



January 9, 2006

Mr. Tim Dieringer  
Director, Knoxville Field Office  
Office of Surface Mining Reclamation & Enforcement  
710 Locust Street  
Knoxville, Tennessee 37902

**RE: Petition to Designate Certain Lands in Tennessee as Unsuitable for Surface Coal Mining Operations filed by the National Parks Conservation Association, the National Audubon Society.**

Dear Mr. Dieringer:

The National Mining Association (NMA) urges the Office of Surface Mining (OSM) to reject the petition filed on November 10, 2005, by the National Parks Conservation Association and the National Audubon Society to designate certain lands in Tennessee as unsuitable for surface coal mining operations. The petition lacks serious merit and is incomplete because: (1) it presumes that contemporary mining practices will not be carried out in conformance with the regulations; (2) the allegations of fact are not specific with respect to those portions of petitioned area to which they purportedly apply or to the specific interests of the petitioners in those areas; (3) the allegations of fact are not supported by evidence that tend to support the validity of the allegations as they apply to specific areas of the petitioned area; and (4) the petitioners have not proffered competent or scientifically sound data as it relates to the allegations of harm in the petitioned area. Quite apart from the foregoing reasons why the petition should be rejected, the petitioners have failed to demonstrate their right to petition by satisfaction of the injury in fact test for the entire petitioned area.

NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering, consulting, financial institutions and other firms serving the mining industry. NMA members would be directly affected by any decision by OSM to designate the lands in the subject area as unsuitable for surface coal mining operations because they own coal reserves and conduct coal mining operations within and nearby the petitioned area.

There are minimum requirements a petition must satisfy in order to be accepted for further processing. If the petition does not meet these requirements, it must be rejected and returned to the petitioners. See 30 C.F.R. § 764.15(a) (3) (if the regulatory authority determines that the petition is incomplete, frivolous or the

petitioners do not meet the injury in fact test, it *shall* return the petition); *see also id.* (a frivolous petition is one in which the allegations lack serious merit).

In assessing whether a petition is frivolous, (*i.e.*, lacks serious merit), or incomplete, the agency must consider: whether the allegations are factual; supported by evidence; specific to the petitioned area to which the allegation applies; specific to the petitioners' interests to which the allegation applies; and, assume adherence to contemporary mining practices under applicable regulatory programs if the areas were to be mined. 30 C.F.R. § 764.13(b) (v).

**I. The Petition lacks serious merit.**

- A. The vast geographical scope of the petitioned area and the lack of specific evidence pertaining to the all of the area make the allegations not credible.

Petitioners seek a designation of more than 443 square miles encompassing four counties in Tennessee as unsuitable for surface coal mining operations. Petition, p. 7. The sheer size of the petitioned area alone suggests that the allegations lack serious merit. In view of the overwhelming success rate of mining and reclaiming lands in Tennessee, as well as throughout Appalachia with similar terrain and features, it strains credulity to even entertain the notion that reclamation throughout the 443 square miles—or any specific portion—of the petitioned area is technologically and economically infeasible under the applicable Tennessee Federal Program.

Petitioners present no objective evidence of substantial failures in the reclamation of surface coal mining operations in the petitioned area that might support even an inference that reclamation is not technologically and economically feasible. OSM's Annual Reports continue to show that bonds are being released for all three phases, which readily demonstrates that reclamation in accordance with the Federal Program is feasible. In short, successful reclamation of mined lands under the Surface Mining and Control Reclamation Act (SMCRA) in Tennessee is the rule, not the exception.

It appears that the filing and unprecedented geographical scope of the petition is designed to effect at least a temporary moratorium on permitting mines while the petition remains under consideration by OSM. *See generally* 30 U.S.C. S 1260(b)(4) (precluding permit issuance in areas under study pursuant to § 522(c)). The last petition filed in Tennessee involving a substantially smaller area (less than one-third) took five years to bring to conclusion. *See Falls Creek Falls Decision*, 65 Fed. Reg. 39178 (June 23, 2000). OSM should not countenance such an abuse of SMCRA's unsuitability petition process and allow our nation's energy security to be held hostage by a frivolous and incomplete petition.

- B. The Petition is improperly premised upon non-contemporary mining practices that will not follow applicable regulatory programs.

The lands unsuitable regulations require that allegations of fact and supporting evidence assume adherence to contemporary mining practices and applicable regulatory programs by future mining operations. 30 C.F.R. § 764.13(b) (1)(v). Here, the Petition's very foundation rests on the opposite assumption—that the applicable standards will not be followed. And then, based upon that premise, petitioners assert that SMCRA's standards are inadequate to protect against the purported harms they allege will follow from coal mining on lands in the entire petitioned area. As OSM explained, such an approach to the lands unsuitable process is not permissible: "a petitioner may not assume mining impacts that would be prevented by the environmental protections requirements mandated by the Act." 48 Fed. Reg. 41312, 41328-29 (September 14, 1983). The consequence of this approach is clearly set forth in the rules—"any petition based upon such preventable impacts would have no merit." *Id.* In a word then, the petition is "frivolous." See 30 C.F.R. § 764.15(a)(3).

Emblematic of petitioners' impermissible approach to presenting their allegations is the unsupported statement that excessive sedimentation will occur because the technologies used to comply with SMCRA are "highly ineffective" on steep terrain. Petition, p. 10. To support this allegation, petitioners resort to a 1979 paper reporting impacts associated with mining operations that not only pre-date the permanent regulatory program, but SMCRA as well. Since that time, OSM has conducted many studies and rulemakings related to sediment control standards, including the examination of existing and new technologies and practices designed to prevent excessive sediment loads in streams. The Environmental Protection Agency has also extensively examined these technologies and found them effective in establishing effluent limitation guidelines for coal mining operations. These studies and rulemakings have concluded that sedimentation basins, siltation structures, diversions and other best management practices are effective in steep slope terrain. Petitioners fail to explain how a 1979 paper and its findings cast doubt upon the efficacy of the permanent program standards that require sedimentation ponds and other control technologies be designed for adequate sedimentation storage volume, retention time, and maintenance (including periodic sediment removal) based upon terrain, precipitation events, and other site specific conditions. See 30 C.F.R. § 816.46.

Indeed, a more recent multi-agency environmental study of coal mining in Appalachia provides a sharply different assessment about mining in steep slopes than the petitioners' unsubstantiated allegations. *Final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia* (October 2005) (EIS). According to this EIS:

- Studies did not conclude that impacts below operations caused or contributed to significant degradation of waters. EIS p. 27.
- Valley fills are not causing excessive sediment deposition on the first and second order streams. EIS p. II D-8
- Substrate characteristics of the mined and unmined areas were not substantially different. EIS p. III D-13.

- The mean substrate size class was found to be very similar between mined and unmined sites. EIS p. III D-7.

Petitioners' allegations regarding impaired waters including acid mine drainage potential in this area are equally inadequate to the minimum demands for a serious or complete petition. See Petition, pp. 20-21. No attempt is made to identify the nature and sources of the impacts alluded to in the studies cited. The petitioners leave it to OSM to discern whether the sources are: pre-SMCRA mines; post-SMCRA mines; and other point and diffused sources of drainage. However, the petition process does not place upon OSM the responsibility to identify whether the facts presented result from contemporary mining practices or mines that have been in compliance with applicable programs. That burden rests as a minimum requirement upon the petitioners. No attempt is made to indicate whether the sources of mine drainage sampled in the New River study arises from mines permitted under SMCRA—permanent or interim program—or pre-Act mines. In any event, SMCRA already requires mines to prevent off-site material damage to the hydrologic balance. Petitioners make no credible attempt to show that compliance with this standard is infeasible or inadequate for protecting environmental values in the petitioned area.

In 2000, OSM determined that since SMCRA's enactment, only eight of 205 permits issued in Tennessee produced acid mine drainage. And four of those permits were issued between 1977 and 1982, while the remaining four were issued between 1984 and 1992. See 65 Fed. Reg. 39178, 39188 (June 23, 2000). Since 1992, predictive and preventive technologies related to mine drainage continue to improve. *Id.* So, contrary to petitioners' unsubstantiated allegations, the coal industry has demonstrated that it can "reclaim mining operations to a level where degradation from AMD is precluded." Petition p. 21.

Moving from reliance upon information gathered about non-contemporary mining practices, petitioners proceed to cite examples of violations at several operations as evidence that reclamation is infeasible if lands in the petitioned area are mined. Again, such a supposition fails to meet the minimum requirements imposed upon petitioners. The regulations do not permit the petitioners to conflate violations of the standards with infeasibility of reclamation. By our count, petitioners marshal examples of slides at three operations in Tennessee, some not even in the petitioned area. Petition, p. 13-16. Petitioners make no attempt to inform the agency whether these slides occurred at sites that were reclaimed in accordance with SMCRA standards or were the result of noncompliance with applicable backfilling and grading standards, including permit designs for compaction and stability. In any event, three examples do not demonstrate infeasibility of reclaiming successfully on steep slope areas. In view of the fact that several hundred permits have been issued in Tennessee under SMCRA, incidents at three mines does not demonstrate any inherent risk or prevalence of slope failures for mining in Tennessee. The recent multi-agency Environmental Impact Statement evaluating mining on steep slopes did not find any inherent risk of failures of backfilled steep slope mines or associated excess spoil fills. According to that

study, "valley fills are generally stable, as evidenced by fewer than 20 reported slope movements out of more than 6,800 fills constructed since 1985." EIS, p. 5.

At bottom, petitioners' allegations are nothing more than an attack upon Congress's decision in SMCRA to permit mining on steep slopes. Early in the history of SMCRA's consideration some advocated a *per se* ban on mining on steep slopes. This approach was overwhelmingly rejected and mining on such terrain is permitted and governed by performance standards that apply to all surface mines and specific standards tailored for mining on steep slopes. See 30 U.S.C. § 1265(c)-(e). Petitioners offer nothing in the way of evidence that supports a conclusion that mining in conformance with these standards within the petitioned area poses any different or unique impacts to resources than anywhere else in steep slopes throughout Appalachia. To accept the petition for processing would be tantamount to the agency rejecting the legislative judgment in SMCRA that mining and reclaiming land on steep slopes in a manner that protects the environment and other resources is feasible. Instead, the only proper course of action here is for OSM to reject the petition because it lacks serious merit. 30 C.F.R. § 764.15(a)(3).

## **II. The Petition should be rejected because it includes areas that are not supported by facts and evidence.**

A complete petition must include "allegations of fact and supporting evidence covering *all lands in the petition area*, which tend to establish that the area is unsuitable...pursuant to specific criteria in sections 522(a)(2) and (3)." 30 C.F.R. § 764.13(b)(1)(v). The purpose of this requirement is to avoid abuses of the process whereby:

"[I]t is possible for a petitioner to include large areas for which Allegations are made but no evidence presented. Section 522(c) of the Act specifically requires both allegations of fact and supporting evidence. It is neither logical nor proper to include areas in a petition which are not covered by such evidence. In effect, it would allow a person to submit a petition without meeting the requirements of the Act."

48 Fed. Reg. at 41328 (Sept. 14, 1983).

This is precisely what petitioners have done here. The petition fails to demonstrate that there are common issues affecting the entirety of the petition area. For example, they allege that mining should be prohibited due to purported impacts on the New River watershed, yet include vast areas outside the watershed. Likewise, their allegations rest principally upon the contention that reclaiming steep slope areas is infeasible, but seek a designation for more than half of the petition area which is not comprised of steep slope terrain. See Petition p. 13 (noting that only 48 percent of the New River watershed has a slope greater than or equal to 20 degrees).

With respect to each of the principal allegations—whether they relate to the reclamation feasibility criteria or the discretionary criteria—petitioners have not made the requisite effort to show where in the petitioned area these criteria apply,

nor have they supplied competent, sound or other relevant information to support their allegations for all areas included in the petition.

Petitioners included an unprecedented amount of land in the petitioned area. The burden rests upon them to bring the necessary precision for their allegations and supporting evidence in order to demonstrate that their allegations tend to establish how all of the area is unsuitable under the criteria they invoke. Obviously, the larger the area sought for designation, the more difficult the burden. However, that is a choice made by petitioners—one which they cannot be relieved from absent the agency countenancing the very abuses the rules were designed to combat. See 48 Fed. Reg. at 41329 (explaining how under previous regulations very large areas were included in petition areas requiring significant efforts by OSM and other parties on issues of questionable merit). For this reason, the petition must be rejected as incomplete.

### **III. The Petition lacks competent and sound evidence to support the allegations.**

The petition relies extensively upon outdated, unsupported or flawed information. The regulations require designations based on competent, scientifically sound data and other relevant information. 30 C.F.R. § 764.11. It stands to reason that allegations at a minimum find support in similarly competent and valid data and information, not outdated studies, information or personal observations.

Likewise, the Petition has not, and cannot support its allegations that reclaiming mine sites in steep sloped areas is not technically and economically feasible. The very first study cited by the petitioners is an unpublished symposium paper from 1979 (barely two years after passage of SMCRA) by the U.S. Geological Survey. See Petition t p.10. Many other studies relied upon by petitioners were conducted before the passage of SMCRA in 1977 and enactment of its implementing regulations. See, e.g., Petition p. 26 citing Barnhisel and Masey (1969); Ahmad (1973); Simmons and Reed (1973); and, Branson and Batch (1972).

Moreover, many studies or sources relied upon by petitioners are confounded by the impacts of pre-SMCRA mines as well as effects from non-coal mining sources such as construction, agriculture, and logging activities. In any event, it would require the agency to subscribe to a perverse form of "pretzel-logic" to consider studies or impacts related to pre-1977 coal mining which resulted in the enactment of SMCRA as a competent basis for processing a petition to designate lands unsuitable for mining by operations conducted almost three decades after the passage of the law under standards and with technology designed to address those concerns.

### **IV. There is no injury in fact.**

Although the petitioners request the federal government to declare 444 square miles—including private and state lands—off limits to surface coal mining, they do not meet the "injury in fact" test imposed under the rules. The regulations require

petitioners to describe the injury to his or her specific affected interests and demonstrate how he or she is among the injured. See 30 C.F.R. § 764.13(a).

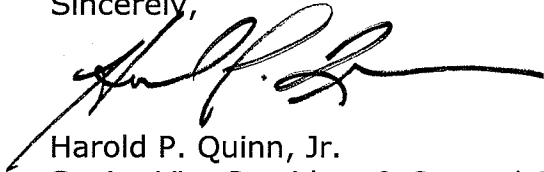
Petitioners have not alleged specific injury in fact to its members with respect to all of the area covered by the petition. See 30 C.F.R. § 764.13(b)(1)(v)(requiring petition to allege facts and supporting evidence covering all lands in the petition area). Allegations by two individuals who believe that recreational values and some bird watching would be diminished have not demonstrated that its members would suffer injury in fact to *all of the area* covered by the petition, and therefore have not met their burden under the injury in fact test.

## **VII. Conclusion**

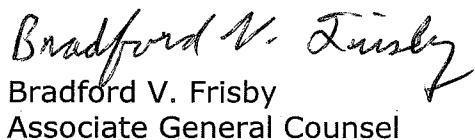
The measure of a petition's merits and completeness is not its length, but rather its quality. Given the vast geographical scope of the petitioned area, the rules require substantially more than petitioners offer here in terms of facts, evidence and explanation for the petition to be accepted for processing. It is not enough to cobble together general allegations, old studies, personal observations, and several isolated violations and then leave OSM to fill in the blanks and connect the dots between and among to the specific areas, purported harms and the unsuitability criteria.

Petitioners are not asking OSM to verify the validity of their allegations and evidence they contend establishes that contemporary mining operations conducted in compliance with applicable programs is unsuitable for the entire area. They are asking OSM to supply the facts and evidence to support their allegations. This approach defies the express intent and purpose behind setting minimum requirements to accept a petition for processing. Acceptance of this petition would invite the abuse of the petition process the agency desired to end when it adopted provisions that "require the petitioner to focus the allegations and supporting evidence that mining in this specific area will result in direct injury to the petitioner's interests and that the area is worthy of designation under the criteria specified in the Act." 48 Fed. Reg. at 41329. OSM should reject the petition because it lacks serious merit and is also incomplete.

Sincerely,



Harold P. Quinn, Jr.  
Senior Vice President & General Counsel



Bradford V. Frisby  
Associate General Counsel