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**On Behalf of  
National Mining Association**

**Before the House of Representatives  
Committee on Natural Resources  
Subcommittee on Energy and Mineral Resources**

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Good morning. My name is Gene Kitts, and I am Senior Vice President of Mining Services for International Coal Group, Inc. ICG is a leading producer of coal in Northern and Central Appalachia and the Illinois Basin. We have 12 active mining complexes located in Northern and Central Appalachia and one in Central Illinois. We control over one billion tons of high-quality coal reserves that are primarily high-BTU, low-sulfur steam and metallurgical quality coal. Over the past three years, ICG's mines and our 2,750 employees have been recognized an average of seven times a year with environmental awards from state and federal mining regulators.

I am appearing on behalf of the National Mining Association (NMA). NMA represents ICG as well as other producers of most of America's coal, metals, industrial and agricultural minerals.

I want to thank the Committee for holding this oversight hearing today. It is vital that this Committee and others in Congress carefully review the Office of Surface Mining's (OSM's) recent activities. Today I plan to discuss two initiatives by OSM, the "stream protection rule" and the agency's "state program oversight" activities.

### **Stream Protection Rule**

OSM spent over five years, from 2003 to 2008, developing the current "stream buffer zone" regulation. This was a collaborative effort drawing on the October 2005 programmatic environmental impact statement, which was sponsored by four federal agencies including OSM, EPA, the Corps, and the Fish and Wildlife Service (FWS). It

included 30 scientific and economic studies, comprising over 5,000 pages of material. OSM published a discussion document and two proposed rules before finalizing the regulation, including public comment on each one, as well as four public hearings on the subject. OSM also completed another environmental impact statement to support the final regulation. OSM published the final rule, with EPA's written concurrence, in December 2008.

While the 2008 stream buffer zone rule was a clarification of the longstanding regulatory interpretation of the earlier rule, it also added significant environmental protections that have been largely ignored in the debate. These include a requirement to avoid mining activities in or near streams if reasonably possible, and to use the best technology currently available to prevent the contribution of additional suspended solids (sediment) to stream flow or runoff outside the permit area to the extent possible. Operators must also minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, to the extent possible.

The current rule also requires that surface coal mining operations be designed to minimize the creation of excess spoil and the environmental impacts of fills constructed for the placement of excess spoil and coal mine waste. Mine operators must do this by:

- making a demonstration to the satisfaction of the regulatory authority that the operation has been designed to minimize, to the extent possible, the volume of

excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible;

- identifying a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills; and
- selecting the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

However, despite 5 years of study, millions of taxpayer dollars spent, two environmental impact statements and 43,000 public comments in developing the current regulation, OSM suddenly decided to shelve it before it was ever implemented on the ground. The rule was challenged by environmental organizations, and instead of defending the rule, the Secretary of the Interior asked a federal judge to vacate it so that the new administration could reinterpret the old rule, through a guidance document. The judge refused, and told the Secretary that if he desired to make any changes to a valid regulation then he must follow the legal requirements that afford full public participation through notice and comment rulemaking. OSM responded by signing a back-door settlement agreement with environmental groups promising to publish a proposed rule by February 28, 2011, a very short timeframe. The agency also agreed to pick up the tab for all of the environmental groups attorneys' fees, at taxpayer expense, despite the fact that those groups didn't win the case.

OSM's proposed changes to the stream protection rule are not occurring in a vacuum. Other agencies, including the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) have implemented similar policies aimed at severely restricting coal mining operations. EPA and the Corps have instituted an unlawful de-facto permit moratorium on Clean Water Act § 404 permits through guidance documents and memorandum. Since March 2009, 235 coal mining § 404 permits have been blocked, and in the ensuing two years only eight permits out of those 235 permits have been issued.

All of these strategies were mapped out in a memorandum of understanding between EPA, the Corps, and the Interior Secretary on June 11, 2009. That document explained how such new policies have been designed to reduce the "environmental consequences of Appalachian surface coal mining operations" and "diversify and strengthen the Appalachian regional economy." Only later did we discover, through news media reports, that "diversifying and strengthening the Appalachian regional economy" meant destroying tens of thousands of coal mining and related jobs in our region.

The stream protection rule is the most far reaching rewrite of the agency's regulations in the last 30 years. Far from providing more regulatory clarity, it fundamentally changes longstanding interpretations of the law and prohibits widely accepted mining techniques.

In OSM's own words, this rule is "much broader in scope than the 2008 stream buffer zone rule," and will apply nationwide in scope.

Despite OSM's statements to the contrary, its own analysis predicts that the restrictions contained in the rule will destroy tens of thousands of coal mining and related jobs across the country. Specifically, the agency's draft EIS predicts that it would eviscerate almost 1/3 of all surface coal mining production in Appalachia, over 20% in the Illinois Basin, over 25% of the production in the Gulf Region, and 84% of Alaska's coal production. OSM's draft EIS predicted that total job losses in the Appalachian region alone are expected to exceed 20,000. NMA believes that this document significantly underestimates the potential job losses, because it does not account for any losses of underground mining jobs through the sterilization of coal reserves and denial of permits to conduct highly efficient full extraction underground mining operations.

Remarkably, OSM has offered little in the way of any real justification for the need to abandon the 2008 rulemaking. Indeed, the only explanation appears in the agency's candid admission that "...we had already decided to change the rule following the change of Administrations on January 20, 2009." 75 Fed. Reg. 34,667 (June 18, 2010). Perhaps this pre-determination by the agency explains both the absence of any meaningful opportunity for consultation with the States and, in part, why the agency has had so many problems with the quality of its environmental impact statement. Those problems were recently acknowledged by Deputy Secretary David Hayes who testified that Interior is so unhappy with the work on the EIS that they may terminate the contractor. I

understand that Interior announced on March 31 that the contractor has indeed been terminated. Both the rulemaking and the process being used by OSM have been universally criticized by states charged with administering SMCRA including the majority of the State EIS-cooperating agencies, the Interstate Mining Compact Commission, and the Western Governors' Association.

In 2010, OSM reprogrammed \$7 million in its budget to accommodate development of this ill-advised stream protection rule and accompanying EIS. Much of this money came at the expense of the States, who are the primary regulators under SMCRA. In a recent letter to this Committee, OSM indicated that it has already spent an estimated \$4.4 million on the rule and EIS, yet "has not completed a draft of the proposed rule." Now the agency is seeking an additional \$3.9 million in fiscal year 2012 to implement this job-killing regulation and increase state program oversight. Based on what we have seen thus far, we strongly urge you to reject any further funding for this misguided regulation and we hope that you will continue to vigorously oversee this agency's actions on the stream protection rule.

### **State Program Oversight**

As part of the MOU on surface coal mining in Appalachia mentioned earlier, OSM committed to reevaluate "how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA," and specifically agreed to remove what it described as "impediments to its ability to require correction of permit defects in SMCRA primacy states." Although OSM is inappropriately changing a

number of its state program oversight policies in response to this MOU, I would like to focus my remarks today on the most objectionable aspect of those changes, the so-called “ten-day notice” policy.

SMCRA § 503, grants a state **exclusive** jurisdiction over the regulation of surface coal mining operations within its borders by submitting a state program to the Secretary of the Interior and securing the Secretary’s approval of that program. Currently all coal mining states, except Tennessee and the state of Washington, have approved state programs and thus enjoy this exclusive regulatory jurisdiction.

To all, with perhaps the exception of OSM, the statutory language and structure is clear—“exclusive” means just that, it does not mean parallel or concurrent jurisdiction with OSM. Thirty years of case law establishes the following principles of SMCRA: (1) the law sets out a careful and deliberate allocation of authority of mutually exclusive regulation by either OSM or the state, but not both; (2) in a state with an approved program that authority rests with the state; (3) states are the sole issuers of permits in which OSM plays no role; (4) OSM does not retain veto authority over state permit decisions; and (5) OSM intervention at any stage in a state permitting matter unlawfully frustrates the deliberate statutory design and allocation of authority.

Despite the clear statutory structure, language and court decisions, OSM’s director issued a memorandum on November 15, 2010, unilaterally asserting that the agency now has the authority to interfere with, change and, as a practical matter, veto state



permitting decisions with which it disagrees. In fact, not only has OSM asserted that it has such authority, but it has followed through with its threats against two of my company's state-issued mining permits.

In Kentucky, OSM has improperly inserted itself into a state water discharge permit controversy between ICG and the Sierra Club. OSM issued a Ten Day Notice in response to a citizen's complaint that directed the state regulatory agency to conduct water monitoring at our mine and to allow the outside parties to participate. This essentially provided free and federal agency assisted pre-lawsuit discovery to the opponents of our twenty year old mining operation. Moreover, the complaint relates to a permit that was not issued under the State SMCRA program but the State Clean Water Act program. It is not a matter over which OSM has any authority under SMCRA and is another example of improper mission creep.

An ICG subsidiary in northern West Virginia was issued a state surface mining permit in October 2010. Local opponents of this project chose to not appeal the issuance of this permit to the West Virginia Surface Mine Board but rather filed in February 2011 a lengthy complaint with OSM alleging "permit defects" and asking OSM to intervene. OSM dutifully responded by issuing a Ten Day Notice to the West Virginia DEP, which in turn replied by stating its objection to use of a Ten Day Notice in these circumstances. Not only has OSM unlawfully frustrated the deliberate statutory design of mutually exclusive state-federal jurisdiction, it has enabled a third party to circumvent the exclusive avenue and the specific deadlines for permit appeals under the state

program. If the permit had been issued by OSM in a non-primacy state such as Tennessee, it could not allow such a back-door attempt to belatedly appeal that decision. Here OSM's actions are doubly-wrong by facilitating this unlawful attempt to collaterally challenge a state permit in a primacy state.

Permit delays and regulatory uncertainty are thwarting capital investment that will create and sustain the high-wage jobs needed and valued in our coal communities. At a time when our nation is recovering from a deep recession and requires low-cost and reliable fuel to remain globally competitive, agency policies are crushing these job-creating enterprises that will be the engine for our economic growth and prosperity.

The agency's fiscal year 2012 budget requests an additional increase of \$3.9 million for activities related to additional state program oversight and for the stream protection rulemaking. At the same time, OSM is proposing to slash by \$11 million State title V grants, used by States to run their SMCRA regulatory programs,. We strongly urge this Committee and others in the Congress to stop funding the agency's controversial ten day notice policy and stream protection rule, and restore the necessary funding for the States to properly implement their SMCRA regulatory programs as intended by Congress..

Thank you. I would be happy to answer any questions from members of the Committee.

