Written Testimony of Bradley C. (Butch) Lambert
Deputy Director
Virginia Department of Mines, Minerals and Energy
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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 H.R. 2824, the "Preventing Government Waste and Protecting Coal Mining Jobs in America Act".

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. This resulted in a significant expansion and enhancement of the Virginia regulatory program.

Coal production in Virginia peaked at 47 million tons in 1990. Production for 2011 reached 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.

For years the states have been administering stellar regulatory programs, including the protection of streams. However, beginning in 2009, OSM embarked on an effort 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, which appears to be the basis for the effort by OSM to change/revise the 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 intention to propose a new Stream Protection 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" under the National Environmental Policy Act (NEPA). In preparing the draft EIS, OSM hired a contractor from outside the coal mining regions who had no mining background. Cooperating agency states voiced their concern about the contactor and its ability to complete the DEIS. We recommended that, before moving forward with the EIS and proposed rule, OSM seriously consider the other alternatives available to the agency for addressing stream protection. We believe that there are opportunities for the states and the affected federal agencies (OSM, EPA, the Corps and the U.S. Fish and Wildlife Service) to work cooperatively together to address stream protection concerns. However, to date our requests for arranging such meetings have been ignored. We believe that there are a variety of tools, protocols, policies and other measures available to us as state and federal agencies that, with some coordination, could lead to a comprehensive and effective approach to protecting streams.

However, OSM moved forward with the contract. Following a limited opportunity to provide comments on a few early chapters of the draft EIS in 2010, Virginia and the other state cooperating agencies have not been involved in the review of comments of the draft or any other portion of the DEIS.

On July 3, 2013, several of the cooperating agency states sent a letter to Director Pizarchik reminding him that the role of the cooperating agencies, as defined by the memoranda of understanding that each of us entered into with the agency, included an opportunity to review and comment on those chapters of the draft EIS that are made available to us. (A copy of the letter is being submitted for the record).

The cooperating state agencies have had several concerns regarding the constrained timeframes under which we were operating to provide comments on the draft documents that were provided to us in 2010. As we have stated from the outset, and as members of Congress have also noted, the ability to provide meaningful comments on OSM's draft documents has been extremely

difficult with limited working days to review the material, some of which can be fairly technical in nature. In order to comply with the deadlines, we have devoted considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business such as reviewing citizen's complaints, permit reviews and AML project design.

There is also the matter of completeness of the draft chapters that we have reviewed to date. In the case of Chapters 2, 3 and 4, several attachments, exhibits and studies were not provided to us as part of that review. Some of these were critical to a full and complete analysis of OSM's discussion in the chapters. It is important for us to receive all applicable documents that are referenced in draft chapters in order to conduct a meaningful review.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. Our experience with the reconciliation process to date has not been particularly positive or meaningful. We are hopeful that as we reinitiate the EIS review and comment process, OSM will engage in a robust reconciliation process. Among other things, we believe it should include an explanation of which comments were accepted, which were not, and why. Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately.

As we noted during the submission of comments by many of the cooperating agencies in the early rounds of the EIS development process, there is great concern about how our comments will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are uncertain whether their names will appear on the draft EIS, which was originally anticipated. This of course would imply tacit approval independent of the state comments that have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs); the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore requested an opportunity to jointly draft a statement that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

The states requested that Director Pizarchik respond to our request by July 10th, 2013 to re-engage in the EIS process. To date, we have not received a response.

We should note here that during the Subcommittee's oversight hearing on OSM's stream protection rulemaking on July 23, Director Pizarchik mentioned that one of the reasons that OSM has not reached out to the states with an opportunity to re-engage in the EIS process and to review revised chapters in the draft EIS is because states expressed concerns about being able to review these chapters given limited time and resources. This is not an accurate representation of our situation or our concerns. It was the constrained time frames under which we were operating in 2010 that proved problematic for the cooperating agency states. The states stand prepared to re-engage in this process and to fulfill their roles as cooperating agencies assuming OSM provides reasonable time periods within which to review and comment on draft chapters of the EIS.

History and background of the Stream Buffer Zone Rule

On December 12, 2008, OSM issued a news release titled "Office of Surface Mining Issues New Mining Rule Tightening Restrictions on Excess Spoil, Coal Mine Waste, and Mining Activities in or Near Streams". In the words of OSM, the agency stated; "We believe that the new rule is consistent with a key purpose of the Surface Mining Law, which is to strike a balance between environmental protection and ensuring responsible production of coal essential to the Nation's energy supply". The statement from the release was from then Assistant Secretary of the Interior, Land and Minerals Management C. Stephen Allred. Mr. Allred is speaking of the 2008 Stream Buffer Zone Rule. He goes on to say that this new rule will clarify the Stream Buffer Zone rule and resolve any long-standing controversy over how the rule should be applied. He is referring to the issues raised with disturbances along stream buffer zones as far back as 1983. There have been several challenges to the stream buffer zone rule over last decades. OSM and state agencies felt as though the 2008 buffer zone rule was a rule that would finally meet the goal of environmental protection while ensuring coal production that would meet the energy needs of the nation.

The development of the 2008 rule was a five year process. OSM solicited public input throughout the process. The agency received over 43,000 comments and held four public hearings that were attended by approximately 700 people. The rule was to take effect on January 12, 2009. However, before the rule was implemented it was suspended. The states had no opportunity to amend our programs to adopt that rule. We believe the 2008 rule contained provisions that would allow disposal of excess spoil in such a manner that would ensure stream protection. Even though Virginia has not formally adopted the 2008 rule, some portions of the rule have been incorporated into coal surface permit review and approval. Alternative analysis and fill minimization are two items from the rule now incorporated into our permitting process. The number of fills has been reduced, as well as the number of cubic yards being placed in fills. VA tracks these numbers as part of overall performance measures on the success of our program.

The data and information we are familiar with (including OSM oversight reports) indicates that the states have been implementing stream protection requirements in a fair, balanced and appropriate manner that comports with the requirements of SMCRA and our approved regulatory programs. It would therefore be helpful if OSM would finally clarify its goals and the problems it hopes to address in the rulemaking process and provide information to states on why the 2008 rule would not be protective of streams. Until OSM is able to do so, we are supportive of the approach contained in H.R. 2824 and believe that the states should be provided an opportunity to implement the 2008 stream buffer zone rule, following which OSM can prepare an assessment of why a different rule is needed. We would also note that given the fact that states are implementing a statutory requirement under SMCRA, we do not see the adoption of the 2008 rule as an unfunded mandate. Whether that would hold true of OSM's current intention to move forward with an expanded stream protection rule remains to be seen.

In a press release dated 4/27/09, the Interior Secretary Ken Salazar announced that the mountaintop coal mining "stream buffer zone rule" issued by the Bush Administration is legally defective. Salazar directed the United States Department of Justice (DOJ) to file a pleading with the U.S. District Court in Washington D.C. requesting that the rule be vacated due to this deficiency and remanded to the Department of the Interior for further action. This was done without any consideration of the five year process it took to develop the rule, and ignored the public participation process, including the number of comments received and the public meetings that were held. And of course the states were never given an opportunity to adopt the rule so that information could be gathered regarding the effectiveness of the rule to protect streams. Without any supporting information on why the 2008 rule was defective, we believe that the 2008 rule should have not been vacated but should have been allowed to move forward.

Thank you for the opportunity to testify today. I would be happy to answer any questions or provide additional information.