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Testimony Regarding Oversight Hearing by the
House Investigations and Oversight Subcommittee 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. My name is Russell Hunter and I serve as Counsel with the Division of Mining and Reclamation of the West Virginia Department of Environmental Protection (WVDEP). I am appearing on behalf of the agency and we appreciate the opportunity to present this testimony before the Subcommittee regarding the State of West Virginia's perspective on the Status of Cooperating Agencies for the Office of Surface Mining's (OSM) Stream Protection Rule.

WVDEP is one of nine states that signed Memoranda of Understanding (MOUs) with OSM to prepare an Environmental Impact Statement (EIS) to accompany a rulemaking to address the stream buffer zone. The MOUs were developed by OSM pursuant to the National Environmental Policy Act (NEPA) and the Council on Environmental Quality's (CEQ) implementing regulations at 40 CFR 1501.6 and 1501.8, and CEQ's January 30, 2002 Memorandum for Heads of Federal Agencies relative to cooperating agencies.

The regulations of CEQ that implement NEPA, (40 CFR Parts 1500–1508), allow Federal agencies, as lead agencies, to invite State governments to serve as cooperating agencies (CAs) in the preparation of Environmental Impact Statements (EISs) and, if a CA is invited, as is the case for the Stream Protection Rule, the CEQ regulations implementing NEPA govern the CA relationship for all federal agencies preparing EISs, including OSM. More specifically, applicable CEQ regulations state:

40 CFR 1501.6 (CEQ) Roles of lead and cooperating agencies.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall: (1) Participate in the NEPA process at the earliest possible time. (2) Participate in the scoping process..., (3) Assume on request of the lead

agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise...

It can be derived from the CEQ regulations (40 CFR 1501.6) and other Department of Interior (DOI) regulations (43 CFR 46.230), throughout the development of an EIS, the lead agency is required to collaborate, to the fullest extent possible, with all CAs concerning issues relating to their jurisdiction and special expertise. Also, CAs may, by agreement with the lead agency (in this case via signed MOU's), assist in doing the following: (i) Identifying issues to be addressed, (ii) Arranging for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data, (iii) Analyzing data, (iv) Developing alternatives, (v) Evaluating alternatives and estimating the effects of implementing each alternative, and (vi) Carrying out any other tasks necessary for the development of the environmental analysis and documentation.

As described, the primary purpose of involving CAs is to bring into the process knowledge, expertise, and familiarity with matters being considered. It is with these expectations that WVDEP, on behalf of the State of West Virginia, signed the MOU to cooperate in the preparation of the EIS to support OSM's current rulemaking. West Virginia, since 1981, has been a primacy state, with WVDEP implementing and administering the Surface Mining Control and Reclamation Act (SMCRA) for West Virginia, under oversight from the OSM. West Virginia, dating back to 1933, had a set of laws addressing the environmental ramifications of mining. In fact, SMCRA, passed by Congress in 1977 to provide a national framework for the regulation of mining, borrowed heavily from the preexisting state programs of West Virginia and Pennsylvania. Given the regulatory history, experience and expertise of West Virginia, we felt WVDEP could meaningfully contribute to the EIS process while gaining insight into any new science, technology or techniques, and thus signed the MOU.

WVDEP participated in the scoping process, and signed an MOU (prepared by OSM) to serve as a CA, regarding the proposed change to the existing 1983 regulations, which have been commonly referred to as the "stream buffer zone rule". OSM unilaterally developed the scope of the initial 2010 draft EIS and then circulated a draft EIS (the '2010 working draft EIS') and packaged it as "Stream Protection Measures". As a result, what had started out as a revision to the stream buffer zone rule, pertaining to discernable stream segments, had been expanded by OSM to include topics beyond the stream buffer zone. The expanded topics included, but were not limited to, the definition of material damage to the hydrologic balance, baseline data collection and analysis, monitoring requirements, the practices of mining through and under streams, corrective action thresholds, and fish and wildlife protection and enhancement. (A discussion on some aspects of the expansiveness of the OSM rulemaking and the appropriateness of it can be found in written comments filed with the Energy and Mineral Resources Subcommittee in conjunction with a hearing about H.R. 1644 on May 14, 2015). Essentially, from our perspective, OSM has turned its proposed stream buffer zone rulemaking into a rewrite of the permitting and performance standards established by Congress in SMCRA.

As a means of initiating the cooperative process described in the MOUs, OSM released sections of their draft rule for review by the CAs. However, in what appeared to be a mockery of the

process, the time periods allowed for review and comment by the CAs were brief and impersonal in that (i) the comment deadlines were extremely short and impracticable, and (ii) were to be provided via a share-file on a web site set up by OSM. Consequently, at no point in the draft review process was there a face to face meeting between cooperating agencies and OSM. Further, given OSM's time constraints, scheduling needed face-to-face meetings was impractical, although it is suggested that convening such a meeting could have been helpful, to address the CAs' comments and suggestions and to reconcile such comments and issues with the 2010 working draft EIS.

Despite the imposition of these logistical hurdles, WVDEP and the other cooperating agencies provided comments to the portions of the drafts which OSM had shared with the CAs. It is noted that OSM did not allow the CAs to comment on some portions of their draft 2010 working draft EIS, and OSM failed to provide the studies relied upon in the draft or a list of the research or studies it utilized.

A critical part of an EIS preparation stage is the identification and analysis of potential action alternatives and the selection of a preferred alternative. Selection of a preferred alternative which is overly restrictive such as categorically preventing disturbance of discernable stream segments could have profound effects on permitting decisions and performance standards and ultimately whether certain mining operations are authorized to proceed. In addition to limiting the CAs participation in the review process, OSM, by selecting a restrictive preferred alternative, would undermine the discretionary permitting decisions of approved state regulatory authorities. Also in preparing its version of the EIS, OSM apparently relied upon modeling performed by outside sources to select and analyze alternatives rather than seeking input from the CAs. These actions further belie the notion that OSM had made its decision as to the outcome of the EIS prior to the actual conclusion of the NEPA process. Such an approach to dictate future permitting decisions by state regulatory authorities, without input from primacy programs, is not only contrary to NEPA principles, but also contrary to the fundamental concept of state primacy under SMCRA.

Further, OSM's withholding of "new science" from review by the CAs deprived the states of information regarding the appropriate development of the EIS. This approach by OSM also served as a disservice to the primacy regulatory authorities charged with making current regulatory decisions as they implement SMCRA on a daily basis by keeping from them the latest available information.

Subsequent to this initial review phase (as described above), conducted in late 2010 and early 2011, there was no further dialogue or input requested of the CAs by OSM. The CAs had discussions regarding this dilemma on more than one occasion and contacted OSM by letters, offering to honor their MOU commitments and to engage, or re-engage, in the preparation of the draft EIS. These offers were repeatedly refused by OSM. In spite of the CAs' inquiries and offers, the only communication from OSM, during this four year period from the end of the abbreviated comment period in January 2011 to March 2015, was a general statement that OSM was still working on a draft EIS and proposed regulation change. Further, OSM staff working on the draft EIS and proposed rule refrained from discussions with WVDEP personnel and declined to answer particular questions, if inquiries were made. From our perspective, OSM's treatment

of the WVDEP, a cooperating agency in the OSM-led EIS, can best be described as limited, abbreviated, restricted, and contrary to the terms of the MOU.

From our discussions with other CAs, it is apparent they also felt disenfranchised by the OSM approach. In many cases, we were informed that letters of termination of their respective MOUs regarding the withdrawal of their participation in the EIS process had been sent to OSM. We understand the reasons for termination and withdrawal included very short review times, failure to provide reports and relevant data, substantial revision of the working draft without the input of the CAs, unwillingness to meaningfully engage the CAs, the overall quality of the work product, missing reference material and the overall expansive nature of the rulemaking effort.

As what appeared to be yet another mockery of the CAs' role in the process and apparently as a result of Congressional inquiry into the Stream Protection Rule and EIS status, OSM, via a communication on March 17, 2015, requested that a meeting be set up with the CAs regarding the draft EIS and proposed rule. Although requests for the meeting were received individually by the CAs, the Interstate Mining Compact Commission (IMCC) was involved and handled the meeting arrangements on behalf of the cooperating agencies. The OSM "briefing" (the meeting) of the CAs was held on April 27, 2015 in Baltimore Maryland and attended by representatives from WV, WY, KY, VA, MT, OH, and IN. It is important to note that the CAs that had terminated their MOU and withdrawn from the EIS process (UT, NM, AL and TX), as well as an IMCC representative, were excluded by OSM from the meeting.

The briefing for the remaining CAs lasted approximately three hours and consisted solely of a power point presentation, made by OSM, with brief questions and answers. It is important to note that neither copies of the presentation, nor any other materials, were furnished to the CAs, neither prior to or at the meeting. OSM's briefing began with a slide that identified the purpose of their proposed rule by using a bullet list of general concepts, with the first bullet in the list being, "Use Advancement in Science". In response to questions regarding such science advancements, it was indicated by OSM that the scientific advances will be seen throughout the OSM draft of the EIS, and reference was made to TDS (total dissolved solids), selenium, reforestation, and geomorphic reclamation (with no details provided or studies referenced as to such science advancements). Similar generalizations can be made as to the other general concepts identified in the bullet list presented during the briefing.

This briefing can be characterized, at best, as a unilateral presentation, primarily of methodology, of OSM's views and determinations, rather than a solicitation of input from the remaining CAs in attendance. The CAs were informed that, despite their doubts, their review comments from 2010/2011 were considered by OSM and that the current OSM draft of the EIS and proposed rule (neither of which as of today, May 20, 2015, have been seen by the remaining CAs) were revised, and that the revisions were peer reviewed by outside experts, based on said comments. Interestingly, despite the terms of the MOUs, neither the WVDEP nor the other CAs had been asked to review the revisions or studies relied upon by OSM to revise the limited portions of the 2010 working draft the CAs had previously seen. Upon inquiry regarding OSM's next step in the EIS preparation process, the CAs were informed that the draft EIS and proposed rule were at the Office of Management and Budget (OMB), specifically Office of Information and Regulatory Affairs (OIRA), and were being circulated among other federal agencies (and not the CAs). The

CAs were further informed that, following the federal agencies' review, a draft EIS and proposed rule would be published and available to the CAs and the public for comment. However, it was indicated that if OSM needed information from the CAs, during or after the comment period, then OSM would contact them. Based on this succinct statement, the only logical conclusion derived from the briefing was that OSM was going to unilaterally publish its draft without input from the CAs, despite the terms of the MOUs.

The fundamental stages in developing an EIS are scoping, preparing and publishing a draft, receiving comments, responding to comments, and publishing a final document. At what stage in the process an action agency (generally the lead agency) proceeds with an action (e.g. proposed rule) is determined by that agency. From our perspective, OSM perverted the NEPA process because, among other things, the CAs' comments on the initial working draft were being treated as a part of the scoping stage, rather than as part of the preparation stage of the EIS process and OSM had already determined the preferred alternative (e.g. the proposed rule language) it would include in the final document.

The fact that the 2010/2011 cooperating agency comments on the OSM initial working draft is the only involvement of cooperating agencies is disappointing to put it mildly. OSM actions during preparation of this EIS denied WVDEP the opportunity to interact with the lead agency, excluded WVDEP from timely receiving information OSM relied on and in effect forestalled WVDEP from performing in the process as contemplated in the MOU and NEPA cooperating agency guidance. The dismissive approach of OSM necessitates that WVDEP position itself to provide transparent and responsible regulatory revisions and decisions to be considered and addressed consistent with the appropriate regulatory processes.

We appreciate the opportunity to provide these comments to the Subcommittee. We urge the Subcommittee to continue its investigation and oversight of the process with the goal of motivating OSM to reconsider the need for and breadth as well as consequences of its rulemaking.

Thank you for the opportunity to testify today. I would be happy to answer questions.

