

TESTIMONY OF MR. MIKE CAREY
PRESIDENT, OHIO COAL ASSOCIATION
BEFORE THE
HOUSE COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES
TESTIMONY ON "*JOBS AT RISK: COMMUNITY IMPACTS OF THE OBAMA
ADMINISTRATION'S EFFORT TO REWRITE THE STREAM BUFFER ZONE RULE*"
SEPTEMBER 26, 2011

Chairman Lamborn, Ranking Member Holt, Members of the Subcommittee, good morning.

Thank you for inviting me to testify at this very important hearing on Office of Surface Mining, Reclamation, and Enforcement's (OSM) Stream Buffer Zone Rule and its impact on American jobs. My name is Mike Carey and I serve as President of the Ohio Coal Association (OCA). I am also a member of The National Coal Council, which serves as an advisory committee for the Secretary of Energy on energy resource issues.

In our country today, coal is mined in 27 states and produces affordable electricity for 48 states. Coal provides 86 percent of the electricity needs for powering Ohio's business and residential sectors. The OCA provides a voice for the many thousands of our citizens working in Ohio's coal sector. The companies we represent are proud to directly employ over 3,000 individuals in Ohio alone and the over 30,000 additional jobs dependent on our industry.

The OCA seeks to continually educate state and federal lawmakers on the effects that policies have on American jobs, the economy, the reliability of electric power production and our global energy manufacturing competitiveness. This is why I am here today. Coal provides our country with a strong international competitive advantage, as we have more coal than Saudi Arabia has oil and gas. Energy Information Administration data shows that at least 261.5 billion tons of coal reserves are available in America, making our recoverable coal reserves almost 1/3 of the world's total supply.

Coal is not only America's most abundant energy resource, but it is, by far, our lowest cost domestic energy resource. Cheap, affordable coal is what powers the nation's manufacturing base and keeps the lights on for millions of America families. The low cost electricity that coal provides is a staple of American life and is essential to many Americans' standard of living.

It is difficult for me to confine my remarks today to only the Stream Buffer rule, because nationwide our industry is facing an unprecedented onslaught of new regulations that are, simply put, designed to eliminate America's coal industry and the thousands of jobs associated with coal. The Obama Administration and its allies have declared a de facto war on coal across Appalachia and America. The Department of Interior's (DOI) OSM Stream Buffer rule and EPA's various rules, including greenhouse gas rule, the Cross-State Air Pollution Rule (CSAPR)

and Utility MACT, have one purpose: to force coal out of business. These regulations, coupled with the permit delays across the entire Obama Administration, will be economically devastating and will have an inevitable adverse effect on our nation. Hard-working Americans will lose their jobs, businesses will shutter, families will be forced to pay more to keep warm in the upcoming winter months as we are forced to supplant our nation's most abundant and affordable energy resource.

Mr. Chairman, the Obama Administration's attempts to rewrite the Stream Buffer Zone Rule is nothing but a blatant attempt to kill coal in Appalachia, which will destroy jobs across the industrial Midwest. Why do I say this?

- 1) The last rewrite undertaken in 2008 – only three years ago - was a thoughtful process involving all of the stakeholders and examining all of the major issues.
- 2) The Obama Administration's efforts were a rushed job done solely to placate their environmental allies, ignoring stakeholders and the impacted States themselves.
- 3) When the Obama Environmental Impact Statement (EIS) was criticized for the bluntness of the potential job losses, instead of admitting the problem, they fired the contractor who made the informed observations.

The Right Way to Conduct a Rulemaking

When OSM revised the Stream Buffer Zone rule in December 2008 it was the product of over five years of studies, millions of taxpayers' money spent on research, two environmental impact statements, over 43,000 public comments, and 30 economic and scientific studies.

OSM began the process in 2003, releasing a discussion draft of methods to clarify the older 1983 rule. Later that year OSM, working with the EPA, Army Corps of Engineers, Fish and Wildlife Service, and importantly the State of West Virginia completed a 5,000 page programmatic ESI on mountaintop mining. This EIS contained 30 separate federal studies on all aspects of Mountaintop Mining. They later proposed additional changes to the rule based upon public comments. Then in 2007 they completed another EIS which examined more specifically the stream buffer zone rule, addressed further comments and involved all stakeholders. The final regulation was issued in 2008.

The Wrong Way to Conduct a Rulemaking

This is contrasted directly with the Obama Administration's closed and rushed efforts to ram a new rule through the process to placate their environmentalist allies.

In 2009, at the beginning of the Obama Administration Secretary Salazar signed an memorandum of understanding (MOU) vowing to revisit the stream buffer zone rule and then attempted to vacate the 2008 rule by guidance document. It took a federal court telling them they had to use the APA rulemaking process.

They later published an advanced notice of proposed rulemaking, making 10 significant changes to the stream buffer zone rule. They only allowed 30 days comment and ran the clock between Thanksgiving and just after Christmas.

In 2010, they entered into secret negotiations with several environmental organizations, emerging with a signed settlement agreement and also agreeing to pay their legal fees. They then started a new EIS and decided to expand the scope of the Stream Buffer Zone rules to include major changes to the underlying Surface Mining Control and Reclamation Act regulations.

As opposed to the 2008 efforts, eight States and the Western Governors Association wrote the Agency objecting to the draft EIS conclusions and the lack of opportunity to participate in the process.

Fire the Messenger

The Administration hired an outside contractor to prepare the EIS, without the benefit of any new federal studies. After the EIS draft was completed, the press seized upon the study which predicted at least 20,000 jobs would be lost including the elimination of 20-30 percent of all surface mining in the East.

Two months later, instead of changing direction on the regulation, announcing they were wrong to eliminate jobs, or that they would change their approach, they instead blamed the contractor, fired them, and announced they would hire a new contractor to start the EIS over again. This is a classic example of shooting the messenger, but not changing the message. If this example wasn't so real and troubling, I would swear that they took their strategy from watching the movie Casablanca. Just like Captain Renault was shocked that gambling was going on, OSM Director Pizarchik was shocked that his regulation would lead to job losses. It's not very credible. One can only surmise that the new contractor has either explicitly or at least implicitly been told to steer clear of any job loss projections.

What's at Stake?

OSM's Stream Buffer Rule is the most comprehensive and far-reaching revision of a SMCRA rule in more than 30 years. Rather than providing regulatory clarity as the 2008 rule did, the new rule replaces decades of interpretation of the law, prohibits standard mining practices and has nationwide application. In light of the five years it took to come up with the 2008 rule, OSM could not properly and responsibly rewrite this rule in such a short period. OSM's rulemaking process and the new rule have been widely criticized by states and state agencies responsible for implementing the rule. Moreover, this rule will have damaging effects throughout the states where the mining industry operates and will destroy tens of thousands of coal related jobs.

It is imperative that this Subcommittee and Congress carefully review OSM's rules in order to protect American jobs. We are always concerned when regulatory overreaching negatively impacts job security and growth in our region. We are in difficult economic times when many Ohioans and Americans find themselves out of work. Unemployment in Ohio is 9.1 percent, the same as the overall unemployment rate in the U.S.

Rural regions in West Virginia, Ohio, Pennsylvania, Illinois, Indiana, Kentucky and Tennessee would be economically devastated from losing a major employer such as the coal industry due to the OSM rule. By OSM's own admission, more than 7,000 jobs in Appalachia would be lost. This is an optimistic, underestimated assessment; we believe Appalachia will lose more than 20,000 jobs and nearly 70,000 coal related jobs would also be lost nationwide. This would mean the unemployment rate rising in these states and a loss of more than \$650 million of earnings and state revenue.

According to the agency's draft ESI, the Stream Buffer rule would annihilate approximately 1/3 of surface mines in the East and up to 50 percent of underground mines nationwide. In addition to closures of Eastern mines, the OSM rule would cause closures in coal production of 20 percent of Illinois' Basin mines, over 25 percent of the Gulf region and 84 percent of Alaska's mines.

This rule will be economically devastating to many states and communities in the East, but its impacts will be far-reaching effecting the nation's economy, employment rate and energy affordability. Decreases in Eastern coal production will increase electric prices, a fact which OSM did not take into consideration while rulemaking. Twenty-two of the 25 states with lowest electricity costs rely on coal for at least 40 percent of their electricity needs.

Mr. Chairman, when an agency:

- 1) Ignores the previous open rulemaking processes of its past, ie the 2008 Stream Buffer rulemaking process, and
- 2) Rushes its replacement through after meeting in secret with environmental organizations and ignoring the stakeholders and the States in the process, and
- 3) Shoots their own messenger, only after the work is derided by the press,

Then one can only conclude that their proposal was intentional and that they knew exactly what they were doing to the coal industry.

I ask that you help reign in OSM and do all that you can to stop this rulemaking. Americans have lost enough jobs; don't allow tens of thousands of additional families to suffer for OSM's misguided and unjustified rule.

Thank you for this opportunity to testify, Mr. Chairman, and stand ready to answer any questions the subcommittee may have about this attack on coal jobs, power providers and businesses throughout the United States.



United States Department of the Interior

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

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DEC 08 2009

Joseph M. Lovett
Executive Director
Appalachian Center for the
Economy and the Environment
P.O. Box 507
Lewisburg, WV 24901

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

Dear Mr. Lovett:

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

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

In your petition, you made the following allegations:

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

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

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

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

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

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

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

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

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

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

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

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

1. Disposal Site Selection

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

2. Fill Material Evaluation

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

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

3. Environmental Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in black ink that reads "Thomas D. Shope". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas D. Shope
Regional Director, Appalachian Region

Enclosure