

**Statement of Joe Lovett to the Committee on Natural Resources of the
United States House of Representatives “The Surface Mining Control and
Reclamation Act of 1977: A 30th Anniversary Review”
July 25, 2007**

Introduction

Good morning Chairman Rahall and members of the Committee. Thank you for the opportunity to testify today. My name is Joe Lovett and I am the Executive Director of the Appalachian Center for the Economy and the Environment, a law and policy center located in Lewisburg, West Virginia. I am also a lawyer who has been attempting to enforce surface coal mining and other environmental laws that federal and state regulators refuse to enforce in Appalachia.

From its inception in 2001, the Appalachian Center has been at the forefront of the battle to end the abuses associated with the devastating method of coal mining known as mountaintop removal. The Center serves low-income citizens, generations-old communities, and local and grassroots groups of central Appalachia.

Unfortunately, it is necessary for us to direct much of our work to rein in federal agencies, whose refusal to enforce environmental laws in our region permits the environmental devastation and community destruction that results from mountaintop removal coal mining.

In the abstract, the Surface Mining Control and Reclamation Act is an imperfect but useful law. Since at least 2001, however, the Office of Surface Mining Reclamation and Enforcement has refused to enforce the Act. The outright failure of OSM to carry out its duties has had devastating impacts on Appalachia.

Appalachian coal has world-wide effects: burning coal from only three Appalachian states (West Virginia, Kentucky, and Virginia) accounted for approximately 15% of the total CO₂ emissions generated in the entire United States from all fossil fuel sources (including petroleum) in 2001. Burning coal produces more CO₂ per BTU than any other energy source and now accounts for more than 50% of U.S. electric consumption.

The local impacts of coal mining, particularly mountaintop removal mining, are just as devastating to the environment of the Appalachian region as coal burning is to the global climate.

The coal-rich mountains of central Appalachia are home to generations-old communities and contain beautiful hollows through which thousands of pristine and ecologically rich mountain streams flow. Mountaintop removal mining

carelessly lays waste to our mountain environment and communities. The deforestation is not only an ecological loss, but a permanent blow to a sustainable forest economy in a region in desperate need of long-term economic development. Mountaintop removal has already transformed huge expanses of one of the oldest mountain ranges in the world into a moonscape of barren plateaus and rubble.

Appalachian coal is “cheap” because OSM ignores its duty to enforce the Act and allows the coal industry to pass its costs onto workers, communities, local and state economies, and the environment. The mining industry naturally takes advantage of federal regulators’ failure to enforce the law. One of the worst consequences of OSM’s disregard for the law is the prevalence of mountaintop removal mines, large strip mines with attendant valley fills.

Mountaintop Removal Coal Mining

Disregarding human and environmental costs, mountaintop removal coal mining as currently practiced in Appalachia eradicates forests, razes mountains, fills streams and valleys, poisons air and water, and destroys local residents’ lives. Toxic mine pollution contaminates streams and groundwater; hunting and fishing grounds are destroyed. Because the large-scale deforestation integral to mountaintop removal takes away natural flood protections, formerly manageable storms frequently inundate and demolish downstream homes.

Mountaintop removal mines are changing the landform of our region in a way more profound than is occurring in any other area. A recent study singles out mountaintop removal mining and valley fills in West Virginia and adjacent states as by far the greatest contributor to earth moving activity in the United States. Hooke, R.L. 1999, “Spatial distribution of human geomorphic activity in the United States: Comparison with rivers, *Earth Surface Processes and Landforms* 24: 687-92. In other words more earth is moved in this region than in intensively developed areas like southern California or the Northeast corridor.

Mountaintop removal and other large scale surface mining operations have been authorized by permitting authorities that have allowed the destruction of over 2,000 miles of Appalachian streams and more than 1,500 square miles of forested mountain terrain. These headwater streams and forests (the most productive and diverse temperate hardwood forests in the world) are valuable long-term economic assets to the local communities and to the Nation and are being forever lost.

Environmental Impact Statement on Mountaintop Removal

Because of litigation that I brought in 1998, a programmatic Environmental Impact Statement on mountaintop removal was performed by EPA, the Army Corps of Engineers and OSM. The EIS found that present and future mining in

Appalachia may cumulatively impact 1.4 million acres, or 11.5% of the study area, and that the destruction of these nearly 1.5 million acres of forest is profound and permanent because “unlike traditional logging activities associated with management of hardwood forest, when mining occurs, the tree, stump, root, and growth medium supporting the forest are disrupted and removed in their entirety.”

The EIS also determined that mountaintop removal mining causes “fundamental changes to the terrestrial environment,” and “significantly affect[s] the landscape mosaic,” with post-mining conditions “drastically different” from pre-mining conditions. Further, mining impacts on the nutrient cycling function of headwaters streams “are of great concern” and mining impacts to habitat of interior forest bird species could have “extreme ecological significance.”

The EIS further concluded that mining could impact 244 terrestrial species, including, for example, 1.2 billion individual salamanders, and that the loss of the genetic diversity of these affected species “would have a disproportionately large impact on the total aquatic genetic diversity of the nation.” Finally, the EIS observed that valley fills are strongly associated with violations of water quality standards for selenium, a toxic metal that bioaccumulates in aquatic life. All 66 selenium violations identified in the EIS were downstream from valley fills, and no other tested sites had selenium violations.

OSM’s response to these devastating conclusions was to further weaken its enforcement of the Act in Appalachia.

In 2001 and 2002, the federal agencies responsible for regulating mountaintop removal weakened the EIS and did not proceed with necessary scientific studies when they realized that the science was showing that mountaintop removal could not be practiced without devastating the environment and economy of our region. The agencies simply halted the economic study that was crucial to the EIS when it became apparent that the results were not what OSM wanted them to be.

In sum, the EIS was supposed to demonstrate the environmental and economic impacts of large scale strip mining on Appalachia and propose ways to protect the environment and mitigate the impacts of mining on the region. In spite of the fact that the environmental studies that were performed all showed significant harm to the environment, OSM guided the other agencies involved to make permits easier for mining operators to receive. OSM ignored the science and turned the EIS on its head.

Because of OSM’s role in this process, we still desperately need an adequate and impartial EIS to be performed to demonstrate the far reaching impacts this form of mining is having on the Appalachian region.

Approximate Original Contour

The heart of the Surface Mining Control and Reclamation Act is the requirement that mining companies must restore surface mines to approximate original contour, or AOC. If mines are restored to AOC, the disturbed area is smaller, valley fills and stream impacts are reduced. The Act provides that approximate original contour is the surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain.

Remarkably, there are few, if any, large surface mines in Appalachia that comply with this basic requirement. Instead, mining operators, with the acquiescence of OSM, thumb their noses at the law and create monstrous valley fills and sawed off mountains that more closely resemble the surface of the moon than our lush, green hills.

Mountaintop removal mines are not required to restore the post mining site to AOC. The Act sanctioned mountaintop removal mining, but only in very limited circumstances. The Act requires that all mines be restored to AOC unless the mining company shows that it will restore the site to an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use.

Almost no postmining land in Appalachia is put to any of these uses. The post mining land is in isolated mountain areas, the land is unstable for building and it will no longer support native vegetation. There is no surface or groundwater available on the post mining sites because the mountain has been blown to bits. In short, mountains and valleys have been changed dramatically in contour so that they resemble no surface configuration on Earth and the land is useless for future development. Whether the mines are technically “mountaintop removal mines” or not (and OSM has so bent the definition of “mountaintop removal” that not all mines that have the affect of mountaintop removal mines are classified as such), almost all Appalachian surface mines fit this description. OSM has not lifted a finger to stop this complete abuse of the most important provision of the Act.

Stream Buffer Zone

Another of the most important provisions of the Act requires that no mines be permitted unless they prevent material damage to the hydrologic balance off site and minimize disturbance on site. OSM promulgated the stream buffer zone rule in 1983 to carry out the Congressional mandate to protect the hydrologic balance.

The buffer zone rule, 30 C.F.R. 816.57, states that no land within 100 feet of a perennial stream or an intermittent stream may be disturbed by surface mining

unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.

On its face, this rule prohibits valley fills in intermittent and perennial streams and, in 1999, a federal judge in West Virginia agreed that this is what the rule means. That decision was reversed on appeal for purely procedural reasons – the Court of Appeals did not reach the merits.

To protect the coal industry, OSM is in the process of trying to promulgate a new and weaker rule to override this 25 year old rule. It is absurd to allow, as OSM has, more than 2,000 miles of mountain streams to be permanently buried beneath mining waste and still claim to be protecting the hydrologic balance. Rather than weakening the rule to accommodate the mining industry, a responsible agency would force the industry to conform to the law.

Cumulative Hydrologic Impacts

OSM is also charged with protecting the cumulative hydrological integrity of the mining region. Again, OSM utterly fails to discharge its duty to assure that states are performing adequate cumulative hydrological impact analyses as the Act requires. For example, according to information released by the Corps, by 2001 as much as two percent – 1,208 miles – of streams in Appalachia had been buried or directly harmed by valley fills and over 1.5 million acres of forest had been destroyed. This amounts to 11.5 percent of the land area in the region encompassing eastern Kentucky, southern West Virginia, western Virginia, and areas of eastern Tennessee. As a result of this destruction of headwater streams, mountaintop removal mines cumulatively devastate aquatic ecosystems. OSM has not attempted (and has not forced the states to attempt) to analyze and minimize the environmental harm of past, present, and reasonably foreseeable future surface mining operations in Appalachia. These impacts include total elimination of all aquatic life in buried streams, negative impacts on the proper functioning of aquatic ecosystems (including fisheries located downstream of mountaintop removal mining operations), and impairment of the nutrient cycling function of headwater streams.

For example, in the Coal River watershed in West Virginia, existing and pending surface mining permits cover 12.8% of the watershed. In the Laurel Creek of the Coal River watershed, existing and pending surface mining permits cover 28.6% of the watershed. Surface mining permits including valley fills cover 14.5% of first order streams and 12% of all streams in the Coal River watershed and surface mining permits including valley fills cover 37.3% of first order streams and 27.9% of all streams in the Laurel Creek watershed.

The United States Fish and Wildlife Service recognizes that mountaintop removal mining results in forest loss and fragmentation that is significant not only within the project area, but also regionally and nationally. In particular, the mines cause a fundamental change in the environment from forestland to grassland habitat, cause significant adverse impacts to the affected species, cause loss and/or reduced quality of biodiversity, and cause loss of bird, invertebrate, amphibian, and mammalian habitat.

When Congress passed the Surface Mining Control and Reclamation Act in 1977, it thought that it was enacting a law to protect the environment and citizens of the region. OSM has used, and has allowed the states to use, the Act as a perverse tool to justify the very harm that Congress sought to prevent. The members of Congress who voted to pass the Act in 1977 could not have imagined the cumulative destruction that would be visited on our region by the complete failure of the regulators to enforce the Act.

Higher and Better Use and Topsoil

The Act requires that all postmining sites be restored either to conditions that are capable of supporting the uses they were capable of supporting before any mining or to higher or better uses. The Act also requires operators to save and replace the topsoil found on the mining site.

Again, OSM's record here is dismal. Our mountains have been reduced to scrubland that will not support native hardwood tree species. Far from requiring a higher or better use of that land, OSM has acquiesced to allowing operators to turn the most productive temperate hardwood forests in the world into useless and unproductive grasslands. One of the reasons for the sham reclamation practices that are common practice on Appalachian surface mines is OSM's failure to assure that operators save and reuse the topsoil. Very few, if any operators, save the topsoil as the law requires. Instead, they are permitted to use "topsoil substitutes" and dump the irreplaceable topsoil into the bottoms of valley fills.

Economics

Mountaintop removal is also devastating the economy of the coal bearing regions of Appalachia. In 1948, there were 125,669 coal mining jobs in West Virginia and 168,589,033 tons of coal mined. In 1978, there were still 62,982 coal mining jobs in West Virginia with only 84,696,048 tons mined. By 2005, however, only 17,992 of these jobs remained despite the fact that coal production had again risen to 159,498,069 tons mined.

So, although coal production today is roughly the same as it was sixty years ago, the number of coal mining jobs has decreased by more than 85%. This job loss has been driven not by environmental production or decreased production, but by

coal operators themselves who have replaced workers with machines and explosives. McDowell County, which has produced more coal than any other county in West Virginia, is now one of the poorest counties in the Nation. Far from being an economic asset to communities, mountaintop removal devastates economies wherever it occurs.

Summary

With increasing global demands for energy, the oppressive influence of “big coal” has not weakened in our region since 1977. As the price of coal increases and so-called “clean coal” and coal conversion technologies are promoted, the pressure to evade the law and recklessly permit mines will increase. The peak of world oil production, the political vulnerability of the world’s oil supply, and the increased price of oil has quickly transformed the economics of the “coal to liquids” industry. The United States has the largest coal reserves in the world and we must control ourselves to protect the Earth and our region.

There is no such thing as “clean coal.” Increased burning or liquefying of coal will produce unsustainable levels of carbon dioxide. Mountaintop removal mining destroys forever central Appalachia’s communities, forests, streams, and wildlife. The region is a “hot spot” for migratory birds and the giant holes now being opened in the forest canopy by mountaintop removal mining are devastating important populations of migratory birds. To compound the problem, as the price of coal rises, coal operators are today mining coal that until now was too expensive to recover in the past. As the price of coal increases or as mining technology becomes more “efficient,” coal seams that were off limits in the past are coming on line. Mining those more “marginal” seams is even more environmentally harmful as coal operators are able to blow up more mountains and move more earth to get at ever thinner and deeper coal seams. The nation is at a tipping point on energy and climate change policy and the impacts of coal mining on Appalachia are an essential consideration in the development of an environmentally responsible energy policy.

Conclusion

I am pleased to see that this Committee is conducting this hearing on the thirtieth anniversary of the Act. I hope that it will actually take action to compel OSM to discharge its duties. The absence of energetic oversight invariably leads to problems, particularly with agencies like OSM that have close ties with the industries that they regulate.

Finally, I would like to take this opportunity to invite members of the Committee and its staff to travel to West Virginia to witness the devastation caused by mountaintop removal to help you appreciate the incalculable harm that OSM’s

failure to enforce the Act has done to our region. We would be pleased to provide flyovers of mountaintop removal areas and to arrange meetings with community members whose lives and property are severely impacted by the illegal mountaintop removal mines that OSM refuses to regulate.