible projects.

B. Surface Mining Control and Reclamation Act

During 2009, OSM will issue guidance concerning appropriate application of the Stream Buffer Zone rule and other related rules and will ensure that states are implementing their counterpart provisions and SMCRA regulatory programs consistent with the guidance.

V. PUBLIC INVOLVEMENT

This IAP will be accompanied by robust public comment on its short- and longer term actions. The agencies will hold public meetings in Appalachia during 2009 to gather on-the-ground input and encourage ongoing local engagement in the environmental assessment and decision-making process. Additional public participation will occur as agency actions move forward.

VI. GENERAL

A. The policy and procedures contained within this MOU are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This MOU does not constitute final agency action on any issue, and any actions contemplated by this MOU will be carried out in an appropriate administrative process by the action agency in accordance with all applicable laws and regulations.

B. This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.

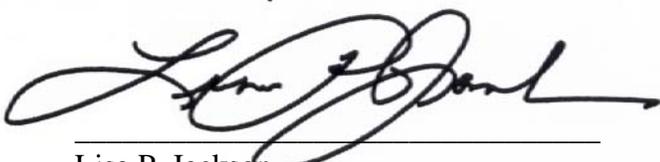
C. Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. All formal guidance interpreting this

MOU and background materials upon which this MOU is based will be issued jointly by the appropriate agencies.

D. Nothing in this MOU will be construed as indicating a financial commitment by DOI, the Corps, EPA, or any cooperating State agency for the expenditure of funds except as authorized in specific appropriations.

E. This MOU will take effect on the date shown above and will continue in effect until permanent procedures are established, or unless earlier modified or revoked by agreement of all signatory agencies. Modifications to this MOU may be made by mutual agreement of all the signatory agencies. Modifications to the MOU must be made in writing.

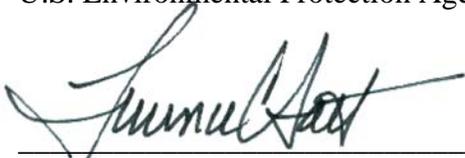
Signed,



Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency



Ken Salazar
Secretary
U.S. Department of the Interior



Terrence "Rock" Salt
Acting Assistant Secretary
of the Army (Civil Works)
U.S. Department of the Army