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Background Briefing Paper On Office of Surface Mining
And Implementation of the 1977 Surface Mining
Control and Reclamation Act

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The incoming Administration has an historic opportunity to reverse years of efforts by hostile Republican Administrations to dismantle the regulatory framework established during the period of 1977-1981, and to restore the interpretation of the implementation of the mining law to be again consonant with the intent of Congress.

This briefing paper provides some background on the key issues concerning implementation of the Act. It is a blueprint for reform of the statute by reversing regulatory policy choices made commencing in 1981 and continuing, with brief respite during the first two years of the initial Clinton Administration, until this day. The major issues facing the agency are highlighted below:

Background on "Mountaintop Mining" Controversy

When Congress enacted the federal Surface Mining Control and Reclamation Act of 1977, it was concerned with the damage done from the dumping of earth and rock from mining benches into headwater streams in Appalachia.

In order to minimize the damage to land and water resources, and to restore the mined land to productive capability, Congress demanded that the earth and rock (called "spoil") be replaced on the mine bench and that the original contour of the mountain be restored.

An exception to this requirement to restore the approximate original contour was created, allowing the removal of all earth and rock material from over a coal seam (called

"mountaintop removal") without having to restore the original contour if specific plans and commitments were demonstrated for development of the land for industrial, commercial, residential, agricultural or public use. Most of the mining operations that are today viewed as mountaintop removal are not technically categorized as such – they are mine plans that use a combination of point removal, area mining and deep contour cuts, and produce similar ecological consequences without the promise of beneficial post-mining uses of value to the community and environment. Because of mischaracterization of mountaintop removal mines as “area” mines in Appalachian coalfields, you could “ban mountaintop removal” tomorrow yet the ecological footprint and visual impact would be negligibly different.

What has happened to Congress’ vision?

- * Where the law contemplates that the approximate contour of land be restored both in elevation and configuration, the agencies have ignored the elevation requirement, and allowed significant amounts of spoil material to be disposed of in valley fills that should have been replaced on the mined area.
- * Where the industry norm was once the hauling and placement of spoil material in compacted fills, spoil material is now routinely disposed of in end or wing-dumped durable rock fills that are located lower in the watershed and are larger in area displaced than needed. These “durable rock” fills are among the largest man-made structures and are created with little knowledge of the long-term stability of the structures.
- * Where the federal regulation provides for 100-foot stream buffer zones to protect intermittent and perennial streams from adverse effects of mining on water quality and habitat, the federal OSM has allowed the states to adopt disparate rules often ignoring those areas filled by spoil when applying buffer zones, and has proposed to further “enable” this destruction by eliminating the rule. That rulemaking is anticipated to be published shortly.

While some may consider the upper reaches of these stream systems as “dry ditches” the filling of which is without ecological consequence, those with greater understanding of stream biology recognize that these ephemeral and intermittent stream reaches play a critical role in stream system health, providing valuable ecological goods and services (Meyer & Wallace 2001) including the provision of hydrologic retention capacity (the loss of which increases frequency and intensity of downstream flooding and lower base flows); (Dunne & Leopold 1978); retaining sediments, (the loss of which leads to excess sediment transport downstream) (Waters 1995); providing for physical and biological processing of inputs of organic matter from the watershed, that when processed are important food resources for ecosystems downstream, (and the elimination of which can result in reduced inputs of fine particulate food resources for downstream ecosystems, and increased downstream transport of unprocessed nutrients with adverse results on biota and water quality); and providing unique habitats for aquatic biota, (the elimination

of which from the landscape increases the vulnerability for extinction of aquatic invertebrate, amphibian, and fish species) (Morse et al 1993).

In 1977, Congress made a clear choice – that the choice of technology would follow, rather than dictate, environmental protection. Rather than utilizing smaller equipment more appropriate to the terrain and to careful management of materials, the industry has systematically replaced the workforce with larger machines, and has violated the spirit and letter of water and mining laws in order to, literally, move heaven and earth in order to maximize profit. Despite claims to the contrary, the industry could internalize the proper environmental costs of “doing business” under SMCRA and still garner a reasonable rate of return.

The change in leadership offers a potential opportunity for a rededication to the principles of the 1977 mining law "to protect society and the environment from the adverse effects of surface coal mining operations" and to give effect to the mission of the Clean Water Act to "end water pollution". The state and federal regulatory agencies **have** the necessary tools to demand much more accountability in all forms of surface mine planning and performance with respect to mine planning, reducing the size and number of valley fills, reforming blasting regulations to better protect the public, restricting the appropriation of public streams for sediment control, eliminating new high and moderate hazard coal waste impoundments and requiring closure and dewatering of old ones; and broadening monitoring and pollution control obligations of coal companies. Unfortunately, the principles established by Congress have been lost in the hands of a federal agency that has, for the better part of its existence, been largely captive to the wishes of the industry it regulates.

Other Substantive Issues

“Material Damage To The Hydrologic Balance”

Congress directed that “material damage to the hydrologic balance outside the permit area” be prevented, and that disruption to the hydrologic balance in the mined area be minimized. Unfortunately, the OSM has interpreted that phrase to allow state regulatory authorities to define the term or implement an approved program in a manner that allows the issuance of mining permits to proposed operations even though information in the permit application or otherwise available to the regulatory authority indicates that effluent or groundwater migration from the proposed operation would likely cause or contribute to a violation of one or more applicable water quality standards in a stream, river, or lake downgradient from the proposed operation. OSM should further define the term to reiterate the statement of basis and purpose for the agency’s hydrologic protection regulations, which expressly assured the public that violations of water quality standards, in addition to effluent limitations, were minimum criteria for measuring “material damage to the hydrologic balance outside the permit area;” See 48 Fed. Reg. 43,956 (Sept. 26, 1983); and to disclaim OSM’s litigation position in *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006).

The reason for doing so is straightforward. One of SMCRA's central purposes is to supplement the Clean Water Act by preventing violation of applicable water quality standards as the result of surface coal mining and reclamation operations wherever possible and authorizing prompt and effective enforcement action to address such violations where they occur.

Ownership and Control

Legislative amendment is likely needed to revise the definition of "permit applicant or applicant" to override the decision in *National Min. Ass'n v. U.S. Dept. of the Interior*, 105 F.3d 691 (C.A.D.C., 1997), which narrowly interpreted the existing definition of the term to exclude "any person who owns and controls the applicant." The historical abuse of corporate business forms by unscrupulous individuals and companies has left a legacy of scarred land and damaged water resources. Companies owning or controlling permit applicants who were linked to unabated violations at other mine sites had been blocked by OSM under its regulations, but in an industry challenge to that practice, the court ruled that the language of the Act did not allow the agency to go "upstream" to block new permits based on owners or controllers of the new applicant. That interpretation allows persons who own or control the coal mined or to be mined at a surface coal mining operation to avoid liability for violation of SMCRA's requirements simply by creating or persuading intermediate legal entities to serve as permittees under the Act. Reform is needed so that every person who holds an interest in the coal mined at a surface coal mining and reclamation operation ultimately **responsible for correcting** any violation of SMCRA that occurs as the result of such operations.

The agency should, as an immediate measure while awaiting the Congressional action just recommended, agree to withdraw the Bush Administration's revised ownership or control regulations currently under challenge in the U.S. District Court for the District of Columbia. Those regulations replaced the Clinton Administration's rules on the subject with an industry-approved softening of the regulatory scheme. The Bush Administration adopted its regulations after withdrawing the Clinton rules in the face of an industry challenge to the earlier rulemaking. Not only is turn-about fair play in this instance, it is vital to effectuating the intent of the Congress that enacted SMCRA.

Surface Effects of Underground Mining and Section 522(e)

In 1999, the Interior Department published a regulation that codified its reversal of the agency's prior interpretation that Section 522 of the federal Act prohibited surface impacts from underground coal mines in certain key areas, including national parks, wildlife refuges, wilderness areas, state parks, occupied dwellings, public buildings, schools, churches, cemeteries and roads. According to the Environmental Impact Statement developed by OSM concerning the reversal of agency position, the decision put at risk 29,600 homes and more than 15,000 acres of protected parks and open space lands.

Citizen groups successfully challenged the 1999 rule in District Court, but that decision was overturned by the U.S. Court of Appeals for the D.C. Circuit in 2003.

In *Citizens Coal Council v. Norton*, 330 F.3d 478 (D.C. Cir. 2003), the Court of Appeals deferred to OSM's "strained" interpretation of SMCRA as excluding underground mine impacts from the buffer zone protections of the unsuitability provisions of law. The OSM reinterpretation allowed subsidence to occur in protected areas, near homes, cemeteries, and protected buildings, and reversed a position long held by the agency that those areas were protected.

A regulatory change would clarify that the agency's initial interpretation was correct, that surface impacts of underground mining were intended to be precluded in such protected areas, and would provide protection to those thousands of homeowners who now face undermining of their property, and will similarly protect public buildings from subsidence damage.

Disposal of Coal Combustion Waste

Management of coal combustion wastes is a significant issue, given the presence in fly and bottom ash associated with coal combustion of levels of metals and organics often in excess of drinking water levels. Co-disposal of such wastes in mined areas increases the potential for migration of such constituents into groundwater. Proper regulations mandating proper characterization and responsible management of coal combustion wastes by the Environmental Protection Agency should be a priority, and OSM should refrain from promulgating regulations to encourage or allow indiscriminate or uncontrolled backstowing of such wastes on mined areas.

Timber Removal In Advance Of Mining

Anticipatory destruction of forested habitat in advance of obtaining mine permits in order to avoid obligations to protect riparian habitat is a significant issue, yet OSM does not exert jurisdiction over clearing of forested habitat where done under contract in advance of other site preparation. By clearing lands prior to filing permit applications, permittees avoid consideration of threatened and endangered species.

By including the removal of timber within those activities defined as "surface coal mining operations" the agency would have authority to prevent timber removal conducted as a prelude to mining from occurring absent prior approval, and could end the abusive practice of coal companies or coal owners contracting the removal of timber from areas that will be mined in order to avoid either conducting sensitive species surveys or providing protections for such known terrestrial or aquatic species or their habitat.

Constructed v. End-Dumped Fills

Excess spoil fills are associated with all forms of surface mining in mountainous terrain, as well as surface face ups of underground mines. Where the 1979 regulations required haulage and placement of the rock and soil in compacted, constructed, engineered fills, in order to accommodate larger earth-moving equipment and to lower material handling costs, OSM weakened the rules to allow end-dumping and wing-dumping of excessive amounts of mine “spoil” - the soil and rock removed from above coal seams, into headwater streams. Much more could be done regarding mine planning to require the maximum safe retention of the soil and rock on the mined area and the use of excess material to reclaim abandoned mines, with the goal of reducing the size and number of fills in valleys. So-called “durable rock” or “end-dumped” fills should be disallowed by restoring the requirement for compacted, constructed fills.

The cumulative impact of fills on watersheds can be lessened further through the proper implementation of the cumulative hydrologic impact analysis (CHIA) provision of SMCRA. The CHIA requirement, which obligates the agency to consider a proposed mining operation in the context of all current and anticipated mining in that watershed, is not properly implemented in many states, and OSM has failed to demand consistency and high quality analysis. CHIA was intended as a backstop against cumulative incremental degradation from numerous mining operations.

Approximate Original Contour

Regulatory clarification is needed that “approximate original contour” means both that the reclaimed area should resemble the area before mining in both aspect (or slope) and elevation. Lax enforcement of the AOC requirement has resulted in mined areas where sites that have been granted variances from AOC resemble those which have theoretically been restored to AOC. Clarifying the obligation to restore premined elevations as well as contours will minimize “excess” spoil.

Clarifying the Insurance Obligation

There are numerous situations where the permittee lacks resources to address damages caused by the mining operation, and the insurer declines coverage because of the existence of high deductibles. Clarification is needed that if an insurer writes a policy that contains deductibles, public protection would be assured by requiring posting of a cash bond or CD for any deductible amount.

Bankruptcy Law And SMCRA Obligations

Regulatory or statutory clarification is needed that bankruptcy courts, cannot allow coal companies to “reorganize” and to shed reclamation responsibility. Language is needed that would make reclamation obligations under permits, regulations and enforcement orders non-dischargeable, unless the obligations were fully satisfied or a successor permittee fully assumed and bonded the liability to assure reclamation would be achieved.

Bonding

Significant problems have arisen among the state in situations where performance bonds are forfeited, and are insufficient to assure completion of the reclamation plan by a third-party. The process for calculating performance bonds should be revised in order to assure that the bond amount is calculated based on the point of greatest vulnerability of the public to the possibility of non-performance of reclamation obligations by a mine permittee.

Blasting

Perhaps the most problematic performance standards under the Act are the blasting regulations. State regulatory authorities discount physical evidence of blasting damage and fail to utilize pre-blast surveys in a manner that assures that blasting damage is identified and repaired, instead relying on formulae that do not accurately reflect the impact of the blasting and which are insufficient to protect housing that is not constructed by standard methods nor on standard foundations.

Roads

Congress defined surface coal mining operations to include all roads used or constructed for coal haulage and access. OSMRE has failed to fulfill a commitment to define when existing public roads used by coal companies will be considered as part of the “affected area” that must be permitted. The result has been a hodgepodge of state approaches to the issue, and a tendency by coal companies, to appropriate dead end residential roads (typically neither built to spec nor to handle such weights but instead paved over a dirt or gravel base) as their haul roads, instead of constructing dedicated haulage through constructed haul roads, tramways or beltlines. A new rulemaking is necessary to define those cases (such as federal highways and interstates) where coal haulage has a *de minimis* impact, and those where the coal haulage and access should be required to be under permit, or should be prohibited due to public health and safety impacts.

Procedural Issues

In addition to substantive issues, there are significant issues associated with the exercise of OSM’s “oversight” of state regulatory programs. Where historically OSM reviewed the state implementation of various permitting and planning requirements, Reg-8 focuses only on whether there is demonstrated “off-site” damage. Given that failures in mine planning may cause such damage that may not be immediately manifest or measured, proper oversight should focus both on whether states are properly implementing permitting and performance standards requirements, and whether off-site damage is occurring.