



Statement of
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General Counsel
National Mining Association
Before the Senate Energy and Natural Resources Committee

*The Consolidation of the Office of Surface Mining
and the Bureau of Land Management*

November 17, 2011

Good morning. Thank you for inviting me to testify before you today. My name is Katie Sweeney and I am speaking today on behalf of the National Mining Association (NMA). NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The Secretary of the Interior, Ken Salazar, issued secretarial order number 3315 on October 26 directing the consolidation of the Office of Surface Mining, Reclamation and Enforcement (OSM) within the Bureau of Land Management (BLM). The proposal raises more questions than it answers. Obviously, the different statutory authority and clearly divergent mandates of the two agencies raises issues about how they can be merged but as a threshold matter, the order raises a serious legal question -- can this consolidation be accomplished without specific authorization from Congress?

On its face, the Surface Mining Control and Reclamation Act (SMCRA) § 201 establishes OSM as an independent agency within the Department of the Interior, and directs the Secretary to "act through the Office..." (referring to OSM). It does not tell the Secretary to "act through the BLM." The same section creates a firewall prohibiting the transfer of any legal authority, program, or function from any federal agency that promotes development or use of coal or regulating the health and safety of coal to OSM. the Federal Land Management and Policy Act (FLPMA), which guides BLM's management of federal lands, clearly promotes the development of coal and other minerals on federal lands. Included in FLPMA's congressional declaration of policy is the statement that "the public lands be managed in a manner that recognizes the Nation's need for domestic sources of minerals . . . from the public lands."

In these difficult fiscal times, NMA appreciates the need for federal agencies to investigate ways to conserve resources. Perhaps there may be some merit to the Secretary's proposal to consolidate some of the non-policy administrative functions of OSM and BLM. But this proposal should also be examined from the broader economic standpoint of what the Department can do to grow our economy and put people back to work. As President Obama recently declared, "ultimately, our recovery will be driven not by Washington, but by our businesses and our workers."

I'd like to highlight the fact that metal and coal mining were among the few sectors of our economy that substantially increased jobs over the last decade—when the overall economy experienced the first job-loss decade in 75 years. Such success is bittersweet, not only because we still have

millions of unemployed Americans, but also because mining could have done so much more if the United States had policies that encourage—rather than impede—domestic mining. And these are the issues we think the Secretary should address. We are skeptical that the consolidation of OSM and BLM will achieve these goals.

In particular, we recommend that DOI review its permitting processes as they relate to mining activities. As the burden of regulations increases so does the complexity and time it requires to obtain permits and authorizations necessary to commence job-creating enterprises. The length, complexity and uncertainty of the permitting process place high hurdles in the path of mine operators. It can already take between 7 and 10 years to get all the permits necessary to mine on BLM lands.

There are many causes of delays for BLM permits but one key, primarily administrative, choke-point in that process is DOI's policy for processing certain administrative notices for mining operations and other commercial enterprises on public lands. The current "clearance process" for National Environmental Policy Act (NEPA) *Federal Register* notices sent from Bureau of Land Management state offices requires 14 levels of review at the Department of the Interior's Washington, D.C., office. This policy adds approximately one year to the already lengthy permitting process and has never, in our experience, resulted in a final notice that differed substantively from the product submitted by the state. And the costs of the delays are substantial, impacting the net present values of projects and putting new jobs on hold. We appreciate the legislation introduced by Sen. Dean Heller (R-Nev.) and co-sponsored by many on this committee to place a 45-day time limit on the reviews of these notices by DOI. And we also applaud the efforts of Senator Murkowski and other committee members to pass critical minerals legislation that includes a review of the permitting system to determine how to make it more efficient while maintaining our current environmental standards.

Merging OSM and BLM has the potential to create uncertainty and even further delays in mine permitting as staff become accustomed to their new roles and responsibilities. In addition, NMA has generally found that when multiple agencies are involved, the permitting process, far from being more streamlined, more often than not leads to greater delays.

Another way the department can marshal scarce resources absent consolidation is to ensure agencies truly focus on mission-essential activities. OSM has strayed from that path with its recent policy of reviewing state-issued mining permits in primacy states and second guessing state permitting decisions. This emphasis on massive increases in the oversight of

state programs has proven to be unnecessary, duplicative, and a waste of millions of taxpayer dollars. OSM's own annual evaluation reports demonstrate that the states have consistently done an excellent job in regulating coal mines. Yet the agency has increased inspections by 46 percent with no reprieve in sight even though the increased inspections have resulted in very few enforcement actions. For example, OSM took no enforcement actions in the country's top coal-producing state, Wyoming. Paradoxically, the agency has funded these unnecessary and wasteful policies at the expense of the very states that are doing such an excellent job in regulating mining.

As part of the agency's state program oversight mantra, OSM has also asserted the authority to issue "ten day notices" in situations where the agency disagrees with permitting decisions by primacy states. This is yet another example of OSM misusing its existing authority and limited resources, and, is being done without proper authority from Congress.

There is much OSM and BLM could do to reflect the new reality that agencies will have fewer resources without the need for a total consolidation of the two agencies. Additional specific recommendations for improvements are contained in Appendix A to this testimony, the comments NMA submitted to DOI in response to the required retrospective review of regulations and policies under Executive Order 13563. But to highlight one example, just look at how OSM has squandered millions of taxpayer dollars with respect to developing unnecessary new rules and regulations. Despite the fact that the federal government has already (and recently) spent 5 years and more than \$5 million on developing a stream buffer zone rule, OSM decided on the first day of the new Administration to change this rulemaking and commission a new EIS before the rule was even given an opportunity to go into effect.

By its own admission and testimony, OSM has already wasted more than \$4.4 million on this project, and even its staunchest environmentalist supporters describe it as "an expensive fiasco." Now OSM is pouring another \$900,000 into the project because it does not agree with its own contractor's report, which showed that the agency's rewrite of existing regulations would likely cost tens of thousands of jobs.

Instead of looking to integrate these two agencies to address budget problems and cover up mistakes, OSM should put to better use the resources that have already been provided by Congress. Instead of conducting unnecessary and redundant inspections that produce no results, illegally second-guessing state permitting decisions, and rewriting hundreds of pages of settled rules that will put tens of thousands of Americans out of work, OSM should be using its resources to do more research, to improve

technology and to provide training for its State partners so they can do a more effective job of being the primary regulators of surface coal mining operations, as SMCRA intended.

While the Secretarial Order may result in cost savings due to consolidation of administrative functions, the merger is not likely to accomplish the other substantive aims laid out in the order. For example, the order will integrate "OSM's abandoned mine land programs and functions . . . and BLM's mine and surface reclamation programs. " Is integration of these programs feasible given the agencies have different regulations, reclamation standards and funding mechanisms. BLM, unlike OSM, currently has no authority to collect monies from active mining operations to fund AML cleanup, and while NMA supports funding of AML cleanup through a reasonable future royalty as part of broader changes to the Mining Law, OSM's AML program should not be that model. According to OSM's own 2012 budget justification, while the AML program has taxed the coal industry more than \$10 billion since its inception, and Congress has appropriated more than \$7.5 billion to the agency for this purpose, OSM has managed to complete only about \$2 billion in the actual clean-up of abandoned mine lands. This type of inefficient program should not be exported to another Interior agency.

Similarly, it is difficult to comprehend how the two agencies' regulation, inspection and enforcement programs can be consolidated. Again, the agencies have different statutory and regulatory mandates. As such, agency personnel gain expertise that does not transfer automatically to another program. For instance, it would be nonsensical to mix and match OSM and BLM inspectors as they are trained to look for different issues at coal and hardrock mines.

Lastly, it is unclear how the states' roles will be impacted by such a merger. While SMCRA contemplates states being the exclusive regulatory authorities within their borders once they have an approved program, BLM operates differently. The state-run programs under SMCRA are significantly more efficient than either OSM or BLM-run programs. Will the merger complicate state permitting, and would a BLM-run agency likewise attempt to interfere with and second guess state permitting decisions the same way that OSM has recently done?

NMA looks forward to a continuing dialog with the agencies, with the Department, and with the Congress about the best way to conserve agency resources while promoting more efficient utilization of our abundant domestic resources to meet the nation's needs for affordable electricity and minerals vital to innovation and a strong economy. We believe that regulating our activities can be done in an efficient manner while ensuring

that our members receive permits in a fair and timely manner, and taxpayer dollars are used effectively.

Thank you for the opportunity to share our views.



March 28, 2011

Regulatory Review
Office of the Executive Secretariat
And Regulatory Affairs
U.S. Department of Interior
1849 C Street NW
Washington, DC 20240

Dear Sir/Madam:

RE: Comments on improving DOI's regulations—Docket Number DOI-2011-0001; Department of the Interior Retrospective Review under E.O. 13563

The National Mining Association (NMA) appreciates the opportunity to respond to your request for information to help shape the Department of the Interior's (DOI) plan to review existing regulations and identify opportunities for improvement through modifications, streamlining, expansion or repeal. 76 Fed. Reg. 10526 (Feb. 25, 2011).

NMA is the national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Since many NMA members conduct mining operations on federal lands, we have a fundamental interest in the adoption of principles and policies that foster the prudent management and stewardship of the nation's natural resources. Because DOI manages much of the lands with our nation's critical mineral resources and administers programs that directly impact many mining operations, NMA offers the following comments regarding the regulations and policies that should be included in the retrospective review under Executive Order (E.O.) 13563.

General Comments

DOI requests comments regarding how, generally, it can best review its existing rules in a way that will identify rules that should be changed, streamlined, consolidated or removed. NMA believes that DOI's engagement of affected parties and other stakeholders is the most appropriate way to identify such rules. As DOI moves forward with its review, NMA urges the department to ensure that its regulations are consistent with DOI's mission, including its resource use mission. As identified in DOI's strategic plan, a key component of the resource use mission is

to provide America with access to energy and minerals to promote responsible use and sustain a dynamic economy. The importance of the federal lands for coal, hardrock and other minerals cannot be understated. See *Fact Sheet: The BLM—A Sound Investment for America* for discussion of the \$112 billion contribution of BLM public lands to the economy.

Rules, Policies and Guidance for Review

NMA has identified below several rules, policies and guidance that should be reconsidered during the retrospective review. These rules, policies and guidance impose substantial and unjustifiable burdens on the mining industry that are simply not necessary for DOI to achieve its regulatory or statutory objectives.

- Secretarial Order 3310 on Wild Lands and related guidance

In issuing Secretarial Order 3310, DOI is creating a confusing and duplicative system to protect federal lands with wilderness characteristics. The announcement of the policy has already halted several planned mining projects as Bureau of Land Management staff are commandeered to conduct the new wilderness inventories required by the order. The order fails to acknowledge the existing federal laws in place to protect “wild lands” such as the Federal Lands Policy and Management Act (FLMPA), National Environmental Protection Act and the Endangered Species Act. Instead, the Wild Lands Policy ignores FLPMA’s “multiple use” mandate and favors very limited passive recreational uses.

Essentially, the policy subverts BLM’s FLPMA obligations by establishing a new regulatory program that re-initiates and expands a Wilderness identification procedure that sunset on October 21, 1993 with the submittal of Presidential Wilderness recommendations to the Congress. The Wild Lands Order requires BLM to identify lands that qualify for management as though they are Wilderness, even though they did not so qualify under the Wilderness Inventory mandated by Congress.

The order will put into place an onerous system that could delay decisions regarding uses of federal lands for a decade or longer. Consider that pursuant to the order, BLM has indicated it will inventory 220 million acres of land in the context of the fact that it is not uncommon for a single Resource Management Plan to take 10 or more years to complete. Pursuant to the retrospective review required by E.O. 13563, DOI should rescind the Secretarial Order on Wild Lands and the related changes to its manuals and guidance documents.

- Federal Register Reviews

DOI should also review the policy enunciated in Instruction Memorandum 2010-043, “Guidance on Preparing Federal Register Notices.” This “clearance process” for NEPA Federal Register notices needlessly adds months to the permit process for minerals mining and coal projects on federal lands as it requires 14 separate layers

of departmental review of notices developed by State BLM offices. (See attached chart.)

The impact of these delays is significant as most mining operations require at least three of these notices per project. As the clearance process routinely takes 3-4 months per notice, this policy adds approximately a year of review time for project approvals. These delays also result in lost federal, state and local revenues, fewer jobs and lost opportunities. For example, one mining company indicated that the delays are preventing the hiring of more than 1,000 new employees, and another stated that for each month of delay the company loses more than \$1 million in net present value. Furthermore, the uncertainties regarding length of time for approval of mining activities has contributed to an all-time low amount of mineral exploration dollars being invested in the United States and to increased reliance on foreign supplies of minerals.

This clearance process is in addition to the existing thorough environmental review process undertaken by BLM for mining projects on federal lands. A typical environmental impact statement undertaken pursuant to NEPA takes over three years to prepare. DOI has never adequately explained the need for this review process and it does not appear to result in substantive changes to the submitted documents. In fact, in the mining industry's experience, the review process has never resulted in a final product that differed substantively from what was submitted by the state BLM offices. DOI should rescind IM 2010-043 and return to the previous process where Federal Register notices could be submitted directly by BLM state offices without stopping at DOI for additional reviews.

- General Review of NEPA Guidance

DOI should also review its guidance on NEPA to determine if there are ways to better integrate NEPA reviews with permitting of mining operations. DOI should recognize that since NEPA's enactment, Congress has passed numerous laws that prescribe substantive goals and procedures to prevent or minimize adverse impacts to environmental resources. These laws include those that provide the authority to promulgate standards for mining operations, such as the Federal Land Policy and Management Act (FLPMA), the Surface Mining Control and Reclamation Act (SMCRA) and the Forest Service Organic Act, as well as specific environmental laws such as the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species Act (ESA) and the Safe Drinking Water Act (SDWA). These laws and their corresponding regulations require a thorough analysis of the possible environmental effects of mining operations. NMA believes that the functional equivalent of a NEPA review occurs during the permitting of mining operations on federal lands, and therefore a completely separate NEPA review is unnecessary, duplicative and results in significant delays. Please see the attached NMA concept paper on exemptions for mining operations based on this "functional equivalence doctrine" that has been developed by federal courts" to exempt federal agencies from complying with NEPA's environmental review process when other "substantive and procedural standards ensure full and adequate consideration of environmental issues."

- Financial Guarantees Under 43 CFR 3809

The retrospective review that DOI is conducting provides a perfect opportunity to rectify a problem created when the 43 CFR 3809 surface management regulations were revised in 2001. Given developments since that time, DOI should review the decision to prohibit new corporate guarantees and increases of any existing corporate guarantees under BLM's revised section 3809.500 *et. seq.*

Commercial surety capacity is frequently constrained and leads to questions as to whether the capacity required by the mining industry will be available even at substantially higher direct and indirect costs. Given the constraints on the availability of surety, BLM needs to ensure a wider variety of financial assurance mechanisms, such as corporate guarantees, are allowed to fulfill obligations under the 3809 regulations. The wholesale jettisoning of corporate guarantees is not necessary to eliminate the problems that BLM and the states had with that form of financial assurance. Past problems with corporate guarantees can be solved by establishing reasonable qualification criteria followed by periodic evaluation to verify that companies remain qualified to self-bond.

Other federal agencies such as the U.S. Environmental Protection Agency (EPA), U.S. Nuclear Regulatory Commission (NRC) and BLM's sister agency, the Office of Surface Mining (OSM), recognize corporate guarantees as an acceptable financial assurance instrument. EPA allows for corporate guarantees for waste disposal sites upon satisfaction of certain criteria, including tangible net worth, a ratio of total liabilities to net worth, a ratio of current assets to current liabilities or total fixed assets in the United States. See 40 CFR 264.143. NRC has a regulatory guidance document, Reg. Guide 3.66 (DG-3002), that provides qualification mechanisms for corporate guarantees. BLM has accepted NRC-approved corporate guarantees for uranium projects on BLM-managed lands in Wyoming, Utah and New Mexico. OSM provisions allow self-bonding based on bond-rating, tangible net worth, a ratio of total liabilities to net worth, a ratio of current assets to current liabilities or total fixed assets in the United States. See 30 CFR 800.23. BLM should consider a corporate guarantee program for the hardrock mining sector based upon sound qualification criteria, just as EPA, NRC and OSM programs have done in order to afford other mechanisms to satisfy bond requirements.

- OSM Policy Directives Relating to State Oversight

In late 2009, OSM proposed major changes to oversight of state programs, including additional federal inspections and significant potential for second guessing of state permitting decisions. OSM's own evaluations of the state programs do not reveal any problems that necessitate these changes. In fact, NMA questions OSM's legal authority to make such changes under the Surface Mining Control and Reclamation Act (SMCRA). OSM's new policy of interfering with state permitting decisions is also inconsistent with a number of court decisions interpreting the federal-state relationship under the Act. Yet OSM ignored these concerns and

finalized several directives, including Directive REG-8 “Oversight of State and Tribal Regulatory Programs,” Directive REG-23 “Corrective Actions for Regulatory Program Problems with Action Plans” and Inspection and Enforcement Directive INE-35 on “Ten Day Notices.” These directives should be rescinded as a part of DOI’s retrospective review.

- OSM Stream Protection Rule

While not yet promulgated, DOI should use this review opportunity to reconsider whether it should move forward with the rulemaking OSM is developing on “stream protection.” This rulemaking is inconsistent with the President’s new executive order. The anticipated stream protection rule is intended to displace a 2008 regulation that was the product of a five-year comprehensive rulemaking process that provided the members of the public and state regulators clarity and certainty, while at the same time requiring improved environmental performance. OSM had not even implemented the 2008 rule before deciding to change it. The agency has not identified any basis or need for these significant regulatory changes, most of which will only add burdens on companies and states through complex and duplicative standards that recreate the uncertainty that was corrected by the 2008 rule.

The rulemaking options under consideration would cost thousands of mining jobs, sterilize millions of tons of coal reserves and impair the coal supply essential to the nation’s energy requirements, without any demonstrated environmental benefit over the current rules they are trying to rewrite. Additional sampling and monitoring requirements will add enormous information collection burdens while essentially duplicating the sampling and monitoring requirements already in place in the project’s associated NPDES permits. Prohibitions on mining near streams could sterilize millions of tons of coal reserves and render many mines uneconomical. Requiring full restoration of stream form and function before any additional mining can take place could paralyze many mining operations, and establishing corrective action thresholds could interfere with legitimate mining operations that have not violated any water quality standards. Also, requiring condition precedent sequencing of the mining activities and limitations on mining areas not only conflicts with what activities have been permitted but also may prevent compliance with the terms and conditions, more specifically the reclamation requirements, of the permit. Dictating certain post-mining land uses would be contrary to goals of wildlife managers and/or landowners who desire more flexible uses for reclaimed mine lands. The new so-called coordination procedures will add months and even years of delay to critically needed mining permits. Many of OSM’s proposals would also duplicate or contradict authorities under the Clean Water Act that are reserved for the states, in violation of SMCRA. Not only do the proposed rules duplicate authorities, but the rules also duplicate sampling, monitoring, avoidance and minimization processes, and the selection of least damaging alternative analyses. DOI should direct OSM to discontinue this rulemaking effort.

- DOI Should Preserve the 1996 Biological Opinion

Since 1996, OSM and the U.S. Fish and Wildlife Service (FWS) have successfully relied on a biological opinion used to address the effects of surface coal mining and reclamation operations on threatened and endangered species. The opinion correctly concludes that such operations conducted in accordance with properly implemented federal and State regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species, and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats. However, certain FWS offices have recently attempted to circumvent the opinion by requiring section 7 consultations or by providing comments through the Army Corps of Engineers' § 404 process rather than through the SMCRA process. DOI should ensure that the longstanding terms of the 1996 biological opinion between OSM and FWS are followed by both agencies.

- DOI Should Not Allow Abuse of Citizen Suit Provisions

OSM, along with some other agencies, have allowed certain groups to exploit the citizen suit provisions of the implementing laws. They are settling lawsuits with plaintiff's lawyers rather than vigorously defending regulations from legal challenge, and are further using the litigation as an excuse to change longstanding policies of the agency. In addition, DOI has paid attorneys' fees to plaintiffs who have not even been successful on the merits of the issue being litigated. DOI should demand that its agencies vigorously defend duly promulgated regulations and findings, and should not pay attorneys' fees to litigants except when warranted under the law.

- Energy Policy Act Amendments to the Minerals Leasing Act

DOI should extend its regulatory review to include rules or policies that, if implemented, would achieve the goals enunciated in the Executive Order to promote economic growth, innovation, competitiveness and job creation. For example, the BLM needs to move forward with its long-planned regulations to implement the Energy Policy Act of 2005's amendments to the Minerals Leasing Act. The 6 year delay in promulgating the rules has created confusion and delays. BLM needs to move forward with the regulations to implement the Minerals Leasing Act amendments. Congress determined that such amendments were necessary to promote efficient production, encourage maximum recovery of coal resources and optimize federal and state royalties. Therefore, BLM should move forward to implement the following EAct amendments and corresponding BLM regulations:

- EAct Section 432: allows lease modifications greater than 160 acres under certain circumstances (requires changes to 43 CFR 3432.1)
- EAct Section 433: extends the current requirement that all reserves be mined within 40 years (requires changes to 43 CFR 3487)
- EAct Section 434: changes the method for computing advance royalties (requires changes to 43 CFR 3483.4)
- EAct Section 435: deletes the requirement that a lessee submit a coal lease operation and reclamation plan within three years of lease issuance (requires changes to 43 CFR 3482.1)

- EPLA Section 436: eliminates the financial assurance requirement to guarantee payment of deferred bonus bid installments by a licensee with a history of timely payments (requires changes to 43 CFR 3422.4)

Conclusion

It is NMA's sincere hope that DOI's retrospective review will result in more efficient regulations consistent with the goals of E.O. 13563. This nation needs a rational and systematic approach to managing the wealth of natural resources in and on our federal lands. If you have any questions about this submission, please contact me at (202) 463-2627 or ksweeney@nma.org.

Sincerely yours,

A handwritten signature in black ink that reads "Katie Sweeney". The signature is written in a cursive, flowing style.

Katie Sweeney
General Counsel