



**Testimony of Lanny E. Erdos
Chief of the Division of Mineral Resources Management
Ohio Department of Natural Resources
Before the U.S. Senate Committee on Environment and Public Works
February 3, 2016**

Good morning Chairman Inhofe, Ranking Member Boxer, and members of the Committee. My name is Lanny Erdos, and I serve as Chief of the Ohio Department of Natural Resources (DNR), Division of Mineral Resources Management. I have worked for the Division for nearly 28 years and was appointed Chief in October 2011.

I appreciate the opportunity to testify in regards to the stream protection rule proposed by the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM). Ohio has primacy over the administration of the Surface Mining Control and Reclamation Act (SMCRA) and consistently receives high marks on our annual evaluations from OSM for how we operate our program. Historically, Ohio DNR's Division of Mineral Resources Management has had a positive working relationship with OSM. However, the process that OSM has set forth for primacy states on their proposed stream protection rule has been one-sided and not open to a productive dialogue.

OHIO'S INVOLVEMENT IN THE PROPOSED RULE PROCESS:

Following OSM's publication of an Advance Notice Proposed Rulemaking relative to mining activities in or near streams in November of 2009, OSM offered states the opportunity to participate as cooperating agencies in the development of an Environmental Impact Statement (EIS) for the proposed stream protection rule. Ohio DNR agreed to participate only as a state commenter, not as a cooperating agency. That decision was made under the previous administration, prior to me becoming Chief. Three chapters of the initial draft EIS, which totaled 1045 pages, were shared with participating states with only 24 business days for review.

Only once, in late 2010, did OSM arrange a conference call with the states to discuss Chapter 2 of the draft EIS. Based on my 28 years of experience, this lack of correspondence was out of character for OSM. This call served as more of a briefing to the states rather than an exchange of information or an opportunity to provide meaningful comments. Over the course of the past four years, following the final opportunity for state input in early 2011, OSM significantly revised the draft EIS, including the addition of new alternatives.

The cooperating agency states¹ sent three letters to OSM expressing their concerns with the EIS process and their role as cooperators. The first, on November 23, 2010, expressed concerns about the quality, completeness and accuracy of the draft EIS; the constrained timeframes for the submission of comments on the draft EIS chapters; the reconciliation process; and the need for additional comment

¹ Alabama, Indiana, Kentucky, Montana, New Mexico, Texas, Utah, Virginia, West Virginia, Wyoming

on the revised chapters. OSM responded to this letter on January 24, 2011 and made a number of commitments regarding continued, robust participation with the cooperating agency states in the EIS development process. Shortly thereafter, OSM terminated involvement on the draft EIS with the cooperating states without explanation.

The cooperating agency states sent a second letter to OSM on July 3, 2013 requesting an opportunity to re-engage in the EIS development process and reiterated the states' concern regarding how their comments would be used or referenced by OSM in the final draft EIS, including an appropriate characterization of their comments and participation. OSM never responded to this letter.

A third letter was sent to OSM on February 23, 2015 by the cooperating agency states specifically outlining the states' ongoing concerns about the EIS consultation process. No response was received. In summary, based on experiences to date with OSM's development of the draft EIS for the stream protection rule, OSM has not provided for meaningful participation with the cooperating or commenting agency states.

The most recent effort by OSM to communicate with cooperating agency states was made through a general briefing and overview of the draft EIS process in April 2015 during an Interstate Mining Compact Commission meeting in Baltimore, Maryland, which I personally attended. The briefing consisted of a PowerPoint presentation by OSM providing overviews of the proposed rule with no opportunity for the cooperating agency states to ask questions. Unfortunately, the overview of the EIS was extremely limited, copies of the presentation were not made available, and the meeting did not allow the states an opportunity to contribute to the EIS. The cooperating agency states present at this meeting communicated to OSM personnel in attendance, including OSM Director Pizarchik, that the meeting was not considered a meaningful consultation, but rather a briefing.

KEY CONCERNS WITH THE PROPOSED RULE:

One provision in the proposed rule that is particularly problematic requires written approval of Protection and Enhancement Plans before a permit to mine coal can be issued. The proposed rule does not require establishment of timeframes by which the U.S. Fish and Wildlife Service must provide a complete evaluation of the proposed mining project to allow the state to move forward and/or for the advancement of permitting process. Not allowing for conditional issuance and approval beyond established timeframes to complete necessary reviews is tantamount to providing the federal government veto power over a permit without any explanation whatsoever.

Additionally, Ohio has identified several other critical areas where state expertise would have proven to be beneficial in development of the proposed rule, including:

- expanding water sampling parameters and site requirements and 12-months of consecutive sampling;
- requiring use of the Palmer Drought Severity Index due to the inconsistent sampling process;
- adding ephemeral stream sampling, monitoring and reclamation requirements due to limited stream flow and biological diversity;
- expanding bonding requirements, resulting in unpredictable timeframes and standards for bond release; and
- defining or expanding the definitions of "material damage" "adjacent area" and "cumulative impact area."

SUMMARY OF TESTIMONY:

Mr. Chairman, had states been given adequate opportunity to provide their technical expertise on the development of the draft EIS and proposed rule through a meaningful process and OSM welcomed that input, the rule would have better accounted for the diversity in terrain, climate, biological, chemical, and other physical conditions in areas subject to mining as anticipated by SMCRA. The rule would have also recognized the appropriate discretion vested by SMCRA to the primacy states that have been regulating coal mining operations in excess of 30 years.

Thank you again for the opportunity to present this testimony. I will be happy to address any questions you may have.