

Written Testimony of Gregory Baker
Virginia Department of Mines, Minerals and Energy
Before the House Oversight and Investigations Subcommittee re Oversight Hearing on
“State Perspectives on the Status of Cooperating Agencies for the Office of Surface
Mining’s Stream Protection Rule”
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Good afternoon. Chairman Gohmert, Ranking Member Dingell, members of the Subcommittee, thank you for giving me the opportunity to testify before you today on the Stream Buffer Zone Rule and its implications to the Commonwealth of Virginia. My name is Gregory Baker and I serve as the Permit Review Supervisor at the Virginia Department of Mines, Minerals, and Energy (DMME) and I hope to share with you today background on the importance of Virginia’s coal industry, the Stream Buffer Zone Rule, and our continued interest in engaging in the rule making process as a cooperating agency.

First, I would like to provide you with background information about the Virginia coal industry and our agency. Since colonial days, coal production has been integral to Virginia’s economic development. The first commercial coal production in the United States occurred in 1748 from the Richmond Coal Basin just west of our State Capital in Richmond, Virginia. During the Civil War much of the coal industry in Virginia was destroyed; however, commercial coal mining rebounded in our Southwestern most counties in the 1880’s and mining in those areas continues today. We recognize that coal is on the decline as it is currently only produced in five of the Virginia counties that were traditionally named the coalfields.

The Commonwealth first implemented rules to address coal mining and reclamation issues in 1966; however, the minimal requirements of the early law and regulations failed to keep pace with the rapid expansion of surface mining activities in the Appalachian region. Following the passage of the 1977 Federal Surface Mining Control and Reclamation Act, Virginia sought and on December 1981 Virginia obtained primacy from the U.S. Office of Surface Mining (OSM) as the primary regulatory authority for coal surface mining. Regulatory authority resulted in a significant expansion and enhancement of the Virginia regulatory program.

As OSM moved forward to create the Stream Buffer Zone Rule, Virginia, chose to participate as a cooperating agency, in order to ensure that we were included in the process. We had the opportunity to review and comment on the initial proposed rule; however, since that time, Virginia, as a cooperating agency, has not been given the opportunity to review the most current version of the rule. This is concerning as the economic impact numbers we previously submitted have drastically changed. Coal production in Virginia peaked at 47 million tons in 1990, but it has dropped significantly in recent years. Production for 2014 was approximately 15 million tons, which has resulted in a decrease in the number of coal mining jobs. In 2009, there were 4,230 people working in the coal mining industry in the Commonwealth and in 2014, that

number dropped to 3,723. We are concerned with OSM using outdated data from the Commonwealth.

Virginia coal is of a higher British Thermal Unit (BTU) and lower sulfur content than the national average. This quality has made Virginia coal more desirable for metallurgical production as well as for the export market. We understand that there has been a reduction in coal production and the coal-producing areas of Southwestern Virginia will continue to see a decline in their economy. We are concerned with the potential impact the draft rule will have on the economy of these regions in Virginia. This may be further exacerbated by the inability to engage in the rule process and the continued use of outdated and inaccurate information.

Virginia's regulatory program is recognized across the nation as a leader and an innovator. Many states have used Virginia as an example in areas such as electronic permitting, underground mine mapping and the development of a GIS database that includes all surface mining areas as well as abandoned mined lands. We continue to work on making this information public through an outward facing web site. Through our electronic permitting system, other state and federal agencies can access coal mining permit data and applications and provide comments using the electronic application.

For years, states have been administering stellar regulatory programs, including the protection of streams. However, beginning in 2009, OSM embarked on an effort to impose a drastic change in state programs. To date, OSM has not provided information to states as to the reason for revising the Stream Buffer Zone Rule now termed the "Stream Protection Rule". Nothing in the states' Annual Evaluation Report indicates that the states are doing a poor job of enforcing current surface mining laws. The U.S. Department of the Interior, U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) signed a Memorandum of Understanding (MOU) in 2009, which appears to be the basis for the effort by OSM to change the Stream Buffer Zone Rule. While, the purpose of the 2009 MOU was to implement an interagency action plan to reduce harmful environmental consequences of surface coal mining in six states; states were not engaged in the process and were not asked to be a part of the MOU but rather join as cooperating agencies.

One significant item resulting from the MOU was the intention to propose a new Stream Protection Rule. As previously stated, early in the development of the draft rule OSM invited several states, including Virginia; to participate in the development of the Draft Environmental Impact Statement (DEIS) as "cooperating agencies" under the National Environmental Policy Act (NEPA). In preparing the DEIS, OSM hired a contractor from outside the coal mining regions and cooperating agencies voiced their concern with the contractor's lack of knowledge in mining. The cooperating agencies recommended that, before moving forward with the DEIS and proposed rule, OSM seriously consider the other alternatives available to the agency for addressing stream protection. The cooperating agencies believe that there are opportunities for the states and the affected federal agencies (OSM, EPA, the ACOE and the U.S. Fish and

Wildlife Service) to work cooperatively together to address stream protection concerns. However, to date, our requests for arranging such meetings have been ignored. We believe that there are a variety of tools, protocols, policies and other measures available to us as state and federal agencies that, with some coordination, could lead to a comprehensive and effective approach to protecting streams.

Following a limited opportunity to provide comments on a few early chapters of the DEIS in 2010, Virginia and the other state cooperating agencies have not been involved in the review of comments of the draft or any other portion of the DEIS.

On July 3, 2013, the cooperating agencies sent a letter to Director Pizarchik reminding him that the role of the cooperating agencies, as defined by the original memoranda of understanding, included an opportunity to review and comment on the chapters of the DEIS that are made available to us.

The cooperating state agencies have had several concerns regarding the constrained timeframes under which we were operating to provide comments on the draft documents that were provided to us in 2010. As we have stated from the outset, and as members of Congress have also noted, the ability to provide meaningful comments on OSM's draft documents has been extremely difficult with limited working days to review the material, some of which can be fairly technical in nature. In order to comply with the deadlines, we have devoted considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business such as reviewing citizen complaints, permit reviews, and AML project design.

We also have concerns regarding the lack of feedback from states in drafting final chapters to date. We noted that several attachments, exhibits and studies were not provided to us as part of reviewing Chapters 2, 3, and 4. Having the opportunity to review these documents is critical to ensuring our ability to provide a full and complete analysis of OSM's discussion in these chapters. It is important for us to receive all applicable documents that are referenced in draft chapters in order to conduct a meaningful review.

As part of the DEIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. Our experience with the reconciliation process to date has not been particularly positive or meaningful. We are hopeful that as we reinitiate the DEIS review and comment process, OSM will engage in a robust reconciliation process. Among other things, we believe it should include an explanation of which comments were accepted, which were not, and why. In an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the chapters as they are completed so that we can

ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately.

As we noted during the submission of comments by many of the cooperating agencies in the early rounds of the EIS development process, there is great concern about how our comments will be used and referred to by OSM in the final DEIS that is published for review. Our concern is that we have not been afforded the ability to fully engage in the process as we believe was originally agreed upon. We remain interested in engaging in this process and while the MOU we signed as cooperating agencies indicates that our participation “does not imply endorsement of OSM’s action or preferred alternative,” we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the DEIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

To date, many of the cooperating agency states are uncertain whether they still desire their names to appear on the DEIS, which was originally anticipated. I would like to reiterate Virginia’s interest in continuing to engage in this process; however, the appearance of a state’s seal on the cover of the DEIS would imply tacit approval, regardless of whether and to what extent state comments have been incorporated into the document. While cooperating agencies have the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), Virginia realizes the importance of DEIS review and the opportunity to contribute to, or clarify, the issues presented. For this reason, Virginia intends to continue to engage on this proposed rule and remain on as a cooperating agency. Moving forward, we would like the opportunity to work with OSM to draft a joint statement that will accompany the DEIS outlining, very specifically, our role as a cooperating agency and the significance and meaning of the comments that we have submitted during the EIS development process.

Thank you for the opportunity to testify before you today. As a cooperating state, Virginia is committed to being constructive partners in the rulemaking process. Our intention has been and will continue to be to stay engaged to ensure that the most up-to-date data is utilized during this process. It is important to us that OSM reengage Virginia in the process and we welcome the committee’s feedback or assistance in making this a reality. I look forward to answering any questions you may have.

History and Background of the Stream Buffer Zone Rule

On December 12, 2008, OSM issued a news release titled “Office of Surface Mining Issues New Mining Rule Tightening Restrictions on Excess Spoil, Coal Mine Waste, and Mining Activities in or Near Streams”. In the words of OSM, the agency stated; “We believe that the new rule is consistent with a key purpose of the Surface Mining Law, which is to strike a balance between environmental protection and ensuring responsible production of coal essential to the Nation’s energy supply”. The statement from the release was from then Assistant Secretary of the Interior,

Land and Minerals Management C. Stephen Allred. Mr. Allred is speaking of the 2008 Stream Buffer Zone Rule. He goes on to say that this new rule will clarify the Stream Buffer Zone Rule and resolve any long-standing controversy over how the rule should be applied. He is referring to the issues raised with disturbances along stream buffer zones as far back as 1983. There have been several challenges to the Stream Buffer Zone Rule over the past several decades. OSM and state agencies felt as though the 2008 Buffer Zone Rule was a rule that would finally meet the goal of environmental protection while ensuring coal production that would meet the energy needs of the nation.

The development of the 2008 rule was a five year process. OSM solicited public input throughout the process. The agency received over 43,000 comments and held four public hearings that were attended by approximately 700 people. The rule was to take effect on January 12, 2009. However, before the rule was implemented it was suspended. The states had no opportunity to amend our programs to adopt that rule. We believe the 2008 rule contained provisions that would allow disposal of excess spoil in such a manner that would ensure stream protection. Even though Virginia has not formally adopted the 2008 rule, some portions of the rule have been incorporated into coal surface permit review and approval. Alternative analysis and fill minimization are two items from the rule now incorporated into our permitting process. The number of fills has been reduced, as well as the number of cubic yards being placed in fills. VA tracks these numbers as part of overall performance measures on the success of our program.

The data and information we are familiar with (including OSM oversight reports) indicates that the states have been implementing stream protection requirements in a fair, balanced and appropriate manner that comports with the requirements of SMCRA and our approved regulatory programs. It would therefore be helpful if OSM would finally clarify its goals and the problems it hopes to address in the rulemaking process and provide information to states on why the 2008 rule would not be protective of streams.