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**Testimony on “Jobs at Risk: Community Impacts of the Obama Administration’s Effort to Rewrite the Stream Buffer Zone Rule.”**  
**September 26, 2011**

**The Decision as to Where the Balance Between Environmental Protection and Energy Production Should be Struck is for Congress to Make, Not OSM**

Somewhere along the path that Congress established for it in the Surface Mining Control and Reclamation Act (“SMCRA” or the “Act”), the Office of Surface Mining Reclamation and Enforcement (OSM) has lost its way. SMCRA was adopted in the midst of the Energy Crisis in 1977. Accordingly, a balance between environmental protection and energy production through coal mining was central to the policy Congress established in this Act. Thirty four years after Congress established the guiding principles for OSM’s existence in SMCRA, OSM is disregarding its Congressional charter in favor of an aggressive regulatory agenda that runs directly contrary to these principles. In Appalachia, the country’s top coal producing region at SMCRA’s adoption, by OSM’s own projections, the set of new regulations OSM is pursuing, the Stream Protection Measures Rule, would cause:

- A decrease in surface mine coal production in the Appalachian Basin of 30%;
- A loss of 10,749 jobs in the Appalachian basin under the worst case scenario;
- Lowering an additional 29,000 people in the Appalachian Basin beneath the poverty level;
- A 13.1% loss in severance tax; and,
- An 11.7% decrease in income taxes.

Recently, there has been a good deal of public discourse over the appropriate level of environmental protection that should govern the coal mining industry. The debate is reminiscent of the issues that were debated publicly and in Congress in the years leading up to SMCRA’s adoption. In OSM’s Stream Protection Measures environmental impact statement and rulemaking, it is playing to a constituency that, like their predecessors a generation ago, favors abolishing or greatly restricting surface coal mining in Appalachia. After at least six years of debate in the 1970’s, Congress rejected this approach and chose to strike a balance between energy production and environmental protection. In adopting SMCRA, Congress found, “expansion of coal mining to meet the Nation’s energy needs makes even more urgent the

establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public” 30 U.S.C. § 1201(d). Among the express purposes Congress set forth in the Act was to:

[A]ssure that the coal supply essential to the Nation’s energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation’s need for coal as an essential source of energy . . .

30 U.S.C. § 1202(f). First among the requirements Congress included in the performance standards section of SMCRA is a mandate that operators “conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel source . . .”. 30 U.S.C. § 1265(b)(1). OSM is now trying to significantly alter the balance struck by Congress in SMCRA and substitute its judgment as the appropriate level of environmental protection for the well-considered judgment Congress made on this subject in the Act. Policy judgments that would radically change the economy of West Virginia and Appalachia need to be made by Congress or the states and not federal bureaucrats at OSM.

### **The Basis for OSM’s Decision to Undertake the Stream Protection Measures Rulemaking**

With neither a new mandate from Congress, nor a record developed over the many years of experience under this Act to support OSM’s regulatory agenda, one might wonder what the impetus behind this attempt to totally change the rules on how coal mining is conducted in America might be. The agency’s only formal answer is disclosed in two Federal Register notices it has published. OSM explained:

On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency (EPA), and the Acting Assistant Secretary of the Army (Civil Works) entered into a memorandum of understanding (MOU) implementing an interagency action plan designed to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states, while ensuring that future mining remains consistent with Federal law.

75 Fed. Reg. 34667 (June 18, 2010); 75 Fed. Reg. 22723 (April 30, 2010). The June 11, 2009 MOU committed OSM to making “[r]evisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone Rule and Approximate Original Contour (AOC) requirements”. In addition to the OSM rulemaking effort that is the subject of the Energy and Mineral Resources Subcommittee’s current focus, this June 11, 2009 MOU has been the genesis of other efforts undertaken by both OSM and the United States Environmental Protection Agency (“USEPA”) to unlawfully seize regulatory authority that legitimately resides with the states and other agencies under SMCRA and the Clean Water Act (“CWA”) and adopt what amount to new regulations for the regulation of coal mining that are contrary to these agencies’ enabling statutes.

The authors of this MOU apparently understood that accomplishment of their regulatory goals would fundamentally change and, perhaps, devastate the economy of the Appalachian region, which has historically been dependent on coal mining. To address this, the MOU anticipates that, “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.” Clearly, economic and social engineering is well beyond any legitimate role Congress has granted to agencies like OSM, EPA and the other signatories to the June 11, 2009 MOU. These agencies need to be accountable to Congress and be required to operate within the legal authority Congress has granted them.

### **OSM is Promoting Regulatory Uncertainty**

SMCRA was adopted thirty four years ago. Through years of regulatory experience under the Act since then, we have only recently arrived at a point at which some regulatory certainty exists. Litigation has been said to follow the promulgation of regulations under the Act “as night follows day”. Nearly all of the regulations promulgated to implement the Act, mostly from the late 1970’s and early 1980’s, have been challenged in court. Only in the past few years have challenges to some of the regulations implementing some of the Act’s basic concepts been finally resolved (e.g., ownership and control, valid existing rights, subsidence impacts). A degree of regulatory certainty has only recently been achieved under this thirty-plus year old law. Just as this has happened, and without the benefit of a new mandate from Congress supporting its actions or even a basis in the regulatory record developed over years of oversight of state regulatory programs, OSM is attempting to undertake a radical re-write of nearly all of the rules governing the manner in which coal mining operations are conducted. After over thirty years of efforts by OSM leadership, through administrations of differing political viewpoints, to “get it right” under SMCRA, today’s OSM has decided that everyone who has preceded it has gotten it one hundred percent wrong. In doing so, the current OSM is boldly making quantum shifts in regulatory policy that are Congress’ business to make.

### **The EIS Process Has Excluded Meaningful State Participation**

OSM correctly realized that its planned Stream Protection Measures rulemaking was sufficient in scope to require the preparation of an environmental impact statement (EIS) in accordance with the National Environmental Policy Act. However, OSM’s schedule for completing this EIS was unrealistically ambitious. When the June 11, 2009 MOU committed OSM to changing its 2008 stream buffer zone rule, OSM was already in litigation with environmental groups challenging the 2008 rule. On March 19, 2010, after OSM was unsuccessful in persuading the court to allow it to simply cast aside the 2008 rule, OSM entered into a “friendly” settlement agreement with the opponents of this rule. In this settlement, OSM

committed to issuance of a proposed regulation replacing the 2008 rule, i.e., the Stream Protection Measures rule, by February 28, 2011. This necessarily required OSM to complete the draft EIS for the Stream Protection Measures rule within the same time frame, by February 28, 2011. The unreasonableness of the timeframe OSM targeted for completion of this EIS might be best illustrated by a comparison with the EIS it conducted for the 2008 stream buffer zone rule, which it aimed to replace. From OSM's announcement of its intent to prepare an EIS for the 2008 stream buffer zone rule through issuance of a draft EIS, a little more than 26 months passed. Importantly, the EIS for the 2008 rule built upon the more extensive Mountaintop Mining – Valley Fill EIS that had recently been completed in 2005. In contrast, the EIS for the Stream Protection Measures Rule has been conducted as a stand-alone EIS for a much more sweeping regulatory change than the 2008 stream buffer zone rule. OSM announced its intent to prepare the Stream Protection Measures EIS in April, 2010 and again in June, 2010. This allowed OSM only eight months to complete a draft EIS for the Stream Protection Measures Rule.

OSM's schedule for the Stream Protection Measures EIS was totally inadequate for the undertaking involved. Cooperating agencies on the EIS, like the West Virginia Department of Environmental Protection, were not allowed to comment on Chapter 1 of the preliminary draft EIS that OSM prepared. The time cooperating agencies were allowed for comment on hundreds of pages of material in Chapters 2, 3 and 4 was 5, 4 and 9 business days, respectively. OSM has either allowed the time commitments it made in its settlement with environmental groups to turn what should be an open, transparent EIS process into a sham or it has intentionally designed a process so as to avoid a transparent, hard look at the consequences of its proposed actions. Either way, OSM's procedure thus far has been a rush to a predetermined result, without any indication that it has paid attention to the comments of state agencies that have years of valuable experience directly regulating the coal industry under SMCRA.

It is difficult to discuss the shortcomings of OSM's process for the EIS for the Stream Protection Measures Rule without also mentioning the problems with the content of the portions of the draft EIS cooperating agencies have been permitted to review. The contractor OSM engaged to prepare the draft EIS had no experience with coal mining or the surface mining regulatory program. This lack of experience shows throughout the drafts OSM has shared. We understand that OSM has been re-writing the drafts its contractor produced. It is our hope that this will result in a greatly improved product. However, with the way OSM has proceeded on the previous drafts of the EIS, we are greatly concerned about whether we will be given an adequate opportunity to review and comment on OSM's re-draft of the EIS. Again, the process for a change as significant as OSM's complete re-write of the rules on how coal mining is conducted in America should be done in a much more transparent fashion.

## **The West Virginia Regulatory Program's Existing Stream Protection Requirements**

The regulatory programs in West Virginia and other states have not been static. The state programs have evolved over time to deal with state issues as they have arisen. The current OSM rulemaking will diminish the regulatory flexibility that states have in favor of national solutions dictated from Washington. West Virginia has been successful in addressing new issues as they arise, within SMCRA's regulatory framework. There are many requirements for the protection of the hydrologic balance an applicant for a permit must meet before a surface mining permit will be issued:

- Core drilling must be conducted in the area where surface mining is proposed. Each layer of rock in the core sample is analyzed for chemical content. The data is used to determine which rock layers have potential to leach and produce pollutants. The principal focus has been on prevention of acid mine drainage (low pH and iron) and selenium pollution. Rock layers that exhibit this potential are required to be specially handled and placed, so the opportunity for these materials to come into contact with water is minimized.
- The applicant must conduct extensive water sampling to establish the pre-mining baseline condition for surface and ground water quality and quantity in the area of the proposed mine. The number of samples taken must be sufficient to establish the seasonal variation in these baseline conditions.
- The applicant must perform a detailed analysis of the likely effects of its proposed mining operation. This analysis is called a "PHC" (prediction of Probable Hydrologic Consequences).
- The applicant must include a Hydrologic Reclamation Plan ("HRP") in its application. The HRP must contain measures the applicant will take to reduce the hydrologic impact of its proposed mining operation, comply with effluent limitations imposed under the CWA and a plan for replacement of the water supply of anyone whose water supply is unexpectedly contaminated or interrupted by the mining operation.
- The applicant must perform a Storm Water Runoff Assessment (SWROA). In the SWROA, the applicant must model storm water runoff from the proposed mining operation under pre-mining, worst case during mining, and post mining scenarios. The SWROA must demonstrate that the mine has been designed so as to not allow a net increase in peak runoff in comparison to the pre-mining condition. There is no federal counterpart to West Virginia's SWROA requirement.

- The application must contain detailed engineering design information for all drainage control or water retention structures.
- The applicant must demonstrate that it has minimized the amount of mine spoil it is not using in reclamation (excess spoil) and placing outside the mined area in a drainway or stream. West Virginia requires applicants to utilize a modeling tool called AOC+ (approximate original contour) in making this demonstration. This modeling tool has been in use for more than ten years and has been approved by USEPA, the Army Corps of Engineers and OSM as a legitimate means of demonstrating the amount of mine spoil returned to the mined-out area for use in reclamation has been optimized and the size of any fill placed in a stream outside the mined area has been minimized.
- The agency must perform a Cumulative Hydrologic Impact Assessment (“CHIA”) for the proposed mine and all other existing or proposed mining in the cumulative impact area for the proposed operation. A permit will not be issued unless the agency can make a finding that the applicant has affirmatively demonstrated that its proposed operation has been designed to prevent “material damage to the hydrologic balance outside the permit area”.
- West Virginia is one of a few states that have promulgated regulations defining “material damage to the hydrologic balance”. There is no federal definition of this term.
- The agency performs a Buffer Zone Analysis (“BZA”) for any permit which contemplates placement of spoil within one hundred feet of an intermittent or perennial stream. The BZA involves detailed environmental analyses of the environmental impacts of spoil placement in such areas and has been relied upon by the Army Corps of Engineers in its issuance of permits for mining-related fills in waters of the United States under section 404 of the Clean Water Act. There is no parallel to the BZA in federal surface mining regulations. The BZA is described in more detail in the attached letter from Thomas D. Shope of OSM to Joseph M. Lovett dated December 8, 2009. This letter also contains a detailed discussion of how the West Virginia regulatory program complies with the State stream buffer zone rule, which the subcommittee may also find to be of interest.
- The permit must establish plans for monitoring surface and ground water quality and quantity during mining, so predictions in the applicant’s PHC can be verified. It must also include a during-mining monitoring plan for verification of the predictions of the SWROA it has conducted.

- The State recently adopted permitting guidance for application of its narrative water quality standard for the protection of the biologic component of the aquatic ecosystem in NPDES permitting under the CWA. As a result, the Aquatic Ecosystem Protection Plans required under this guidance for the NPDES permitting program are now also being included in HRPs for mining operations. CHIA's the agency performs are also addressing protection of the aquatic ecosystem.

Beyond the permitting requirements outlined above, the West Virginia regulatory program includes a number of performance standards that apply to all aspects of hydrologic protection that are addressed in permitting. The West Virginia Department of Environmental Protection inspects all permits on a minimum frequency of once per month to assure that performance standards and permit conditions are being met. Enforcement action is taken, including notices of violation and cessation orders, as appropriate, for a mine operator's failure to comply. Civil penalties are assessed for non-compliance. Operators which fail to correct violations on a timely basis are blocked from receiving future permits. A pattern of violations can result in suspension or revocation of a mine operator's permit.

### **Impacts of the Stream Protection Rule**

As discussed above, the negative economic impacts OSM projects for the Appalachian region are quite substantial. Because OSM has yet to lift the veil on the actual language of its proposed rule, a concise assessment of the rule's regulatory burden on state agencies cannot be performed. However, some observations can be made, based on the actions OSM has otherwise taken since the Interior Department signed on to the June 11, 2009 MOU and the concepts of the Stream Protection Measures Rule that state agencies have been able to glean from portions of the draft EIS and briefings OSM has provided.

If the general direction OSM has taken since the June 11, 2009 MOU is any indication, the regulatory burden the Stream Protection Measures Rule will impose on state regulatory programs can be expected to be quite substantial. Nearly every action OSM has taken since the June 11, 2009 MOU has increased the burden on the states. Consider that OSM:

- Has unlawfully terminated the Abandoned Mine Lands emergency program and indicated that it will transfer the personnel OSM had previously dedicated to this program to oversight of state programs;
- Proposed a draft budget that cuts funding of state regulatory programs by 15%; and,
- Promulgated, without formal rulemaking, three new policies governing oversight of state regulatory programs, REG-8, REG-23 and INE-35, which each alter the federal-

state relationship that previously existed and impose substantial new bureaucratic regulatory burdens on the states.

At the same time OSM is adding more sets of eyes to watch state regulators and increase the number of federal inquiries to which states must respond, it is proposing to reduce the amount of money available to the states to operate their programs and has aggressively increased the bureaucratic burden it imposes on the states. With a total re-write of all of the rules on how coal mining is conducted, the changes states must undergo to implement the Stream Protection Measures Rule may represent the most significant of any of the new burdens the current OSM has thrust upon the states.

Another fundamental shift in the federal-state relationship under SMCRA that will come from the Stream Protection Measures Rule is in the ability of states to craft their regulatory programs as necessary to address local state issues. In the thirty four years since SMCRA was adopted, OSM has left two of the Act's most fundamental concepts "approximate original contour" and "material damage to the hydrologic balance", to the states to apply. This was done with good reason. Application of "approximate original contour" in the rugged Appalachian terrain of eastern Kentucky, southwest Virginia and southern West Virginia raises far different issues than in the flatter farmland of Indiana or the western plains. Application of the term, "material damage to the hydrologic balance" necessarily involves vastly different issues in the arid west than in the more humid east. The Stream Protection Measures Rule will end the authority to deal with state-specific issues at the state level that states currently enjoy. It will impose national one-size-fits-all standards from Washington. This approach runs contrary to one of the express findings Congress made in adopting SMCRA:

[B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States[.]

30 U.S.C. § 1201(f).

There are many other specific issues with concepts that are expected to be embodied in the Stream Protection Measures Rule that are troublesome to the West Virginia Department of Environmental Protection. Some of them are:

- SMCRA provides that it is not to be applied in a manner that will supersede, amend or repeal the federal Clean Water Act. 30 U.S.C. § 1292(a). This provision of SMCRA has been applied by the courts to reject a past attempt by OSM to establish what amounted to water quality standards. At the present time, several of the Appalachian states, including West Virginia, are in the process of establishing how narrative state water quality standards for the protection of biologic components of the aquatic ecosystem are to be applied in the context of the regulation of coal

mining. This process involves great potential for conflict between USEPA and the states over the application the Clean Water Act in this area. OSM intends to interject itself in the middle of the debate between USEPA and the states over this issue by including a biologic component in its material damage definition . There is great potential for this element of OSM's rules to conflict with the Clean Water Act. The biologic component of the material damage definition may be another unlawful attempt by OSM to establish what amounts to a water quality standard.

- A proposed performance standard that would prohibit adverse impacts to a stream's biologic community. This proposal suffers from the same defects that affect OSM's proposal to include a biologic component in its material damage definition, as discussed in the paragraph above.
- The material damage definition is also expected to include "quantification methods" to define what constitutes material damage. Again, OSM appears to be at risk of interfering with the Clean Water Act where these quantification methods amount to de facto numeric water quality standards.
- The material damage definition will also include "corrective action thresholds" to identify trends and require correction before the level of material damage is reached. This, too, presents great potential for conflict with the Clean Water Act. The NPDES permitting program under the Clean Water Act has a process to establish effluent limitations for protection of water resources. Discharges from mines or other facilities that comply with these limitations are lawful and discharges that exceed these limitations are unlawful. OSM's corrective action thresholds would appear to be attaching regulatory consequences to what would otherwise be lawful discharges under the Clean Water Act's NPDES program, in conflict with the Clean Water Act.
- The material damage definition is expected to codify OSM's Acid Mine Drainage Policy. Without getting into an in-depth discussion of the AMD policy, this probably is a sufficient enough departure from the statutory language of SMCRA to require it to be adopted through Congressional action rather than agency rulemaking.
- OSM will propose that approval to mine through natural drainage ways or streams be "sequenced". By this, OSM means that a mine must completely reclaim a drainway it has mined through, including restoration of the pre-mining biologic community in the drainway, before the mine will be allowed to mine through any subsequent drainway. In as much as drainways across Appalachian mountain sides may be separated by only a couple hundred feet, this proposal is entirely unrealistic.

- The portion of the Stream Protection Measures Rule that deals with disposal of excess spoil proposes to require constructed aquatards within excess spoil fills. Historically, nearly all of the construction standards that have applied to excess spoil fills have been oriented toward assuring their stability. One element of the design has been to assure that these structures drain freely. An aquatard is a layer of decreased permeability where water will be forced to drain laterally through the interior of a fill. This has the potential to seriously compromise the structural integrity of these fills. Our engineers refer to the aquatard as a “failure plane.” The failure of such a structure would be a threat to public safety.
- The excess spoil disposal rules will also require the tops of fills to be sloped to cause drainage to run off instead of infiltrating the fill. Achieving the goal of promoting runoff will cause peak flow to increase during rain events, contributing to offsite flooding.
- OSM proposes to place additional restrictions on the granting of variances from the existing requirement for restoration of the approximate original contour of mined lands. This proposal has great potential to conflict with West Virginia land use planning laws. The coal mining areas of southern West Virginia have had little economic development because the terrain is too rugged. The State Legislature has recognized that mining presents a unique opportunity to provide a resource that these areas lack, flat land. This is essential to the future, post-mining economic viability of these areas. The State has adopted legislation which requires county level economic development authorities to develop county-wide master land use plans. These plans are required to be approved by state government and to meet certain minimum state requirements. Each plan must be updated and re-approved by the State at three year intervals so as assure that it remains current. Under these plans, land that is proximal to supporting infrastructure, such as four lane highways or other transportation corridors, is targeted for development while forestry and comparable land uses are planned for more remote lands. New mining operations are required to attain a post mine land use that comports with the county master land use plan. OSM’s proposal to further restrict variances from the approximate original contour requirement conflicts with these State land use laws and may foreclose the opportunity to provide flat land through the mining process, so there can be economic development of these historically coal dependent areas after the coal is gone.

### **Conclusion**

I sincerely hope this written statement, the attachment submitted herewith and the oral testimony presented before the subcommittee are useful to it. If I can be of further assistance to the subcommittee, please contact me.



# United States Department of the Interior

## OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

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DEC 08 2009

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Re: Response to petition requesting Federal enforcement of West Virginia's surface mining program pursuant to 30 C.F.R. Part 733.

Dear Mr. Lovett:

This letter responds to your August 10, 2009, petition requesting Federal enforcement, pursuant to 30 C.F.R. Part 733, of West Virginia's stream buffer zone (SBZ) regulation. In reviewing the allegations raised in your letter, we have found no indication that West Virginia does not apply its SBZ rules consistent with its historic application of the SBZ requirements, as approved by OSM. Therefore, and for the further reasons outlined below, I am denying your request for an evaluation of the State program at this time. Neither your allegations nor other available information supports the conclusion that the State is failing to administer its approved SBZ provisions.

However, it is a high priority of OSM to improve stream protection in Appalachia, and OSM is in the process of reviewing and revising our stream protection requirements through an expedited SBZ rulemaking. On November 30, 2009, OSM published for a thirty-day public comment period an advance notice of proposed rulemaking for its SBZ and related regulations. Further, to provide increased protection for streams pending the final outcome of the pending rulemaking, we are currently seeking comment on a series of state oversight measures, and we are implementing immediate stream protection measures under existing program requirements.

In your petition, you made the following allegations:

- "... WVDEP's decision to exempt valley fills and huge stream elimination projects from the scope of the rule's protections renders the regulation meaningless."

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- "...West Virginia does not apply the buffer zone rule to the footprints of fills, neither does it consider the buffer zone rule in regard to permanently eliminating intermittent and perennial stream segments."
- "...we believe that the State has never denied a request for a variance from the buffer zone rule."

Your petition also advances numerous legal arguments supporting your position that West Virginia must construe its rule in a manner consistent with your interpretation of the 1983 Federal regulation.

We have reviewed the relevant aspects of West Virginia's program and have found that the factual allegations in your petition are not supported by the record. However, I encourage you to submit your views as comments on the current rulemaking.

West Virginia does not interpret its SBZ rule in a manner that serves as an absolute prohibition of fills and all other coal mining activities (such as mining through, crossing, relocating or other activities) within 100 feet of an intermittent or perennial stream. West Virginia is applying its rule in a manner consistent with OSM's historical interpretation of the 1983 Federal SBZ rule upon which the State rule is based. The State program applies the SBZ rule in a manner that allows the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams. However as explained below, the State uses procedures and processes to reduce, minimize and in some cases eliminate the placement of fill in streams in order to reduce the environmental impacts.

West Virginia has previously implemented measures to minimize the adverse environmental impact of the placement of excess spoil in streams. As a result of a consent decree in *Bragg v. Robertson*, Civil Action No. 2:98-0636 (S.D. W. Va. 1998), which was approved by U.S. District Court Judge Charles Haden, on February 17, 2000, the West Virginia Department of Environmental Protection (WVDEP) agreed to do the following, *inter alia*:

- Enforce its SBZ rule and make site-specific written findings before granting SBZ variances;
- Make site-specific written findings showing that ponds are to be placed as close as practicable to the toes of fills; and
- Develop a plan to meet approximate original contour (AOC) and to optimize spoil placement. The plan does not cover contour operations. Furthermore, the plan shall only be implemented pursuant to a memorandum of understanding (MOU) or agreement among the affected Federal and State agencies.

In response to the consent decree, WVDEP, in cooperation with OSM, developed procedures for optimizing spoil placement. The guidance documents were approved by three Federal agencies

(USEPA, USACE, OSMRE) and were implemented by WVDEP in June of 2000. This guidance, known as "AOC+", was developed to achieve the following stated objectives:

- Provide an objective process for achieving AOC while ensuring stability of backfill material and minimization of sedimentation to streams;
- Provide an objective process for determining the quantity of excess spoil that may be disposed of in excess spoil disposal sites such as valley fills; and
- Optimize the placement of spoil to reduce watershed impacts.

The AOC+ method is a reasonable procedure to ensure that an adequate amount of spoil will be returned to the mine excavation so that the AOC requirements of configuration, stability, and drainage will be achieved. This volumetric model (defined backfill template) expands the in-place overburden and then reduces the total expanded volume to ensure backfill stability, drainage, access and safety during the mining and reclamation process. The calculated backfill volume is placed in the mine excavation. All spoil material in excess of the backfill volume is placed in excess spoil fills, usually in adjacent valleys. Minor variations from the model are allowed for the final grading to blend with surrounding contours and drainage patterns.

West Virginia also incorporates a site-specific "Buffer Zone Analysis" (BZA) into its permitting process whenever an applicant proposes to conduct mining activities (including fills and mining through) within 100 feet of an intermittent or perennial stream. This analysis, which is conducted by WVDEP prior to the issuance of a permit, addresses the following issues:

1. Disposal Site Selection

- Does the site selection of the proposed fills and its associated drainage structures represent the least environmentally damaging practicable alternative?
- Can the activity operate without fills in an intermittent or perennial stream?
- Has the least adverse impact alternative on special aquatic sites been identified?
- Has the activity's fill volume been minimized?
- Has the fill been located and confined to impaired streams to minimize smothering of organisms?
- Are previously used disposal sites available?

2. Fill Material Evaluation

- An evaluation of the proposed fill for any indication of possible contaminants, considering the following physical characteristics:
  - Results from previous testing of the material or similar material in the vicinity of the project.
  - Protection practices for petroleum products or designated hazardous substances.

- Known existence of substantial material deposits of substances, which could be released in harmful quantities to the aquatic environment by manmade discharge activities.

### 3. Environmental Analysis

- Are the physical and chemical characteristics of the aquatic ecosystem significantly affected in the following areas:
  - Substrate impacts, changes in physical, chemical and biological characteristics?
  - Suspended particulate/turbidity impacts?
  - Changes in chemistry and physical characteristics of the receiving stream?
  - Alteration of normal water flow which will result in changes in habitat, food supplies, and spawning areas?
- Do the proposed fills and associated drainage structures significantly affect the following:
  - Violate applicable State Water Quality Standards?
  - Violate applicable toxic effluent standard?
  - Jeopardize the continued existence of endangered or threatened species or their habitat?
  - Aquatic ecosystem diversity, productivity, and stability?
  - Other wildlife ecosystem diversity, productivity, and stability?
  - Wetlands?
  - Riffle and pool complexes?
  - Human health, municipal and private water supplies?
  - Recreational, aesthetic and economic values?
  - Parks, historical sites and wilderness areas?

The BZA also includes a table summarizing temporary and permanent impacts to intermittent and perennial streams within the proposed permit area. Finally, the BZA makes a specific recommendation, signed by the reviewing engineer, biologist, geologist and NPDES permit writer, to the WVDEP Director regarding approval.

In response to your allegations, we have verified that WVDEP is still using AOC+ and the BZA in its permitting process and conducts a BZA and corresponding authorization for all mining activities within 100 feet of an intermittent or perennial stream, including mining through and relocating streams. We have reviewed recently issued permits and selected four which our staff believe were large enough to require valley fills. Three of these permits proposed impacts within stream buffer zones: Alex Energy, Inc., S-3011-07, Raven Crest Contracting, LLC, S-5006-08, and Alex Energy, Inc., S-3009-07. WVDEP did prepare BZA's for the permits, and the permit files include AOC+ documentation. Two of the BZA's conducted concerned durable rock fills while one was for mining through and permanently relocating a stream.

With respect to your last allegation that the WVDEP has never denied a stream buffer zone variance, neither OSM nor the State collects or tracks such statistics, and we were unable to verify or refute that allegation. However, State officials advised us that requests for the placement of spoil or the conduct of other activities in streams or stream buffer zones are often modified to reflect the least environmentally damaging practicable alternative through the normal permitting process. In addition, during the review process the applicant may revise the mining plan to avoid certain streams, and that may avoid the occasion for a denial. WVDEP provided a list of recently issued permits where proposed stream impacts had been eliminated or reduced through the permit review process. OSM conducted independent verification of two instances where proposed fills were in fact eliminated. The first is S5034-08 (Sandy Gap Surface Mine) in which an excess spoil fill was proposed, but was subsequently eliminated, with the excess spoil being placed on an adjacent permit backfill area. The second is U5013-03 (Jarrell Branch Mine, Portal A) in which authorization was requested for an existing haul road and a temporary excess spoil fill in a stream buffer zone. The temporary excess spoil fill was subsequently eliminated, with the material to be placed in two locations on existing pre-law benches, and ultimately to be used in reclaiming the pre-law benches and highwalls.

Previously, for the Environmental Impact Statement conducted for the Federal 2008 stream buffer zone rule, OSM had reviewed 110 separate versions of WVDEPs' BZAs. In response to your petition, we reviewed a sample of those analyses and noted that one BZA resulted in moving the toe of a durable rock fill upstream approximately 2,800 feet, which eliminated the need to permanently fill several hundred feet of stream (SMA # S-5007-01, Apogee Coal Company).

In summary, we found no evidence that West Virginia is implementing its SBZ rule in any way that substantively deviates from the approved State program. Therefore, we have no reason to conduct the program evaluation under 30 CFR 733.12(a)(2) that your petition requests.

In recent litigation, *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4<sup>th</sup> Cir. 2009), the United States Court of Appeals for the Fourth Circuit discussed requirements of SMCRA concerning coal mining impacts on streams. In that decision, the court stated:

Congress clearly contemplated that the regulation of the disposal of excess spoil and the creation of valley fills fall under the SMCRA rubric. *See* 30 U.S.C. § 1265(b)(22)(D) (2000) (requiring that lateral drains be constructed where a spoil disposal area contains "springs, natural water courses or wet weather seeps"); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4<sup>th</sup> Cir. 2003) ("[I]t is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States . . .").

Thus, *Aracoma* and *Rivenburgh* recognize that under SMCRA it may be appropriate to allow placement of excess spoil in streams. In addition, the *Aracoma* court stated:

As part of its federally approved SMCRA regulatory program, the WVDEP surface mine permitting process examines “[e]very detail of the manner in which a coal mining operation is to be conducted . . . includ[ing] the plan for disposal of excess spoil for surface . . . mining operations . . .” \*\*\* As the Corps explains in its permits, “the social and environmental impacts associated with surface coal mining and reclamation operations are appropriately analyzed by WVDEP in this context before that agency decides whether to permit the mining operation under SMCRA.” \*\*\* A SMCRA permit applicant must provide detailed information about possible environmental consequences of the proposed operations, as well as assurances that damage to the site will be prevented or minimized during mining and substantially repaired after mining has come to an end. The WVDEP must ensure compliance with SMCRA’s environmental protection performance standards. *See* 30 U.S.C. §§ 1257, 1260, 1265 (2000).

*Aracoma*. 556 at 195-196. The *Aracoma* court’s opinion recognizes that the State provides a detailed review of stream and environmental impacts for mine permit applications, and requires the operator to meet SMCRA requirements to prevent or minimize damage and to reclaim.

I conclude that there is no requirement for OSM or the State to change the interpretation of the existing State SBZ rule. Further, as discussed above, I have reviewed the allegations you have made and I find that they are not verified by the information we have reviewed. I have no basis to conclude that the State is failing to effectively implement its approved stream buffer zone provisions, or that the State has changed its historic interpretation of those provisions. Therefore, I find that pursuant to 30 CFR Part 733, I have no basis to evaluate the State’s implementation of its stream buffer zone provision at this time.

Although I have decided not to evaluate West Virginia’s implementation of its provision, OSM believes it is important to improve protection of streams under SMCRA. Therefore, as mentioned above, we have started an expedited rulemaking to revise the Federal 2008 SBZ rule to provide better environmental protections from the impacts of Appalachian surface coal mining. Further, OSM is taking immediate protective measures for streams pending final action on the rulemaking.

As you are aware, on December 12, 2008 (73 FR 75814-75885), OSM published a final rule modifying the circumstances under which mining activities may be conducted in or near perennial or intermittent streams. That rule (referred to as the 2008 rule) took effect January 12, 2009. In cases filed on December 22, 2008, and January 16, 2009, *Coal River Mountain Watch, et al. v. Salazar*, No. 08-2212 (D.D.C.) ("*Coal River*") and *National Parks Conservation Ass'n v. Salazar*, No. 09-115 (D.D.C.) ("*NPCA*"), a total of nine organizations challenged the validity of the rule.

In *NPCA*, on April 27, 2009, the Government filed a motion for voluntary remand and vacatur of the 2008 rule. Granting of the Government's motion likely would have had the effect of reinstating the 1983 version of the SBZ rule. In *Coal River*, on April 28, 2009, the Government filed a motion to dismiss the complaint as moot, which the Government argued should be granted if the court granted the motion in *NPCA*.

On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency, and the Acting Assistant Secretary of the Army (Civil Works) entered into a Memorandum of Understanding (MOU) implementing an interagency action plan to significantly reduce the harmful environmental consequences of surface coal mining operations in six states in central and northern Appalachia. Among other things, the MOU required that we develop guidance clarifying how the 1983 SBZ rule would be applied to reduce adverse impacts on streams if the court granted the Government's motion in *NPCA* for remand and vacatur of the 2008 SBZ rule.

On August 12, 2009, the court denied the Government's motion in *NPCA*, holding that, absent a ruling on the merits, significant new evidence, or consent of all the parties, a grant of vacatur would allow the government to improperly bypass the procedures set forth in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, for repealing an agency rule.

On November 30, 2009, OSM published an Advance Notice of Proposed Rulemaking in the *Federal Register* seeking comments on our intention to revise our regulations concerning the conduct of mining activities in or near streams (74 FR 62664-62668). Those revisions would implement, in part, the MOU. Accomplishing that goal will involve revision or repeal of certain elements of the Federal 2008 rule. The rulemaking process will comply with the requirements of the Administrative Procedure Act, including any applicable notice and comment requirements, consistent with the court's decision in *NPCA*. While the Federal 2008 rule remains in effect, OSM is implementing immediate steps to improve stream protection pending the final outcome of the SBZ rulemaking. A copy of those immediate protective measures is enclosed.

It is possible that concerns you have raised may be resolved through our new SBZ rulemaking initiative, which we plan to complete as expeditiously as possible. If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Thomas D. Shope". The signature is written in black ink and is positioned above the printed name.

Thomas D. Shope  
Regional Director, Appalachian Region

Enclosure