

**Testimony of
Patrick C. McGinley
Before the United States House of Representatives
The Committee of Natural Resources,
Subcommittee on Energy and Mineral Resources
Hearing on “Coal Miner Employment and Domestic Energy Act
November 18, 2011**

Chairman Lamborn, Representative Holt and members of the Committee, thank you for inviting me to testify today on the proposed “Coal Miner Employment and Domestic Energy Act.”

Since 1975, I have been a member of the West Virginia University College of Law faculty where I am presently the Judge Charles H. Haden II Professor of Law. Prior to this, I served as a Special Assistant Attorney General with Pennsylvania’s Environmental Strike Force where I enforced laws regulating coal mining and mine safety prior to enactment of SMCRA.

I grew up in the Western Pennsylvania coalfields as the grandson of a coal miner who worked in West Virginia, Ohio and Alabama coal mines a century ago. My mother was born in Piper, a coal company town in the Cahaba coalfield of Bibb County, Alabama. From the time I joined the WVU faculty until the present, I have represented coalfield families and organizations in matters relating to SMCRA. I was honored to have served on then-Governor Manchin’s Independent Investigation teams that reported on the Sago and Upper Big Branch mine disasters.

As far as the proposed Bill is concerned --- its sponsor clearly understands the plight of coalfield communities – the lack of jobs and opportunities in these communities is heart wrenching. I know because I have friends and family who live and work in the coalfields. However, the lack of employment is not new. For more than a century an economic boom-bust cycle has visited the best of times and the worst of times upon those communities that provide fuel that generates fifty percent of our nation’s electricity.

It should be noted, however, the since SMCRA was enacted in 1977, coal production has increased dramatically. The loss of jobs in the coalfields is related directly to mechanization --- the ingenuity of mining engineers --- who have brought giant drag-line shovels to strip coal from mountain ridges and longwall mining that gouges two mile long swaths of a coal seam --- a mile wide – from below the earth’s surface.

The mechanized mines of the 21st century are not labor intensive – but they produce far more coal per miner than would have been thought possible when SMCRA was enacted. Interestingly, today, after a long downward trend, coal mining jobs are on the upswing. There is evidence that strictly regulated coal mining is producing more jobs while protecting the environment. That said, more jobs and better protection of the environment and coalfield communities is needed.

However, the proposed bill will, in my review, deliver neither, notwithstanding its praiseworthy goal. The language of the 5 subsections of the bill contains terms that are

extraordinarily vague and, therefore unenforceable. The bill provides no definitions by which to measure the loss of jobs or coal production. The geographical limits of the bill's prohibitions are undefined.

Such legislation, if enacted, would trigger the law of unintended consequences. Enactment of the bill has the potential to make regulation less predictable for a coal industry crying out for predictability.

The prohibition of agency power to initiate regulatory action could jeopardize the property, health and lives of coalfield families. Subsection 4, though vague, could prohibit coalfield communities from petitioning to have areas declared unsuitable for coal mining when such mining places community water supplies, homes and coalfield environments at risk.

Subsection 5 places upon the Department of the Interior an impossible task of determining what regulatory actions might be considered --- by a court --- to be unconstitutional "takings" of private property. As Justice Brennan once remarked -- determining what is a regulatory taking is "the equivalent to the physicist's search for the quark."

Subsection 5 is simply unenforceable by any legal standard and also raises serious constitutional separation of powers concerns.

As the goal of the proposed bill is to promote jobs and economic development in coalfield communities, I submit that it is important to understand the context in which SMCRA was enacted and has been administered and enforced since 1977. I examined this context in a law review article I wrote. I want to share this context with the Committee and urge it to consider the broader context before proceeding on the proposed bill.

The Coal Bust of the 1960s: New Relationships Between Coalfield Communities and the Companies

As the 1960s began, a combination of coal industry consolidation, a poor coal market, population exodus from coalfield communities, and the attendant collapse of mining employment "made for a severe and chronic economic predicament" for West Virginia's coalfield communities. West Virginia's unemployment rate was the nation's highest, more than triple that of the rest of the nation. As the coal-based economy continued to collapse, tens of thousands left the coalfields in search of work in the industrial plants of the Northeast and the nonunion textile and manufacturing plants of the Sunbelt.

Unwilling to be stuck with camp houses, commissaries, and other facilities that the newly contracted industry did not need, some camp owners altered the relationship between themselves and the miners living in the company houses. This relationship continued in many instances for decades; even today there are former coal camps where the successors in interest to the first coal company masters collect rents from descendants of early miner occupants.

The rent in most cases was and is consistent with the quality of the premises involved. For example, a 1987 Charleston (W.Va.) Gazette ("the Gazette") article related that coal camp

houses were being rented then for \$15 per month. While the rental amount seems incredibly low, one must consider that the amount reflects what is said to be the first rule of real estate valuation: location, location, location. Associated Press reporter Jules Loh described the location of the old coal camp in Eureka Hollow:

The springs from Eureka Hollow flow into Elkhorn Creek. The village on its trash-strewn banks at the mouth of the hollow is Eckman. You won't find it on a road map. Eckman consists of a grocery store, filling station and a one-room post office. Wooden planks thrown over a ditch at the uphill edge of town mark the start of the road up Eureka Hollow.

Woebegone wooden houses, many of them falling down, dot the hillsides along the road. Tree limbs, like crutches, prop up porches. Abandoned houses crumble alongside inhabited mobile homes. Coal dust trodden into black gum replaces grass. Red dog, a rust-colored mine waste turned into coarse gravel, paves driveways. Automobile carcasses rot beneath clotheslines burdened with patched jeans and faded shirts.

Roosters peck around lopsided sheds, providing a staccato music. Homemade pinwheels stuck in bare yards offer snatches of joy.

After closure of the mines connected to a company town, the landlord-tenant relationship was most frequently a “month to month” agreement. These month to month tenancies in many instances were honored by the coal camp owners for decades. However, as explained below, in the last ten years encroachment of large-scale mountaintop removal and longwall mining operations has often resulted in abrupt termination of these long relationships. With little notice, families whose history in an old coal camp extends back for many decades have been unceremoniously forced to move to make way for mining operations. In some instances, a whole community has been evicted. Within weeks of notice, homes were torched and bulldozed, leaving only empty lots where community and family roots had been planted and nurtured for the better part of a century.

Renting coal camp houses was not the only way owners of coal camps sought profit. In the 1950s many coal companies chose to sell the camp houses to their occupants. Harry Caudill describes the sales “technique” used to persuade coal camp occupants to buy the houses in which they lived:

The first step in their program to “free” the camps lay in the making of blandly optimistic statements to their employees and to the general public. They gave the impression that the company anticipated twenty or thirty years of uninterrupted mining with their employees drawing high wages. No mention was made of mechanization or of reduced payrolls. While no specific promises were made, the miner and his wife were led to believe the inhabitants of the camps could expect continued employment at union-scale wages.

The next step in the operators' disposition of coal camp houses was the announcement that they were getting out of the real estate business so their executives could concentrate on mining. Writing with razor-sharp sarcasm, Caudill describes the “con”:

Besides, said the benevolent bosses, they wanted the miners and their families to enjoy the feeling of independence and self-assurance that comes from home ownership. It was undemocratic, the Big Bosses now declared, for the company to dominate the affairs of the community. A new generation of stockholders and officials wanted the people to live proudly in their own homes and to govern their communities in conformity with the Great American Dream. The company owners opened up offices for the purpose of facilitating the sale of camp houses. Prices were not exorbitant and occupants were given purchasing priority. Buyers could pay through monthly deductions from their wages.

The timing of these sales programs was excellent--for the company owners. Most sales occurred as the winds of mechanization began to blow through the industry. The timing was not so good for a miner who might find "himself jobless before his home was cleared of debt, though most purchasers pridefully held a deed 'free and clear of encumbrances' before the discharge notices were slipped into their pay envelopes."

Although nearby underground mines closed and production from the remaining deep mining operations continued to decline, if the new home owners could find work in other mines they tried to maintain and improve what they had purchased. Moreover, a critical distinction existed between coal camp rental properties, whose residents had no incentive to spend their often meager income on property that they were merely renting and houses purchased by camp residents from company owners. Families in the latter category generally invested in the maintenance, repair, rehabilitation, and remodeling of their homes to the extent that their income would enable them to do so. Attorney Gerald Stern described how families worked to improve the camp houses they bought from the company and the investment they made to transform a camp house to a home of their own:

The miners took great pride in turning them into real homes, helping each other, or even paying someone to do the work once they saved enough money. An indoor bathroom, maybe new electrical wiring, electrical baseboard heating, new floors, a new roof, new siding to keep out the cold, maybe a new porch or even a new room. Roland [Staten] and his wife Gladys spent seven years remodeling House No. 20--adding a cesspool, paneling, insulation, siding, a new roof and furnace, and even a garage. This was no coal-camp house anymore. In those communities where mining jobs could still be found, miners receiving respectable middle-class wages often built modest new homes so that they could continue to live near relatives in what had been their homeplace for many decades.

Of course, when a camp house was purchased and the family breadwinner lost his mining job and could not find another that paid a living wage, purchasing food and fuel for heating and cooking took precedence over home maintenance and repair. During the 1960s bust, and again in the last decade and a half of the twentieth century, many residents of the former coal camps found it increasingly difficult to maintain their homes as more and more mines closed and mining jobs evaporated.

Thus, to the vicious cycle of coal industry boom and bust--long the dominant impediment to sustained coalfield economic development --was added the albatross of home ownership. Miners who purchased a coal camp house and abruptly found themselves on the unemployment dole

without promise of finding work faced the horns of a dilemma. To provide for their families, they would be forced to migrate to another region of the country leaving behind their relatives, lifelong friends, and ancestral homeplace. And, if they decided to leave, it would be difficult to sell their home. If they could find a seller at all, they were likely to sell at a significant loss. If they stayed, there were no jobs and only the largess of government relief programs was available to sustain them.

Faced with such a choice, many unemployed miners chose to seek work in other states, abandoning their homes and the life savings they often represented. Some who left could not establish themselves in other places and returned to their homeplace. Others chose to hang on, hoping against hope that another coal boom would begin and “the mines” would start hiring again. In the interim, unemployed miners would do whatever it took to survive. Roger Luster, of Eureka Hollow explained the quandary he and thousands of other coal camp families faced as coal mining jobs evaporated:

“It's rough, buddy. . . . This is home. This is where we were both born and raised. We like it here. Until I can find work, we stay. If the program I'm on runs out, well, then I guess we'll have to think about moving on. Where to? Where can a man with a family go with no place to set out for and no money to get there? Hard as it is, we want to stay here. This hollow is home.”

Unfortunately, new underground and strip mining technology and other political and economic factors dashed dreams of a new boom and “the mines,” as 1960s coal camp residents knew them, ceased to exist. Professor John Alexander Williams places the hopes of coalfield residents and four decades of reality into perspective:

One measure of the social change induced by these trends was the number of miners in West Virginia: more than 150,000 in 1945, but just over 17,000 in 1999, by which time there were fewer miners in the state than there were nurses or telephone solicitors. WalMart now has more employees in West Virginia than any coal company, although coal industry apologists still insist that “five thousand people working at WalMarts in this state don't equal 400 coal jobs.” Michael Harrington's widely acclaimed book, *The Other America*, captured the plight of the urban and rural poor at the beginning of the 1960s. The book was a phenomenon, revealing for the first time to a broad national audience that the nation's post-World War II economic prosperity had not reached many Americans. Harrington observed, “The millions who are poor in the United States tend to become increasingly invisible. Here is a great mass of people, yet it takes an effort of the intellect and will even to see them.”

The dire circumstances of many who lived in the coal camps of central Appalachia was not invisible to those who took the time to look. But, as Harrington explained, “looking” took some effort:

Poverty is often off the beaten track. It always has been. The ordinary tourist never left the main highway, and today he rides interstate turnpikes. He does not go into the valleys of Pennsylvania where the towns look like movie sets of Wales in the thirties. He does not

see the company houses in rows, the rutted roads (the poor always have bad roads whether they live in the city, in towns, or on farms), and everything is black and dirty. And even if he were to pass through such place by accident, the tourist would not meet the unemployed men in the bar or the women coming home from a runaway sweatshop.

Two years before *The Other America* was published, one important observer did take the time to visit West Virginia's coal camps. Then-Senator John F. Kennedy was shocked by what he saw and learned there during the state's 1960 presidential primary. That primary campaign was crucial to Senator Kennedy's quest for the Democratic Party's nomination and his later election to the presidency. As one West Virginia newspaper observed:

It was important to Kennedy He won the primary, showing that a Catholic could win in a predominantly Protestant state, a key victory in his drive to the nomination and the presidency. It was important as well because of what he saw, and what the reporters and TV cameramen with him saw, at the home of Burley Luster. Luster was a disabled coal miner with a sickly wife and eight hungry children living in a four-room shanty. Kennedy talked with them for 45 minutes and then, shaken, stood on the Luster's sagging front steps and promised, if elected, to press Congress for federal help in Appalachia.

Kennedy's message from Eureka Hollow alerted America to the paradox of wretched poverty in an area teeming with rich resources. Professor John Alexander Williams relates that "Kennedy and his entourage . . . traveled through West Virginia by bus and car in the early spring, when nature had not yet hidden the abuse of the land by mining The politicians and reporters following the campaign were less impressed by the state's scenic beauty than by its environmental scars and miserable roads." Despite the relief efforts at the federal level, life was as bleak as ever in the coalfields of Appalachia as the 1960s drew to a close.

2. The 1970s Coal Boom

As the decade of the 1970s began, John Denver's song *Take Me Home, Country Roads* portrayed West Virginia as "almost heaven." Denver's song put West Virginia residents in an upbeat mood, coming along "at just about the right time" as "it reflected a growing feeling of satisfaction shared by many, if not most, citizens, a feeling that one of the worst chapters in West Virginia's history was closing at last."

The coalfield economy perked up again at the beginning of the 1970s as the United States attempted to come to grips with an "energy crisis" triggered by price fixing of petroleum supplies by a Middle-Eastern cartel. The cost per barrel of petroleum soared during the 1970s as the Organization of Petroleum Exporting Countries (OPEC) ratcheted up prices in response to the Yom Kippur War and the closing of the Iranian oil fields after the Shah of Iran was overthrown in a 1978 Islamist coup. The U.S. economy reeled in the 1970s from the impact of the abrupt skyrocketing of energy prices. The nation's gross domestic product fell by 6% and unemployment doubled to 9%.

In the former company towns of southern West Virginia and other Appalachian states, significant numbers of job postings for coal mines appeared for the first time in decades as electric energy producers shifted from petroleum to a more reliable and less costly product. In West Virginia alone, more than 17,000 new miners were placed on payrolls during the period between 1973 and 1978.

Freelance journalist Rudy Abramson capsulized life in the Appalachian coalfields during the short-lived boom:

During those fabulous days in the mid-seventies, thousands of men who had left the mountains came home from distant cities to dig coal. In West Virginia, Virginia, Kentucky, and Tennessee, small truck mines that had been abandoned for years were reopened. Nearly anybody who had or could borrow money to buy a dump truck and a road grader could become a strip mine operator. Bootleggers mined without permits and got good money for gray mixtures of coal, slate, and rock. Spot market prices soared to nearly \$100 a ton and suddenly-rich independent operators lived in opulence, bought luxury cars for their wives, and concluded business deals on the golf course. Two and a half decades after the boom, Abramson interviewed people who had lived in or near the Boone County, West Virginia, town of Whitesville. They described life there during the boom:

Saturday nights in Whitesville were reminiscent of the good old days after World War II when it was hard to get through the crowds on the sidewalks. Miners' families from communities up and down the Big Coal River--Seth, Comfort, Sylvester, and Sundial--and up from Marfork, High Coal, and Seng Creek Hollows came to shop, take in a movie, and catch up on the news. You could forget finding a parking place in the middle of town. The good times did not last.

Coalfield Communities: 1980 to Present

The boom of the 1970s was short. As oil prices increased in the 1980s, and midwestern utility companies turned to cheaper western coal in the 1990s, the economy of the Appalachian coalfields cycled again into a bust phase. Another factor responsible for this shift was the continuing loss of mining jobs in Appalachian underground mines resulting from even further mechanization. In 1980, coal jobs had dropped by 7,000 from the boom high of almost 63,000 in 1978; five years later only 35,813 miners were working in West Virginia. Ten years later, in 1990, coal mine employment had dipped further to less than 29,000. By 2002 less than 15,000 miners worked in the state. Today, --- ten years later --- and notwithstanding SMCRA, NEPA and Clean Water Act requirements more than 20,000 coal miners are at work in West Virginia. Similar patterns of the natural resources boom bust cycle occur in most coalfield communities.

The recession of the early 1980s further weakened West Virginia's economy. By 1984, West Virginia had the nation's highest unemployment rate and "economic indicators pointed to continuing difficulties, with recovery trailing far behind that of the other states."

Another important factor in the economic plight of West Virginia from the 1980s to the present has been the coal industry's continuing political domination of state government. In 1985, the West Virginia Legislature enacted the "super tax credit," a law supposedly intended to

expand economic development in the state. In 1986, the legislature extended the super tax credits, provided that existing state companies increased hiring and modernized their operations. Given the grip of Coal industry interests on the state, it is not surprising that coal companies received nearly ninety percent of the total amount of these credits.

This coal lobbyist-generated windfall for industry harmed the state economy rather than promoting economic development. One observer has suggested that:

[I]n their long-range effect, they may have actually compounded the very problem they were supposed to alleviate. The study of the super tax credits in 1990 revealed that the number of jobs in coal mining had fallen by 1,300 in spite of an increase of 13.3 percent in coal production. The adverse effects of the super tax credits on state revenues and on the general economy led in 1990 to *45 legislation to prevent coal companies from using the super tax credits to avoid payments of severance taxes. . . . [T]ax officials estimated that about 20% of the coal mined in the state was produced free of any business taxes.

During 1985-1989, under the guise of stimulating new coal development, the state's Workers' Compensation Fund (WCF) slashed premiums paid by coal companies by thirty percent and awarded generous refunds to companies. By the beginning of the 1990s, the WCF faced a deficit of \$1.2 billion.

While West Virginia ended the 1970s in better economic shape than it had been in for decades, state government corruption in the 1980s eliminated the economic gains. Journalist Rudy Abramson interviewed Randy Sprouse who had lived Whitesville, West Virginia during the 1970s boom. Sprouse remembered the prosperity of the moment: "You had two or three clothing stores, shoe stores, furniture stores, a whole bunch of restaurants, taverns, a movie theater, and a bowling alley. . . . Anything you wanted, you could get right there in Whitesville. You didn't have to leave Whitesville for anything." Whitesville today is depressingly different:

Most of [what Randy Sprouse described] has been gone for years. The sidewalks of Whitesville are usually empty. Vacant stores dot the town's main drag and windows are covered with dust from coal trucks that rumble through night and day. Traffic lights work intermittently. Parking meters were removed long ago.

The economic plight of coalfield communities in the 1980s continued throughout the next decade as new mining technologies replaced more labor-intensive methods. While Appalachian coal production approached record levels in 2003, the number of coal miners declined to its lowest level since the nineteenth century. The coalfield economy continues to stagnate with high levels of unemployment in those areas which lead in coal production.

Unable to rely on state government for economic and environmental protection, the communities looked to Washington for assistance. The federal assistance that John F. Kennedy had promised from the front porch of Burley Luster's Eureka Hollow home in 1960 materialized in a plethora of federal programs such as food stamps and Medicaid, which continue to this day to sustain many who remain in the old camps of central Appalachia. One new federal program, the Surface Mining Control and Reclamation Act of 1977, held out the promise of protecting

coalfield communities and their citizens from the environmental, economic, and social harm that unregulated coal mining had caused. The following discussion examines how that promise was effectuated.

Regulation of the Adverse Impacts of Coal Mining

When historian John Williams completed *West Virginia: A History*, he made predictions about the future of coalfield communities:

In terms of short-run market considerations, strip mining is the swiftest and cheapest way to expand coal production Stripping is the most costly method of producing coal, however, if social and environmental factors are calculated. . . . The future of tourism and recreation depends to a significant extent on what is done about surface mining and other environmental issues Yet the political impact of recreation industries is diffuse, and the aesthetic and human values that environmental degradation subverts are difficult to measure. By contrast, the coal industry retains much of its old-time political power . . . and can readily deploy it to defend immediate and specific economic concerns. It appears that Professor Williams was especially prescient when he predicted that “environmental controversies promise to generate the most lively and probably the most crucial debates that West Virginia faces in the last quarter of the twentieth century.”

Professor Williams's prediction that environmental controversies would come to the fore as the twentieth century came to a close was not based on gut instinct or crystal-ball gazing. Rather, as a historian, Williams based his predictions on an appreciation of the policies, politics, and players that had shaped West Virginia's past and his recognition of the old and new forces that were then in motion vying for control of the extraction of Appalachia's vast coal wealth.

As students of history are aware, most of the enterprises of the Industrial Age created significant adverse externalities. For example, effluent from steel and chemical manufacturing poisoned thousands of miles of the nation's streams and air pollution from the same plants clouded urban skies. For the better part of a century, the nation's polluting industries were given a free pass by Americans who agreed with industry's plea--“where there's smoke there's jobs.”

It was not until the mid-1960s that people in the United States began to appreciate the extent to which industrialization had externalized costs to their own communities. Citizens' demand for pollution cleanup and regulation of the adverse effects of industrial activities spurred Congress to enact the National Environmental Policy Act of 1969 and reached its apogee in 1977 with passage of the federal Surface Mining Control and Reclamation Act. No other federal environmental regulatory statute contains as many opportunities for citizen involvement nor grants to citizens such a broad array of statutory rights that may be used to influence the law's administration and enforcement than does SMCRA.

To understand the current struggle of the people of the coalfields for economic and environmental justice, one must understand how SMCRA came to be law and the way in which its strict mandate has been administered and enforced. The following discussion begins with an examination of SMCRA's origins in the oppressed and poverty stricken Appalachian coal camps

in the 1960s. SMCRA's history is then traced from enactment through criticism of state and federal enforcement to the current extraordinary controversy over enforcement of SMCRA's so-called "mountaintop removal" regulatory regime.

Historical Overview of the Pre-SMCRA Period

Prior to the enactment of SMCRA in 1977, unregulated surface and underground coal mining created enormous environmental harm throughout the Appalachian coalfields. These externalities created disincentives for local economic development as well as other adverse social and economic consequences. Generally, local people experiencing these costs of mining also enjoyed the benefits of jobs created by mining. The adverse environmental impacts of mining received scant notice in the Appalachian coal camp struggle for survival during the first half of the twentieth century. Like the pervasive pollution that accompanied steel mills and chemical plants, coal mining's adverse impacts were seen as part and parcel of the industrialization.

The most visible adverse impacts of coal strip mining were the scars gashed in Appalachian mountainsides. Surface mining strips away forest vegetation, causing erosion and attendant stream sedimentation and siltation, accompanied by negative impacts on aquatic life and drinking water supplies. In some coalfield regions, iron-laden sulphuric acid mine drainage pollution from underground mining produces red-orange stained stream beds and renders some watercourses ecologically sterile. Underground and strip mining contaminated or depleted underground aquifers that provide domestic and farm water supplies to many coalfield families. Loud noise and dust from blasting and earth-moving activities disturb nearby communities and wildlife. During mining, dust and debris often fill the air as soil and underlying rock strata are blasted apart, earth is moved, and coal extracted. Landslides caused by indiscriminate dumping of mine spoil downslope on steep Appalachian mountainsides buried cars, homes, and sometimes killed people.

From the beginning of these efforts to regulate strip mining, the coal industry cooperated with local and state politicians to oppose meaningful state regulation. Economic competition between coalfield states for jobs and tax revenues fueled this opposition. Instead of placing limits on the worst of strip mining abuses, legislators chose to protect their own domestic industry. Obviously, they reasoned, a state choosing to pass laws to reduce the adverse consequences of coal mining would impose increased costs on its own coal industry. Those costs would not be incurred by coal operators in other states that chose to give carte blanche to their own coal operators. State politicians recognized that the price of coal produced in a state forbearing regulation would be cheaper and thus more competitive in the market than coal produced in a state that imposed environmental regulatory costs on its operators.

By the end of the 1960s, public concern over the adverse impacts of coal mining had grown to a crescendo of opposition. It was generally recognized that the states could not and would not impose meaningful regulation on coal companies operating within their own borders. Coalfield citizens and other critics of strip mining realized that only a statute passed by Congress could end the states' "race to the bottom." A federal law imposing uniform national regulatory standards would nullify the strongest argument raised against regulation--in-state coal operators' competitive position vis-à-vis operators in other states. Operators in every state would be

required to play by the same federal rules. The race to the bottom pressures would be eliminated by instituting a uniformly applicable federal regulatory program.

Years of national media attention and unrelenting pressure from coalfield residents made it impossible for Congress to ignore coal stripping. Proponents of federal regulation accumulated massive documentation of the enormous costs coal mining had externalized onto coalfield communities. Furthermore, Congress faced a national outcry against irresponsible coal mining when the totally avoidable collapse of a huge coal waste impoundment at Buffalo Creek, West Virginia killed more than one hundred people, injured thousands more, and wiped out whole communities.

Twice Congress passed legislation, and twice the coal industry and its state political allies succeeded in persuading President Gerald Ford to exercise his veto power. But with the transition to the Carter Administration came cooperation from the executive branch, and Congress once again passed legislation regulating surface mining. On August 3, 1977, President Jimmy Carter signed the Surface Mining Control and Reclamation Act of 1977. Finally, federal regulation was being imposed on the coal industry in an effort to minimize the adverse impacts of underground and strip mining.

SMCRA's Cooperative Federalism Approach to Regulation

Paralleling other federal environmental regulatory laws, Congress designed SMCRA as a “cooperative federalism” statute. Congress found that “the cooperative effort established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.”

SMCRA's cooperative federalism scheme instituted an extensive and permanent federal regulatory presence to deal with problems previously within the sole domain of the states. Congress created a new Office of Surface Mining (OSM) to oversee implementation, administration, and enforcement of SMCRA. Congress intended that states have the option to assume “exclusive jurisdiction” to administer and enforce SMCRA, subject to compliance with minimum statutory standards and compliance with OSM's implementing regulations. Moreover, state assumption of “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” was made specifically subject to OSM's oversight and enforcement power. If an OSM-approved state fails to implement, enforce, or maintain its program in accordance with SMCRA, OSM must enforce part or all of such program or assume exclusive federal jurisdiction over all mining operations within the state.

Problems immediately arose pertaining to OSM's administration of SMCRA's phased implementation. OSM's effort to promulgate permanent program rules produced one of the most extensive rulemaking proceedings in the history of administrative law. Two drafts were submitted for public comment; 57 public meetings and 25 days of public hearings were held; 589 public comments were received by OSM; 22 different task forces, composed of over 100 technical experts from more than 20 agencies, evaluated and revised the draft rules into their final form.

In the quarter century since enactment of SMCRA, the environmental degradation and attendant adverse social and economic impacts on coalfield communities continue, albeit not at the catastrophic levels that existed in the pre-SMCRA years when coal mining was essentially unregulated. One of the best examples of such continuing regulatory failure can be seen in the failures of state and federal enforcement of SMCRA's requirements pertaining to huge mountaintop removal strip mines that have proliferated in the southern West Virginia coalfields. It is there, in close proximity to coalfield communities that a specific SMCRA promise of environmental protection and local economic development was broken by coal operators and compliant federal and state regulators.

Mountaintop Removal Strip Mining

A decade and a half after enactment of SMCRA, some believed the statute was reducing abuses of coalfield lands and people caused by conventional strip and underground mining. Notwithstanding a significant measure of success, some coalfield communities continued to feel the effects of inadequately regulated mining that had plagued them decades earlier. Many of these post-SMCRA impacts were produced by new surface and deep mining techniques that had gained favor with the nation's biggest coal producers.

A major transformation of the coal industry triggered this post-SMCRA departure from conventional mining methods. Corporate mergers, consolidations, and bankruptcies accompanied intense competition between eastern and western coal mining operations. A combination of all of these events foreshadowed the growth of "mountaintop removal"--a strip mining technique that existed only on a small scale before SMCRA. One commentator observed:

Because of [competition with] cheap western coal, mountaintop removal suddenly boomed in central Appalachia in the 1990s. Trucks and power shovels have grown to gargantuan sizes, and drag lines swing shovels holding up to 100 cubic yards of rock. Mountaintop mines that reduce ridges and peaks by hundreds of feet now sprawl across more than 2,000 acres. An estimated 400 square miles of southern West Virginia mountains and ridges have been leveled and 1,000 miles of streams buried beneath debris blasted, shoved, and dumped into narrow valleys. The move to the use of large-scale mountaintop removal operations would make mining in Appalachia more efficient, productive, and--most importantly for coal operators--much less labor-intensive. Mechanization and concomitant massive job losses attendant stripping operators' embrace of mountaintop removal were paralleled by the underground operators' adoption of new deep mining technology.

The coal industry's competition-driven movement to new mining methods in central Appalachia adversely impacted coalfield communities both above and below the earth's surface. ***On both fronts, coal production and man-hour efficiency in Appalachian mines increased dramatically. However, as mountain ridges were blasted apart and more miles of headwater streams were buried under huge valley fills, mine jobs continued to hemorrhage. Promises that mountaintop removal mining would spur job-creating commercial, industrial, and residential development have gone unfulfilled.***

Mountaintop Removal Mining Methods

SMCRA regulations define mountaintop removal as “surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing substantially all of the overburden off the bench and creating a level plateau or gently rolling contour, with no highwalls remaining.” As traditional contour and area mining rapidly declined during the 1980s and 1990s, growing numbers of mountaintop removal mines began clear-cutting the steep-sloped hardwood forests and chopping off mountaintops in eastern Kentucky and southern West Virginia. The underlying coal seams there lie sandwiched in layers of rock and soil hundreds of feet thick. In mountaintop removal operations, each layer of the rock above a coal seam is blasted and removed, the coal is extracted, and then the next layer is removed until the removal of rock and coal layers is no longer cost-effective.

Operators put some of the removed rock back on the flattened mountaintop. Because rock blasted from its natural state “swells,” coal operators assert there is usually inadequate room available on the flattened mountaintop to place this “swell” or “excess spoil.” The spoil is dumped in adjacent valleys, often creating huge “valley fills.” A single valley fill may be as much as 1,000 feet wide and extend several miles at the upper reaches of Appalachian headwater streams.

Over the course of more than two decades, the West Virginia Department of Environmental Protection (DEP) and its predecessors authorized the coal companies to bury at least 786 miles of West Virginia streams under valley fills. Thousands of acres of hardwood forests were leveled. The United States Fish and Wildlife Service found that “the loss of these streams and their associated forests may have ecosystem-wide implications.” Beginning in the late 1980s, the size and number of mountaintop removal mines and their associated valley fills increased, especially in southern West Virginia, which has enormous reserves of high-energy, low-sulfur coal coveted by electric utilities.

The 95th Congress Placed Strict Limits on Mountaintop Removal Mining Under SMCRA

Ordinarily, when a state grants a permit to conduct strip mining operations, a coal operator is required to restore mined land to its approximate original contour (AOC). When Congress was debating SMCRA, central Appalachian coal operators and coal-state congressional representatives sought an exemption from the AOC requirement for mountaintop removal mining. Mountaintop removal mining, they argued, could produce flat land for development--a commodity in very short supply in the mountainous coalfields of West Virginia, Kentucky, Virginia, and Tennessee. Congress accommodated these requests, but placed severe limitations on those situations where mountaintop removal would be allowed under a variance from the generally applicable AOC reclamation requirement.

In order to qualify for a variance from the AOC requirement, SMCRA requires that a mountaintop removal permit applicant propose a postmining land use that falls in one of five specific categories: industrial, commercial, agricultural, residential, or public facility (which includes recreational facilities). In addition, the permit applicant must also prove that the *59

proposed postmining use constitutes an equal or better economic or public use of the affected land as compared to the premining land use. *An applicant seeking an AOC variance must also provide specific plans for its proposed postmining land use and accompanying assurances. Finally, SMCRA requires that the applicant demonstrate that the proposed use would be consistent with adjacent land uses, existing state and local land-use plans and programs*, and that all other requirements of SMCRA will be met. In granting a mountaintop removal permit with an AOC variance, a state must impose certain specific public safety and environmental protection requirements on the permittee.

Where is the Promised Economic Development? Where are the Post-Mining Jobs SMCRA Promised as the Trade-off For Allowing Mountaintop Removal?

In a 1997 interview, longtime West Virginia coal industry lobbyist Ben Green told Business Week, “With mountaintop removal, you get 100% mineral recovery, you can't mine again, and you get better land use than you ever had in its natural state.” If by “better land” Greene meant “flatter” land then his statement was true. Mountaintop removal had created tens of thousands of acres of flat land. Greene's claims echoed the arguments that persuaded Congress to allow the practice only if the resulting flattened mountaintop was to be used as part of a coal operator proposed development that would create jobs for coalfield communities and promote local economies.

Ben Greene was not alone in trumpeting the value of flat land. As they have from SMCRA's inception, coal industry and government officials continue to tout flattening mountain ridges as a panacea for economic development. There was, and is, one problem with the scenario--mountaintop removal has played a significant role in the precipitous decline in coal mine employment, and has flattened and deforested mountaintops that now lay barren, generating weeds rather than jobs. As explained below, a quarter century after enactment, SMCRA's promise to coalfield communities of shopping centers, industrial plants, and new affordable housing--all located on flattened mountaintops--has been broken.

In August 1997, Penny Loeb, a Senior Editor at U.S. News & World Report, broke the story of mountaintop removal's adverse impacts on coalfield residents. Her article, “Shear Madness,” exposed to a national audience the social and environmental injustice attendant the large-scale expansion of mountaintop removal in the coalfields. Loeb wrote:

[C]oal companies and some state officials note that strip mining provides high-paying jobs--weekly pay averages \$922. And some contend that West Virginians are better off with their mountains flattened--several dozen buildings, including four schools and three jails, have been built on them so far.

. . . But the costs are indisputable, and the damage to the landscape is startling to those who have never seen a mountain destroyed. Topographic and landscaping changes leave some regions more vulnerable to floods. . . . And state employment records suggest the jobs argument is not very compelling. Mountaintop removal accounts for only 4,317 workers in the state--less than 1 percent of its job force. Overall, mining employment in the state has fallen from 130,000 in the 1940s and 1950s to just 22,000 last year. Loeb catalogued multiple impacts on coalfield communities caused by the proliferation of mountaintop

removal mines:

Thirty floods have occurred in the past two years in areas where watersheds were bared and redesigned, and several people have lost their lives in such floods. Whatever the role of mining in the state's overall economy, its impact on nearby communities is devastating. Dynamite blasts needed to splinter rock strata are so strong they crack the foundations and walls of houses: Homeowners filed 287 blasting complaints with the state in the past year. Trucks full of coal rumble past some people's front porches at the rate of 20 an hour, 24 hours a day. Mining dries up an average of 100 wells a year and contaminates water in others.

The claims that mountaintop removal would bring economic development and prosperity to coalfield communities are not supported by the facts.

Thirty floods have occurred in the past two years in areas where watersheds were bared and redesigned, and several people have lost their lives in such floods. Whatever the role of mining in the state's overall economy, its impact on nearby communities is devastating. Dynamite blasts needed to splinter rock strata are so strong they crack the foundations and walls of houses: Homeowners filed 287 blasting complaints with the state in the past year. Trucks full of coal rumble past some people's front porches at the rate of 20 an hour, 24 hours a day. Mining dries up an average of 100 wells a year and contaminates water in others.

Loeb's report was followed by a comprehensive series of investigative newspaper articles in the Charleston Gazette, beginning in 1998, which examined mountaintop removal mining and its impacts on the economy and people of the coalfields. The series, "Mining the Mountains," exposed the myth promoted for two decades by coal industry advocates. The claims of industry lobbyists, politicians, and regulators that mountaintop removal would bring economic development and prosperity to coalfield communities were shown to be demonstrably false.

State Mountaintop Removal Permitting Receives Scrutiny

The first article in the series described a DEP hearing on the application for the largest strip mine ever proposed in West Virginia. The hearing was held in the gymnasium of an aging Logan County elementary school; more than 125 people jammed the narrow bleachers. Ward described the scene as follows:

Just over the ridge from the school, Arch Coal Inc. had stripped 2,500 acres of the Logan County hills around Blair Mountain. The company has applied for a permit to mine 3,200 more.

If state regulators approve the new permit, giant shovels and bulldozers will eventually lop off the mountaintops of an area as big as 4,500 football fields.

Residents of the tiny communities along W.Va. 17 complained Arch Coal's existing mine already makes their lives miserable. Why, they asked regulators at the hearing, should the company get a permit to mine more?

Melvin Cook of Blair was the first to walk across the gym floor to a microphone and

speaking up. He complained about the blasting. . . . “You can't bear it,” Cook said. “It has torn my house all to pieces.”

Residents of nearby communities were not the only people who attended the public hearing.

A solid block of the gym's bleachers was filled with miners and their families who said that “they wanted jobs at the new mine. But they agreed the company should make sure mining doesn't disturb area residents.”

The Gazette series told of giant machines that “towered over old-time shovels and bulldozers” used in earlier coal stripping. Those monster machines “can literally move mountains,” the newspaper related; only a few skilled equipment operators stood at the controls. Gazette readers also learned that in twenty years nearly 500 square miles of the state had been strip mined; from 1994 to 1998, the average size of the new mines had doubled each year; and, in 1997, DEP had issued new permits totaling 31 square miles, an area larger than Charleston, West Virginia. Today, the areas and coalfield communities impacted have grown substantially, while coal production continues to produce high revenues for coal companies – but few of the jobs or economic development promised by SMCRA.

State Mountaintop Removal Permitting Decisions Questioned by Environmental Protection Agency

The Gazette also closely examined specific mountaintop removal permitting decisions by state and federal agencies. The series noted that Arch Coal, Inc.'s subsidiaries had been seeking agency approval to permit larger and larger mines which would bury long segments of mountain headwater streams.

Coal Industry's Initial Response to Media Investigations of Mountaintop Removal

At the beginning of the “Mining The Mountains” series, Ken Ward Jr. explained the initial response of coal industry officials and state and federal regulators: “Coal operators say all of this attention is unwarranted. Some have hauled out standard jobs-vs.-the-environment arguments. Others insisted the fight over stopping strip mining ended decades ago--and that they won.”

A coal mine manager told Ward, “I want everybody to understand that we have been trying to work with the community[.] . . . It's not as one-sided as everybody tries to make it appear.” An official of the DEP Office of Mining and Reclamation said, “We think we're doing a daggone good job, but we could always do better.” An environmental engineer in EPA's Region III told Ward: “We are definitely evaluating the overall issue[.] . . . But at this point, we're just talking among ourselves[.] . . . It's a little early to say what EPA will do right now.”

Regulators Ignore SMCRA's “Approximate Original Contours” Mandate

As discussed above, SMCRA requires most strip mines to be reclaimed to their approximate original contours (AOC). SMCRA, however, allows the AOC requirement to be waived for mountaintop removal mining operations in certain narrowly circumscribed situations. In order to

qualify for an AOC waiver, a permit applicant is required by SMCRA to propose commercial, industrial, residential, agricultural, and/or public uses for the land after it has been stripped, leveled, and reclaimed. The obvious goal of waiving the AOC restoration mandate was economic development that would bring new jobs and prime the pump for coalfield community economies.

A Charleston (W. Va.) Gazette investigation raised serious questions about state and federal agency oversight of state decisions to waive AOC restoration requirements for mountaintop removal mines. The Gazette described a visit to DEP's Logan County office and his discussions there with officials in charge of permitting mountaintop removal mines:

Ken Stollings points to the maps and charts on his office wall to show how Hobet Mining will turn the rugged peaks and valleys around Blair Mountain into flat plains and a few rolling hills.

Stollings, a Division of Environmental Protection engineer, shows the changes to his boss, agency permit supervisor Larry Alt. Asked if this proposal meets the legal mandate that mined land be reclaimed to its "approximate original contour," Alt and Stollings just laugh.

"We just can't stack it as high as God did," Alt says with a shrug.

Approximate original contour, or AOC, is the heart of the federal strip mining law. But among many West Virginia regulators, it's becoming a joke. The Gazette reported that the AOC waiver rules were "routinely skirted by dozens of huge mountaintop-removal strip mines." After coal companies blasted and ripped apart mountain ridgetops to reach multiple coal seams, state regulators allowed them to avoid the expense of restoring the land to AOC. Instead, DEP permitted coal operators to take the cheapest path: shoving and dumping the remains of mountains-- millions of cubic yards of rock and dirt--on top of headwater streams in nearby valleys.

Information contained in DEP's own files revealed a systemic failure on the part of state regulators to apply SMCRA's AOC requirements to mountaintop removal mines. An The investigation found that in 1997 alone, DEP had authorized twenty permits for mountaintop removal mines to level twenty square miles. That study showed that the companies obtaining these permits rarely ask for or received approximate original contour exemptions for mountaintop removal." A West Virginia Freedom of Information Act request revealed that only one-quarter of active mountaintop removal mines had obtained the AOC exemption. Thus, 75% of active mountaintop removal mines in West Virginia were being operated in violation of state and federal law.

A freedom of information Act request led an investigative reporter to a memorandum written in the early 1990s by OSM officials that, for the first time, resembled an agency AOC policy. Because the policy contained no guidance for permit reviewers on how to define AOC, it served as the basis for state officials' later defense that they had no idea what AOC meant when it came to mountaintop removal mines. The upshot of this bureaucratic sleight of hand was that operators could lop hundreds of feet off mountaintops, dump "excess spoil" into valleys, and level off thousands of acres--all under the guise of meeting SMCRA's AOC requirement.

By definition a mountaintop removal mine is one that removes entire coal seams running beneath a mountaintop. Many of the mines permitted without AOC variances reduced the elevation of mountain ridges by hundreds of feet. *A mountaintop removal mine that reclaims mined land to its approximate original contours is obviously an oxymoron--but an oxymoron that regulators were willing to embrace so that coal operators could avoid SMCRA's strict economic development requirements applicable to mountaintop removal mining. The most egregious impact of DEP's failure to enforce the AOC requirement was the denial of jobs and permanent economic development that should have accompanied mountaintop removal mining operations.*

The Response of Industry and Regulators to the Revelation that AOC Requirements Had Been Ignored for Two Decades

Upon learning the results a newspaper's investigation of DEP's systemic violation of AOC permitting requirements, coal lobbyists at first admitted that problems might exist. However, they insisted that only technical matters were involved. The president of the West Virginia Coal Association told the Gazette: "It sounds like to me [like DEP] needs to take a look to see if they meet all the requirements[.] . . . Apparently, there are some issues to be addressed, but they have little [to] do with environmental compliance."

An A.T. Massey public relations officer asserted, "Massey Coal companies have complied with the reclamation regulations[.] . . . On any permit that does not include an AOC variance, the plans for reclaiming the mine site meet state guidelines for AOC standards." David Todd, then an Arch Coal executive asserted, "We have been applying for mining permits and they have been reviewed by and granted by DEP, with oversight by OSM[.] . . . That's got to be pretty fair evidence that [mountaintop removal mines] are being approved and operated according to and in compliance with the law."

A supervisor of the OSM Charleston field office was questioned at a press conference where he appeared with the visiting OSM Director. OSM maintained that DEP was not issuing mountaintop removal permits without AOC variances. When later confronted with a list of such permits, the federal officials promised OSM would look into the allegations. "Maybe we should put the burden on the state to come up with some criteria," an OSM official said. "It's something we might want to tighten down on. I don't think the state has paid enough attention to AOC and postmining land uses and configurations."

A Promise Broken: Systemic Waiver of Mountaintop Removal Requirements Negate SMCRA's Economic Development Goal

A Charleston Gazette investigation during the summer of 1998 examined long-standing claims of coal industry advocates and government regulators, who championed mountaintop removal as an economic development engine. The Gazette published a devastating article documenting how SMCRA's promise of economic development had been ignored by the West Virginia coal industry with the acquiescence of state and federal regulators.

The Gazette found that for more than two decades, SMCRA's mountaintop removal requirements had been consistently ignored by regulators and coal operators. Coal companies had been allowed to flatten mountains and dump hundreds of millions of cubic yards of “excess spoil” in valleys obliterating hundreds of miles of headwater streams.

The Gazette investigation found that over two decades, DEP had permitted more than fifty square miles for mountaintop removal mines; the plans for “economic development” at those mines were limited exclusively to pastures, hayfields, forests, or range lands. On the contrary, the Gazette's investigation showed that the most popular land use proposed for mountaintop removal sites was “fish and wildlife habitat.” Incredibly, while “fish and wildlife habitat” was not a post-mining land use recognized by SMCRA, it accounted for almost one third of the total mountaintop removal acreage permitted by DEP. In the last decade however there has, thankfully been at least some effort to create post-mining development on MTR mine sites. That effort has been meager, to say the least. The full potential of SMCRA’s post-mining economic development mandate has been ignored.

The Response of Industry and Regulators to the Lack of Economic Development

When confronted with the results of the Gazette's postmining land-use investigation, industry lobbyists agreed there had not been much development, but claimed it was not the fault of coal operators. ““Are you going to have a Toyota plant at Wharncliffe, West Virginia?”” one asked. Answering his own question, he said, ““Probably not. But I don't think the law obligates the mining industry to put up bricks and mortar. Our responsibility is to make sure the opportunity is there.””

The former President of the West Virginia Mining and Reclamation Association said SMCRA's requirements were outdated and ““too stringent for today's large mountaintop removal mines.”” An official with DEP's Office of Mining and Reclamation said that all the involved parties needed to look at postmining uses: ““There's not a lot of pre-planning done in terms of development[.] . . . There is a need for some long-term land use planning considerations. It's hard for us to say what's going to be out there and who is going to develop what and what the future holds.””

Conclusion

It has been more than a decade since these questions were raised about the failure of state and OSM officials to require coal operators engaged in MTR mining to provide the industrial, commercial, and residential economic development mandated by SMCRA --- long-term economic development sorely needed in the Appalachian coalfields.

It is laudable that members of this Committee and the author of the Bill seek ways to bring much needed jobs to coalfield communities. There is no disagreement that unnecessary regulations can impede economic development and deprive our nation of much-needed jobs at a time of nationwide concern about our economic future.

However, make no mistake, environmental protection of coalfield communities --- their land and their water --- and economic development --- are not mutually exclusive. While the proposed bill is no doubt well intended, it does not hold out a serious promise for the creation of jobs in America's coalfields. Removing virtually all power of the Department of the Interior to take regulatory action to protect coalfield communities is neither wise policy nor will this Bill impose legally enforceable standards that could possibly create the employment opportunities that are the sponsor's goal.

With all due respect, this Committee can take the initiative to investigate the failure of state and federal regulators to honor SMCRA's promise of post-mining industrial, commercial and residential development on lands permitted for MTR mining.

When Congress enacted SMCRA in 1977 it recognized a trade-off -- flattened mountain ridges would be replaced by long-term economic development --- creating jobs in coal regions where the boom-bust economic cycle had resulted in high unemployment and few opportunities. For those who desire jobs in the coalfields, one must ask --- why has SMCRA's mandate been almost totally ignored.

This is not to say, however, that jobs are more important than the homes, water supplies, and the environment of coalfield communities. Recent studies have raised serious questions about the possible relationship of large scale coal mining operations and adverse health impacts experienced by those who live near these mines. Moreover, peer-reviewed studies by scientists indicate very serious concerns about the impact of some coal mining on water quality of entire watersheds in Central Appalachia.

This Committee and this Congress should heed these warnings and thoroughly examine coal mining's externalities before deciding that regulation by the Department of the Interior is unnecessary, kills jobs and inhibits the spirit of creativity and ingenuity that have long characterized American industry and business.

The lessons of the past provide important messages for the policy makers of today. Those lessons -- of the Buffalo Creek disaster, of the Farmington No. 9 mine, and more recently of the Massey Energy Upper Big Branch Mine explosion speak to us today. Black lung disease is on the rise among coal miners, our coalmines are still not safe enough and enforcement of SMCRA and the Clean Water Act still does not adequately protect coalfield communities.

I would be glad to answer any questions and to provide any additional information that may be helpful to the Committee. Thank you.