

Statement of
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Before the United States Senate
Committee on Energy and Natural Resources
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Chairman Bingaman, Senator Murkowski, and members of the Committee, thank you for inviting me to participate in this hearing on the Secretary of the Interior's Order No. 3315 to Consolidate and Establish the Office of Surface Mining Reclamation and Enforcement within the Bureau of Land Management.

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 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.

Today, I have the privilege of appearing before the Committee to speak on behalf of coalfield citizens who were surprised and shocked by the Secretary's proposal to bury the Office of Surface Mining ("OSM") within the behemoth bureaucracy of the Bureau of Land Management ("BLM").¹ Their opposition to Order No. 3315 is based upon the following:

- Order No. 3315 violates SMCRA and contravenes Congress's carefully crafted structure for regulating the adverse impacts of surface and underground coal mining; it also conflicts with the Department's long-standing interpretation of OSM's relationship with the Office of the Secretary;
- The Secretary's action is precluded by the specific language of the statute barring the Secretary from co-mingling employees of any federal agency that "*promotes the development or use of coal*" with OSM - a prohibition that clearly applies to the BLM;
- The Secretary's Order was conceived in a vacuum with no prior notice or consultation with Congress, the coal industry or coalfield citizens; rather than saving money and making both agencies more efficient, the Order would create additional costs and inefficiencies as well administrative chaos;
- Underlying Order No. 3315 is the Office of the Secretary's profound miscomprehension of the role Congress designed for the Secretary and OSM within SMCRA's structure.

¹ See Appendix "A" for list of those represented.

Secretarial Order No. 3315 Violates the Letter and Spirit of SMCRA

Congress carefully designed SMCRA to insure OSM would act as an independent entity within the Department of the Interior under the direct supervision of the Secretary. To accomplish this purpose, SMCRA §201 (b), 30 U.S.C. §1211(b) provides:

The Office shall have a Director who shall be appointed by the President, by and with the advice and consent of the Senate, . . . The Director shall have the responsibilities provided under subsection (c) of this section and those duties and responsibilities relating to the functions of the Office which the Secretary may assign, consistent with this Act.

SMCRA subsection §201 (c), 30 U.S.C. §1211(c) mandates that:

The Secretary, *acting through the Office, shall*

(1) administer the programs for controlling surface coal mining operations which are required by this Act; review and approve or disapprove State programs for controlling surface coal mining operations and reclaiming abandoned mined lands; [and] make those investigations and inspections necessary to insure compliance with this Act[.] (emphasis added).

The legislative history of SMCRA explicitly describes Congress's purpose in creating and placing OSM in the Department of the Interior:

*To insure administration of the program by an independent agency with neither a resource development (the promotion of mining, marketing, or use of minerals) or resource preservation (pollution control, wilderness, or wildlife management) bias or mission, this title establishes the Office of Reclamation and Enforcement in the Department of the Interior. This Office will be separate from any of the Department's existing bureaus or agencies. It is intended that the Office exercise independent judgment in implementing the Act.*² (emphasis added).

Thus, Congress mandated that the Secretary act through OSM in administering and enforcing SMCRA. Then Secretary Andrus recognized this direct relationship between the Secretary and an OSM exercising independent judgment when the permanent regulatory program regulations were promulgated in 1979.³ Importantly, every subsequent Secretary of the Interior for more

² See COMMITTEE ON ENERGY AND NATURAL RESOURCES; SENATE REPORT NO. 95-128; 95TH CONGRESS 1st Session; S. 7, at 63-64. (emphasis added)(Hereafter "Senate Report 95-128"). See also, H.R. CONF. REP. 95-493, H.R. Conf. Rep. No. 493, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 728, at ___, 1977 WL 16021 (Leg.Hist.) (Senate and House Bills substantially similar).

³ See 44 F.R. 15313 Mar. 13, 1979 and 44 F.R. 49684 (Aug. 24, 1979), 30 C.F.R § 700.1 – §700.4.

than three decades through both Republican and Democratic administrations has accepted this interpretation of SMCRA without question. Order No. 3315 is clearly contrary to, and conflicts with, the Department of Interior's long-standing interpretation of the Act.

An administrative agency may be authorized to change its original interpretation of ambiguous provisions of an organic statute, but it cannot amend the statute by administrative fiat. Nor may an agency camouflage a major policy decision under the guise of making minor adjustments of personnel and assignments within an agency.⁴ In this regard, it must be noted that the Secretary's proposal to restructure SMCRA's abandoned mine lands (AML) program and fee collection system has major policy implications. The 2006 AML program reauthorization by Congress was carefully crafted and should not and cannot be altered through a Secretarial Order that is both inappropriate and unlawful.

Secretarial Order No.3315 would alter the clearly delineated unambiguous long-standing relationship of the Secretary to OSM and impact statutorily-mandated functions without the express grant of such authority by Congress. The Secretary may not restructure SMCRA by such an order and his attempt to do so is *ultra vires* - that is, beyond the constitutional and executive powers of the Secretary.

Comingling Employees of OSM with those of Agencies That Promote Development or Use of Coal is Explicitly Prohibited by SMCRA

The Secretary's action in seeking to "integrate" OSM into BLM is precluded by the specific language of the SMCRA, which bars co-mingling employees of OSM with those of any federal agency that "promotes the development or use of coal" with OSM. Section 201 of SMCRA created OSM and assigned its responsibility. Congress intended to provide some flexibility in staffing OSM and utilizing, where appropriate, the skills and expertise of employees of other federal agencies:

The Office shall have a Director who shall be appointed by the President, by and with the advice and consent of the Senate, . . . The Director shall have the responsibilities provided under subsection (c) of this section and those duties and responsibilities relating to the functions of the Office which the Secretary may assign, consistent with this Act . . . *The Office may use, on a reimbursable basis when appropriate, employees of the Department and other Federal agencies to administer the provisions of this Act, providing that no legal authority, program, or function in any Federal agency which has as its purpose promoting the development or use of coal or other mineral resources . . . shall be transferred to the Office.* (emphasis added).

The legislative history of SMCRA explains that "[t]he Act specifically states that there cannot be transferred to the office any legal authority which has as its purpose promoting the development

⁴ See 5 U.S.C. §553 (a)(2) (Excepted from the Administrative procedure Act's informal rulemaking requirements are "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts").

or use of coal . . .”⁵ As noted above, Senate Report 95-128 made it very clear that SMCRA was not to be administered by a resource development agency whose duties included either “the promotion of mining, marketing, or use of minerals” or “a resource preservation (pollution control, wilderness, or wildlife management) . . . mission.” BLM is both a resource development agency and resource preservation agency.⁶ It is odd, indeed, that the prohibition contained in §201 (b) and the legislative history was ignored when Secretarial Order No. 3315 was issued.

Curiously, the Office of the Secretary has quickly forgotten the lessons of the combination of enforcement and mineral development in the Minerals Management Service (“MMS”). In May 2010, Secretary Salazar properly recognized that combining mineral marketing with environmental protection and enforcement responsibilities created a destructive conflict within the MMS:

“The Minerals Management Service has three distinct and conflicting missions that – for the benefit of effective enforcement, energy development, and revenue collection – must be divided,” said Secretary Salazar. “The reorganization I am ordering today is the next step in our reform agenda and will enable us to carry out these three separate and equally-important missions with greater effectiveness and transparency. These reforms will strengthen oversight of offshore energy operations, improve the structure for revenue and royalty collections on behalf of the American people, and help our country build the clean energy future we need.”⁷

The combination of conflicting missions of the MMS was intolerable. The Secretary found that separation of those conflicting responsibilities into separate and independent administrative entities will enable the Department to carry out its mission with “greater effectiveness and transparency,” and the reforms will “strengthen oversight” and improve “revenue and royalty collections.” Contradicting the analysis leading to the separation of conflicting functions in the MMS, Order No. 3315 tells us that doing the opposite - “consolidating” - OSM within BLM - will “integrate the management, oversight, and accountability of activities associated with mining regulation . . . ensure efficiencies in revenue collection and enforcement responsibilities and provide independent safety and environmental oversight of these activities.”⁸ These contradictory messages and the underlying logic of DOI decision-makers are difficult to decipher.

⁵ Senate Report 95-128 at 64.

⁶ The scope of BLM’s authority is described by the agency as managing “public land resources for . . . energy development, livestock grazing, recreation, and timber harvesting, while protecting a wide array of natural, cultural, and historical resources . . . include[ing] 221 Wilderness Areas totaling 8.7 million acres, as well as 16 National Monuments comprising 4.8 million acres.” http://www.blm.gov/wo/st/en/info/About_BLM.html

⁷ Interior Dept. Press Release, *Salazar Divides MMS’s Three Conflicting Missions*, (May 15, 2010), <http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm>

⁸ Section 1, *Purpose*, Secretarial Order No. 3315 (October 26, 2011).

What is clear, however, is that the decision to combine the mission of OSM within BLM violates both the letter and the spirit of SMCRA. Moreover, Order No. 3315 pursues a policy that the Secretary himself rejected as unworkable in the context of the Mineral Management Service. While OSM has had its strong critics among the constituency I represent, and among state programs and the coal industry, OSM has never experienced a scandal of the magnitude of what occurred at the MMS. Moreover, the nation's coal production has increased and environmental protection as well as mine land reclamation have improved significantly in the thirty plus years of OSM's existence. Coalfield citizens I represent are at a loss to understand the motivations underlying Secretarial Order No. 3315.

In supporting the Secretary's order, a BLM news release emphasized that its mission includes managing "over 245 million acres . . . primarily located in 12 Western states, including Alaska . . . with a budget of about \$1 billion" and that it "administers 700 million acres of sub-surface mineral estate throughout the nation." Moreover, the release stated, "BLM's multiple-use mission is to sustain the health and productivity of the public lands for the use and enjoyment of present and future generations . . . by managing such activities as outdoor recreation, livestock grazing, mineral development, and energy production, and by conserving natural, historical, cultural, and other resources on public lands."⁹

In contrast, since its creation, OSM's focus has been exclusively on coal mining regulation, reclamation of coal mines and enforcement of SMCRA. The experience and expertise of the giant agency and the small, specialized agency are complimentary only at the extreme margins. Surely, the merger of an agency with 525 employees into BLM's huge 10,000-employee workforce with its billion-dollar-plus budget would bring scant efficiencies and economies of scale.

Troubling as well is a message given in support of the proposed merger: An OSM official reportedly told a House of Representatives Committee last week that "[f]or the past decade, the agency has consistently been underfunded . . . consolidation could bolster our ability to get the resources we need to maintain oversight"¹⁰.

Given the importance of coal mining to our nation, the strict but fair regulation of mining and reclamation, and the protection of the nation's waters should compel the Secretary of Interior to personally make a powerful case for fully funding OSM so that it may "maintain needed oversight." Burying the agency in BLM and hoping that the move "*could* bolster our ability to get the resources we need to maintain oversight" would seem an odd way for the Secretary to administer SMCRA's mandate to protect coalfield communities and their environments.

Experience suggests that the proposed consolidation is likely to produce administrative chaos and bureaucratic turf wars as an agency with expertise and experience in regulating coal mining is buried deep within an agency whose multiple missions include the promotion of mining,

⁹ BLM News Release, *Interior to Examine Integration of Interior's Mining Regulation and Mine Reclamation Programs* (October 26, 2011).

¹⁰ Platts Energy Week, *Lawmakers question OSM merger impact on coal* (Nov. 2011), <http://www.plattsenergyweektv.com/story.aspx?storyid=173876&catid=293>

marketing, of minerals and resource preservation. Common sense facilitates sound decision-making. Common sense suggests “if it ain’t broke - don’t fix it.” Secretary Salazar should withdraw the unlawful, ill-conceived and illogical Order 3315.

A Suggestion for a Broader Application of SMCRA’s Ban on Comingling Resource Production and Enforcement Within One Agency

A statement must also be made relating to Senator Murkowski's excellent observations about the integrity of the Interior Department's regulatory programs. Occasionally, irresponsible coal operators cause catastrophic death in our coal mines; similarly irresponsible companies have caused environmental devastation in the diverse coalfield communities across the nation where coal is mined. Like negligent lapses in mine safety that kill miners one by one, the adverse impacts of irresponsible coal mine operations play out almost unnoticed by the larger world and the media: one damaged coalfield community; one lost forest; one polluted stream; and one polluted or destroyed water supply.

A poignant article in the Charleston Gazette newspaper explained the depth of the loss of coal miners in “accidents” that claim one or two coal miners at a time.¹¹ Each coal miner’s death, the article found, was caused by a violation of mine safety law and rules. Similarly, a steady, widespread, degradation of Appalachian communities occurs as a result of mining operations that violate the law.

Coalfield citizens are left to feel that they are unimportant to this Administration and that they are not entitled to the same consideration that underlies the Secretary’s correct decision to isolate offshore oil and gas regulation from the DOI’s oil development activities. Coalfield citizens are astonished that the Secretary and the President believe that inserting coal mining regulatory enforcement inside the very Interior agency that promotes and profits from coal development is a prudent idea. They wonder how BLM can decide to lease a tract of coal on public land and then expect the “integrated” OSM permitting staff to feel independent enough to deny a permit if the mining is found to violate SMCRA and cause adverse externalities.

If the Administration is serious about preserving and enhancing the integrity of the Interior Department's environmental enforcement programs, a very different approach would emerge. OSM would be joined, in reporting directly to the Secretary, not just by the offshore oil and gas regulatory agency, but also by a new agency, the Office of Public Lands Protection and Enforcement. BLM could continue its mission to promote heavily subsidized mining, timber, and oil and gas production from public lands and turn designated public lands into sites for private developers of energy facilities. But the BLM staff regulating those industries, charged with enforcing the laws and regulations and supposedly protecting public lands, would, like the regulators of offshore energy development and the regulators of coal mining environmental impacts, be in a separate regulatory agency independent of BLM's resource development function.

¹¹ Ken Ward Jr., *Beyond Sago: One by One Disasters make headlines, but most miners killed on the job die alone*, THE CHARLESTON GAZETTE (Nov. 5, 2006).
<http://wvgazette.com/News/BeyondSago/200611050006>

Not only is there no public interest, economic or efficiency justification for the Administration's proposal to place an independent regulatory agency inside the Interior Department's resource development agency, the Administration's plan to do this indicates that the only way to truly safeguard the integrity of environmental regulation within the Interior Department is to take BLM's regulators and enforcers and place them in an independent public lands protection agency, as was appropriately done in the case of the Mineral Management Service.

Lack of Transparency Erodes Confidence in OSM's Regulatory Mission

The Secretary's Order appears to have been conceived in a vacuum with no prior notice or consultation with Congress, the coal industry, coalfield citizens or the sovereign Native American nations. This failure to consult, discuss and explore the implications of a major decision altering the statutory structure of enforcement within the Department of the Interior is inexplicable given the President Obama's endorsement of transparency in government.

Apparently, someone at the Department of the Interior decided that burying OSM within the enormous BLM bureaucracy would, as mentioned earlier, "integrate the management, oversight, and accountability of activities associated with mining regulation and abandoned mine reclamation; ensure efficiencies in revenue collection and enforcement responsibilities; and provide independent safety and environmental oversight of these activities."

Ordinarily the impact of such an important decision as evinced by Secretarial Order 3315 would be fully evaluated and all those with an interest in the success of the agency's mission would be consulted in advance. There is no evidence, however, that the DOI studied or otherwise analyzed the impact of merging the smaller agency into the huge entity. The purported savings and efficiencies that would accrue from the implementation of Secretarial Order 3315 are based on pure conjecture. Statements by BLM and OSM spokesmen confirm this.

BLM Director Robert Abbey's is quoted in a BLM news release: "OSM and the BLM have many complementary responsibilities with respect to mining and the reclamation of mine lands, and *it makes sense to explore how we can bring the best out of the two bureaus* as they carry out their statutory responsibilities." (emphasis added). Interior spokesman Chris Holmes, told a media interviewer that "*it's too early in this process to identify precisely where those savings will come from and how much we can save . . .*" (emphasis added).

In short, these statements confirm that "exploring" how to integrate OSM into BLM is something that will be done between now and March 1, 2012. How and when DOI will determine if there are, in fact, "savings" that will accrue is not apparent; plainly, such a calculation was not performed by DOI in advance of the issuance of Order 3315. It is not surprising that those responsible for the issuance of the Order failed to consult with OSM's stakeholders in advance.

Looking and listening can avoid a train wreck. That simple logic apparently was not considered in DOI's rush to bury OSM inside BLM. The coalfield citizens I represent before you hope that this Committee will inquire and identify how and why such a decision was made without serious study or analysis of its impact on those affected.

The Secretary Fails to Comprehend OSM's Role in Protecting Coalfield Communities

Finally, but importantly, those whom I represent today believe that Secretarial Order No. 3315 represents a profound failure to comprehend the role Congress designed for the Secretary and OSM, and the importance of OSM to coalfield communities and to the Nation. At the very heart of Congress' enactment of the SMCRA and of OSM's mission, is an overarching concern for the people of America's coalfield communities and for the environment that sustains them.

In 1976, coal supplied eighteen percent of America's electricity. Today, coal powers fifty percent of our electricity and in significant degree because of SMCRA and OSM's supervision of state coal regulatory programs. Recognizing this fact is not to suggest that SMCRA is currently being administered and enforced as intended. As with regard to coal mine safety, much progress has been made – but much more can and should be done to protect the environment of the coalfields and the people who live there. But that is an issue for another day. Suffice it to point out that many in this Congress have argued that coal is crucial to America's energy future. I submit that robust and fair enforcement of SMCRA is equally crucial; burying OSM in BLM would impede accomplishment of both goals.

The 95th Congress understood this simple point when it enacted the SMCRA. The Act contains more public participation rights than any other federal environmental regulatory statute – for a reason. That Congress understood that a key to public acceptance of coal mining is to prevent externalization of harm to families, communities and the environment caused by unlawful coal mining activities. The legislative history of SMCRA is replete with this message as is the statute itself.

Historically Secretaries of the Interior have treated OSM as a poor stepchild of the Department – an agency with a narrow focus on only one mineral and on enforcement rather than federal public land management. The agency has long been significantly underfunded, as Director Pizarchik recently conceded. However, the burial of an underfunded half-alive OSM in the behemoth bureaucracy of BLM is beyond any prior marginalization of the agency.

Many coalfield citizens who understand the role of OSM under SMCRA feel that Secretary Salazar's issuance of Order 3315 shows a fundamental disrespect for them and their communities. I suspect, however, that the decision to issue this Order was grounded in a failure to recognize and appreciate the mission of the long beleaguered OSM.

Let me briefly explain. Over the years since enactment of SMCRA those whom I represent have at times been very critical of regulatory and policy decisions made by OSM political appointees. Nevertheless, the field personnel and technical experts within OSM have frequently taken citizen complaints and concerns seriously. These front-line OSM inspectors, geologists and mining engineers have been crucial in OSM's efforts to implement SMCRA's mandate to protect those who live over and near coal mines from environmental and socio-economic injuries that accompany violations of SMCRA.

There are numerous examples of OSM's field inspectors and technical experts using their expertise to prevent mining operations that would have harmed coalfield communities and families. These professional OSM staffers also have, in some situations, been permitted to use their expertise to develop facts that allow coalfield families who have suffered injuries to have their rights vindicated through SMCRA-created administrative or judicial remedies. These efforts of front-line men and women of OSM are accomplished using their skills, expertise and savvy garnered from years of working cooperatively with coal operators and state program regulators.

Sadly, one can examine Secretarial Order 3315, DOI news releases and the statements of agency officials without finding a reference to the OSM mission regarding coalfield communities. Whether grounded in disrespect of coalfield citizens or ignorance of OSM's mission and its' impact in the coalfields, Order No. 3315 dishonors the letter and spirit of the SMCRA and should be withdrawn. Perhaps, at the highest levels of the Department of the Interior the controversy triggered by this ill-considered and cavalier administrative decision will give rise to a new understanding and appreciation of OSM's mission - and renewed respect for coalfield citizens.

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

Appendix A

The following organizations are represented by Professor Patrick C. McGinley's testimony at the Senate Committee on Energy and Natural Resources Hearing on November 17, 2011 regarding the Secretary of the Interior's Order: 3315.

Citizens Coal Council - Bridgeville, PA

8th Day Center for Justice - Chicago, IL

Appalachian Citizens' Law Center - Whitesburg, KY

Black Mesa Water Coalition – Flagstaff, AZ

Black Warrior Riverkeeper - Birmingham, AL

Cahaba Riverkeeper - Birmingham, AL

Center for Coalfield Justice - Washington, PA

Citizens Against Longwall Mining - Hillsboro, IL

Citizens Against Ruining the Environment - Lockport, IL

Citizens for Pennsylvania's Future (PennFuture) - Harrisburg, PA

Citizens Organizing Project - Knox County, IL

Coal River Mountain Watch - Whitesville, WV

Cook Inlet Keeper - Homer, AK

Delaware Riverkeeper Network - Bristol, PA

Environmental Integrity Project - Washington, DC

Faith in Place and the Illinois Interfaith Power and Light Campaign - Chicago, IL

Friends of Bell Smith Springs - Stonefort, IL

Friends of Hurricane Creek - Tuscaloosa, AL

Friends of the Earth - Washington, DC

GASP - Birmingham, AL

Greene County Watershed Alliance - Greene County, PA

Kentucky Resources Council - Frankfort, KY

Mountain Watershed Association - Melcroft, PA

National Wildlife Federation - Washington, DC

Nizhoni Ani – Kykotsmovi, AZ

Ohio Environmental Council - Columbus, OH

Ohio Valley Environmental Coalition - Huntington, WV

Powder River Basin Resource Council - Sheridan, WY
Prairie Rivers Network - Champaign, IL
Residents Against the Power Plant - Bulger, PA
Statewide Organizing for Community eMpowerment - Knoxville, TN
The Foundation for Pennsylvania Watersheds - Alexandria, PA
Upper Wheeling Creek Watershed Association - East Finley, PA
Waterkeeper Alliance - New York, NY
West Virginia Highlands Conservancy - Rock Cave, WV
Wheeling Creek Watershed Association - Nineveh, PA
Wild South - Asheville, NC