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HEARING ON THE STREAM PROTECTION RULE: IMPACTS ON THE  
ENVIRONMENT AND IMPLICATIONS FOR ENDANGERED SPECIES ACT AND  
CLEAN WATER ACT IMPLEMENTATION

Wednesday, February 3, 2016

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 9:35 a.m. in room 406, Dirksen Senate Office Building, the Honorable James Inhofe [chairman of the committee] presiding.

Present: Senators Inhofe, Boxer, Barrasso, Capito, Boozman, Fischer, Sullivan, Cardin, Gillibrand and Markey.

STATEMENT OF THE HONORABLE JAMES M. INHOFE, A UNITED STATES  
SENATOR FROM THE STATE OF OKLAHOMA

Senator Inhofe. The hearing will come to order. We appreciate you and the witnesses on the second panel being here. I think we are going to have a bigger turnout in a few minutes.

Let's go ahead and get our opening statements out of the way, if that is all right, Senator Boxer.

Today's hearing is to examine the Department of Interior's Office of Surface Mining Stream Protection Rule and its nexus with implications to the Clean Water Act and the Endangered Species Act. I would also like to discuss the NEPA process for developing this rule. In particular OSM's failure to allow States a meaningful opportunity to participate in the NEPA process, even though they were cooperating agencies under NEPA.

This rule establishes the conditions a coal mining operation is going to have to meet to receive a permit under the Surface Mining Control and Reclamation Act, also known as SMCRA.

SMCRA includes provisions for protecting the environment. However, SMCRA also specifically says that it does not authorize duplicative federal environmental regulation. And, under SMCRA, in 24 authorized States, the State agency, not the Federal Government, makes coal mining permitting decisions.

Unfortunately, the rule that the Office of Surface Mining proposed just last July would establish new onerous conditions

that duplicate or supersede existing Clean Water authorities of States and the Corps of Engineers, which I contend is an illegal power grab.

Under the Clean Water Act, States establish water quality standards. The so-called Stream Protection Act would override that authority and let OSM set new water quality standards for coal mining operations. These new standards are set at the whim of OSM, without any of the notice and comment rulemaking required under the Clean Water Act and can be used to override State water quality certifications and the State coal mining permitting authorities. Again, it is a power grab.

Under the Clean Water Act, the Corps of Engineers issues permits to fill in streams. The Stream Protection Rule would allow OSM to override the Corps' authority by adding conditions to SMCRA permits over and above what the Corps requires in section 404 permits and by creating even more confusion over the reach of the federal authority under the Clean Water Act, the issue that is being litigated as part of the WOTUS rule challenges. Again, a power grab.

Under the Endangered Species Act, the Fish and Wildlife Service lists threatened and endangered species. Under the Stream Protection Rule, States are required to meet new conditions that apply not only to listed species, but also species that Fish and Wildlife have proposed for listing,

circumventing the notice and comment rulemaking process required for listing new species under the ESA. Now, even worse, the proposed rule would give Fish and Wildlife unprecedented veto authority over State permits. So that is what is all the way through this.

Under NEPA, cooperating agencies are supposed to be granted access to information and an opportunity to provide comments while an Environmental Impact Statement is being developed. Eleven States became cooperating agencies for the Environmental Impact Statement for this rule. However, OSM shut them out of the process, failing to provide any information to States since early 2011. As a result, OSM developed a rule for a State administered program without adequate State involvement.

The unauthorized provisions of this proposed rule will have a significant adverse effect on mining States. It will add so many layers of bureaucracy that mining permits will halt and even current permits could be reopened, causing severe economic impacts.

Now, I know this is true. I spent last Friday out north of Poteau, Oklahoma. That is a big mining area that we have historically. It has been there for many, many years. People don't think of Oklahoma as being a coal mining State, but what we have is people really hurting out there. It is a serious problem.

In comments Senator Capito filed on this proposed rule in September of last year, she noted that finalizing this rule would result in an annual loss in coal production valued at \$14 billion to \$20 billion and losses in Federal and State revenues of \$4 billion to \$5 billion a year.

The coal industry has already lost tens of thousands of jobs in the past few years. We have to be cautious to ensure we don't regulate into extinction one of the most important energy sources for this Country, which I think is some people's intention.

So, this is the situation created by this proposed "Stream Protection Rule":

State water quality standards under the Clean Water Act will be superseded by new standards that OSM creates.

The Corps of Engineers' permits under section 404 of the Clean Water Act will be superseded by new conditions imposed by OSM.

A permit that a State coal mining permitting authority wants to issue can be vetoed by the Fish and Wildlife Service based on impact to species that are not even listed under the Endangered Species Act.

All this Federal overreach is going to impose a hardship on coal miners and the States they live in.

I want to thank our witnesses for being here.

Unfortunately, one of our witnesses, Director Todd Parfitt from Wyoming, he couldn't do it because of some weather issues they had up there, so I would ask unanimous consent that his statement be placed in the record. Thankfully, we have Mr. Larkin here with us today who was able to step in at the last minute, and I look forward to hearing from all of our witnesses.

Senator Boxer?

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF THE HONORABLE BARBARA BOXER, A UNITED STATES  
SENATOR FROM THE STATE OF CALIFORNIA

Senator Boxer. Thanks so much. Mr. Chairman, could I have an additional minute, as you did?

Senator Inhofe. Sure.

Senator Boxer. So we have six minutes on the clock. Thanks. Because this is really important. Today the Majority have decided to hold a hearing on the Department of the Interior's proposed Stream Protection Rule. Now, the proposed rule is going to revise 30-year-old regulations based on significant scientific advances on the impacts of surface coal mining on human health. That is important, human health, and the environment.

Now, coal mining regulations under the Surface Mining Control and Reclamation Act, that generally falls under another committee's jurisdiction, but I appreciate the fact that my chairman, who I respect and admire, feels there are implications in our jurisdiction, so we are having this hearing. And I am glad, in a sense, that we are because I have a lot to say about it.

There is a growing body of peer-reviewed science that shows that people living downstream from coal mines face a greater risk of cancer, birth defects and premature death. Let me say it again. We are not just talking about some problem far from

earth. A growing body of peer-reviewed science shows people living downstream from coal mines face a greater risk of cancer, birth defects, and premature deaths. We have a witness who will testify to that.

So what does the Majority want to do? It is clear. They want to disrupt a rule that is going to protect the people of, particularly, Appalachia. The Stream Protection Rule will place limits on the dumping of mine waste in headwater streams and mountaintop removal coal mines, one of the most destructive mining practices used today.

This practice involves literally cutting the tops off of mountains and dumping the excess rock and soil into headwater streams that are critical for flood control, water quality, and the health of some of the Nation's most precious ecosystems. This isn't made up, this is factual. Mountaintop removal coal mining has already destroyed more than 500 mountains, buried more than 2,000 miles of headwater streams, and polluted thousands of miles of downstream surface waters.

And the mining waste associated with these sites can include a host of toxic chemicals. Let's hear what these chemicals are. I am sure you would love to drink a glass of water with these chemicals in them: selenium, arsenic, lead. How about giving it out to my colleagues here? None of them would drink that, because these toxins can leach into streams

and rivers, severely degrading water quality.

For the first time, the proposed Stream Protection Rule coal mining companies to collect baseline data on water quality and require mining companies to monitor streams during mining and reclamation to ensure that downstream waters are not harmed.

Having this information is critical for affected citizens to know if their sources of drinking water are being polluted. We just faced the Flint, Michigan travesty, tragedy, whatever you want to call it, either one of those words. Don't you think the people here have the right to know what is in their water? You would if it was your grandkid. I certainly would if it was mine. And I certainly feel it is fair to the people there to know what toxins are in their drinking water.

So what does this Environment Committee do on the heels of Flint? First, we pass an amendment last time that says, oh, you can take pesticides and spray them on water sources that are for drinking water, sure, you don't need a permit. They passed here. They put it in the Sportsmen's Act. In the base of the Sportsmen's Act it says fishing tackle that has lead can never be regulated under TSCA. So they have done those two things. And today is another wonderful thing this Environment Committee is doing. My friend, he and I, I hope we can get back to infrastructure issues, because on that we work so well.

Senator Inhofe. WRDA is coming up.

Senator Boxer. WRDA is coming up, and it makes me so happy. But, in the meantime, here we go. On the heels of Flint, yet another move by this so-called Environment Committee to say that let's disrupt a rule.

Now, the Department of Interior is doing the right thing, regardless of what I think we are going to hear, to modernize its mining rules, and we are going to say the coal industry has to be consistent with national standards of drinking water protection. The poisoning, again, by lead of children in Flint has shaken the Nation. We can laugh all we want. This is the time for us to protect the waters that our kids drink, not to just say, oh, let's just walk away from this rule that is going to strengthen the power of the community to know what they are drinking. So stopping the Stream Protection Rule is not right.

Now, we are going to hear from the people of the community. I am so glad we have that witness. And here is the deal. No rule is perfect. I am sure this one isn't perfect. I have heard from environmental groups and health organizations that think this is a weak sister of a rule; it is not good. And then we have the other side that says forget about it, we don't need any rule, this is just perfect. So obviously there is room for us to work together.

We can craft something that is going to make sense. But to disrupt this rule as we are looking at the poor people of Flint

and what this is costing them in brain damage, in money, and in fear, to disrupt a rule that is protective of the people I think is the wrong thing to do.

Thank you.

[The prepared statement of Senator Boxer follows:]

Senator Inhofe. Thank you, Senator Boxer.

Mr. Pizarchik, you are recognized for your opening statement.

STATEMENT OF JOSEPH PIZARCHIK, DIRECTOR, OFFICE OF SURFACE  
MINING RECLAMATION AND ENFORCEMENT

Mr. Pizarchik. Thank you, Chairman Inhofe, Ranking member Boxer, and other members of the Committee for the opportunity to be here today. I am here to testify how the proposed Stream Protection Rule complements the Clean Water Act and Endangered Species Act, and fills the water protection gaps as required by the Surface Mining Control and Reclamation Act.

The proposed Stream Protection Rule includes reasonable and straightforward reforms to modernize 30-plus-year-old coal mining rules. We recognize that coal mining and coal-fired electricity production will continue to be a part of our energy mix for decades. The proposed rule incorporates current science, technology, and modern mining practices while also safeguarding communities and protecting our streams from the long-term effects of pollution and environmental degradation that endanger public health and undermine the future economic viability of coal country communities.

The proposed rule was available for public review and then comment for over three months. We held six public hearings, extended the public comment period, and received more than 94,000 comments, adding to the more than 50,000 comments previously provided by States and other stakeholders.

We have learned a great deal over the past three decades

about the impacts of coal mining and how to avoid or minimize those impacts. The final rule will strike an appropriate balance between protecting our water and the Nation's need for coal. The rule will provide greater regulatory certainty to the mining industry; it will improve consistency with the Endangered Species Act and promote coordination and cooperation with the agencies that implement the Clean Water Act.

It is important to note that Congress clearly delegated protection of the waters of the United States to the Environmental Protection Agency, and also provided the Army Corps of Engineers a role to play when fill will be placed in a stream.

It is our expectation that the proposed rule, once finalized, will fill regulatory gaps through a more complete implementation of our legal obligations under SMCRA. Our rules to fulfill the legal requirements of SMCRA will complement, and not conflict with, the Clean Water Act requirements.

SMCRA specifically requires regulatory authorities to protect water resources during coal mining, and these protections go beyond the protections that are provided by the Clean Water Act. Most notably, the Surface Mining Act requires coal operators to minimize disturbances to the prevailing hydrologic balance in the permit area and to prevent material damage to the hydrologic balance outside the permit area.

It is also important to note that we are not changing our longstanding rules that require mine operators to comply with all applicable Clean Water Act requirements. The proposed rule seeks to strike the right balance between fulfilling our statutory obligations, while providing the appropriate deference to Clean Water Act regulatory authorities to fulfill their duties. The final SPR will do so in a complementary and effective manner.

With regard to the Endangered Species Act, the proposed rule would codify the existing process contained in the 1996 biological opinion where coal mining may adversely affect species listed or threatened as endangered. These provisions will ensure that the incidental take coverage provided by the 1996 bi-op is effective for the State regulator and the mine operator when the permit is issued.

Based on comments we received, the final rule will likely include changes and modifications to further clarify and make it easier for people to understand there are no conflicts with the Clean Water Act or the Endangered Species Act.

OSMRE's analysis and outreach to stakeholders identified seven key areas for improvement to fulfill the requirements of the law. They include a better understanding of baseline environmental conditions at mining sites; improved monitoring during mining and reclamation; clarity on what constitutes

material damage to the hydrologic balance outside the permit area; and enhanced material handling and restoration requirements designed to take advantage of the advances over the last 30 years, which will enable responsible operators and regulators to better protect people and their water from the adverse effects of coal mining; the proposed rule would protect several thousand miles of stream.

The costs contained in the draft Regulatory Impact Analysis compared to the industry total revenues are a fraction of those. The proposed rule is what Americans expect from their Government, a modern and balanced approach to energy development that protects their water. It provides coalfield communities an economic future. The proposed Stream Protection Rule provides State regulators the flexibility to tailor their protections to individual mines or regions. The rule will reduce conflicts, reduce costs, enhance coordination among regulators, and provide for a more effective implementation of the Surface Mining Act, the Clean Water Act, and the Endangered Species Act.

Thank you.

[The prepared statement of Mr. Pizarchik follows:]

Senator Inhofe. Mr. Pizarchik, Section 702 of SMCRA says that you have no authority to supersede, reading out of the statute now, amend, or modify any other Federal law, including laws relating to water quality. You just heard my opening statement. I mentioned three specific areas how the Stream Protection Rule would expand the Federal authority to do exactly what the law says not to do. Three things: by superseding State authority of water quality standards under section 303, by superseding the Corps' authority to issue permits to fill in streams under 404, and by expanding the Fish and Wildlife authority under the Endangered Species Act.

Now, I am going to ask you this for the record, because I used the rest of my time by verbalizing it. So the question I am going to ask you is, do you claim that your rule won't have these effects, and how would you claim that? That would be for the record.

Farrell Cooper, a mining company in Oklahoma, I was there last Friday. I think quite often the regulators here who are usurping more powers from State and from local government and from other departments, if they just go out and see the people out there. Half of Farrell Cooper right now, they are unemployed already as a result of what is anticipated from this. Despite the fact that the State controls its own surface, nonetheless, that is happening.

Now, we talked about this issue before. You claim that they haven't appropriately done reclamation. But I can tell you that the reclamation is good. The Oklahoma Department of Mines agrees with me and Farrell Cooper, and your own Department of Interior Office of Hearings and Appeals and the courts agree with me and Farrell Cooper, and they disagree with your interpretation of the law. The company spent millions of dollars fighting your accusations in multiple lawsuits and, in the process, they have had to lay off half of their workforce, and these are good paying jobs.

Now you are trying to bypass the courts and win those lawsuits with the regulations that we are talking about today, which would overturn 35 years of legal precedence relating to how reclamation is done.

I would like to ask you why don't we just resolve this issue in Federal court? Would you be willing, would you agree to just support moving the case to the Federal District Court so a fair trial with a qualified judge could be heard? What do you think?

Mr. Pizarchik. Senator, I appreciated when we visited the Rock Island mine together summer before last to look at the reclamation that the Arkansan Mining Company did and how it did not restore the land to AOC, to the detriment of that farmer with those 45-foot spoil piles and 100-foot deep water-filled

impoundments. And you are right, there are three litigation cases out there. I can't comment on the, it is Department policy not to comment on litigation, and we would certainly entertain what you are saying. I would have to take that back to the Department, talk with our lawyers and talk with the Department of Justice because you are right, two of those cases where the court ruled in accordance with what you said; the third case actually agrees with us and that one is still being briefed, and they are all under appeal and we will have to see where the courts go.

Senator Inhofe. In terms of fulfilling this request, you would consider doing this? You say take it to the appropriate people. Who are they?

Mr. Pizarchik. Senator, I can't make that decision here; I will need to talk to our lawyers and everybody else. I believe we ought to allow the courts to continue to fulfill their duties in accordance with the law, that is the way it is set up. There are three appeals before them and I think it is appropriate for them to go through that process. As I understand the law, once that decision is made, there would be opportunities for appeal to a higher level court. So I think it would be premature to short-circuit the current administrative and legal process.

Senator Inhofe. So your answer to that question is no, in terms of doing it now?

Mr. Pizarchik. I think we should allow the process to continue in the courts.

Senator Inhofe. All right. Now, let me ask you is there anything ambiguous about this language in 702? Let me just read it from the statute. It says "Nothing in this chapter shall be construed as superseding, amending, modifying, or reopening the Mining and Minerals Policy Act of 1970, the National Environmental Policy Act of 1969, or any of the following Acts," and then it lists all eight of the acts that fall under this category. Is that ambiguous?

Mr. Pizarchik. I do not find it ambiguous, no.

Senator Inhofe. Okay. I want staff to take this over and give it to Mr. Pizarchik. One of the problems we have is getting information from the bureaucracies and making requests, even in those that are in the jurisdiction of this committee. In this case, the documents that we have had, all documents, we are going to request in writing that within two weeks you send to us -- now, we have made this request before, my junior senator and I have both made the request in June and September, and we haven't heard back yet. So the request is for all documents including, but not limited to, emails, memoranda, legal analysis concerning communications between the OSM reclamation and enforcement, including yourself, and the Office of Solicitor regarding the overturn of the decision in November

of 2010 and the issuance of INE-35. Number two, all documents including, but not limited to, emails, memos, and legal analysis concerning the communications to or from Director Pizarchik, yourself, about the INE-26, including February 2015 and the decision to rescind INE-26.

Now, will you commit to getting this information for us, for this Committee?

Mr. Pizarchik. Senator, I am aware of those document requests and it is my understanding that the Department has already provided several thousand pages of documents to the Committee and that we are working to continue to provide comments and to supplement those responses, and I anticipate that we will be providing supplemental responses, including additional responsive documents, very shortly. I would have to get back to you regarding any specific details on that, but we are continuing to process the requests.

Senator Inhofe. Well, the requests, though, are very specific. What we have received is not specific, so we thought we would just be more specific. I am just asking for you to stay to us you will supply us this information within two weeks.

Mr. Pizarchik. Senator, I have not read these comments.

Senator Inhofe. I just read them to you.

Mr. Pizarchik. Well, I would be happy to take them back to the Department for evaluation so that we can provide an

appropriate response.

Senator Inhofe. Well, you have had the request from myself, several others, including my junior senator, for months now, so you have had plenty of time to look over. In fact, the very wording that you are looking at there you have seen before. So I ask you a third time will you give us this information in two weeks?

Mr. Pizarchik. We will continue to process the document requests and provide the appropriate response documents as soon as we can. We have already provided several thousand pages and we will continue to do so.

Senator Inhofe. Senator Boxer.

Senator Boxer. Thanks. Again I would ask that I have two minutes more.

Senator Inhofe. I was one minute over.

Senator Boxer. You were 2:43 over.

Senator Inhofe. You can have 2:44, how is that?

Senator Boxer. Okay, 2:44.

Senator Sullivan. Do we all get two minutes more?

Senator Boxer. No. This is our thing.

Senator Inhofe. Well, no, no. In that unanimous consent, the next two that will be heard will be Senator Markey and Senator Sullivan. I ask unanimous consent that they also be given seven minutes instead of five minutes.

Senator Boxer. Absolutely.

Senator Inhofe. Okay. No objection. Then we go back to five minutes.

Senator Boxer. I want to hear from all of them at great length.

All right.

Senator Sullivan. We can do it in five.

Senator Boxer. I can't, because there is so much to talk about, there really is.

Now, just in general I want to make a comment, that the Majority party here, with all due respect, this is their philosophy, they demonize anybody in the Federal Government, my view, who is trying to help protect the environment and public health. They demonize. And I will tell you why it is wrong. But I will wait until they are finished.

[Pause.]

Senator Inhofe. Go ahead.

Senator Boxer. I waited.

Okay, I am back.

Senator Inhofe. Oh, good.

Senator Boxer. You so don't want to hear this.

The Majority demonizes any Federal agency that tries to help; it doesn't matter if it is the EPA, they demonize. It doesn't matter if it is you, sir. Do not take what they throw

at you personally. They don't mean it personally at all. They just don't want any involvement. And here is what is so odd.

I remember the BP oil spill. It went on and on. Senator Markey and I, and I remember Senator Nelson, we were so frustrated, along with the senators from Louisiana, both Republican and Democrat, because no one could seem to come up with the answer. You know who did? The Secretary of the Interior, Steven Chu. Because he got in there, he took charge because he was very smart and knew. He happened to be from the Federal Government and he found out there was a technology that needed to be used to really look at this spill in a better way. Once they figured it out, they stopped it.

Now, we have a situation in California right now. I am so grateful to my colleagues because we now set up a task force headed by the DOE to come in and look. So why do we always have to demonize somebody?

The fact is wisdom does not reside with the Federal Government, with the State government, with the local government, with anybody on this panel. All wisdom doesn't reside. We all have some good ideas. So when we get together and work together, it is fine.

Now, it is my understanding, sir, that you took a lot of input from the public as you put this together. Is that correct? Could you describe the process a bit?

Mr. Pizarchik. Yes, Senator, we did. We started off with an advanced notice of proposed rulemaking, which was preceded by some stakeholder outreach sessions. We met. I had 15 different meetings with industry, environmental community, citizens. Now, we have the advanced notice of proposed rulemaking with public comments on that. We also did two public scoping sessions, one where we had nine public meetings across the Country. Those processes generated well in excess of 50,000 comments. We shared drafts of the EIA with the cooperating agencies and received many, many comments from the States, numerous comments that were very helpful and are reflected in the final rule. And we proposed the rule and we received about 94,000 more comments in addition to what we have.

The process that we had done has been unprecedented for this agency, and the amount of comments we have had is far in excess of any rulemaking that we have done in the past.

Senator Boxer. And, sir, isn't it true that your rule has been criticized by the left and the right? In other words, people who want to see it be more stringent and those who say you are duplicative and you are surpassing the ESA, as my chairman has said? Isn't it true that those are the comments you received?

Mr. Pizarchik. Yes, Senator, they are.

Senator Boxer. I think that is an important point. You

did something right. Everybody is mad at you. You know, you tried to find some ground that you could defend and that you could truly say is a compromise, and I thank you for that.

Now, in your job, you are the Director of the Office of Surface Mining Reclamation and Enforcement. Isn't it true that you are required under the law to protect the environment? Isn't that actually in the law?

Mr. Pizarchik. Yes, Senator. If you look at the Surface Mining Act, there are numerous provisions in it that talk about the purposes of the law and what I am supposed to do. It is protecting the people and the environment from the adverse effects of coal mining, preventing the pollution from coal mining. And we have numerous provisions. I also have to strike a balance with coal. But the law is an environmental protection and public protection law.

Senator Boxer. Fine. This is important, because when you get criticized by my friends here, they are my friends, I love them dearly. When you get criticized by them, you have to understand what they are asking you to do, in my opinion, is to walk away from your responsibility. And isn't it true, sir, if you did that, wouldn't you be the subject of lawsuits? Let's say somebody living in Appalachia got cancer and it was a cluster and it came from, whether it was arsenic or lead, there were problems, you were sued. Wouldn't you have to mount a

pretty good defense if you did nothing, if you walked away from this challenge? We all know the challenge exists. Have you not seen the health impacts?

Mr. Pizarchik. There have been a lot of studies documenting health impacts and we have been working to try to get a review of those by the National Academy of Sciences. And, yes, I probably would be sued. Actually, I get sued all the time for just about everything we did, so it would not be unusual. But it would also be an abdication of my duty if I did not promulgate rules that carry out and fully implement the statute, and that is what I am trying to do.

Senator Boxer. Well, thank you. And I compliment you from the bottom of my heart, because we have seen in Flint, from the State government there, and even the EPA that, yes, told Flint but didn't do enough, in my view. We have seen what happens when people in positions such as yours get cold feet and back away, and it isn't a pretty story. And I am so pleased that you have done what you have done and that you are standing up for what you have done, and that you have listened to all the voices. And I know you look at the economics of it as well. The fact is the economics that were cited by my friend and that will be cited from my friend from West Virginia, and I have seen those surveys, those studies, they have been refuted, and I think our witness here is going to show that those studies are

not accurate.

The bottom line is people have to be kept safe.

Now, let me ask you a couple of other questions. When you make this rule, you look at the health impacts, you look at the economic impacts, you look at everything, is that right?

Mr. Pizarchik. We look at, yes, mostly those. Primarily, under this rule, it is about protecting the water for people so that water is included, the critters are poisoned.

Senator Boxer. Let's go there. Your function in this rule is to protect people from drinking water that could harm them, is that correct?

Mr. Pizarchik. That is one of the roles of it. Also protecting the environment is another, yes.

Senator Boxer. Yes. Well, protecting the environment means that you have fish in there that aren't contaminated, is that correct?

Mr. Pizarchik. Yes.

Senator Boxer. Sir, I just want to say to you, regardless of what you hear, you just stand up and you continue to do that. And when people look at you and say, sir, you shouldn't do this, just tell them to look at those families in Flint. This is what happens when we don't do our job. And this committee, the Environment Committee, should not be questioning this rule; we should be working to make it workable.

Thank you.

Senator Inhofe. Thank you, Senator Boxer.

Senator Sullivan.

Senator Sullivan. Thank you, Mr. Chairman.

And thank you, Director, for appearing today. I always feel the need to start my comments off with a little prefatory remark. I have the utmost respect for the Ranking Member here. We all want clean water. We all want clean air. We all want healthy kids. And I actually think that States are pretty good at this. I think my State, for example, Alaska, has the cleanest water, cleanest air, best managed fish and wildlife certainly in America; cleaner than California, cleaner than Delaware, cleaner than New Jersey. And it is State officials that do that. So we all want that.

But what is always surprising to me on this Committee is that we also need agencies to follow the law. You have everybody from Laurence Tribe saying burning the Constitution should not be part of our energy and environmental responsibilities. And I have a lot of experience with SMCRA and what we call ASMCRA in Alaska, which is the State version of SMCRA, but this is classic Obama Administration action and you guys are all part of it. You can't pass a law, so you break a law with a regulation. The States that are impacted are almost 100 percent against it, which you will get sued on this one,

trust me. And then you say it is driven by science, and I am going to get into that, because with regard to Alaska you didn't cite one scientific study that relates to my State, one of the biggest coal reserves in the Country, when it is really a power grab and politics. Thousands of new pages of regs.

Then there is this claim that it is partisan.

Mr. Chairman, for the record, I would like to submit the State of Alaska's letter from our governor, who is an Independent, our lieutenant governor, who is a Democrat, who are fully, fully opposed to this rule.

Senator Inhofe. Without objection.

[The referenced information follows:]

Senator Sullivan. So it is not partisan. The concern is federalism and the law. It is not the environment. We all want a clean environment.

Again, my State has cleaner water and cleaner air than any State in the Country. And it is not because you are helping; it is because State officials do it.

So there is no demonizing here. The problem is when a Federal agency doesn't follow the law, it is our responsibility to make sure that doesn't happen. And what I am always amazed about is how often my colleagues on the other side of the aisle say, fine, go ahead, violate a Federal law, violate the Constitution. But Americans are starting to get really, really tired of it.

So let me go into a couple things on process. You talked about the process.

Alaska is one of the largest coal reserves in the Country. Did you go to Alaska in terms of public hearings for this rule?

Mr. Pizarchik. No, sir, we did not.

Senator Sullivan. Okay. Why? Did you go to any State west of the Mississippi?

Mr. Pizarchik. Yes.

Senator Sullivan. How many times? Once.

Mr. Pizarchik. I believe it was twice. There was a

hearing in St. Louis --

Senator Sullivan. I believe it was once.

Mr. Pizarchik. -- and also in Denver.

Senator Boxer. Let me him answer the question.

Senator Inhofe. Come on, Barbara, don't do that.

Senator Boxer. You don't want people to have --

Senator Sullivan. Did you have any studies citing Alaska in your entire proposed rule?

Mr. Pizarchik. Senator, if you look at what we are proposing --

Senator Sullivan. Just answer the question. I have a bunch of questions.

Mr. Pizarchik. I am attempting to answer that. Yes, the baseline data needs to be gathered everywhere. Just because we don't have baseline data does not necessarily mean that mining is not causing problems there. I have been across the Country and I have seen water pollution in Colorado --

Senator Sullivan. I am sorry, you are not answering the questions. Do you have any studies citing Alaska coal in your rule? No. The answer is no.

So let me go on to another question. My governor had requested, again, he is an Independent, that you did five-year rulemaking, thousands of pages, and you gave States 60 days to comment. Do you think that was fair?

Mr. Pizarchik. Senator, they had over 100 days, over three and a half months, to review the documents and to provide comments, and we had extended the comment period as well.

Senator Sullivan. No, initially you provided 60 days, isn't that right?

Mr. Pizarchik. Initially we provided a public comment period of 60 days.

Senator Sullivan. Do you think that is fair?

Mr. Pizarchik. And we extended that. I believe --

Senator Sullivan. Three thousand pages, five years in the making, 60 days to comment? Do you think that is fair?

Mr. Pizarchik. I believe it was. Based on the quality of the comments that I have seen, it is clear that the States were able to read that.

Senator Sullivan. Let me ask another. I am going to get a little more legal on you here. Section 101(f) of SMCRA, do you know what Section 101(f) states?

Mr. Pizarchik. Not off the top of my head, but I have it right here, too.

Senator Sullivan. Let me read it to you. So Section 101(f) of SMCRA states, "The primary government responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter shall rest with the States." You should be very

familiar with that. SMCRA is a very interesting statute because a lot of statutes provide veto power of the Federal Government over State programs. But SMCRA specifically did not. The primacy of regulatory issuance and enforcement lies with, according to Section 101(f), lies with which entity, you or the States?

Mr. Pizarchik. As you indicated, the Surface Mining Act is very complicated. It imposes upon me the obligation to establish the minimum Federal standards across the Country.

Senator Sullivan. Correct.

Mr. Pizarchik. And under the section that you cited it does give States that authority. Now, you need to go a little bit further, because out of the 24 States that have primacy, about half of them have State laws that prohibit the State regulators from implementing rules that are more protective than the Federal minimum standards.

Senator Sullivan. I just want to make it clear. For the record, SMCRA provides States -- I just read it. 101(f), the primary government responsibility on developing, authorizing, issuing, and implementing regs belongs with the States. And yet you are making a rule that goes into essentially the ability to nullify, so let me get into that issue a little bit.

Are you familiar with the letter that was sent to you by the State of Alaska on August 2nd, 2012 from the Department of

Natural Resources? I was commissioner at the time. Let me describe it. It was OSM, who the State of Alaska had worked closely with for years, coming to the State of Alaska and saying there has been a permit issued by the State for 20 years. We now want you to pull it. So the State of Alaska, when I was a commissioner, looked at the legal research, worked with West Virginia, and we politely told you to go pound sand, that you didn't have that authority. Do you think you have the authority to look at permits that have been issued by States and retroactively nullify them? Is there anything remotely in SMCRA that gives you that authority?

Senator Inhofe. Senator Sullivan, you are over your time. We had given you --

Senator Sullivan. Oh, I thought, Mr. Chairman, we were going to do two minutes after.

Senator Inhofe. You have already used those.

Senator Boxer. Time flies.

Senator Sullivan. May I ask one final question, Mr. Chairman?

The D.C. Circuit says --

Senator Boxer. I object unless you give that extra time to my friend over there. Is that all right?

Senator Sullivan. Oh, I would be glad to.

Senator Boxer. Well, it is up to my chairman.

Senator Inhofe. Okay, without objection.

Senator Sullivan. I just want that nullification question is a really important one, and let me help you with it. The D.C. Circuit, talking about this issue in a 1981 decision, said administrative and judicial appeals of permit decisions are matters of State jurisdiction in which the Secretary of Interior plays no role.

Your rule provides for the ability for the Federal Government to nullify State permitting decisions, and that has been clearly ruled by the courts and in the law that say you don't have that power. Can you just address that issue, nullification?

Mr. Pizarchik. Thank you, Senator. If you look at the statute as a whole, what it provides is that if States want to be the primary regulatory authority, they do so subject to the oversight of Office of Surface Mining, Reclamation and Enforcement. That includes everything that they do under the law. And there is plenty of case law out there that upholds our ability to look at performance standards after the fact, whether a State regulatory authority made a mistake. And if you look at that statutory provision about that permit you are talking about, the law says that if the mining company fails to activate the mining within three years, their permit shall terminate.

Senator Inhofe. All right. Let me just go ahead and

interrupt this. Confession is good for the soul, Senator Boxer, and I confess I goofed. One of the reasons I wanted to do this, Senator Sullivan has an interesting background. It is not just that he was attorney general, but he was also commissioner of natural resources; and I knew that he was going to take longer. So I apologize to the other members.

What we are going to do is have a second round, and those individuals who are just taking five minutes now can take an additional three minutes if they want to stay.

Senator Boxer. Good. But my understanding is he --

Senator Inhofe. Oh, yes, yes. Don't feel obligated, however, Senator Markey, to necessarily do --

[Laughter.]

Senator Boxer. Senator, feel obligated.

Senator Inhofe. Senator Markey.

Senator Markey. Thank you, Mr. Chairman, very much.

The principal reason why we are here is mountaintop removal mining, and it is one of the single most environmentally destructive practices on earth. The streams in the Appalachian region are being buried at an estimated rate of 120 miles per year, and the regulations governing this harmful mining practice are more than 30 years old.

But more than destroying the health of the environment, this mining practice is destroying the health of the residents

in local communities. There are mountains of evidence that mountaintop removal mining is significantly harming the health of the residents in these areas, and it is well past time for the Interior Department to update these regulations to ensure that we can protect the health of local communities, our environment, and our climate, and I am pleased and proud that the Interior Department is engaged in the process of issuing strong new rules that will help protect streams and the people and their health in the communities that surround them from mountaintop mining.

So, Director Pizarchik, the Surface Mining Control and Reclamation Act of 1997, which I will now refer to as SMCRA just so anyone who is listening knows what we are talking about, lays out a number of purposes of the Act aimed at lessening the impacts of mining on the environment. Specifically, it is intended to establish "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and to assure that surface coal mining operations are so conducted as to protect the environment."

Isn't the Interior Department Stream Protection Rule necessary to fulfill the Department's statutory obligations under the law?

Mr. Pizarchik. Absolutely, Senator.

Senator Markey. So it doesn't go beyond your authority,

but in fact it is an exercise of your authority and your responsibility to protect the environment and the health of those who live near these streams, is that correct?

Mr. Pizarchik. Yes, Senator.

Senator Markey. If you did not in fact take these actions, given what we now know 30 years later, you would not actually be fulfilling your responsibilities in the job which you have right now, is that correct?

Mr. Pizarchik. Yes, sir.

Senator Markey. So would the Department's proposed Stream Protection Rule protect the environment and local communities by reducing the number of streams that are buried or adversely affected?

Mr. Pizarchik. Yes, sir, that was the expected outcome, and we expected there would be several thousand miles of streams that will have been protected.

Senator Markey. That will be protected. And as a result of your protection of them, it will reduce the amount of toxic pollution which will go into the streams, that otherwise would be in the streams, that could have adverse impacts on human beings, is that correct?

Mr. Pizarchik. Yes, Senator.

Senator Markey. And you consider that to be your responsibility, to protect against deadly toxic materials going

into streams, going into rivers in America?

Mr. Pizarchik. Not only do I believe that, but that is specifically set forth a number of times in SMCRA.

Senator Markey. So that is why it is hard to understand why people would object to this. I mean, we just learned the lessons once again in Flint, Michigan. But going back all the way to the Cuyahoga River in Cleveland, we see what happens when there is a callous indifference to using river streams as just dumping grounds, toilets, where arsenic, other dangerous materials are just poured into these bodies of water. Ultimately, it comes back to haunt, to hurt the health of families.

And we can see in the pictures night after night of how horrified ordinary families are in Flint, Michigan, but we know that is not the only place in America where there is a danger from lead in pipes. This is just one example. But the faces of the people in that community are saying pretty much we thought the Government was protecting us. We wouldn't believe that water could come out of faucets that could harm our children. We wouldn't believe anyone would allow the water that our children are exposed to could have these dangerous materials in them. And you could almost see them saying we trusted you; we wouldn't think that you would allow something so dangerous to occur without the protections being put in place.

So there have been many studies that have been done documenting the adverse health impacts associated with living in areas affected by mountaintop removal mining operations. Did your Department take into account the health impacts associated with this type of mining in developing your new rule?

Mr. Pizarchik. Senator, as part of our process, we looked at all the science that we could get our hands on as far as what the impacts of coal mining were in order to factor that into what we were proposing.

Senator Markey. And what was the conclusion which you reached?

Mr. Pizarchik. We have concluded, based on the developments in science, that we are continuing to have streams that are adversely impacted, water that is adversely impacted by coal mining, both groundwater and surface water, and that we need to up our game, to modernize our rules to better protect surface and ground waters from the adverse effects of mining.

Senator Markey. Thank you. So the streams in the Appalachian region are the headwaters for the drinking water supply for tens of millions of Americans, so it is not just some isolated issue that we are talking about. The impact is on tens of millions of people and their drinking water; and if arsenic or selenium is going into that water, then there is a danger to children, not just in that one location, but as it flows down

the water bodies that are near those headwaters.

So that is your essential concern, to protect the health and wellbeing of families in our Country?

Mr. Pizarchik. Yes, Senator. And just to put it in perspective, the headwaters of the Potomac River start in Appalachia.

Senator Markey. Well, I think the water that we are drinking right now should be checked immediately so that we understand what the impact should be on those of us who are here in this room today. It has to be an ongoing quest to ensure that we have the highest quality drinking water. Flint, Michigan has just been the poster child for what can happen if you forget the children in our Country.

Thank you for all your good work.

Mr. Pizarchik. Thank you, Senator.

Senator Inhofe. Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

And thank you, Mr. Pizarchik, for your service and for working hard. I want to begin my statement by saying I live in Appalachia, that place everybody is talking about. My home is five miles from an underground mine and a surface mine, maybe ten miles. So I am in and around people and folks all the time; they are my neighbors, friends, so I have a deep passion for what we are talking about today.

I have been very frustrated with the Administration because we have been fighting for affordable, reliable energy that does all the above. We have pushed back on the Clean Power Plan because of what it does to the economics of certain regions, picking winners and losers. And now we have the Stream Protection Rule, and I would like to just talk about some of the economic effects.

You got into this just very minimally in a response to a question, and I would like to preface, too, that living there, being there, clean water, clean air is as important to us as it is anybody else. So I have a chart here that says that the new Stream Protection Rule in Appalachia, which we have been referring to quite a bit, is up to about 64,000, \$15 million in lost revenues, and many mining jobs lost and at risk. Also, the production of coal will go down significantly, as it has been doing.

Our State is now \$300 million underwater, State of West Virginia \$300 million underwater in our State budget. We have had to cut our education budget because our tax revenues, principally from coal, have gone down so much. This is the second hearing that we have had, because I am also on the Energy Committee as well, where we had testimony much the same that we have today.

So I just feel like this rule is just so broad and

overreaching, and we have talked about it minimally here too, reaching into the Clean Water Act and the Endangered Species Act. So one question I would like to say is we have talked a lot about the States' responsibility here and what kind of input the States had. We had testimony over in the Energy Committee that it was rebuffed by OSM, and a lot of States signed on originally to be part of the partnerships to develop a rule that made sense for States and for the Federal, but then my understanding is that many States pulled out of that partnership; Indiana, Kentucky, Montana, New Mexico, Utah, Alabama, West Virginia, and Texas.

And then in response to Senator Sullivan's question you said that they were given 100 days, I think you said, to respond, 60 days and then an extension after that, on a 3,000 page rule. So I guess I would ask you why, in your opinion, did the States pull out of this cooperative arrangement?

Mr. Pizarchik. Senator, thank you for the question. I too grew up in Appalachia, in coal country.

Senator Capito. Right, Pennsylvania.

Mr. Pizarchik. And I have relatives and friends, people who worked in the coal mines. Some of my classmates from school worked in the coal mines. I am very sympathetic to people who are losing their jobs and I know how important coal jobs and coal can be in certain parts of the community, and I have

traveled across the Country, been in your States numerous times. I have seen that.

As far as the States' motivation, I wouldn't speculate on that.

Senator Capito. Well, wouldn't you see, if you have the vast majority of States that are cooperating, who deal with this every day, pulling out from any kind of cooperative agreement certainly should have been a signal to you that this was highly contentious and I think would have been, at least in my case, an impetus to rethink the direction that you were going.

Let me ask you this. What is the impact of this rule? We heard about mountaintop. What is the impact of this rule, in your opinion, on underground mines? There is a great concern there this is going to eliminate a lot of production in underground mines, which it will. We have already lost, just last week, 2,000 jobs in the coal mine industry alone, most of these underground mines. Can you answer that question?

Mr. Pizarchik. I could, yes, and that is an important point to clarify because there is a misperception out there that this rule would prohibit all long-wall underground mining. That is not the case. The term that we are defining, material damage to the hydrologic balance outside the permit area, includes those areas above underground mines; and what we are proposing is to give teeth and effect to that part of the law so that

underground mining that would destroy those streams on the surface will not allow those streams to be destroyed. So they can do different types of underground mining.

And the statute has a provision in it that also provides it is my obligation that where reclamation cannot be successfully done, that permits should not be issued for that. From the analysis that our outside experts looked at, most of the underground mining will be able to continue to go forward on that. There is going to be some areas where you just can't undermine because you are going to destroy the water resources, the streams on the surface. That has always been the law. That has been my experience in Pennsylvania. Some areas can be mined, some areas cannot.

So there will be some impact on it, but it will not be a major impact. And as the rules on classifying impacts that we follow under this, I believe collectively the impacts on the industry are going to be considered small. I think it is less than 0.2 percent of production, and it is a fraction of the total annual revenues of the industry.

Senator Capito. Let me ask you another question on the balance. This is the big question that we get in this Committee, and I think the chairman and I join together to try to talk a lot about the economic impacts of rulemaking in all different areas. It is not so much the goal that any of us

would be rejecting. Who would be rejecting a goal of clean water and clean air? Absolutely not. But sometimes it is just not that simple, as you know; you are in the business of trying to do that.

What kind of considerations in this rule, in this specific rule, were made in terms of looking at the economic impacts? We can talk about creation of pockets of poverty in my State that are growing, the pessimism, the desolate attitude of my government is doing this to me and nobody cares. So what kind of balance do you look for here, and do you look for that?

Mr. Pizarchik. I am very concerned about those people who lose their jobs and things of that nature, and yes, we do a balance. The statute requires me to balance the interests of protecting society, protecting the water resources while ensuring there is sufficient coal supply to meet the Country's energy needs. As part of the NEPA process, what we have done, we hired outside experts to do that type of analysis; not relying on my staff or my people, but other folks. And their analysis was peer-reviewed pursuant to the procedures and processes established by the applicable rules.

That information was used in assessing the potential impacts of changes that we were potentially considering.

Senator Capito. I am at the end. Can I get that information, that NEPA review? Is that something that I could

see, the economic impact statement that they provided for you?

Mr. Pizarchik. That, I believe, is included in the draft Environmental Impact Statement and is publicly available. Yes, we can provide that. We have also prepared, in accordance with the rules, a regulatory impact analysis. We would be happy to provide that to you as well.

Senator Capito. Thank you. Thank you.

Senator Inhofe. Thank you, Senator Capito.

Senator Cardin.

Senator Cardin. Thank you, Mr. Chairman, and thank you for convening this hearing.

And thank you very much for your attendance and your service, your public service. I would hope that all members of Congress want clean air and clean water, but we are judged by our actions, not by our words; and each Congress has an opportunity to add to that, and certainly not to take away from the protections that we provide for clean air and clean water.

Clean water is vital to our economy, and I think we all can acknowledge that. A child who has suffered from lead poisoning as a result of not having safe drinking water, that child will not reach his or her full potential; and it is tragic for the individual and it is tragic for our economy. The number of premature deaths due to the quality of water, the number of missed days at work because of tending to public health issues,

the number of missed days at school, the importance of industry having sources of clean water for their products, all that adds to the economy.

And as we are all bragging about being in Appalachia, my State, of course, has, in the western part, part of the Appalachia region, and I have enjoyed camping out with my children and skiing, and just enjoying one of the most beautiful places in our Country. And, yes, recreation use depends upon clean water and clean air, and that is a huge part of the growth of the economic opportunities in the Appalachia region. So all that cries out for you carrying out your responsibilities for clean water.

Surface, underground, or mountaintop removal all have risks involved in our environment, and we need to deal with that. So, yes, I also want clean water from our streams in the Chesapeake Bay, as many of those waters end up in the Chesapeake Bay of Maryland and this region.

So my first question is it is difficult to repair the damage once it is done, and I would like you to comment about that. Mountaintop removal, we have seen major damages to streams. Once it is caused, where are the challenges in trying to clean up the results of the damage to our streams?

Mr. Pizarchik. Once you have caused the pollution, typically, it is a long-term pollution problem, you cannot

eliminate it, and it often costs way more money to treat that water than to prevent the pollution from occurring in the first place. We are aware of some studies that were done where, in the mountaintop mining, they filled in the valleys, and some of these valley fills are decades old and they are still discharging high levels of total dissolved solids. The only way to take the total dissolved solids out is a reverse osmosis treatment system, the one of which I am aware of was from underground mines in West Virginia. It cost over \$200 million to build and \$9 million to \$18 million a year to operate. If you are mining coal, you can't build too many of those and continue to stay in business.

Selenium gets elevated on a lot of streams. To build a bioreactors for those seleniums cost a couple of million dollars, it is my understanding, in order to take out, and then you have to constantly maintain it. It is a whole lot better to prevent the problem.

The example I can give most effective is from my experience in Pennsylvania with acid mine drainage. Until the State was able to predict so you could prevent it, a lot of companies went out of business because they couldn't afford to treat the pollution they created.

Senator Cardin. So in the regulatory process, what are you doing to preserve and protect buffer zone protections from

mining operations?

Mr. Pizarchik. The existing 100-foot provision is still going to be in the rule. By creating the definition for material damage to the hydrologic balance, that creates a standard so that people can know what they are measured against by creating the baseline of the stream data to collect that. That helps inform the process so we know whether mining is going to occur.

And while the Surface Mining Act allows people to mine through streams, what we are creating is a standard in there that they need to gather that baseline on the water quality, the quantity, and the aquatic community, the critters living in that stream, to be able to make a determination can they restore that; and then proposing in our rule that they restore the ecological and geologic function and the hydrologic function of that stream. Let them make the business decision can they do that.

Some streams can be rebuilt and repaired; some cannot. And if you cannot do it, the law says the permit should not be issued for it.

Senator Cardin. In the 111th Congress, Senator Alexander and I introduced the Appalachia Restoration Act. It was an effort to get a real handle on mountaintop removal, recognizing the devastating impact that mountaintop removal coal operations

have on our environment. Not only destroyed streams; it destroys landscape. It destroys forever. That legislation was not enacted, but as a result of that legislation the Administration took certain actions to control mountaintop removal coal operations.

Could you explain what actions you will be taking in this regulation, or how it will affect mountaintop removal? There are many people who would like to see this practice totally eliminated, including myself. I understand that you are not taking that tact. Could you just explain to us where we are on mountaintop removal?

Mr. Pizarchik. Yes, Senator. Thank you for that question. The statute allows mountaintop removal mining and it sets certain provisions for when it can be conducted. We are proposing to change our rules to incorporate those statutory provisions into that provision as well, also requiring that the excess soil be put back and that the land be restored to approximate original contour, as mentioned, that means put the mountain back when it is done, and changing the bonding requirements so that if the operator has an approved post-mining land use, which the law allows, but they don't implement it, then there is enough bond there to put the mountain back.

As well as the practice of it, by protecting those downstreams and finding out what kind of resources and stuff are

living in the streams, having that the baseline to monitor, to make sure that if they are creating those valley fields, they are not creating pollution; because we need to know what is in the stream because, frankly, I know a lot of people don't want to hear it, but the days of line mining are over. We need to put an end to that. We need to get the baseline data, figure out what is there, measure the operation standards against that to make sure that we are not creating more Flint Rivers.

Senator Cardin. Well, I appreciate that and, obviously, there are challenges in our political system. We understand that. But the American people understand the importance of the work that you are doing and we thank you very much for your service.

Senator Inhofe. Thank you, Senator Cardin.

Senator Barrasso, for seven minutes.

Senator Barrasso. Thank you very much, Mr. Chairman.

Mr. Pizarchik, I would like to turn to the National Environmental Policy Act, NEPA. NEPA requires every Federal agency to assess the environmental impacts that would result from the agency's actions, actions like approving a permit, issuing a new regulation. Now, a Federal agency assesses environmental impacts in what is known as the Environmental Impact Statement, the EIS. Prior to issuing an EIS, the Federal agency is required, required to consult with other agencies,

including State agencies, State agencies which have special expertise with respect to the action under consideration. The Federal agency preparing the EIS is called the lead agency and then the other agencies are called the cooperating agencies. Under NEPA, the lead agency is not only required to consult with cooperating agencies; it must ensure that the participation of the cooperating agencies is "meaningful."

So when your office began developing the so-called Stream Protection Rule, it identified 10 State agencies as cooperating agencies. Your office signed agreements with these agencies, these 10 State agencies, in which your office pledged to provide them with, number one, copies of key or relevant documents underlying the EIS; signed a document pledging to provide them with administrative drafts of the EIS; and signed a document pledging to provide a reasonable time for review and comments. That is your agency, your office.

Between then, January of 2011, and the issuance of the proposed rule in July of 2015, your office did none of this. For four and a half years, your office shared neither the drafts of the EIS nor the documents related to the EIS. During this time, your office engaged in no meaningful consultation whatsoever with the State agencies. It even ignored the States' repeated requests for consultation.

In 2015, eight States felt they had no other choice but to

withdraw as cooperating agencies.

Now, Mr. Pizarchik, you have been Director of the Office of Surface Mining since November of 2009, before all this started, so why have you allowed your staff to make a mockery of its obligation under the National Environmental Policy Act, and where does the law allow your agency to go dark for four and a half years?

Mr. Pizarchik. Thank you, Senator, for that question. The States have had a lot of input into this process and we have requested those States who had provided notice that they were not going to continue to participate to reengage. I sent that out in October of that year. I also sent out a request to the Interstate Mining Compact Commission for them to reengage. They declined. I have not heard back from the States.

Notwithstanding that, we have continued to reach out. We are continuing to work with the States. The State regulatory authorities that submitted comments, we have been meeting with them. We have had, I believe, about 18 meetings with them over the past several weeks, getting input from them on the proposed rule and the comments that they provided. We stand ready to meet with those. The assistant secretary has met with State folks as well. She has been to Alaska; she has a trip planned for North Dakota. We are continuing to provide outreach to the States.

Senator Barrasso. Well, let me be clear. Your agency did

not consult with the States for four and a half years, from January of 2011 until the issuance of the rule of July of 2015. You, sir, have made a mockery of this process. When, in February of 2011, Governor Butch Otter of Idaho, a Republican, chairman of the Western Governors Association, as well as a Democrat, the governor of Washington, wrote to the Secretary of the Interior about the rulemaking, they asked the secretary to ensure that your agency engaged States in a meaningful and substantial way. The Secretary of the Interior, Secretary Salazar, wrote back and said all cooperating agencies will have an additional opportunity to review and comment on a preliminary draft EIS statement before it is published for public review and comment. Never happened. Never happened in four and a half years.

Why did your agency fail to honor Secretary Salazar's specific commitment to cooperating State agencies?

Mr. Pizarchik. Senator, the States have had meaningful input. We have received a lot of valuable comments from the State regulatory authorities that has helped us craft this proposed rule and informed the process on that, and we have made a number of changes. We have continued to reach out to them to meet, reengage on that, and that offer continues to be open with them and we continue to reach out to the States to obtain State input on this rule as we go forward.

Senator Barrasso. With all due respect, your answer just doesn't pass the smell test. Your agency did not consult with the States between January of 2011 and the issuance of the rule, four and a half years later. Secretary Salazar understood your agency's obligations under NEPA. You continue to give excuses, play this tired game of cat and mouse. It really is high time for your agency to at least own up to its failure to follow the National Environmental Protection Act and withdraw the rule immediately.

Thank you, Mr. Chairman.

Senator Inhofe. Thank you, Senator Barrasso.

Senator Gillibrand?

Senator Gillibrand. Thank you, Mr. Chairman.

Do you agree that when evaluating the potential cost of a regulation such as the Stream Protection Rule, we should ensure that we are also factoring the costs of inaction, which could include the costs that families face when their quality of life is significantly impacted by polluted water, including the health impacts and diseases associated with poor water quality and the cost of restoring environmental damage if it is not prevented? And can you discuss how the Stream Protection Rule will address those types of costs and consequences?

Mr. Pizarchik. Thank you for that question, Senator Gillibrand. There are rules out there that govern the type of

factors that we look at and costs that are included in an impact analysis on it, and I think there are a lot of things that ought to be included that sometimes the existing rule process does not include, for instance, like the avoided costs if an operator, as I mentioned earlier, if they create pollution, they have to perpetually treat that and they are creating pollution. But that is not a cost factor that goes into the cost analysis, so in many ways we are actually protecting the industry from these potential costs.

As far as costs on health and people, I don't know how to put a value on someone's life, put a value on whether their life has been shortened or something like that. I don't know how that gets taken into the thought process. I would much rather approach this to carry out my responsibilities to implement the law to prevent the pollution from occurring in the first place.

Senator Gillibrand. How has the science used to evaluate the effect of mining operations on water quality evolved in the past 30 years since the Stream Buffer Zone Rule was implemented and how has that influenced the need for this new rule?

Mr. Pizarchik. We know a lot more today than we did 30 years ago when these regulations were developed. For instance, we know that selenium can be mobilized from coal mining in certain areas, and it gets into the water, bioaccumulates in the aquatic community, causes deformities in those critters living

in the stream, and can be bioaccumulating in unsafe levels for people who were to consume the fish for people that were living in that particular area.

We also know that total dissolved solids, years ago we did not know it was a problem. Even as recently as maybe 10 or 15 years ago we did not know total dissolved solids was having an adverse impact. In my experience in Pennsylvania, at Dunkard Creek, there was a huge fish kill, and it wasn't based on baseline data that West Virginia had collected for those coal mines or that my State had collected for those coal mines, it was because people were seeing large fish washing up on the shore and floating, and it was due to high levels of total dissolved solids.

We have seen studies in the past few years downstream of valley fills that were built sometimes several years or a decade or more ago, and the only thing in that watershed is that valley fill. No other human activities, and yet the sensitive macro invertebrates, the bugs and communities that live in there, they are gone. And then if you look at the fish, there is less fish biomass in there, and it stands to reason because if there is nothing to eat, there aren't going to be any fish there. And we look at the control stream.

So we know more about that type of science and how to see things that 30 years ago were not known to be a problem. What

we are proposing in this rule is to deal with that science and also ask people to take a broader look, because I am sure there are probably things that are in the water today that we have not yet recognized as causing pollution problems, and we want to provide the States the flexibility to develop those standards at the State level, the mine level in order to protect the water and their people.

Senator Gillibrand. Can you elaborate a little more further on why you believe this proposed Stream Protection Rule is necessary to fill regulatory gaps that can't be adequately filled by relying on the States and the Clean Water Act alone?

Mr. Pizarchik. Yes. The Clean Water Act has had a lot of success over the years, but its primary point is measuring or setting effluent limits at the point where the pollution or the water is discharged from the mine into the stream, to meet those limits here. They don't look at a cumulative loading of that water until the stream becomes impaired, polluted. Well, from our standpoint, my law says that we have to maintain the water quality of that stream to protect those resources. It goes beyond the Clean Water Act.

The Clean Water Act also only looks at the surface waters. The Surface Mining Act says I have to look at the surface water and the underground water, so protect all of that.

Clean Water Act, with the Army Corps of Engineers for

putting fill in the streams, where they look at the cumulative load, they look at the stream banks and the high water mark; they don't look at what happens up here or happens over here, the whole watershed. Under my law, we have to do that. We have to take a cumulative look at the entire watershed to see what is happening, as well as look at off the permit area.

So the Clean Water Act has been a great success as far as it goes. Congress, I believe, recognized that and reserved that exclusively for EPA. We recognize that and that is what we are staying away from. But we are trying to fill those areas where the Clean Water Act just does not come into play, like for groundwater.

Senator Gillibrand. Thank you, Mr. Chairman.

Senator Inhofe. Thank you, Senator Gillibrand.

We are going to be dismissing this panel. Senator Boxer wants to submit something for the record.

Senator Boxer. Yes. I want to thank you so much for your patience in the face of some anger here. Thank you.

I ask unanimous consent to place in the record the statement of purpose of the Surface Mining Act, which is to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations. That is A. That is A. And then the second section that deals with your authorities is Section 304, the duties,

which require you to report on every State's status. And the last is the enforcement, which gives you a lot of strength here to go after those bad actors.

So I am putting that in the record and maybe people will come to their senses about what we are supposed to be doing here.

Senator Inhofe. Without objection.

[The referenced information follows:]

Senator Inhofe. And for the minute and 15 seconds that I have, I will cede that to Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

I would again like to say that over the years, since 1977, there have been improvements of this rule that has resulted in cleaner water in and around the area that I live. I think the biggest flashpoint for me is just the lack of State cooperation on the ground and the States that I mentioned that are the regulator. There is a concern about underground mining.

And I would like to say anecdotally, I told Senator Cardin with his visual, I would have liked to have seen the after picture of that. You mentioned all the things that these type of mining operations go through on the reclamation process at the end. You have seen some of the end products, and, when done right, can be a benefit to some communities for airports, schools, shopping centers, in Appalachia where we have no flat land. So there are some. If it is done right, there can be some tremendous economic benefits to this.

And just to put this in the record, in the State of West Virginia there is only active surface mining operation at present time.

With that, I yield back.

Senator Inhofe. Thank you, Senator Capito.

Mr. Pizarchik. Could I comment a little on that?

The Senator is absolutely right, when it is done right, it can make sense. And as far as the airports and things, there is specific provision for post-mining land uses that allows those to occur, and things are a lot better. What we also know, we have room to improve because there are things that are causing pollution that we didn't know about before.

Senator Inhofe. Thank you, Mr. Pizarchik. We will dismiss you now as the first panel.

Mr. Pizarchik. Thank you, Senator.

Senator Inhofe. We would like to invite the second panel to come to the panel. That will be Mr. Lanny Erdos, the Chief of the Division of Mineral Resources Management, Ohio Department of Natural Resources; Clay Larkin, a partner in Dinsmore; and Matt Wasson, Director of Programs for Appalachian Voices.

We will start with opening statements. We will recognize first Mr. Erdos.

STATEMENT OF LANNY ERDOS, CHIEF, DIVISION OF MINERAL RESOURCES  
MANAGEMENT, OHIO DEPARTMENT OF NATURAL RESOURCES

Mr. Erdos. Good afternoon, Mr. Chairman.

Senator Inhofe. Good afternoon.

Mr. Erdos. 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, Division of Mineral Resources Management. I have worked for the Division for nearly 28 years and I was appointed Chief in October of 2011.

I appreciate the opportunity to testify in regard to the Stream Protection Rule proposed by the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement. 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 our program. Historically, Ohio DNR has had a positive working relationship with OSM. However, the process that OSM has set forth for the primacy States and the proposed Stream Protection Rule has been one-sided and not open to productive dialogue.

In November of 2009, OSM offered States the opportunity to participate as a cooperating agency in the development of the 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 being appointed as chief. Three chapters of the initial draft EIS, which totaled 1,045 pages, were shared with the 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. 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.

The cooperating agency States sent three letters to OSM expressing their concerns with the EIS process and their role as cooperators. The first, on November 23rd, 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 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 3rd, 2013, requesting an opportunity to reengage 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. OSM never responded to this letter.

A third letter was sent to OSM on February 23rd, 2015, by the cooperating agency States specifically outlining the States' ongoing concerns about the EIS consultation process. No response was received.

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 the cooperating agency States was made through a general briefing and overview of the draft EIS process in April of 2015 during an Interstate Mining Compact Commission meeting in Baltimore, Maryland, a meeting 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 the meeting communicated to

OSM personnel in attendance, including OSM Director Pizarchik, that the meeting was not considered a meaningful consultation but, rather, a briefing.

One provision in the proposed rule that is problematic requires written approval of Protection 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 the permitting process. Not allowing for conditional issuance and approval beyond established timeframes to complete necessary review 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 the development of the proposed rule.

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 area 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 would be happy to address any questions you may have.

[The prepared statement of Mr. Erdos follows:]

Senator Inhofe. Thank you, Mr. Erdos.

Mr. Larkin?

## STATEMENT OF CLAY LARKIN, PARTNER, DINSMORE AND SHOHL

Mr. Larkin. Thank you, Mr. Chairman, and thank you to the Committee. My name is Clay Larkin. I am a partner at Dinsmore and Shohl in Lexington, Kentucky, and also serve as a senior policy advisor to the Kentucky Coal Association, or the KCA, which represents companies that mine about 90 percent of the coal mined in Kentucky.

The Stream Protection Rule is a rule in search of a problem. Although OSM has stated that the rule will help reduce offsite impacts from coal mining, by OSM's own estimates, State regulators and coal miners are already doing an outstanding job of controlling these offsite impacts under existing regulations.

According to OSM's own figures, over 90 percent of sites nationwide were free from offsite impacts last year, and in some States that figure was 100 percent. Despite this track record, the proposed 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 this rule, I want to focus today on the way in which it unlawfully conflicts with the Clean Water Act and the Endangered Species Act.

OSM, simply put, cannot regulate issues within the scope of other Federal laws pursuant to Section 702(a) of SMCRA, which

specifically prevents them from regulating in conflict with other environmental protection statutes and specifically mentions both the Clean Water Act and NEPA; and courts have held that that list is not exhaustive and, therefore, precludes them from regulating in a way that conflicts with the Endangered Species Act.

In this proposed Stream Protection Rule, OSM has failed to comply with Section 702(a) of SMCRA on multiple fronts. First, the proposed rule unlawfully conflicts with the Clean Water Act. State Clean Water Act authorities already enforce Clean Water Act programs at the State level. Mining operators must navigate a burdensome and stringent permitting process under multiple sections of the Clean Water Act.

Despite this existing process which fully addresses water quality issues related to mining, OSM seeks to appoint itself as the premier water quality regulator for all water quality issues related to surface and underground coal mining. This is both illegal and impractical.

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 primary framework, which gives primary regulatory authority to the States, not a Federal agency. There is 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, and 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 its one-size-fits-all Federal approach.

OSM also seeks to impose a completely duplicative water quality permitting process on coal miners and State regulators in which OSM will define parameters of concern reasonably foreseeable uses of streams, and then establish its own numerical criteria for those parameters of concern. This directly conflicts with Section 303 of the Clean Water Act, which already provides the authority for how States are to establish water quality standards within their borders and includes both designating uses of streams and establishing water quality criteria necessary to protect those uses.

There is also Section 402 of the Clean Water Act regarding effluent limitations which are imposed upon coal mining that OSM seeks to usurp in the rule as well.

In addition to Section 402, the proposed rule conflicts with the Section 404 permitting process, which already does what OSM is proposing to do in this rule in terms of requiring mine operators to avoid impacts to streams where possible and, where

those impacts cannot be avoided, choosing the least environmentally damaging practicable alternative to those impacts, and then mitigating whatever impacts they create. This existing and comprehensive regulatory program under Section 404 of the Clean Water Act does not contain any gaps that the State Mining Regulatory or OSM must fill. As such, OSM lacks authority to regulate in this area.

With respect to the Endangered Species Act, the proposed rule raises two primary concerns: first, it extends the protection and enhancement plan and other Endangered Species Act review criteria within the SMCRA permitting process to cover both listed and non-listed species, giving OSM itself a power that Congress never saw fit to give it with respect to species that are only proposed for listing; and it gives the Federal Fish and Wildlife Service a veto authority over State-issued mining permits, in contravention of SMCRA.

[The prepared statement of Mr. Larkin follows:]

Senator Inhofe. Thank you.

Mr. Wasson?

STATEMENT OF MATT WASSON, DIRECTOR OF PROGRAMS, APPALACHIAN  
VOICES

Mr. Wasson. Thank you, Chairman Inhofe, Ranking Member Boxer, Senator Capito, and other members of the Committee for the opportunity to speak today. I hope my testimony is going to make clear to this Committee that the people, the wildlife, and landscapes of Appalachia cannot afford any more delays in finalizing rules to rein in the damage caused by mountaintop removal coal mining.

In preparing this testimony, I reviewed the statements that dozens of residents of coal mining communities provided to OSM last fall in support of a strong Stream Protection Rule. There are a lot of reasons local residents gave for supporting a strong rule, but five general themes emerged in comments of many coalfield residents across many different States.

The first theme was simply the intolerable scale of damage to streams that has occurred under the existing rule. Almost every commenter had witnessed the pollution or obliteration of streams and springs where they used to swim, fish, and drink water. Gary Garrett of Clairfield, Tennessee, wrote to OSM: "It's gone! What once was a gathering spot for many locals is no longer and will never be again. The cold, crystal clear, mountain water that brought many folks with empty water jugs in hand to fill to a small mountain stream which once flowed down

Old Standard Hill in the Clairfield area of Claiborne County, Tennessee is now covered up.”

That is just one example of many powerful statements from local residents.

A second theme brought up by many commenters was their concern about threats to their health, specifically the high rates of cancer and other diseases that are strongly correlated with living near coal mines in Appalachia. Based on a growing body of scientific evidence, these are legitimate concerns. In the past decade, more than 20 different studies published in peer-reviewed scientific journals and authored by more than 40 different researchers have demonstrated pervasive impacts on the health, well-being, and life expectancy of people living near mountaintop removal and other types of coal mines in Appalachia.

The result of all these health impacts is that life expectancy for both men and women actually declined between 1997 and 2007 in Appalachian counties with a lot of surface mining. In 2007, life expectancy in the five Appalachian counties with the most surface mining was comparable to that in developing countries like Iran, Syria, El Salvador, and Vietnam.

A third theme in the comments of local residents was the need to empower citizen involvement and enforcement of mining and clean water acts that, in their experience, State agencies have been unwilling or unable to enforce. Citizen enforcement

has been the only backstop to protect Appalachian streams in States like Kentucky, where Clean Water Act violations have occurred at staggering levels under the noses of State regulators.

Even more concerning in that State is the brazen pattern of falsifying records that coal companies employed to avoid accountability under the Clean Water Act. For years, fraud went undetected by State regulators, until citizen enforcement actions shined a light on, in the words of Kentucky's largest newspaper, the State's "failure to oversee a credible water monitoring program by the coal industry."

The fourth thing you might want to talk about was the need for strong environmental rules to support economic revitalization. Many commenters expressed their concern that continuing to sacrifice their region's natural capital to benefit coal companies' bottom lines is a poor long-term investment for their communities.

Please make no mistake that we have grave concerns about OSM's approach to writing this rule. By abandoning the 1983 stream buffer zone language, there is no longer a bright line rule that prohibits the filling of intermittent and perennial streams by waste and debris from surface mining operations. We acknowledge, however, that the old rule was never effectively enforced by States, which were all too willing to rubber-stamp

variances at the request of mining companies.

By eliminating clear buffer zone language, however, OSM bears a heavy burden to ensure the other provisions of this rule will end the wholesale destruction of Appalachian streams and mountains that has torn communities and landscapes apart for generations and is what led to the multi-agency MOU and action plan that initiated this rulemaking in the first place.

We believe that constructive participation in the rulemaking process, rather than intimidation and obstruction, is the appropriate route for community and environmental advocates for State regulatory agencies and for Congress to take as well.

Thank you.

[The prepared statement of Mr. Wasson follows:]

Senator Inhofe. Thank you, Mr. Wasson.

In order to accommodate Senator Capito's schedule, I will exchange order with Senator Capito.

Senator Capito?

Senator Capito. Thank you, Mr. Chairman.

Thank all of you for your presentations today.

I would like to ask you, Mr. Erdos, you heavily emphasize in your statement the lack of cooperation and cooperative attitude that you felt OSM is moving forward with the rule. One of the things really got my attention when you said that there was no conditional approval, no timelines. To me, that just sounded like major stall tactic. You can just keep moving on and on and never get a resolution. What are investors going to do? How many jobs are going to be lost in the process?

Could you comment on that a little more fully? Would you think that would be an improvement to the rule? Was that a suggestion that Ohio made, in your opinion?

Mr. Erdos. Thank you, Senator. I say that in the context relative to the Endangered Species Act and the way that we currently do business in the State of Ohio relative to Protection Enhancement Plans. The way the rule is written, the proposed rule, the interpretation could be that the U.S. Fish and Wildlife Service would essentially have to approve that PEP plan prior to the State issuing a permit. What we have done in

Ohio is, if we have a 1,000-acre permit and the PEP may only be a half an acre, in many cases we issue those permits conditionally. That requires the operator not to affect those areas that are currently being reviewed by the U.S. Fish and Wildlife Service.

The way the rule is written today, the interpretation could be that we would no longer be able to do that, so we would have to hold a permit up relative to issuance for that half acre for this 1,000-acre area. That was my reference.

Senator Capito. Right. So no flexibility there at all.

Mr. Larkin, you mentioned in your testimony just briefly underground. I asked a question earlier, you might have been here in the earlier segment, about there is great concern about what impacts this could have on your ability to mine underground. What is your interpretation of this rule in terms of underground mining?

Mr. Larkin. Thank you, Senator. The rule absolutely applies to both surface and underground mining.

Senator Capito. Right.

Mr. Larkin. There seems to be a bit of a misperception here today that this is all about mountaintop removal mining. If it had been that simple, there were things that OSM could have done much differently in this context; they could have simply gone forward with the 2008 rule if that was the intent.

As I think the director candidly mentioned, long-wall mining, I think he said you could continue to long-wall mine as long as that wouldn't cause any substantive impacts to streams. I am not sure exactly, but there is grave concern that this would, as a practical matter, make it impossible to permit a long-wall mine, which, of course, in your State is important and is important to the Nation's energy needs. Those are some of the most efficient mines and there are some that are still running now.

So as I read this proposed rule, it will have an impact on both surface and underground mining.

Senator Capito. Thank you.

Mr. Erdos, one thing I have been thinking about as I have been listening to the testimony, because we have had testimony in this Committee on waters of the U.S. under the Clean Water Act, and then we had the stream buffer.

How do you keep track of all this as a regulator in your State? What kind of conflicts are going to exist? To me, I think that would create huge burdens on your State regulatory agencies. You have talked about Ohio being under budgetary constraint. Certainly the State of West Virginia, I mentioned, is over \$300 million under our tax estimates for this year. What would your response to that be?

Mr. Erdos. I believe there are significant challenges and

it will be very confusing. As of today, I have had my staff looking into that in regard to the Clean Water Act and who enforces what, and I think that is going to be a real challenge. In Ohio, the Ohio EPA enforces the Clean Water Act under their 402 national discharge pollution elimination system permits. Those are also part of our SMCRA permits. So it is a little more complicated in Ohio, but it a system that works for us.

Under the proposed rule, it is not clear who has the authority. If SMCRA truly has the authority today, how do they interact with Ohio EPA, the current authority in regard to the Clean Water Act in Ohio? So I think there is much, much to discuss moving forward in regard to the Clean Water Act and how it is going to be enforced in Ohio, and what I have said and what we have said at Ohio DNR, we would like to be reengaged by OSM. Let's sit down and have a conversation relative to these very important issues.

Senator Capito. And that is going to be my final comment. I think one of the bottom lines here with a lot of frustrations from many State regulators and certainly the States most heavily impacted is the lack of State input on the front-end. The States who actually were cooperating removing themselves, Kentucky being one and West Virginia being one, and now what kind of confidence would you have that OSM is going to come in and say, well, here is the delineation of this and this is where

we take care of this? And before you know it you are either under heavy fines or the balance of the economy, if there is one in this case, is simply non-existent.

Thank you.

Senator Inhofe. Thank you, Senator Capito.

Senator Boxer?

Senator Boxer. I always find it amazing the criticism that comes from that side. How do you know what to do? We have the Clean Water Act, we have the Safe Drinking Water Act, we have the Surface Mining Act. Oh, you know why we have those? Because the people that Mr. Wasson talks about are real, and the public support these acts by 90 percent.

So why don't you who complain about this repeal these? You know why? They would love to. They can't because they would be thrown out of office and the people would rise up and there would be marches all the way to the Capitol from California. That is the reason.

Now, let's get real here. We have an attorney here who represents coal companies, is that correct?

Mr. Larkin. Yes.

Senator Boxer. And one of your affiliations and memberships, you belong to the Kentucky Coal Association, sir? Are you affiliated with them?

Mr. Larkin. As I said in my testimony, yes.

Senator Boxer. So you are affiliated with them. How about the Lexington Coal Exchange, are you affiliated with them?

Mr. Larkin. Sure. Yes.

Senator Boxer. And how about the Energy and Mineral Law Foundation, are you affiliated with them?

Mr. Larkin. Yes. That is a non-partisan --

Senator Boxer. Well, whether they are not, I am just asking yes or no. Okay.

Mr. Larkin. Oh, yes. Yes.

Senator Boxer. So my point is here we have an attorney paid big bucks to represent the polluting industries. We don't have an attorney here who represents the people, who represents the environment; and that is sort of a sad situation.

Now, you have one witness who says this is a rule in search of a problem. Really? So do you discount, Mr. Larkin, the quote that Mr. Wasson made by just an ordinary human being who can no longer go to a mountain stream? Do you think that that individual has a right to say that? And do you agree or disagree with his comments, that he used to go over and fill a bottle with water, and now that is gone, no longer possible? Do you think that is a problem?

Mr. Larkin. Senator, of course I have no basis to disagree with that comment; I don't know the gentleman who made it. I don't know any of the facts of that situation.

Senator Boxer. Well, I understand you are an attorney. My point is you are saying that this is a rule in search of a problem, and yet there is a huge problem and real people say it who don't get paid by industry. That is my point.

Now, Mr. Erdos, you point out with great upset that you don't feel the States were respected. However, it is my understanding that the role that you did have, you were invited to advance notice of proposed rulemaking in 2009, was far in excess of what the Bush Administration did in 2008. It is my understanding the States did not have a similar role, any comments when the Bush Administration developed their 2008 stream buffer rule. And this Administration has had a far more open process.

Did you complain, or your predecessors complain, when Bush Administration issued the rule, that you weren't consulted?

Mr. Erdos. Thank you, Senator. It would be difficult for me to answer that question relative prior to 2008; I wasn't in my current position.

Senator Boxer. Fair enough. Well, we will look it up, because the record does not show it. This was an unprecedented reach-out, and all we hear are complaints about it. But the law is not going away.

Now, Mr. Larkin, you say there are no gaps in existing law that need to be filled. If this is the case, why are there

numerous peer-reviewed studies documenting the significant water quality and public health impacts near coal mines?

Mr. Larkin. Thank you for your question, Senator. First of all, those studies that were referenced are subject to significant dispute. The vast majority of them are authored by a single, I believe he is a psychologist at Indiana University, Michael --

Senator Boxer. Well, let me cut you off. Let me cut you off for this reason.

Mr. Larkin. Go ahead.

Senator Boxer. We are running out of time and you are wrong. How about there are 21 peer-reviewed studies by different people? How about that I am going to put them in the record and these are the facts that were found out. I know you are paid by the coal companies, but don't tell me they are one person only, when there are 21 separate peer-reviewed studies. And we will send this to you for your information so at least you can look them all over before you criticize them.

Here's what they found out. People living near mountaintop mining have cancer rates of 14.4 percent, compared to 9.4 percent for people elsewhere in Appalachia. Two, the rate of children born with birth defects is 42 percent higher in mountaintop removal mining areas. Fact. The public health costs of pollution from coal operations in Appalachia amounts to

a staggering \$75 billion a year.

Twenty-one separate peer-reviewed studies.

I ask unanimous consent to place this in the record.

Senator Inhofe. Without objection.

[The referenced information follows:]

Senator Boxer. My time is over, but I have to say bless your heart, you do a good job for the companies you represent. But that is not my job and is not the job of this United States Senate. It is to protect the health and safety of the people, while of course looking at the economics. And I have to say that the witness we had before who talked about this rule seems to understand that balance. Sir, you do not. You are not paid to, I get it.

And I really do want to say, Mr. Wasson, thank you for your testimony.

Senator Inhofe. Well, Mr. Larkin, I guess industry is bad, right? Who employs people out there?

Mr. Larkin. Coal companies do, Senator.

Senator Inhofe. Did you know I was down north of Poteau, Oklahoma last Friday? There are one-half the number of employees there today than there were less than a year ago when I was down there. I think I said that in my opening statement.

Do you care about that?

Mr. Larkin. Absolutely, I do care about that, Senator, and that is why I am here. I am not being paid to be here today.

Senator Inhofe. I understand.

Mr. Larkin. I am here because I care about my State and what is going to happen to it, and the economic devastation that rules like this can cause.

Senator Inhofe. Yes. You know, there is one good thing that I have always supported as we have had our meetings in this Committee, and that is the Regulatory Impact Analysis that is required to be made. I think that is very reasonable, and yet a lot of liberals really object to the fact, well, why should we be concerned about jobs? Why should we be concerned about the cost to the American people for these various regulations? They even get offended.

It is my understanding, and I want to ask you about this, that in this rule the OSM fired its initial contractors when their estimate, estimate, now we are talking about, under the Regulatory Impact Analysis, showed a substantial number of job losses. Do you believe that?

Mr. Larkin. Yes, I am familiar with that, and I believe there has been testimony here in the Congress about how that operated; that basically OSM got numbers that they didn't like and that didn't support the rule, so they fired the contractor.

Senator Inhofe. So they hired contractors. But they somehow perhaps have a little wink and nod understanding before they come on. That is what I think. And you see that they come out and talk about these people are going to lose their jobs. How dare you do that? Let's find somebody who maybe doesn't believe that. Do you think that happened?

Mr. Larkin. Yes, I do. They had very knowledgeable mining

consultants working on the project and came back with answers that OSM didn't want to hear, and they were fired.

Senator Inhofe. Mr. Larkin, sometimes serving in the Senate, I have thought of it as being an advantage not to be a lawyer, because when I read the law I know what it says. Now, you heard me in my opening statement, maybe it wasn't in opening statement, it may have been initially in this meeting, read Section 702. When you read that, which I won't read again because it takes too long, but that is so specific. Do you see there is any room for ambiguities in that law?

Mr. Larkin. No, Senator, I don't. I think we all agree that it is pretty clear.

Senator Inhofe. Mr. Erdos, if a State, like your State of Ohio, is authorized to issue permits for coal mining operations, now, I am talking about today, not with this rule, but the way it is today, who is in charge of making those decisions today?

Mr. Erdos. Ultimately, I am, the chief.

Senator Inhofe. And how would this change if this proposed rule would go into effect?

Mr. Erdos. I would still have the authority to issue the permits, But with that being said, the way the rule is proposed in regard to the Endangered Species Act, it would make it challenging to issue a permit without the approval of the U.S. Fish and Wildlife Service.

Senator Inhofe. So they would have veto?

Mr. Erdos. Ultimately, U.S. Fish and Wildlife Service could have veto power, yes, over the permit.

Senator Inhofe. That is not the way it operates today. So in my opening statement I made four different references as to what was going to be changed in terms of the Federal takeover, what I consider to be illegal Federal takeover. So as we look at the rule that is coming up, yes, we do make considerations, at least I do, in seeing what has happened actually in my State.

When we have talked and we have heard the witnesses today, and we know that there is another Federal takeover in the wings, I have really good friends who are liberals.

Senator Boxer. You are sitting next to one.

Senator Inhofe. Well, I am not going to make the direct reference, because then I know what is going to happen.

I have to say this, that my good friend here, we work together. It is Environment and Public Works. On the public works side we work together. We recognize that Government does have a role. In fact, there is an old beat-up document that nobody reads anymore, it is called the Constitution. Article 1, Section 5, I think it is, says we are really supposed to be doing two things primarily around here: defending America and then roads and bridges. We understand that.

But a true in his heart or in her heart liberal really

believes that Government does things better than people do, so we do have basic differences and philosophies. And I am going to do what I can as chairman of this Committee and as someone who is desperately concerned about what is happening economically with overregulation that we are facing to try to keep this rule from becoming a reality.

So thank you for being here. We will dismiss this panel and adjourn our meeting.

Senator Boxer. Mr. Chairman, may I please, since you went over a minute, have one minute to close with my comments, with, of course, your being able to retort?

Senator Inhofe. Of course.

Senator Boxer. First, I want to thank the panel. This was important, and we see the conflict. And my colleague, who is a dear friend of mine, summed up my remarks in his way: industry is bad. That was his word, industry is bad, as if that is what I was saying.

And I resent it. I come from the largest State in the Union. We are the eighth largest country in the world, if we were to be a country, in terms of our gross domestic product. We have more industry than anybody, than him, than him, her, everybody. And I have great relationships.

Of course we want industry. Of course we want jobs. You have to have that. But industry, as individuals, must be

responsible. And if they are causing problems, then we ought to work together, together.

And that is why, Mr. Erdos, I question you, because we did open up the door to hear from you, and yes, you will have to collaborate with Fish and Wildlife before you issue the permit. It is not like you are in some kind of vacuum. You are a nice man; you are going to meet with a nice person at Fish and Wildlife. You are going to find out the best way to go so we don't poison our fish and we don't poison our children. A very important point.

And, Mr. Larkin, I would just like to finish. Mr. Larkin, you do your job well for the coal industry, and good for you. And I didn't mean to suggest that you are doing anything wrong. They deserve the best and the brightest. But so do we, and that is why we have Mr. Wasson here.

So I am going to conclude by saying this. I suggest you all read the Surface Mining Act, because Section 102 says, "(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and, wherever necessary, exercise the full reach of the Federal constitutional powers." Constitutional powers that my friend talked about. By the way, this is a Government of by and for the people. I don't view the Government as an enemy. "Exercise the full reach of the Federal constitutional powers to

ensure the protection of the public interest through effective control of surface coal mining operations." Here it is. We put it in the record before.

The point is, all right, what the Administration is doing is constitutional, is required under the law. It is to protect the very people that, sir, you spoke about. And, again, this is a sharp division, and I guess the people will make their judgments every time they go to vote. You know, they vote for him in his State; they vote for me in my State.

Senator Inhofe. All right, Senator Boxer.

Senator Boxer. What a great Country is all I can say.

Senator Inhofe. I am not adjourning the meeting yet, but I will in three minutes. And I understand that if you haven't been through the experience that a lot of people in this room have been through, and I suggest the two of you have, it is a tough world out there.

I had a career before this and I was out doing things, I was building, developing. Some people think that is bad. I was expanding the tax base. I was doing what Americans are supposed to be doing. And the opposition that I had was always overregulation. Unless you have lived being overregulated, you don't understand how this can happen.

So, anyway, we are here now to try to let people have more freedom to do the things they want to do, to hire people, to

expand the tax base, and to have a more prosperous America.

Now, a specific comment was made about you, Mr. Erdos, about they opened up everything to you. Would you like to respond to that? Was everything opened up to you?

Mr. Erdos. I am sorry?

Senator Inhofe. The comment was made that all this was opened up to you at the State level.

Mr. Erdos. Oh, yes. Yes, thank you. Yes, it was, and we certainly appreciated that. We have said from the very beginning that we want to be engaged with OSM. We want to be engaged in this process, and initially we were.

Our concern is over the four-year period where that one-way communication developed. And, again, we want to work with OSM and we continue today to want to work with OSM. So it is not that we don't want to be part of the process. We want to be part of the process. We want to say to you, OSM, come back to the table. We want to sit down with you. We think we can help you. And that is essentially what we are saying at Ohio DNR, just talk to us.

Senator Inhofe. And, Mr. Larkin, a job description was commented about you, what your job is. Do you want to characterize what your job is and what your personal feelings are, how that interacts with whose payroll you are on?

Mr. Larkin. I do represent coal companies, Senator, and I

am proud to do it because of how important they are to the State where I live. But I am here today both in that role, as someone who has gained knowledge about what it is like to be overregulated and because, through representing coal companies, I have met those people who live in the coalfields, and a significant number of them are coal miners.

And because coal miners live in the coalfields, they are not going to do anything that is going to put something that is toxic or dangerous into the water, and they are going to do everything they can to be as responsible to the areas where they live because they live there.

So I think it is a misperception that there is this vast majority of people out there that somehow oppose mining in the areas where mining occurs, because a tremendous number of those people are in fact coal miners themselves. So it is for them that I am here today as much as anything.

Senator Inhofe. We thank the panel and we are adjourned.

[Whereupon, at 11:39 a.m., the committee was adjourned.]