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On Examining the Implementation of Federal Coal Mine Land Reclamation and Abandoned Coal Mine Land Economic Revitalization Programs
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Good morning Chairman Manchin, Ranking Member Barrasso, and members of the committee. My name is Rob Rice, and I am the Deputy Cabinet Secretary of the West Virginia Department of Environmental Protection (WVDEP) and Director of the agency's Division of Land Restoration. My written testimony provides West Virginia's current perspective on issues surrounding the implementation of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), the Infrastructure Investment and Jobs Act (IIJA), the STREAM Act, and the Abandoned Mine Lands Economic Revitalization (AMLER) program, including our assessment of the oversight role performed by the federal Office of Surface Mining Reclamation and Enforcement (OSM) under these federal laws and programs. West Virginia has had exclusive authority to conduct regulatory coal mining and Abandoned Mine Lands (AML) programs or "primacy" since February 23, 1981. Thank you for the invitation to speak with you today about how West Virginia has implemented the substantial increase in appropriations for AML programs through the Infrastructure Investment and Jobs Act (IIJA).

This is a very exciting time for State Abandoned Mine Land (AML) programs that correct public safety and environmental hazards of coal mines that ceased operation prior to August 3, 1977. The infusion of much-needed funding from the Infrastructure Investment and Jobs Act (IIJA) has ushered in a new era for the West Virginia AML program and created significant new opportunities to bring its benefits to communities across the state. We thank Congress for recognizing the critical role AML plays in contributing to health and safety, environmental restoration, access to clean water, and the creation of jobs and opportunities for economic growth. This is especially important in West Virginia, which faces the adverse impact of the energy transition. Over the last two years, WV AML has awarded $53M in design and project oversight contracts for 127 projects, which will utilize over $200M in IIJA funding. An additional $17M of projects, which previously lacked funding, will also now be funded for construction.

While States have been working with the Office of Surface Mining (OSM) for over 40 years on AML programs, we have experienced a continual layering of bureaucratic processes that occur without meaningful state input and often result in added work that lacks a proportionate amount of benefit. Since the passage of AMLER and IIJA, States have been excluded from meaningful discussions regarding their implementation and how they are administered. Since the enactment of the IIJA, West Virginia has noticed OSM's failure to communicate and collaborate with States prior to making important programmatic changes.] Noted in a recent Federal Register (Vol. 88, No. 206) regarding the revised OSM-51 document, OSMRE is requiring different standards on projects funded by the IIJA than the traditional fee-based program. While criteria for funds is different, OSM should not be requiring completely different grant applications, reporting requirements, and the Authorization to Proceed (ATP) process.

States have played a pivotal role in on-the-ground implementation, with over 99% of the responsibilities for both the AML and regulatory programs established by this law falling on our shoulders. This underscores the critical importance of effective communication between OSM and the states. However, OSM's decision-making processes often lack direct communication with the States. Instead, significant decisions, including those related to the implementation of the IIJA, are frequently published as responses to Frequently Asked Questions (FAQs) on the OSM website without prior notification to the 24 State program managers who require this vital information. Furthermore, essential programmatic changes are sometimes buried in the Federal Register, causing delays in awareness and response. For example, the 2023 IIJA NOFO was not directly provided to the State and Tribal Programs, resulting in a delayed application submission. Additionally, OSM HQ's distribution of STREAM Act FAQ's to their Regional and Field Offices in October 2023, with the information having been posted on OSM's website in May or June of the same year, highlights the disconnect in communication. With 21st century communications capability, communicating with States on implementation of the IIJA should be simple and direct. In Senate Report 118-83, which accompanies the Senate's FY 2024 appropriations bill for the Interior Department, the Senate Appropriations Committee recognized that effective implementation of the IIJA will require OSM to go beyond communicating effectively with states in, and actively solicit State and Tribal input.

> *"The Committee is committed to ensuring States and tribes are able to access and utilize funding from the Infrastructure Investment and Jobs Act (Public Law 117–58) to reclaim abandoned mine land across the country as expeditiously as possible. To that end, the Committee expects the Office of Surface Mining Reclamation and Enforcement to work with and solicit input from the States and tribes to simplify the process where possible and directs OSMRE to consider synchronizing reporting requirements."*

There is a significant disconnect between OSM HQ, Regional, and Field offices, resulting in confusing and conflicting directives depending on the region or field office, exacerbating challenges for States. This disconnect extends to OSM's requirement for updating State plans and the failure to review amendments, leaving States perplexed as to why OSM is requesting these changes when the intent behind the IIJA funding was to expedite program funds for land reclamation and redevelopment. While there are dedicated and knowledgeable individuals at OSM, the need for improved communication and collaboration between OSM and the States is evident to ensure the efficient implementation of SMCRA and IIJA programs.

The Abandoned Mine Land Economic Revitalization (AMLER) program, established in the FY 2016 appropriations legislation, originally aimed to expedite reclamation and promote economic development of pre-1977 mine sites (AML), initially referred to as the AML Pilot. Over time, it has evolved into an annual allocation known as Abandoned Mine Lands Economic Revitalization (AMLER). AMLER's current framework mandates that funds be spent on or adjacent to mines that ceased operations before August 3rd, 1977. While States and Tribes do have some flexibility to utilize funds on post-1977 mine sites, they must be in proximity to a pre-1977 AML. The distinction between pre-1977 and post-1977 mine sites is crucial, as the majority of AML sites are unsuitable for economic development due to their small size, locations on the sides of mountains, or in flood-prone areas. In contrast, most post-1977 mine sites offer

more promising conditions for economic development, with their larger size, flat terrain, existing access, utilities, and adjacent rail facilities. However, despite the potential for economic development on these post-1977 sites, AMLER does not provide funding to support such projects, leading to missed opportunities. With IIJA now securing AML reclamation funding, there is no doubt about the reclamation of AML sites. If AMLER continues, a recommendation is to allow AMLER funds to be used on phase III released post-1977 mine sites without the restriction that an AML site be on or adjacent to the project site.

Furthermore, the State recommends shifting federal oversight of AMLER away from OSM. Created primarily as a regulatory and reclamation agency, OSM lacks the expertise and responsibility for implementing an economic development and revitalization program. Although it boasts a highly skilled staff in mining regulation and reclamation, OSM does not have the expertise to manage economic development grants. West Virginia's AML program faces similar limitations, and relies on a committee composed of members from various state agencies to select projects with the most potential for success. Shifting oversight of AMLER to a federal agency with expertise in economic development grants is recommended, as it would better align with the program's objectives and improve its efficiency.

Since its inception in 2016, AMLER has encountered annual growing pains. Each year brings new guidance on what is and is not allowed, causing delays in the advancement of recommended projects. States are also unable to proceed with selected projects until OSM approves them through a vetting process, which has proven to be a time-consuming ordeal, often taking several months or more. This vetting process, led by Program Support based in Washington D.C., allows individuals disconnected from the Appalachian region's needs to question State-selected projects. While no projects have been outright rejected, almost all have faced delays in responding to inquiries from Program Support. This, compounded with the increased timelines and additional processes and requirements, hampers the program's ability to effectively meet its goals. Between 2016 and 2019, the assessment period for AMLER projects averaged approximately three months. However, as the years progressed, the timeline for project evaluation experienced a significant expansion. Notably, in 2020, the average vetting duration surged to five months, with one specific project, Timber Tech, enduring a staggering 21-month evaluation process. The projects from 2021 encountered a 10-month vetting period, with three projects still navigating through the assessment process. In the case of 2022 projects, only one has successfully completed the vetting process, while the remaining five have lingered in evaluation for over six months. The challenges of time delays, heightened scrutiny, and persistent requests for supplementary information persist into the Authorization to Proceed (ATP) phase. From 2016 to early 2020, ATPs enjoyed a swift turnaround, often requiring just a few days to a maximum of two weeks for approval. However, by late 2020 and throughout 2021, the ATP process began taking 3-4 weeks. In the period spanning from 2022 to the present, ATPs have been stretching over a 2-3 month period to over a year, necessitating multiple submissions. Notably, one project has been mired in the ATP process for over eight months, with another enduring a six-month evaluation phase.

Recently, OSM introduced a requirement for deed liens or covenants on both ongoing and future AMLER projects, retroactively applying this condition to all projects funded since 2016. The new policy also withholds Authorization to Proceed (ATP) approvals until deed recorded covenants have been provided. This decision, made unilaterally, was communicated through a letter sent by the Director of the Lexington Field Office, and Acting Director of the

Charleston Field Office, to colleagues in Kentucky, Virginia, and West Virginia. The other three AMLER states (Ohio, Pennsylvania, and Alabama) have not yet received this directive. This development raises several concerns. The terms and conditions of subgrants awarded by our agency already necessitate compliance with all federal and state laws, rules, and regulations, including 2 CFR 200, commonly referred to as the Administrative Rule.

Under section 200.330 of the Administrative Rule, it states that the federal awarding agency or pass-through entity must require a non-federal entity to submit reports at least annually on the status of real property in which the federal government retains an interest. (The reporting can be adjusted if the property is held for 15 years or more). The decision to demand covenants on all past, present, and future projects disrupts ongoing successful projects, and neglects those projects that may not have been as fruitful, indicating a lack of nuanced understanding by OSM of the Congressional purpose underlying AMLER. According to OSM, this only affects a small number of AMLER projects, which are the "exception." However this applies to 38 of the 56 AMLER projects in West Virginia, which is the majority. Many of these projects are already in progress, are currently under construction, or have been completed.

Section 200.316 states that real property, equipment, and intangible property that are acquired or improved with a federal award must be held in trust by the non-federal entity as trustee for the beneficiaries of the project. It further states that the federal awarding agency MAY require the non-federal entity to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a federal award and that use and disposition conditions apply to the property.

Section 200.311 restricts the use of real property to be used for the originally authorized purpose and restricts the non-federal entity from disposing of or encumbering the property as long as needed for its intended purpose. The various disposition options in this section either return the federal interest dollars to the federal awarding agency or provide for the federal awarding agency's control as to how the property will be transferred. A non-federal entity cannot dispose of property without first obtaining approval from the federal awarding agency or pass-through. In summary, the definition of federal interest is the amount of federal dollars put into the project.

The reporting and disposition requirements, as a condition of a non-federal entity receiving
funding, indicates control over the federal interest by the federal government. The lien/covenant option stated in 200.316 is not directly applicable to protecting the federal interest, as it's already protected by 2 CFR 200. This lien/covenant option is merely an "appropriate notice of record" to indicate that the property was purchased with federal funds. The implied intent is that future purchasers, or banks intending to encumber the property, are properly notified of that fact and must act accordingly.

Moreover, OSM is exacerbating the problem by undertaking a comprehensive examination of the legal authority for every State AML plan dating back to the 1980s since the adoption of the IIJA. Any identified deficiencies will lead to federal demands for States to adopt

new statutes, regulations, or procedures, potentially adding more State actions to the pending approvals. As States grapple with efficiently and effectively deploying the increased AML resources provided by Congress through the IIJA, OSM is diverting AML program managers' attention to a meticulous review of historical legal authority. This endeavor seems unnecessary given that these programs have operated for over 40 years under continuous OSM oversight. OSM exercises oversight over each AML project through its authorization to proceed (ATP) process, ensuring that every project complies with federal law before funding is released. OSM's inability to approve the extensive list of pending plan revisions and program amendments, or any new ones it might require, highlights the impracticality of the comprehensive program review it is currently conducting.

The ongoing legal authority review appears to be aimed at coercing States into adopting Administration policies that exceed legal mandates. This effort emphasizes measures the federal government "encourages" but cannot require, and these encouraged measures are also incorporated into the IIJA grant application, obligating States to justify any deviations from these non-mandatory measures. While some of the Administration's policy objectives may be commendable, the attempt to coerce States into adopting plan revisions or grant conditions that exceed federal requirements encroaches on each State's sovereign authority to make policy choices. These debates should occur in State legislatures or Congress, rather than between OSM and state AML program managers. The primary focus of State AML program managers and OSM should be the efficient and effective use of AML funds to eliminate public safety and environmental hazards posed by abandoned coal mines, rather than unnecessary distractions from this fundamental objective.

It is also important to address concerns with respect to the coal regulatory program. West Virginia has a very urgent need for an increase to the federal funding share of our grant for the coal regulatory program it operates under Title V of SMCRA. The other States operating these programs are in the same position. Over the past two fiscal years, Congress has appropriated $65 Million each year for regulatory grants to States for operation of these programs. This is a reduction from the $68.59 Million Congress provided for these grants on an annual basis over several previous years. The inflation the working people of this country have faced over the last couple of years is no secret. As a result of this inflation, the salaries and benefits West Virginia pays its mine inspectors, permitting staff and other mining regulatory professionals has significantly increased. Because salaries and benefits are the biggest cost in operating our mining regulatory program, declining regulatory grants from the federal government will force West Virginia and other States operating these programs to make difficult choices. An increase in funding from Congress is necessary to sustain these programs at the level necessary to meet the challenges of regulating an industry and protecting the public and the environment from potential adverse mining impacts. Operating SMCRA’s federal regulatory program through State programs comes at a bargain to the federal government. Fifty percent (50%) of the cost of regulation on non-federal lands is borne by the States. Additionally, even with inflation affecting the salaries States pay, State pay scales lag well behind those of the federal government. If OSM were to undertake operation of coal regulatory programs in place of the States, the costs of these programs to the federal government would be well more than double the current cost. State programs must be adequately funded. We urge Congress to provide at least $72 million for State coal regulatory program operation in the next federal budget legislation it adopts.

A central theme of SMCRA from its conception has been that States are free to tailor regulatory and AML programs to address individual State circumstances, which vary widely across the country, so long as the State program remains as stringent as federal law. While cooperative federalism was an element of the other bedrock federal environmental laws adopted in the 1970s, it was supremely important in addressing the impacts of coal mining, which occurs in very diverse geologic and climatic settings across the country. Changes a State makes to its SMCRA Title IV AML program to tailor it to address specific State needs are called "plan revisions." Changes to a State's SMCRA Title V regulatory program are called "program amendments." Federal regulations prohibit either type of change from taking effect until it has been formally approved by OSM. Because OSM has been sitting on these approvals for years, the cooperative federalism envisioned by SMCRA is badly broken. West Virginia alone has 11 amendments pending approval. These date as far back as 2009, when this Committee's Chair was our Governor. Nationwide, OSM has a backlog of over 55 program amendments from the State programs granted regulatory primacy under SMCRA. OSM is required by 30 CFR 732.17(h)(13) to complete final action on all amendment requests within six months after receipt from the State. Inaction by federal bureaucrats has usurped the will of our Governor and Legislature. We encourage Congress require that OSM adopt an expedited timeline to either approve or deny plan revisions and/or program amendments.

We very much support the Senate committee report language directing OSM to communicate and collaborate with States to better understand our needs and unique situations. Additionally, we thank the committee for the hearing today. It goes without saying that the States and OSM have a similar goal of efficiently and effectively carrying out the mission of SMCRA. Unfortunately, we appear to be taking different paths to get there. Our hope is that this hearing will aid in bringing OSM and the States to a point of mutual agreement on many of the issues we will discuss today.