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before the
United States Senate Environment and Public Works Committee

The Stream Protection Rule: Impacts on the Environment and Implications for Endangered Species Act and Clean Water Act Implementation

February 3, 2016

Good Morning. I am Clay Larkin, Senior Policy Advisor to the Kentucky Coal Association ("KCA") and an attorney with the law firm of Dinsmore & Shohl. KCA's member companies produce approximately 90% of the coal mined in Kentucky and employ a similar percentage of the approximately 10,000 workers directly engaged in the mining of coal in Kentucky.

The so-called "Stream Protection" Rule is not really about protecting streams. It is about completely rewriting OSM's existing regulatory program, replacing or amending some 465 existing regulations, imposing significant regulatory burdens on coal miners, and creating an immense financial and administrative burden for the primacy states that administer SMCRA. This is all unnecessary, and will serve only to cause thousands of miners to lose their jobs, and states to lose billions in tax revenue from coal production.

The "Stream Protection Rule" is a rule in search of a problem. Although OSM has stated that the rule will help reduce "off-site" impacts from coal mining, by OSM's own estimates state regulators and coal miners are doing an outstanding job of controlling these off-site impacts under existing regulations. According to OSM's own figures, over 90% of sites nationwide were free from off-site impacts last year, and in some states that figure was 100%. Despite this track record, the rule would require states to implement duplicative permit review procedures that are already addressed by other state and federal agencies, at a time when states like Kentucky are already dealing with significant budget shortfalls.

Although there are numerous problems with the rule, as demonstrated in the hundreds of pages of written comments OSM has received in opposition to the rule, I would like to focus today on the ways in which the rule unlawfully conflicts with the Clean Water Act and Endangered Species Act, and how OSM failed to comply with its obligations under the National Environmental Policy Act. Because the rule conflicts with these statutes, OSM must withdraw it and start over.

OSM Cannot Regulate Issues Within The Scope of Other Federal Laws

OSM's authority to regulate is conferred by SMCRA. Section 702(a) of SMCRA prevents OSM from regulating in a way that conflict with other environmental protection statutes. SMCRA specifically mentions that OSM's regulations cannot conflict with the Clean Water Act or NEPA, but courts have also held that the list of statutes in Section 702(a) is not exhaustive, so OSM also cannot regulate in a way that is inconsistent with the ESA.

In the Stream Protection Rule, OSM has failed to comply with Section 702(a) of SMCRA on multiple fronts. First, it is attempting to create a wholly new water regulatory program that conflicts with the Clean Water Act and the thorough permitting process under that statute which is already stringently administered by state water regulators and EPA. Second, OSM has unlawfully granted an unprecedented authority to the U.S. Fish & Wildlife Service to "veto" coal mining permits, without providing any meaningful recourse for coal miners to challenge Fish & Wildlife's determinations. Third, OSM has failed to meaningfully engage with state regulators, in violation of NEPA.

The Proposed Rule Unlawfully Conflicts with the Clean Water Act

State CWA authorities already enforce CWA programs at the state level. Mining operators must navigate a burdensome and stringent permitting process under multiple sections of the Clean Water Act. Once these permits are obtained, they are stringently enforced by state water quality regulators. Despite this existing process, which fully addresses water quality issues related to mining, OSM seeks to appoint itself the premier water quality regulator for all water quality issues related to surface and underground coal mining. This is both illegal and completely impractical.

A Nationwide Approach is Illogical and Unnecessary

For example, OSM seeks to provide a nationwide, one-size-fits-all definition of the term "material damage to the hydrologic balance outside the permit area." This is inconsistent with SMCRA's state primacy framework, which gives primary regulatory authority to the states, not a federal agency. SMCRA wisely grants states primacy in this matter because a federal definition is unworkable. There is a significant diversity of hydrology and geography in different mining states that requires a state-by-state, site-by-site approach to defining, evaluating, and preventing material damage to the hydrologic balance. States have demonstrated that they are better positioned to address the unique water quality concerns within their borders. OSM has provided no meaningful justification for a federally mandated approach to this issue.

The Proposed Rule Unlawfully Usurps State Water Quality and NPDES Permitting Authority

OSM also seeks to impose a completely duplicative water quality permitting process on coal miners and state mining regulators. Under the proposed rule, mining regulators must determine all reasonably foreseeable uses of streams, identify "parameters of concern," and establish numerical material damage criteria for "parameters of concern." This directly conflicts with Section 303 of the CWA, which grants authority to the states to establish water quality standards, including both the establishment of designated uses of streams and the water quality criteria necessary to protect those uses.

The proposed rule also unlawfully duplicates the work already done by state water quality regulators under CWA Section 402's NPDES permitting program. CWA Section 402 permits not only impose effluent limitations designed to protect water quality, but also stringent technology-based effluent limitations based on available control technologies that can reduce pollutant quality to a degree that is more than protective of water quality for certain parameters. NPDES permits also contain monitoring and reporting requirements, and special conditions as necessary to protect streams. NPDES permits are also stringently enforced by state water quality regulators who have expertise in the requirements of the CWA.

Simply put, the protection of water quality is already comprehensively addressed by the CWA and state water regulators. Every water-quality based aspect of the proposed rule's concept of material damage to the hydrologic balance is already addressed via the CWA's NPDES permitting program. OSM cannot impose its own duplicative and conflicting water quality requirements without creating an unlawful conflict with the Clean Water Act.

The Proposed Rule's Unlawfully Duplicates the CWA Section 404 Permitting Process

The proposed rule would impose numerous new requirements on mining operations that cause temporary impacts to streams, such as mine through operations. Under the proposal, among other things, the permittee must establish a 100 foot buffer on each side of a stream to be mined through, restore post-mining drainage patterns to pre-mining condition, pose a separate "ecological function" bond, and comply with a list of mitigation requirements established by OSM. The problem with this approach is that the mining through of streams, or any other placement of material in streams, is already comprehensively regulated under Section 404 of the Clean Water Act, which is administered by two federal agencies, EPA and the Army Corps, with input from state water quality regulators. The Section 404 permitting program already restricts impacts to streams, requires miners to adopt the least environmentally damaging practicable alternative when stream impacts cannot be avoided, and comprehensively governs mitigation of stream impacts. This existing and comprehensive regulatory program contains no "gaps" that mining regulatory authorities must fill. As such, OSM lacks authority to regulate in this area, and lacks the expertise to effectively do so even if it could.

The Proposed Rule Conflicts with the Endangered Species Act

In the proposed rule, OSM has created conflict with the ESA by granting to itself authority that Congress has never given it under the ESA or SMCRA. The proposed rule also grants to the Fish & Wildlife Service a veto that agency does not possess under any statute.

Endangered species are already adequately protected by existing surface mine permitting regulations and the ESA. Under SMCRA's existing regulations, states collect fish and wildlife resource information relating to listed species for proposed operations and provide it to the Fish and Wildlife Service upon the Service's request. Consistent with SMCRA, the state mining regulatory authority, after receiving input from the Service, makes a final decision to issue the permit. This approach has several benefits. It limits unnecessary involvement by the Service, which is already responsible for reviewing fish and wildlife information from numerous agencies, and instead allows the Service to concentrate only on those projects with a realistic potential to impact endangered species. This existing process also allows primacy states to maintain their appropriate statutory role as the final decision-maker with respect to SMCRA permit applications. The proposed rule completely changes this process, unlawfully and unnecessarily expanding the role of the federal Service in state permitting actions, and removing the final decision-making authority of state regulatory agencies.

The Proposed Rule Unlawfully Expands Service and OSM Jurisdiction Beyond Any Statutory Authority

Under the proposed rule, the state mining regulatory authority may not grant a permit if there is a likely potential to jeopardize species "listed" under the ESA, or species *"proposed for listing.*" The problem with this is that OSM can only require compliance with existing law. SMCRA does not provide any authority for OSM to establish its own threatened and endangered species protection program that includes both listed species and species *proposed* for listing. And the ESA's provisions applicable to mining permits issued by primacy states only apply to listed species. Thus, in the proposed rule, OSM is attempting to give to itself authority that Congress never gave it, either in the ESA or SMCRA.

The Proposed Rule Grants the Service an Unlawful Veto Authority

Of even greater concern, the proposed rule would allow the federal Fish and Wildlife Service to effectively "veto" any state-issued mining permit where it is not 100% satisfied with the protection and enhancement plan provided in the permit application. Under current regulations, the state permitting agency, after any necessary input from the Service in cases where listed species are involved, makes a final determination as to whether the permittee is taking adequate measure to protect species and habitat. Under the proposed rule, however, the *federal Service*, and not state mining regulators, must "approve" the protection and enhancement plan. Without such federal approval, the state mining permit could not issue. This is clearly an unlawful interference in the decision-making of SMCRA primacy states.

To provide some perspective on the extent to which this provision would federalize what should be a state decision to issue a mining permit, consider that this veto authority would apply to all mining activity within the range of the Northern Long-Eared Bat, which covers most of the eastern and central United States. This would give the Service final authority to veto nearly every mining permit in the Appalachian and Interior regions.

Perhaps more troubling, the proposed rule does not provide any meaningful limit on the Service's veto authority or provide any meaningful way for permit applicants to challenge the Service's veto. Although the proposed rule purports to contain a dispute resolution provision, this "appeals" process does not meet basic notions of due process. Under the so-called dispute resolution process, if FWS withholds approval, effectively vetoing the permit, FWS itself decides whether this decision was correct. There is no provision for involvement of the Department of Interior, or even the courts, in this process. The proposed rule therefore runs afoul of what Congress intended in SMCRA, by placing FWS in the role of final decision-maker on most mining permits across the country.

OSM Failed to Comply With NEPA

The legal deficiencies in the proposed rule are readily apparent to many primacy state regulators. Had OSM engaged in meaningful dialogue with the states when crafting the proposed rule, it is possible that these problems could have been identified and addressed, allowing OSM propose a meaningful yet appropriately tailored rule. But OSM did not engage in meaningful discussion with the states. As others will discuss at this hearing, and as states explained in their comments opposing this proposal, the state regulatory authorities – who must ultimately implement this rule – were effectively shut out of the decision-making process. This violated OSM's obligations with respect to "cooperating" and "commenting" agencies under NEPA.

Despite freezing state regulators out of the rulemaking process, OSM has placed an enormous burden on state regulators during a time of tremendous budget pressure. For example, in my state of Kentucky, to have any hope of resolving billions of dollars in unfunded state employee pension liability, state agencies must reduce their budgets. Yet to effectively meet the requirements of the proposed rule, the mining regulatory authority would have to significantly increase its staff, primarily to include water quality specialists whose jobs are already being done by our state's Division of Water. All to implement a rule that unlawfully conflicts with other federal statutes, and is aimed at a problem OSM itself recognizes does not exist.

Coal miners in Kentucky, and throughout America, live and work in the coalfields, and support responsible practices that protect the environment. They do not, however, support duplicative regulations, and unfunded federal mandates like the Stream Protection Rule. The rule should be withdrawn.

Thank you for allowing me the opportunity to testify before this Committee on behalf of the Kentucky Coal Association. I am happy to answer any questions that you may have.